BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARK MITCHELL, Claimant, vs. LABOR WORLD OF IOWA, INC., Employer, and ZURICH AMERICAN INSURANCE CO., Insurance Carrier, Defendants.	File No. 5048278.01 REVIEW-REOPENING DECISION Head Notes: 2501, 2905

STATEMENT OF THE CASE

Claimant, Mark Mitchell, filed a petition in review-reopening seeking workers' compensation benefits from Labor World of Iowa, Inc. (Labor World), employer, and Zurich-American Insurance Company, insurance carrier, both as defendants. This matter was heard on December 7, 2021, with a final submission date of January 17, 2022.

The record in this case consists of Joint Exhibits 1 through 5, Claimant's Exhibits 1 through 2, Defendants' Exhibits A through J, and the testimony of claimant.

The parties filed a hearing report at the commencement of the review-reopening hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this review-reopening decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

ISSUES

1. Whether claimant is entitled to additional permanent partial disability benefits under review-reopening proceeding.

2. Whether there is a causal connection between the injury and the claimed medical expenses.

FINDINGS OF FACT

Claimant was 52 years old at the time of hearing. Claimant graduated from high school. Claimant attended nine months at electrical technician school. He also took some classes in electronic repairs. (Arbitration Decision p. 7)

Claimant has worked as a property manager and was self-employed repairing computers. He has also worked as a laborer, as an assembly line worker, and as a heavy equipment operator. Claimant has done tree removal, yard care, computer sales and telemarketing. He has also worked as a casino slot technician and a handyman. Claimant has done electrical work, roofing and basement refinishing. (Arbitration Decision p. 7)

Claimant began working for Labor World in May of 2011. Labor World is a temporary employment agency. Claimant was assigned to work as a flagger for a road crew. (Arbitration Decision p. 2)

On August 15, 2011, claimant was working on a jobsite when he slipped off a trailer. The record indicates claimant landed on his head, neck and shoulder. (Arbitration Decision p. 2)

Claimant was assessed in November 2011 as having a herniated disc at the C6-7 level with neurological deficits. (Arbitration Decision p. 3)

On August 22, 2012, claimant underwent a C6-7 anterior cervical discectomy and fusion. Surgery was performed by Loren Mouw, M.D. (Arbitration Decision p. 3)

Claimant was found to be at maximal medical improvement (MMI) on September 18, 2013. (Arbitration Decision p. 5) He was found to have a 28 percent permanent impairment to the body as a whole by both Joseph Chen, M.D. and Sunil Bansal, M.D. (Arbitration Decision p. 5) Claimant was given permanent restrictions in line with a functional capacity evaluation (FCE) which, in part, limited claimant to lifting up to 40 pounds from waist to floor occasionally and occasionally carrying 45 pounds. (Arbitration Decision p. 5)

An arbitration hearing was held on April 17, 2015. At the time of hearing, claimant was not employed and was not looking for work. (Arbitration Decision pp. 8-9) Claimant was found to have a 40 percent industrial disability and awarded 200 weeks of permanent partial disability benefits under the arbitration decision. (Arbitration Decision pp. 9, 13)

That decision was affirmed on intra-agency appeal on February 15, 2017.

Between November 2015 and July 2017 claimant had three chiropractic treatments for neck and back pain. (Joint Exhibit 1, pp. 1-2)

In April 2016, claimant began employment with Jiffy Lube. (Hearing Transcript, pp. 15-16) Claimant said he changed oil on cars for approximately six months. Claimant said he was able to do this job, but sometimes asked for help due to neck pain and lack of arm strength. (TR pp. 17-18)

After six months, claimant began doing maintenance for five Jiffy Lube stores. Claimant traveled between Jiffy Lube stores in Marshalltown, Ames, Mason City, Cedar Falls and Waterloo. He said that along with maintenance, he was also occasionally assigned to do oil changes. Claimant worked between 20 and 40 hours per week and some overtime. Claimant earned between $12.00 and $15.00 an hour on this job. (TR pp. 22-23, 54-56)

