BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

GARY THOMPSON, Claimant, vs. MAIL CONTRACTORS OF AMERICA, Employer, and CHARTIS INSURANCE, INC., Insurance Carrier, Defendants.	File No. 5039421 REVIEW-REOPENING DECISION Head Note No. 2905

STATEMENT OF THE CASE

The claimant, Gary Thompson, filed a petition for review-reopening and seeks workers' compensation benefits from Mail Contractors of America, employer, and Chartis Insurance Company, insurance carrier. The claimant was represented by Jason Neifert. The defendants were represented by Kelsey Paumer.

The matter came on for hearing on August 5, 2020, before Deputy Workers' Compensation Commissioner Joe Walsh in Des Moines, Iowa via CourtCall. The record in the case consists of joint exhibits 1 through 4; and defense exhibits A through F. The claimant testified under oath at hearing. Kristi Miller was appointed and served as the court reporter. The matter was fully submitted on September 14, 2020, after helpful briefing by the parties.

ISSUES

The parties submitted the following issues for determination:

1. The primary issue in this case is whether the claimant has proven the prerequisites to demonstrate he is entitled to review-reopening benefits under Iowa Code section 86.14. The claimant is seeking permanent total disability benefits, which is disputed by the defendants.

STIPULATIONS

Through the hearing report, the parties stipulated and/or established in the prior hearing:

1. The parties had an employer-employee relationship at the time of the injury.

2. Claimant sustained an injury which arose out of and in the course of employment on February 4, 2009.

3. This work injury is a cause of both temporary and permanent disability.

4. Temporary disability/healing period and medical benefits are not in dispute.

5. The weekly rate of compensation is $639.54.

6. Affirmative defenses have been waived.

7. There is no issue regarding credit.

PROCEDURAL HISTORY AND FINDINGS OF FACT

This is a review-reopening case. The first hearing/snapshot occurred on February 20, 2013. An arbitration decision was filed on July 24, 2013, which awarded the claimant an 80 percent industrial disability. The factual findings in that decision are preclusive.

At the time of the first hearing, the deputy determined Mr. Thompson was 65 years old. He did not complete high school or receive a GED. His work history was primarily as an over-the-road truck driver and he had virtually no computer skills. The deputy described his work for the employer and his work injury as follows:

> He began working for Mail Contractors of America in 2002 hauling first priority mail from Des Moines to locations throughout the Midwest. He underwent a pre-employment physical, which indicated that he had no limitations or accommodations required.
>
> The claimant sustained a low back injury on February 4, 2009. This injury occurred when the air ride seat on which the claimant was sitting collapsed, causing him to drop approximately two and a half feet to the floor of the semi-tractor he was driving. As a result of this accident, the claimant sustained a herniated disc to L4-5, which was surgically repaired by John Piper, M.D., on May 22, 2009. The claimant initially experienced low back, right knee, leg, and hip pain after the injury. When he first saw Dr. Piper on April 23, 2009, he was also experiencing numbness down his right leg. The surgery was performed May 22, 2009.

(Arbitration Decision, page 2, July 24, 2013)

After the injury and the initial course of treatment, Mr. Thompson improved for a period of time although he was still having fairly significant right hip and leg pain. Dr. Piper released Mr. Thompson from care in November, 2009, after a valid functional capacity evaluation which placed him in the medium work category. Mr. Thompson, however, had been terminated from his employment because of a positive drug test following his work accident. In April, 2011, his symptoms increased while he was at

home and he sought additional medical treatment. The deputy described this as follows:

> On September 19, 2011, the claimant was taken to the emergency room at Iowa Lutheran Hospital for treatment for intractable low back pain with radiation into the right leg. He was subsequently transferred to the Iowa Methodist Medical Center and evaluated by Dr. Piper. Dr. Piper diagnosed recurrent radicular pain and foot drop, and recommended a repeat of his previous surgical intervention. See Exhibit 2, page 30. CT scan confirmed the presence of a recurrent L4-5 disc herniation. On September 21, 2011, Dr. Piper performed a redo laminectomy, facetectomy, foraminotomy, and discectomy at L4-5 on the right side. See claimant's Exhibit 2, page 32.
>
> The claimant was fitted with an ankle-foot orthosis brace on his right foot after he was discharged from the hospital. The claimant was still wearing this device at the time of the hearing. Without this device, the claimant's foot drags making it difficult for him to walk and susceptible to falling down. The claimant required the use of a walker to ambulate post-surgery but has been able to recover to the point that he only requires a cane.

