

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARCUS HILLIARD,
Claimant,

vs.

ABF FREIGHT SYSTEM, INC.,
Employer,

and

ACE AMERICAN INSURANCE
COMPANY,
Insurance Carrier,
Defendants.

File No. 5052136

REVIEW – REOPENING
DECISION

Head Note No.: 2905

STATEMENT OF THE CASE

The claimant, Marcus Hilliard, filed a petition for review-reopening and seeks workers' compensation benefits from ABF Freight System, Inc., a self-insured employer. The claimant was represented by Matthew Petrzelka. The defendants were represented by Stephen Spencer.

The matter came on for hearing on June 18, 2019, before deputy workers' compensation commissioner, Joe Walsh, in Des Moines, Iowa. The parties did an excellent job of presenting a concise record for determination. Both parties were well-represented. The record in the case consists of Joint Exhibits 1 through 3; Claimant's Exhibits 4 through 5; and Defense Exhibits A through H. The claimant testified under oath at hearing. Julie McCurnin served as the court reporter. I have taken administrative notice of portions of the agency file including the previous arbitration decision dated July 21, 2016. The matter was fully submitted on July 15, 2019, after helpful briefing by the parties.

ISSUE

The parties submitted the following issue 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.

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 August 8, 2013.
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 \$705.46.
6. Affirmative defenses have been waived.
7. Defendants have paid 150 weeks of permanent partial disability benefits.

These stipulations are accepted and deemed binding upon the parties at this time.

FINDINGS OF FACT

Marcus Hilliard was 39 years old at the time of his review-reopening hearing. He testified live and under oath at hearing. I find his testimony at hearing to be generally credible. His testimony was generally consistent with the other evidence in the record. He was a reasonably good historian regarding his condition. There was nothing about his demeanor at hearing which caused me any concern about his truthfulness.

The first snapshot of claimant's condition was taken on April 13, 2016. On July 21, 2016, the agency entered a decision which legally established Mr. Hilliard's condition as of April 13, 2016. Relevant findings of fact are set forth below.

Claimant is now 36 years old. He is married with three minor children. Claimant resides on his farm in Brandon, Iowa in Buchanan County. Brandon is a very small community of just 311 residents. Claimant's parents also reside with claimant and his family on the farm. Claimant has 140 acres with crops and he raises 50 head of cattle.

Claimant graduated from Washington High School in Vinton, Iowa in 1998. He testified he earned C and D grades during high school. Claimant reported he has only limited computer skills.

After his graduation from high school, claimant commenced employment with Stickle Warehousing. He also obtained a commercial drivers' license

that year. It is valid until June 2, 2019. Claimant continued to work for Stickle until 2007.

In 2005, claimant started working as a casual driver for ABF Freight System, Inc. Claimant worked as a casual driver until he was hired as a full time employee on September 10, 2007. Claimant was hired to drive a forklift truck, or a semi-tractor trailer. He checked in freight, picked up freight, hooked trailers, and lifted trailers, as well as delivered all types of goods. There were weeks when claimant worked overtime hours.

On August 8, 2013, claimant was unloading a semi-trailer with a forklift at the ABF Cedar Rapids terminal. While driving backward out of the trailer, claimant hit the dock plate with the forklift. The forklift stopped suddenly, and jerked claimant. The jolt caused the fuel tank strap on the forklift to hit the back of the seat. Claimant's hat flew from his head. The entire terminal building shook. The undercarriage of the forklift was deemed inoperable. Claimant's foreman, Mr. Tim Russler, viewed the accident from his office window and assisted claimant. Claimant testified he was confused, not orientated to his surroundings; he had blurred vision, and a sore neck.

(Arbitration Decision, pages 3-4) The deputy commissioner recounted Mr. Hilliard's treatment history for his neck injury in detail. Significant efforts were undertaken to avoid surgery. Eventually, Mr. Hilliard had cervical fusion surgery. The deputy summarized his surgery and post-surgical evaluations as follows.

There was a delay in authorizing the surgery. Finally it was scheduled for August 13, 2015. Dr. Abernathy performed a "C5-C6 and C6-C7 anterior cervical discectomy, osteophyctectomy, instrumented allograft fusion, microscope." (Ex. 2, p. 5)

Subsequently, Dr. Abernathy opined the following with respect to claimant's spinal condition:

1. I believe that patient's ultimate need for surgical intervention is related to his alleged work injury. I do not see any clear evidence to the contrary.
2. I believe that the patient has achieved Maximum Medical Improvement at this point as of today, 2-19-16.
3. I would consider the patient to have an 11% whole body impairment rating as a result of a two level anterior cervical discectomy and fusion with instrumented allograft.
4. I do not believe that patient has or needs any restrictions related to his alleged work incidents.