On August 15, 2017, claimant returned to Dr. Mouw with complaints of neck pain and left arm numbness and pain. He was assessed as having pain, paresthesias, and muscle atrophy. An EMG/NCV was recommended. (JE 4, pp. 71-73)

An EMG of claimant's left upper extremity on September 11, 2017, was found to be normal. (JE 3, p. 62)

Claimant returned to Dr. Mouw on September 12, 2017. Claimant's normal EMG was reviewed. Claimant was assessed as having degeneration of the cervical discs and neck pain. He was recommended to seek further treatment with his primary care physician. (JE 4, pp. 74-76)

On January 8, 2018, claimant saw Sherri Vesely, DNP, for neck pain. Claimant was taking three oxycodone daily to do his job. Nurse Practitioner Vesely prescribed Percocet for pain and recommended claimant continue to do YMCA visits for water exercise. (JE 2, pp. 5-8)

Claimant underwent a cervical MRI on February 19, 2018. It showed an anterior vertebral body spurring at C6-7, new since the August 7, 2012 MRI. The MRI also showed a right-sided C4-5 disc protrusion producing C4-5 foraminal narrowing and moderate to severe left and moderate right C5-6 foraminal narrowing. (JE 3, pp. 68-69)

Claimant returned to Nurse Practitioner Vesely on July 16, 2018, with complaints of lower back and neck pain. Claimant was returned to his prior Percocet dosage. (JE 2, pp. 13-15)

Claimant saw Nurse Practitioner Vesely on four more occasions in 2018 with continued complaints of neck and back pain. Claimant's treatment regimen remained unchanged after these visits. (JE 2, pp. 16-27)

Between January 2019 and April 2019 claimant saw Nurse Practitioner Vesely on four more occasions for neck and back pain. Claimant's treatment regimen remained the same. (JE 2, pp. 29-40)

Claimant continued to treat with Nurse Practitioner Vesely throughout the remainder of 2019 for neck and lower back pain. He was prescribed Percocet and gabapentin for pain. (JE 2, pp. 47-57)

Claimant's job with Jiffy Lube ended early in 2020 due to the COVID-19 pandemic. He said that Jiffy Lube cut back on employees and eventually was bought out by another company. Claimant testified he was offered a job changing oil with the new company but had to submit a job application. He said that he did not submit an application to the new company. Claimant said that prior to COVID-19, he intended to continue to work for Jiffy Lube. (TR pp. 23, 54-55)

Claimant said he was employed for a short period of time in 2020 after leaving Jiffy Lube. He said he got a job with Midwest Janitorial cleaning the offices of his family doctor. Claimant's duties with Midwest Janitorial included mopping, cleaning and sanitizing rooms, vacuuming and taking out trash. Claimant said he worked approximately 25 hours a week at this job. (TR pp. 26-27)

Claimant left Midwest Janitorial after he was asked to leave the doctor's office due to unpaid bills. (TR pp. 28-29) Claimant testified Midwest Janitorial offered him work in Iowa City, Waterloo and Cedar Rapids. Claimant said he declined these job offers as the drive to these locations was too far. (TR p. 30)

On November 19, 2020, claimant was seen at Twin City Chiropractic for mid-back pain after riding in a car for 11 hours. (JE 1, p. 2)

In May and June of 2021, claimant returned to Twin City Chiropractic for continued lower back pain. (JE 1, p. 3)

On August 5, 2020, claimant was seen at the Meskwaki Tribal Health Center to establish care for pain management. Claimant had pain and numbness in his left arm from a work injury. Claimant was assessed as having cervicalgia. Records indicate claimant was aggressive, profane and disruptive to staff. (JE 5, pp. 77-80)

In a September 7, 2021 report, Charles Mooney, M.D., gave his opinions of claimant's condition following an independent medical evaluation (IME). Dr. Mooney opined claimant's prior diagnosis of a C6-7 fusion with mild residual left C7 radiculopathy was unchanged since 2015. Dr. Mooney opined there was no objective evidence for an advancement of claimant's cervical condition. He found claimant's permanent impairment of 28 percent from 2015 was unchanged. He also found claimant's lower back condition was not connected to his 2011 work injury. (Ex. E)

