BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
JAN 17 2019
WORKERS' COMPENSATION

CHERYL DICKENS, Claimant, vs. MR MANAGEMENT, LLC, Employer, and WESCO INSURANCE CO., Insurance Carrier, Defendants.	:	File No. 5064384 REVIEW-REOPENING DECISION Head Note Nos.: 1803, 2905

STATEMENT OF THE CASE

Claimant, Cheryl Dickens, filed a petition seeking to review-reopen the agreement for settlement entered into between the parties on June 24, 2015 and approved by this agency on June 30, 2015.

On July 3, 2018, claimant filed her Original Notice and Petition. The same was served by certified mail, return receipt requested. Defendants failed to appear, answer, move, or otherwise plead.

On August 31, 2018, claimant filed her notice of intent to file written application for default, which had been served on the employer on August 30, 2018. Defendants did not respond. On October 18, 2018, claimant's application for default was granted and the matter was scheduled for hearing on damages on January 8, 2019. On the date of the hearing, the undersigned confirmed that the administrative file contained no answer, appearance or any pleading or filing from defendants. The matter proceeded to telephonic hearing.

The telephone hearing occurred on January 8, 2019. The proceedings were recorded digitally, and constitute the official record of the proceeding. Claimant offered Exhibits 1-5, which were admitted into evidence. Claimant provided testimony.

The matter was considered fully submitted on the date of the hearing.

ISSUES

Claimant submitted the following issues for determination:

1. Whether claimant is entitled to review-reopening of the prior agreement for settlement, and if so the extent of permanent impairment.

2. Independent medical examination (IME) reimbursement, Iowa Code section 85.39.

3. Costs.

FINDINGS OF FACT

After a review of the evidence presented I find as follows:

At the time of the underlying agreement for settlement, claimant was employed by MR Management as a head housekeeper earning $7.50 per hour. She supervised housekeepers, prepared the schedule, cleaned rooms and washed laundry.

On August 11, 2014, claimant fell while working for MR Management and fractured both her right and left elbows. Claimant received medical care for both arms with Xerxes Colah, M.D. (Ex. 1-7) Dr. Colah assigned 2 percent permanent impairment for each arm based on range of motion, which he then combined to 4 percent of the whole person. (Id.)

Claimant and defendants resolved the bilateral arm claim by agreement for settlement, which was filed with this agency on June 24, 2015 and approved on June 30, 2015. (Ex. 1-1, 3) The parties agreed therein that the applicable weekly rate for permanent partial disability benefits is $200.34. (Ex. 1-1, 4) The parties also agreed that claimant would be paid a total of 5.3 percent permanent partial disability for her bilateral arm injury, which was 26.5 weeks. (Ex. 1-2)

Claimant testified that after the agreement for settlement, the ownership changed at her place of employment and all the employees who previously worked for MR Management, LLC, were laid-off, including her.

After being laid-off, claimant worked at Casey's for a time and then Wal-Mart, where she continued to work at the time of this review-reopening hearing. She earns $11.50 per hour at Wal-Mart. She testified that she did not sustain any injuries while employed for either Casey's or Wal-Mart.

Claimant credibly testified, since the agreement for settlement, her physical condition has deteriorated. She stated that since the agreement for settlement, she has experienced loss of strength, reduced range of motion, decreased sensation, and general increase in pain, worse on the left. She stated she experiences difficulty sleeping because her left hand goes numb waking her up at night.

There was no evidence of additional medical treatment after the agreement for settlement.

On December 7, 2018, claimant was seen by Sunil Bansal, M.D. at the direction of claimant's counsel, for the purpose of an IME. (Exhibit 2) Dr. Bansal signed his report and presumably issued the report on December 10, 2018. (Ex. 4-10) Dr. Bansal examined claimant's range of motion and found it was somewhat worse than it was when Dr. Colah examined her prior to the agreement for settlement. For example, Dr. Bansal found ratable impairment under the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides) for flexion and pronation, which were not previously identified by Dr. Colah. (Ex. 4-8; Ex. 1-6, 7) In addition, Dr. Bansal opined that "her range of motion worsened since 2015 in an expected fashion from the progression of post-traumatic arthritis." (Ex. 4-8) This supports a finding that claimant's condition has deteriorated and is causally related to the original work injury.