(Ex. 2, p. 8)

Claimant requested an independent medical examination pursuant to Iowa Code section 85.39. Richard F. Neiman, M.D., a neurologist in Iowa City, examined claimant on October 7, 2015. (Ex. 8) Dr. Neiman opined claimant had a 20 percent permanent impairment rating according to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Dr. Neiman placed claimant in DRE Cervical Category IV. (Ex. 8, p.3) Dr. Neiman attributed claimant's condition to the work injury on August 8, 2013. (Ex. 8, p. 3) The doctor did note there was an additional injury reported on February 17, 2014, but Dr. Neiman did not explain how the second injury impacted claimant's condition, if at all. (Ex. 8, p. 3)

Dr. Neiman recommended permanent work restrictions. The physician concluded claimant was not able to drive a forklift or other type of truck. Dr. Neiman opined claimant could lift in the range of 10 to 15 pounds with a maximum lift of 25 pounds but no more than 4 times per hour. (Ex. 8, p.3) Dr. Neiman recommended a pain clinic as an option for future medical treatment. (Ex. 8, p. 3)

At his arbitration hearing, claimant testified he requested another MRI in November 2015 but his request was denied. Claimant also testified he requested treatment in the form of pain management but that too was denied after an appointment had been scheduled. Claimant testified, he experienced tingling and numbness in his fingers, tingling in his biceps, pain in his shoulders and in his neck. He reported sleeping disturbances during the night.

During direct examination, claimant testified he had spoken to his supervisor, Dan Parnell, in January or February of 2016. Mr. Parnell inquired into the date claimant could return to work. Claimant testified he was not capable of performing the physical aspects of the job.

(Arb. Dec., pp. 7-8)

After considering all of the evidence related to industrial disability, the deputy commissioner entered the following binding Conclusions

Claimant is a relatively young man with a high school education. He has no technical training beyond the high school level. He has either farmed or driven various types of trucks since he left high school. Claimant holds a current commercial drivers' license (CDL). The license does not expire until June 2, 2019. (Ex. 12, p. 3)

There are two impairment ratings for claimant. Dr. Abernathey rated claimant's permanent impairment of the cervical spine at 11 percent. It is

true claimant underwent a serious surgical procedure. Dr. Neiman rated the permanent impairment of the cervical spine at 20 percent. Dr. Abernathy opined work restrictions were not warranted. Dr. Neiman imposed numerous work restrictions and even went so far as to deem claimant incapable of ever driving a forklift or other truck again. (Ex. 8, p. 3)

This deputy considers the restrictions imposed by Dr. Neiman to be extreme. Dr. Neiman examined claimant on one occasion only. When Dr. Neiman examined claimant, he was just two months post-surgery. Claimant was still in a healing period and had not reached maximum medical improvement. Dr. Neiman acknowledged claimant needed additional medical treatment. The undersigned does not accept the restrictions imposed by Dr. Neiman as legitimate. Since the writing of Dr. Neiman's independent medical report, claimant has had additional time to heal.

Claimant does not believe he is capable of returning to ABF Freight System, Inc., however, he and members of management have not negotiated a return to work date. Claimant has not even attempted to return to work on a schedule with reduced hours, in order to begin a work hardening program. From the evidence presented, it appears Mr. Parnell is interested in returning claimant to work. Claimant has not sought employment elsewhere.

In his deposition, claimant testified about his farming operation. He testified he decided to rent out the land in the fall of 2013 because claimant did not believe he could perform the physical tasks and because he thought renting the land would be financially advantageous for his income status. (Ex. 12, p. 2) Claimant also testified he raises 50 head of cattle. (Ex. 12, pp. 2-3) Claimant feeds and waters the cattle; he drives a tractor and skid loader; he moves and opens gates which weigh up to 40 pounds. (Ex. 12, p. 6) There are occasions when claimant seeks help from family members.