(Arb., pp. 3-4, July 24, 2013)

Following the second surgery, Mr. Thompson eventually underwent a second FCE which detailed significant medical restrictions.

> Mr. Blankespoor's functional capacity evaluation performed at claimant's attorney's request identified significant deficits:
>
> **Significant Deficits:**
>
> 1) Lifting/carrying
>
> 2) Pushing/pulling
>
> 3) Positional tasks – elevated work, forward bending, trunk rotation, squatting, crouching, kneeling and crawling
>
> 4) Standing/walking tolerance
>
> 5) Stair/step ladder climbing

(Ex. 10, p. 135)

> Mr. Blankespoor placed the claimant in the sedentary category and recommended:

Recommendations:

1) These projections are for 8 hours per day and 40 hours per week at the levels indicated with the FCE Test Results and Interpretation.

2) The client's capabilities are in the **sedentary** category (lifting up to 25 pounds on a rare basis and up to 20 pounds on an occasional basis with the front carry task) of physical demand characteristics. Specific capabilities are noted with the FCE Test Results and Interpretation.

3) Please contact me if you have any additional questions regarding this report.

(Ex. 10, p. 135) (Arb. Dec., p. 4, July 24, 2013)

Much of the evidence at the first hearing concerned whether claimant's second surgery was causally connected to the work injury. The deputy weighed all of the medical evidence and ultimately determined it was. (Arb., p. 8, July 24, 2013) Following his recuperation from the second surgery, Mr. Thompson was approved for Social Security disability. John Kuhnlein, D.O., evaluated Mr. Thompson for an independent medical examination and provided expert opinions regarding his condition.

The claimant underwent an independent medical evaluation with John Kuhnlein, D.O., on September 12, 2011. Dr. Kuhnlein opined that the claimant has 21 percent whole person impairment and recommended restrictions, but noted that he believed the functional capacity evaluation of Mr. Blankespoor underestimated the claimant's actual physical abilities. Dr. Kuhnlein proposed that the claimant would be restricted to lifting 25 pounds occasionally from floor to waist, 30 pounds occasionally from waist to shoulder, and 20 pounds occasionally over the shoulder. Further, he believed the claimant would be capable of sitting, standing, or walking on an as-needed basis and that he could stoop, bend, or crawl at least on an occasional basis.

(Arb., pp. 4-5, July 24, 2013)

The deputy commissioner made the following additional findings:

In 2011, the claimant realized he was not going to be able to return to employment like he had performed in the past, so he applied for and was approved for Social Security disability.

In June 2012, the claimant had hip replacement surgery. At the time of the hearing, the claimant complained that he still had some pain in his back. He is able to sit for about two hours at a time and is able to walk for about a block. He currently has a job driving new car dealer trades to other dealers for Karl Chevrolet. He began this job in November 2012.

> His son-in-law is the vice president of Karl Chevrolet, and apparently this probably helped him obtain this job. He makes about two to three trips with new dealer trades per week varying in lengths. He is paid 20 cents per mile. The most that he estimates he has driven in one week is 1,000 miles. The claimant does not believe he could climb into a semi or use a clutch or lift much.

(Arb., pp. 6-7, July 24, 2013)

The deputy commissioner considered all of the evidence and found Mr. Thompson had sustained an 80 percent industrial disability as a result of his work injury for the employer.

> The claimant has significant permanent impairment. The lowest rating of impairment in this record is 10 percent on account of this injury. The claimant has significant limitations in his ability to perform work as the result of the work injury. The claimant can still drive an automobile but his ability to drive a truck, as he did at the time of the injury, is foreclosed. The claimant has limited education and is not a good candidate for retraining. Considering these and all factors of industrial disability, it is concluded that the claimant has sustained an 80 percent industrial loss entitling him to 400 weeks of permanent partial disability benefits. The commencement date is February 23, 2012.