In a September 19, 2021 report, Sunil Bansal, M.D. gave his opinions of claimant's condition following an IME. Claimant had continued neck pain. Claimant had pain radiating down his left arm with numbness and tingling. Claimant had intermittent tingling in his right arm. (Ex. 1, p. 5)

Dr. Bansal assessed claimant as having a failed cervical spine syndrome. He opined that claimant had a worsening cervical spine condition since his last evaluation. This was based, in part, on claimant indicating increased pain since his last IME. Dr. Bansal also based this opinion on worsening conditions when comparing claimant's 2012 MRI to a 2018 MRI. Dr. Bansal opined claimant had a 33 percent permanent impairment to the body as a whole. He limited claimant to no lifting greater than 20 pounds. (Ex. 1, pp. 6-8)

At the time of the hearing, claimant was occasionally working for TDC Equipment (TDC). TDC is a company that installs storage lifts for cars at dealerships and other consumers. Claimant said he worked for TDC when he also worked for Jiffy Lube and Midwest Janitorial. (TR p. 30) Claimant said he works for TDC on an "on-call" basis. He said he works for TDC approximately 6-10 times per month. He said he works between 4-6 hours each time he is called. Claimant said he travels to locations in Iowa, Minnesota, Wisconsin and Illinois for TDC. Claimant said the job requires him to pick up supplies and put together nuts and bolts. Claimant estimated he makes approximately $165.00 per day working for TDC. (TR pp. 31-34)

Claimant said that along with his work for TDC he also does handyman work for neighbors. This includes snow removal and mowing. Claimant said he has a riding snowblower and mower. (TR pp. 34-35)

Claimant testified he has not made an application for employment since October of 2020. (TR p. 61) He says no physician has opined he cannot work. (TR p. 79)

CONCLUSION OF LAW

The first issue to be determined is whether claimant is due additional permanent partial disability benefits under review-reopening proceeding.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" refer to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when

performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

Upon review-reopening, claimant has the burden to show a change in condition related to the original injury since the original award or settlement was made. 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 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).

In August 2012 claimant had an MRI of his cervical spine. At that time the MRI showed, at the C5-6 level, a mild disc osteophyte complex and a mild to moderate C5-6 left foraminal narrowing. (Arbitration Decision p. 3)

On August 22, 2012, claimant had a C6-7 anterior cervical discectomy and fusion. (Arbitration Decision p. 3)

On February 19, 2018, claimant had a cervical MRI. In comparison to the 2012 MRI, it showed a C5-6 facet arthropathy and a moderate right and moderate to severe left C5-6 narrowing. (JE 3, pp. 68-69; Ex. 1, p. 7)

The record indicates that between 2017 and 2020 claimant saw health care practitioners approximately 20 times related to worsening neck pain. During most of those visits claimant was prescribed prescription medications relating to neck and arm pain. (JE 4, pp. 71-76; JE 2, pp. 5-61)

Claimant testified at hearing that his neck pain and the pain in his upper extremity has worsened since the time of his 2015 arbitration decision. (TR pp. 47-48)

Two experts have opined regarding the changes to claimant's physical condition since his 2015 arbitration hearing. Dr. Bansal evaluated claimant for an IME for the 2015 hearing. He also performed an IME in regard to the 2021 review-reopening hearing. Dr. Bansal opined that claimant had a deteriorating cervical condition since his 2015 arbitration hearing. This opinion was based, in part, on the comparison between the 2012 and 2018 MRI that showed a worsening of the spine level at C5-6. This opinion was also based on claimant's records and claimant's interview, indicating worsening pain levels since the 2015 hearing. (Ex. 1, pp. 6-7)

Dr. Mooney evaluated claimant once for an IME. Dr. Mooney opined that claimant's prior diagnosis of the C6-7 fusion with mild radiculopathy remained unchanged. (Ex. E) Dr. Mooney's opinion does not appear to address the comparisons between the 2012 and 2018 MRI showing a worsening of claimant's spine at the C5-6 levels. It also does not take into consideration the multiple medical records spanning approximately three years indicating a worsening cervical condition. Based on this, it is found that Dr. Mooney's opinion regarding an unchanged cervical condition is found not convincing.