In light of all of the factors involving industrial disability, it is the determination of the undersigned; claimant has sustained an industrial disability in the amount of thirty (30) percent as a result of the work injury on August 8, 2013. Defendants shall pay unto claimant, 150 weeks of permanent partial disability benefits at the weekly benefit rate of \$705.46 per week. Said benefits shall commence from February 19, 2016. Defendants shall take credit for all benefits previously paid to claimant.

(Arb. Dec., pp. 10-11) It is noted that at the time of the first snapshot in April 2016, Mr. Hilliard was less than a year out from his cervical fusion surgery.

The second snapshot of Mr. Hilliard's condition was taken on June 18, 2019, a little more than three years after the original snapshot. Mr. Hilliard is still married and has three children who are now 11, 10, and 6. He testified that he manages his 140-acre farm, which he still rents out. Mr. Hilliard testified that "managing the farm" involves performing custom work for others. "So I take the clients and get everything in place to bale hay. That's what we do for custom work." (Transcript, p. 10) He testified that the physical labor for this is performed by others, including his father, his uncle and a neighbor. (Tr., p. 11)

Mr. Hilliard testified that since his April 2016 hearing, his pain is more severe. He testified that his pain is between his shoulder blades and moves into his back, and from his neck the pain radiates into the back of his head, down into his shoulders and down into his arms, wrists and hands. (Tr., pp. 12-13) He has gained 40 to 50 pounds since the original hearing. He testified that he now primarily treats with Casey Boyles, M.D., for his neck condition. Furthermore, Dr. Boyles is now treating him for depression. Mr. Hilliard testified that the pain has taken over his life and he has feelings of inadequacy. (Tr., pp. 13-14) Dr. Boyles has primarily treated his condition through medication management. He testified regarding a variety of new medications that he is now taking that he was not taking at the time of the original April 2016 arbitration hearing. (Tr., pp. 16-19) He also testified he suffers from headaches now. He testified that he really cannot perform any type of work for more than about 30 minutes or so.

Dr. Boyles' medical records confirm everything Mr. Hilliard testified about at hearing. (Joint Exhibit 1, pp. 1-31) Dr. Boyles documented weight gain in February 2017. (Jt. Ex. 1, p. 1) In January 2018, and again in March 2018, Dr. Boyles saw Mr. Hilliard for specifically neck pain and ibuprofen PM was prescribed. In April, an MRI was performed. Mr. Hilliard was evaluated by Jeffrey Clark, M.D., who diagnosed cervical radiculitis and recommended an epidural steroid injection (ESI). (Jt. Ex. 3) Mr. Hilliard testified the ESI did not help much. In May 2018, Dr. Hilliard documented the "pain began several years ago and has been gradually worsening." (Jt. Ex. 1, p. 15) Mr. Hilliard described the pain in detail, which was consistent with Mr. Hilliard's description, with numbness and tingling extending into his fingers bilaterally. At that time his pain was an "8" on a scale of 0-10. He was prescribed the following medications: Zanaflex, Cymbalta and Neurontin (gabapentin). (Jt. Ex. 1, p. 15) In June 2018, after the ESI was attempted, Dr. Boyles documented a prescription for Lexapro and the Cymbalta was discontinued due to side effects. (Jt. Ex. 1, p. 19) In August 2018, Dr. Boyles' records indicated that his symptoms were unchanged but the Zanaflex was helping a lot. Physical therapy was attempted.

In November 2018, Dr. Boyles documented the follow up was for neck pain, depression and anxiety. (Jt. Ex. 1, p. 26) Documented symptoms included difficulty concentrating, feelings of losing control, feelings of worthlessness/guilt and irritability. In February 2019, Dr. Boyles documented headaches, depression and new symptoms in his low back and hips. "He has had incomplete results with injectable therapy and essentially his delayed surgical care has resulted in his chronic pain syndrome. He has had no significant benefit from physical therapy. I think [*sic*] would be best to have him

see a physical medicine physician for further thoughts in regards to his chronic pain.” (Jt. Ex. 1, p. 30) He diagnosed moderate major depression at that time. (Jt. Ex. 1, p. 30) In an opinion letter, Dr. Boyles opined that Mr. Hilliard’s condition has “suffered a continuous decline since the date of his surgery.” (Cl. Ex. 4, p. 2) He further opined that his “chronic pain . . . has resulted in significant depression.” (Id.)