(Arb., p. 8, July 24, 2013)

The defendants appealed the arbitration decision. Claimant cross-appealed arguing he was permanently and totally disabled. On December 26, 2013, the Commissioner affirmed the 80 percent award and stated the following:

> Pursuant to Iowa Code sections 86.24 and 17A.15, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on July 24, 2013 that relate to issues properly raised on intra-agency appeal and cross-appeal. The findings of the presiding deputy commissioner are supported by a preponderance of the evidence. The finding as to the extent of claimant's loss of earning capacity is affirmed as claimant has sustained a significant, but not total loss of his earning capacity. At the time of the arbitration hearing in this matter claimant was employed in a driver position on an as needed basis for Karl Chevrolet. The employment position was a position he obtained in the competitive labor market, perhaps with assistance from his son. Regardless, claimant obtained and was capable of performing the driver position on the date of the arbitration hearing. The sporadic nature of that position is inherent in the position, not in claimant's ability to perform the work. There is no evidence that claimant would not be able to perform his driver duties on a daily basis if such work became available. As such, the findings of the presiding deputy commissioner as to the extent of loss of earning capacity is affirmed.

(Appeal Decision, pp. 1-2, December 26, 2013)

This decision became a final decision. To summarize, the arbitration decision determined Mr. Thompson had sustained a severe permanent partial disability as a result of his February 4, 2009, work injury. The injury resulted in two surgeries, significant medical restrictions and prevented Mr. Thompson from performing his past employment of truck driving. Mr. Thompson was gainfully employed at the time of the first snapshot, however, at Karl Chevrolet. This prevented the agency from awarding a total disability.

The second snapshot of Mr. Thompson's condition occurred at hearing before the undersigned on August 5, 2020. Mr. Thompson presented at this hearing live and provided testimony under oath. His testimony was generally credible. His testimony was consistent with other portions of the record and there was nothing about his demeanor which caused the undersigned any concern about his truthfulness. His hearing testimony was compared to his sworn deposition testimony and the testimony is found to be consistent. (*See* Def. Ex. B)

At the time of his review-reopening hearing, Mr. Thompson described his condition as follows:

> Low back pain and the numbness and tingling sensation in my right calf and foot. I wear a brace on my right foot to keep it from dragging because of the foot drop. And nerve pain that really gets worse as the -- I have really bad swelling in my right foot --.

(Tr., p. 14)

Mr. Thompson credibly described how this condition had worsened gradually since his first hearing. (Tr., p. 18) In particular, he testified that if he is on his feet for any length of time he experiences a severe burning sensation in his right leg and significant swelling. He also testified that he occasionally experiences a "lightning bolt" sensation that feels like an electric shock in his right foot for the past two or three years. (Tr., pp. 18-19)

Mr. Thompson then testified that his driving position for Karl Chevrolet ended in the summer of 2013 shortly after his first hearing. (Tr., p. 32) As noted in the earlier arbitration decision, Mr. Thompson had secured this position with the help of his son. He was not given a specific explanation for his termination, but he testified to his opinion that is was likely a direct result of his work injury. He testified that he wears a brace on his right leg. While he typically wore long pants to work, he wore cargo pants to work instead, revealing the presence of the brace. He testified that his supervisor looked "kind of shocked" when she saw the brace. After that day, Mr. Thompson was never called back to work for Karl. (Tr., p. 32) Mr. Thompson did not complain because he did not want to cause any problems within the family. I find this testimony to be credible and compelling.

Mr. Thompson did look for other work. He contacted another local auto dealership about performing similar work and he also contacted a security company. His work search was not particularly extensive. One employer told him he would need to fill out an application online. Mr. Thompson testified he does not possess "any computer skills at all." (Tr., p. 37) Again, this is believable. I find it highly unlikely, given his age, education and work experience, that a more extensive work search would have yielded better results. Mr. Thompson has not performed any gainful work since his employment ended with Karl. Mr. Thompson testified that he did not believe he could perform the work as a driver for Karl any longer because of the increased symptoms in his right foot. (Tr., pp. 29-31) He testified specifically that when he drives now, he must take frequent breaks and elevate his leg to alleviate increased symptoms.

Since the original hearing, Mr. Thompson has undergone some additional medical treatment primarily consisting of medication management. His treating physician is now Saima Shahid, M.D. (See Jt. Ex. 1, pp. 10-64) In February 2019, she significantly increased his dosage of gabapentin. (Jt. Ex. 1, p. 64) It is noted that Mr. Thompson has a host of other health concerns commensurate with a man his age. At that time, he presented, in part, for burning in his feet. "He has neuropathy since the time of his back surgery and he has been taking gabapentin 300 mg 3 pills 3 times a day and that used to help him a little bit with the burning sensation and the numbness and the pain in the feet, but not anymore." (Jt. Ex. 1, p. 62) It is evident that his symptoms were worsening significantly during this timeframe.