Claimant testified his neck condition has worsened since the 2015 hearing. Comparison of the 2012 MRI with the 2018 MRI shows a worsening at the C5-6 levels. Medical records spanning approximately three years corroborate claimant's testimony of a worsening cervical condition. Dr. Mooney's opinions regarding an unchanged cervical condition are found not convincing. Given this record, claimant has carried his burden of proof his physical condition has worsened since his 2015 arbitration hearing.

Claimant also needs to carry his burden of proof to show he has sustained an impairment of earning capacity proximately caused by the original injury. E.N.T. Associates v. Collentine, 525 N.W.2d 827, 829 (Iowa 1994)

At the time of his 2015 arbitration hearing, claimant was not working. (Arbitration Decision p. 8) Since the arbitration hearing, claimant has held jobs with Jiffy Lube, Midwest Janitorial and TDC. Claimant's jobs with Jiffy Lube and Midwest Janitorial ended for reasons unrelated to his 2011 neck injury. The record indicates that claimant

was offered work with both companies and declined those offers. Claimant testified he has not filed an application for employment with any other employer.

A loss of earning capacity due to voluntary choice or lack of motivation to return to work is not compensable. Malget v. John Deere Waterloo Works, File No. 5048441 (Remand Dec. May 23, 2018); Rus v. Bradley Puhrmann, File No. 5037928 (App. December 16, 2014); Gaffney v. Nordstrom, File No. 5026533 (App. September 1, 2011); Snow v. Chevron Phillips Chemical Co., File No. 5016619 (App. October 25, 2007). Copeland v. Boone's Book and Bible Store, File No. 1059319 (App. November 6, 1997). See also, Brown v. Nissen Corp., 89-90 IAWC 56, 62 (App. 1989) (no prima facie showing that claimant is unemployable when claimant did not make an attempt for vocational rehabilitation).

At the time of the review-reopening hearing claimant was still working jobs for TDC. No healthcare practitioner has opined that claimant cannot work. No treating physician has increased claimant's work restrictions. There has been no new FCE since the 2015 hearing indicating that claimant's permanent restrictions have increased since 2015. No expert has opined claimant has a loss of earning capacity since the 2015 arbitration hearing. During the six and one-half years since the 2015 arbitration hearing, claimant has found jobs with three different employers and maintained employment. The record indicates that any loss of earning capacity claimant may have at present is due to his voluntary removal of himself from the workforce. Given this record, claimant has failed to carry his burden of proof he has loss of earning capacity proximately caused by the 2011 injury. Claimant has failed to carry his burden of proof he is entitled to additional permanent partial disability benefits under review-reopening proceeding.

The next issue to be determined is whether there is a causal connection between the injury and the claimed medical expenses.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Claimant seeks reimbursement for medical expenses found in Exhibit 2. Some of these expenses appear to relate to charges incurred in 2014. (Ex. 2, pp. 2-4) Reimbursement for these medical expenses incurred before the 2015 arbitration hearing should have been made an issue in the 2015 arbitration hearing. As such, defendants are not liable for expenses detailed in Exhibit 2 that were incurred prior to the 2015 arbitration hearing.

Defendants indicate in their post-hearing brief they will reimburse claimant for medical charges found in Exhibit 2 that were incurred after the 2015 hearing. (Defendants' Post-Hearing Brief, p. 20)

ORDER

THEREFORE IT IS ORDERED,

That claimant shall take nothing in additional permanent partial disability benefits in this matter.

Defendants shall pay medical expenses incurred after the 2015 arbitration hearing as detailed in Exhibit 2.

Defendants shall file subsequent reports of injury as required under Rule 876 IAC 3.1(2).

Signed and filed this 28th day of February, 2022.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Ryan Beattie (via WCES)

Charles Blades (via WCES)

Rachel Neff (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 bee n 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.