Dr. Bansal found clamant had reduced sensation in both the left and right upper extremities, although he did not assign any permanent impairment for this loss. (Ex. 1-7) Dr. Bansal assigned permanent partial disability for the bilateral upper extremities based on range of motion of 8 percent. (Ex. 4-8) I accept the rating as assigned by Dr. Bansal as uncontroverted evidence of claimant's current permanent impairment, which is supported by claimant's testimony of her worsening condition and decreased range of motion since the agreement for settlement.

Dr. Bansal also assigned work restrictions of no lifting greater than 15 pounds with the right and 10 pounds with the left. However, I note that there is no discussion or rationale provided for the restrictions assigned and there was no testimony supporting such restrictions. I therefore give them little weight.

CONCLUSIONS OF LAW

1. Is claimant entitled to an increase of compensation through a review-reopening?

In a proceeding to review-reopen an award for payments or agreement for settlement as provided by section 86.13, 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).

The Iowa Supreme Court has held that a claimant does not need to prove that the change in the condition was not contemplated at the time of the original decision(s). Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387 (Iowa 2009). However, the party bringing the review-reopening proceeding has the burden of showing that the employee's condition has changed since the original award or settlement was made and that that change in condition relates back to the original injury. The change may be either 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). A mere difference of opinion

of experts as to the percentage of disability is not sufficient to justify a different determination on a petition for review-reopening.

To establish a compensable review-reopening claim, claimant must prove by a preponderance of the evidence that the current condition is causally related to the original work injury. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009). 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. Id.

Although a review-reopening award is not precluded simply because evidence was considered or anticipated at the time of the arbitration hearing, this agency is not charged with re-determining the condition of the claimant, which was adjudicated in the former arbitration proceeding. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 391 (Iowa 2009). A "condition that has already been determined by an award or settlement should not be subject of a review-reopening petition." Id.

A change in circumstance that may justify an increase of a prior arbitration award can be a worsening of claimant's physical condition or an economic change in condition that reduces claimant's earning capacity. Id.

In this instance, claimant seeks a review and reopening of her agreement for settlement based on an alleged deterioration of her physical condition.

However, a mere difference of opinion of experts as to the percentage of disability arising from an original injury is not sufficient to justify a different determination on a petition for review-reopening. Rather, claimant's condition must have worsened or deteriorated in a manner not contemplated at the time of the initial award or settlement before an award on review-reopening is appropriate. Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957). A failure of a condition to improve to the extent anticipated originally may also constitute a change of condition. Meyers v. Holiday Inn of Cedar Falls, Iowa, 272 N.W.2d 24 (Iowa App. 1978).

At the time of the agreement for settlement in this case, claimant was found to have reduced range of motion and she was assigned permanent partial disability of 4 percent by Dr. Colah. The parties stated in the agreement for settlement that the impairment was actually 5.3 percent of the whole person, which is 26.5 weeks.

Following a December 7, 2018 IME, Dr. Bansal assigned 8 percent permanent partial disability of the whole person for the bilateral upper extremities, which is 40 weeks. This rating was based on reduced range of motion that exceeded the findings of Dr. Colah in April, 2015. I have accepted this rating above as uncontroverted evidence of claimant's current permanent partial disability. This is supported by claimant's testimony that she has experienced a deterioration of her range of motion since 2015. In addition thereto, claimant has experienced an increase in pain, loss of strength and reduced sensation. Further, she now has interrupted sleep from the numbness and tingling in her left hand.

I conclude that claimant has met her burden of proof that she has suffered a change in her condition since the agreement for settlement was approved by this agency on June 30, 2015 and that her current condition is related to the work injury of August 11, 2014. I further conclude under Bousfield, that claimant's change in condition is a physical deterioration and not a mere difference of opinion regarding impairment ratings. This is supported by the fact that Dr. Bansal made different findings than Dr. Colah, which represent a worsening of claimant's condition. Further, claimant provided credible testimony of her worsened condition.