The defendants asked William Boulden, M.D., to prepare an expert opinion report prior to hearing in May 2019. Dr. Boulden reviewed records and provided opinions and analysis. (Jt. Ex. 4) Dr. Boulden was specifically asked whether "Mr. Thompson has sustained a change in physical condition from his disability at the time of the Arbitration Decision and the present time, and whether that change in physical restriction (if any) relates solely to the initial work injury". (Jt. Ex. 4, p. 3) In response to that question, Dr. Boulden opined that Mr. Thompson suffers from a host of non-work related conditions, which are the cause of his decreased activity levels, including COPD, hypertension, and angina. He added "I do not believe that his increased physical disability is related to the initial work injury." (Jt. Ex. 4, p. 8)

It is noted that Dr. Boulden's opinion regarding causation was rejected at the first hearing. He did provide opinions based upon new information, namely Mr. Thompson's host of non-work related health conditions, however, he did not directly address whether Mr. Thompson's symptoms related to his work-related low back condition had worsened since the first hearing. Instead, he focused on Mr. Thompson's other health conditions as being the primary cause of the decrease in his activity level.

On April 22, 2020, Dr. Kuhnlein interviewed Mr. Thompson for purposes of preparing expert opinions for the review-reopening hearing. On July 6, 2020, he opined that based upon Mr. Thompson's responses, "there has been a change of his condition since the arbitration hearing with the increased gabapentin dose and decreased physical endurance for activity." (Jt. Ex. 3, p. 4)

Dr. Boulden provided a rebuttal opinion to this report on July 13, 2020. (Jt. Ex. 4, pp. 14-16) He opined, "If there is a true diagnosis of peripheral neuropathy, then that is from another disease process and is not related to the original disc herniation of 2009 or the recurrent disc in 2011." (Jt. Ex. 4, p. 14) He also reiterated his opinions regarding the other conditions.

> I believe there are many other reasons for why the patient has decreased physical endurance for activities. I do not believe it has changed based on the musculoskeletal system as much as it has changed because of his underlying medical conditions. I think I have pointed out reasons for that, especially chronic obstructive pulmonary disease (COPD) and other medical conditions that do not allow him to be very active. In my opinion, this is not related to the 2009 injury by any means. It is due to other medical conditions, which I have previously discussed.

(Jt. Ex. 4, p. 15)

CONCLUSIONS OF LAW

The first and primary question is whether the legal elements for review-reopening have been met in light of the findings of facts set forth above. Mr. Thompson alleges he has proven the low back condition, including radiation into the right leg and foot, have worsened since his first hearing in February, 2013, causing permanent total disability. He further alleges an economic change of condition in the loss of his job at Karl Chevrolet which resulted from his disability. The defendants argue that his condition has not changed significantly and that his activity is limited now because of other non-work related chronic conditions.

In a proceeding to reopen an award for payments or agreement for settlement as provided by section 86.14, inquiry shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded or agreed upon. Iowa Code section 86.14(2) (2017). In order to demonstrate eligibility for an increase of compensation under section 86.14(2), the claimant must demonstrate what his physical or economic condition was at the time of the original award or settlement. At a subsequent review-reopening hearing, claimant has the burden to prove that there is a substantial difference in such condition which warrants an increase in compensation. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387 (Iowa 2009). The difference can be economic or physical. Blacksmith v. All-American Inc., 290 N.W.2d 348 (Iowa 1980); Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959). Essentially, two snapshots of the claimant's condition are taken; one in each hearing or settlement. The claimant must prove that there is something substantially different between the two snapshots such that it warrants an increase in benefits. Gosek v. Garmer & Stiles Co., 158 N.W.2d 731, 735 (Iowa 1968).

The principles of res judicata apply and the agency should not reevaluate facts and circumstances that were known or knowable at the time of the original action. Kohlhaas at, 392. Review-reopening is not intended to provide either party with an opportunity to re-litigate issues already decided or to give a party a "second bite at the

apple." The agency, however, is forbidden from speculating as to what was contemplated at the time of the original snapshot. Id.

The burden remains upon the injured worker to prove by a preponderance of the evidence that the current condition is proximately caused by the original injury. Kohlhaas, 777 N.W.2d at 392. When a work-related injury causes another injury to the worker, this new injury (sequela) may also be considered as a work-related injury under Iowa's workers' compensation laws.