Dr. Boyles testified via deposition on May 1, 2019. (Cl. Ex. 5) He verified the opinions in his February 2019 opinion letter. (Cl. Ex. 5, Boyles Deposition, pp. 41-45)

Mr. Hilliard testified that he has discontinued driving a truck and hauling cattle in the fall of 2018 because of the deterioration of his physical condition. (Tr., p. 34) Claimant’s wife, Beth Hilliard testified live and under oath as well. Her testimony is highly credible. She is a Catholic pre-school teacher who has been married to Mr. Hilliard for 17 years at the time of hearing. She testified that Mr. Hilliard sometimes stays in bed until 11 a.m. or noon. She testified that he has become depressed and when he tried to engage in physical activities, he is unable to complete them.

CONCLUSIONS OF LAW

The only question is whether the legal elements for review-reopening have been met in light of the findings of facts set forth above. Mr. Hilliard alleges he has proven that his condition is worse than it was in April 2016. The defendants argue that his condition has not changed significantly.

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 or her 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 relitigate 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 arbitration hearing in April 2016. At that time, Mr. Hilliard had ceased working for the employer in this case. He did not feel he could perform the work. He has been renting out his family farmland since 2013. He did not seek to return to work in any capacity and chose instead to manage the family farm. The restrictions recommended by Dr. Neiman were deemed to be inappropriate at that time. Mr. Hilliard was not taking any medications at that time other than ibuprofen. He had undergone significant cervical surgery in August 2015 with, what appeared to be, fairly good results. His treating surgeon placed no restrictions on him. He was under no active medical care and had no psychological diagnosis of any kind. He was actively helping with the custom farming operation at that time and helping with the cattle hauling.

The second snapshot was June 2019. At that time, the snapshot of Mr. Hilliard's condition was significantly different. He had been under active medical treatment by Dr. Boyles since at least January 2018. He experienced significant weight gain and began treatment for pain with prescription medications, including Zanaflex, Cymbalta and Neurontin. He had an MRI and an ESI. He underwent physical therapy. His treatments continued up through the date of hearing and he was referred to physical medicine. He was diagnosed with chronic pain, depression and anxiety. He testified credibly, corroborated by the treatment notes, that his pain worsened and included numbness and tingling in his hands and fingers. His depression significantly adversely impacts his condition. He has difficulty getting out of bed at times. He can no longer work for more than 30 minutes at a time.

I find it is likely that the claimant's condition appeared better than it actually was at the time of the first snapshot because he was so close out from his surgery. He had surgery in August 2015. He appeared to have good results and the treating surgeon had released him with no further medical care or restrictions. The deputy who took the

snapshot of his condition at that time found he had no medical restrictions and failed to attempt to return to work or undertake any efforts to look for work. It is certainly understandable that the deputy viewed the industrial disability at that time as moderate to low (30 percent loss of earning capacity). The second snapshot demonstrated, however, that claimant had in fact not healed well from the surgery and needed substantial additional treatment. Time has allowed a much clearer understanding of the claimant's condition following the surgery. The ongoing substantial medical treatment after the first hearing, combined with the new diagnoses of chronic pain, depression and anxiety, create a vastly different snapshot, and therefore, understanding of what his real condition is, at least as of June 18, 2019. I specifically find that all of the treatment Mr. Hilliard has received from Dr. Boyles was reasonable and necessary. His loss of earning capacity as of the time of the second snapshot is moderate to severe.

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 R. Co., 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 the 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.

Based upon the evidence presented at hearing, I find that the claimant has proven he has a 50 percent loss of earning capacity resulting from his August 8, 2013, work injury. The extent of his disability was unknown at the time of the first injury as he was less than a year out from his cervical fusion surgery in May 2015. He was released by the treating surgeon with no medical restrictions and he did not attempt to return to work with the defendant employer. Instead, Mr. Hilliard chose to manage the family farm. His activities on the family farm have changed significantly since the time of the first hearing, commensurate with the increased physical and mental symptoms he has suffered since then. Having found that Mr. Hilliard has suffered a 50 percent loss of earning capacity, I conclude he is entitled to an additional 100 weeks of permanent partial disability benefits commencing as of the date he filed his review-reopening petition.

ORDER

THEREFORE, IT IS ORDERED


Defendants shall pay claimant one hundred (100) weeks of permanent partial disability benefits at the rate of seven hundred five and 46/100 dollars (\$705.46) per week commencing January 19, 2018.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

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 11th day of March, 2020.



JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Matthew J. Petrzeka (via WCES)

Stephen William Spencer (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.