I conclude claimant's current permanent partial disability is 8 percent of the whole person as assigned by Dr. Bansal, which is 40 weeks. Claimant previously received 5.3 percent of the whole person, which was 26.5 weeks of permanent partial disability as a result of the agreement for settlement, and is therefore entitled to 13.5 weeks of additional benefits as a result of this review-reopening (40 – 26.5 = 13.5 weeks).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks. Section 85.34(2)(s). I conclude that permanency benefits shall commence on January 2, 2016, which is 26.5 weeks after the agreement for settlement was approved on June 30, 2015.

Defendants shall pay accrued weekly benefits in a lump sum together with interest. Interest payments on additional permanency benefits in a review-reopening claim commence as of the date of the filing the review-reopening petition. See Dickenson v. John Deere Products Engineering, 395 N.W.2d 644, 649 (Iowa App. 1986).

2. The second issue is claimant's request for reimbursement of an IME pursuant to Iowa Code section 85.39.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

The Iowa Supreme Court has stated that Iowa Code section 85.39 "does not expose the employer to liability for reimbursement of the cost of a medical evaluation unless the employer has obtained a rating in the same proceeding with which the claimant disagrees." Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 394 (Iowa 2010).

This review-reopening is a new and distinct proceeding separate from the prior claim that resulted in the agreement for settlement. Kohlhaas, 777 N.W.2d at 395.

The Iowa Supreme Court's decision in Dart V. Young, 867 N.W.2d 839 (Iowa 2015), clearly states that if no impairment rating has actually been provided by an employer retained physician prior to the occurrence of the claimant's IME, then the injured worker does not qualify for reimbursement for the IME under section 85.39.

In the case at bar, on December 7, 2018, Dr. Bansal conducted his IME of claimant. However, there was no opinion from an employer retained physician after the time of the agreement for settlement in June, 2015 to the date of Dr. Bansal's IME. Therefore, the condition precedent of an employer-retained physician that has evaluated permanent disability that claimant believed was too low, does not exist. As a result, claimant's request for IME reimbursement must be denied because she does not qualify under the statute.

3. Costs.

Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs allowable under commissioner rule are as follows:

> Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes.

876 IAC 4.33.

The Iowa Supreme Court in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 846-847 (Iowa 2015) has stated that the cost of a doctor's report is allowable as a cost under Iowa Code section 86.40, but not the cost of the physical examination needed to create the report. The ability to be reimbursed for the examination itself is available only under Iowa Code section 85.39, which has been addressed above.

I conclude that claimant was successful in this claim and therefore exercise my discretion and assess costs against the employer described in Claimant's Exhibit 5, but limited to the total amount of $2,089.00. This amount includes the cost of the filing fee: $100.00 and the cost of Dr. Bansal's report, signed December 10, 2018: $1,989.00. (Ex. 5-2, 4) Claimant is entitled only to the cost of Dr. Bansal's report, not the cost of the physical examination pursuant to Des Moines Area Regional Transit Authority, 867 N.W.2d at 846-847 (Iowa 2015).

ORDER

IT IS THEREFORE ORDERED:

Defendants shall pay claimant permanent partial disability benefits of thirteen point five (13.5) weeks (forty (40) weeks, less a credit of twenty-six point five (26.5) weeks) at the previously agreed upon rate of two hundred and 34/100 dollars ($200.34), and said benefits shall commence on January 2, 2016.

Defendants shall pay accrued weekly benefits in a lump sum together with interest. Interest payments on additional permanency benefits in a review-reopening claim commence as of the date of the filing of the review-reopening petition.

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 pay costs of two thousand eighty-nine and 00/100 dollars ($2,089.00) as set out above.

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

Signed and filed this 17th day of January, 2019.

TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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 in writing and received by the commissioner's office 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 a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.