When an employee suffers from a compensable injury and another condition or injury arises that is the consequence or result of the previous injury, the sequelae rule applies. If the employee suffers a compensable injury and later suffers further disability, which is the proximate result of the original injury, such further disability is compensable. If the employee suffers a compensable injury and thereafter returns to work and, as a result, the first injury is aggravated and accelerated so that the employee is more greatly disabled than they were before returning to work, the entire disability may be compensable. The employer is liable for all consequences that naturally and proximately flow from the accident. Oldham v. Scofield & Welch, 222 Iowa 764, 767-68, 266 N.W. 480 (1936).

In order to apply the facts to the law, the two snapshots must be contrasted and compared. The first snapshot was taken at the time of the first hearing in February 2013. At that time, Mr. Thompson's symptoms were already severe. He had substantial work restrictions, significant impairment and significant restrictions. It was determined at that time, however, that he was not permanently and totally disabled. This was primarily based upon the fact that Mr. Thompson had secured gainful employment as a driver for Karl Chevrolet. The work was somewhat sporadic, and he likely only secured this employment due to a family connection, but it was determined, in fact, that this employment was gainful employment.

After the February 2013, hearing, Mr. Thompson lost his job. He credibly described the circumstances of how he lost his job. His employer simply stopped providing him assignments. While he did not make a far reaching job search, he did make a minimal effort to secure employment within his highly limiting work restrictions and job skills. The reality is that he was not awarded a permanent total disability at the time of his February, 2013, arbitration hearing specifically because he was continuing to work in gainful employment. He lost that job, likely as a direct result of his disability.

Since then, his physical condition has deteriorated. While Dr. Boulden may be correct that his condition has not changed "based on the musculoskeletal system," I find that Mr. Thompson has credibly described a worsening of his symptoms, particularly the radicular symptoms in his right leg and foot, which is related back to his original work injury. Mr. Thompson undoubtedly has other factors present now which would interfere with his activity level and his ability to work as noted by Dr. Boulden including COPD. This does not change the fact that Mr. Thompson's description of the symptoms in his right leg and his ability to engage in activities is undoubtedly worse than it was at the time of the first arbitration hearing. In the December, 2013, appeal decision, the Commissioner found that he not only was able to work as a driver for Karl Chevrolet, but

that the record demonstrated that he could have worked increased hours in that position if they became available. (App. Dec., p. 2) This is simply no longer the case. Based upon the snapshot taken of claimant in August, 2020, I find that Mr. Thompson would be unlikely to be able to perform any type of gainful driving work on a sustained basis based upon the description of his low back, right leg and foot symptoms.

Importantly, I have found Mr. Thompson to be a credible witness. I believe him regarding the circumstances of his job loss as well as the gradual increase of his radicular symptoms culminating in a significant increase in his medications in 2019. Considering all of the appropriate factors set forth in Section 86.14, I find that the claimant has carried his burden of proof to show that his case warrants an increase in compensation. The next question is whether he is permanently and totally disabled.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Ry. Co. of Iowa, 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the Legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Although claimant is close to a normal retirement age, proximity to retirement cannot be considered in assessing the extent of industrial disability. Second Injury Fund v. Nelson, 544 N.W. 2d 258 (Iowa 1995). However, this agency does consider voluntary retirement or withdrawal from the work force unrelated to the injury. Copeland v. Boones Book and Bible Store, File No. 1059319, Appeal Decision (November 6, 1997). Loss of earning capacity due to voluntary choice or lack of motivation is not compensable. Id.

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

At the time of the review-reopening hearing, Mr. Thompson was 72 years old. He had not worked in any gainful employment since the summer of 2013. He has no computer skills and has not learned any new marketable skills since the original hearing. His restrictions have not changed per se, however, his symptoms are worse and he is no longer gainfully employed. I find that even if he performed a more substantial work search, he would be unlikely to secure any type of meaningful, gainful employment in the competitive job market. I find claimant is permanently and totally disabled.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay permanent total disability benefits at the rate of six hundred thirty-nine and 54/100 dollars ($639.54) per week commencing from the date the review-reopening petition was filed.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the Federal Reserve in the most recent H15 report settled as of the date of injury, plus two percent. See. Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

Defendants shall be given credit for the weeks previously paid.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Costs are taxed to defendants.

Signed and filed this 3rd day of March, 2021.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Jason David Neifert (via WCES)

Kelsey Paumer (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.