

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

VICENTE LINARES,

Claimant,

vs.

TYSON FRESH MEATS,

Employer,
Self-Insured,
Defendants.

File No. 5031412

REVIEW-REOPENING

DECISION

FILED

AUG 28 2015

WORKERS' COMPENSATION

Head Note Nos: 1803, 2905

STATEMENT OF THE CASE

Claimant, Vicente Linares, filed a petition in review-reopening seeking workers' compensation benefits from Tyson Fresh Meats, self-insured employer, as defendant, as a result of a stipulated injury sustained on June 3, 2009. This matter came on for hearing before Deputy Workers' Compensation Commissioner, Erica J. Fitch, on September 15, 2014, in Sioux City, Iowa. The record in this case consists of claimant's exhibits 1 through 21, defendant's exhibit A, and the testimony of the claimant. The undersigned also agreed to take administrative notice of the prior decisions, as well as the transcript and briefs filed in the underlying arbitration matter. The proceedings were translated by Frank Gonzalez. The parties submitted post-hearing briefs, the matter being fully submitted on October 14, 2014.

ISSUES

The parties submitted the following issues for determination:

1. Whether there has been a change of condition since the original arbitration hearing on December 9, 2010, that might entitle claimant to additional permanent partial disability under a review-reopening;
2. If a change in condition is established, the extent of claimant's industrial disability; and
3. Specific taxation of costs.

The stipulations of the parties in the hearing report are incorporated by reference in this decision.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

In the underlying arbitration matter in this file, claimant alleged he sustained work-related injuries to his bilateral shoulders, neck, chest, and low back as a result of a cumulative injury on June 3, 2009. Defendant provided limited medical treatment, but no permanent work restrictions were imposed. As a result of the lack of authorized physician-imposed restrictions, claimant continued to work in his preinjury position as a "low backer." The file proceeded to arbitration hearing on December 9, 2010, and the presiding deputy commissioner issued a proposed decision on February 7, 2011. After weighing multiple expert medical opinions, the deputy found the opinions of Daniel McGuire, M.D. most convincing. (Arbitration Decision)

Dr. McGuire had causally related claimant's left shoulder, neck, and chest conditions to multiple causes, one of which being an aggravation by his repetitive work duties. Dr. McGuire opined claimant sustained a 5 percent whole person impairment and recommended permanent restrictions limiting material handling to 20 to 30 pounds and limiting overhead work. (Exhibit 4, page 20) He added that limiting repetition may also help, as the repetitious movements at work likely caused a persistent aggravation of claimant's conditions. (Ex. 4, p. 21) Dr. McGuire opined many of claimant's complaints were repetition-driven and noted it may be quite difficult to limit repetitious movements at claimant's current job site. (Ex. 4, p. 20) However, he indicated a modified work station may help to a degree, but most likely the repetitions required in claimant's position would irritate claimant's conditions. (Ex. 4, p. 19)

In adopting the opinions of Dr. McGuire, the presiding deputy found:

Dr. McGuire had the best understanding of the job and credibly opined that the causative activity was not heavy work, but its repetitive nature. Therefore, I find that claimant suffered permanent aggravation injury to his neck, shoulder and chest (sternoclavical) causing significant permanent impairment to the body as a whole and more importantly in his industrial claim, permanent work restrictions against lifting, pushing, or pulling over 20-30 pounds and no overhead work I am unable to find that the right shoulder problems, although a sequelae work injury, have resulted in permanent impairment or disability.

....

While Vincente has returned to his job, it is quite apparent the repetitive work is really not suitable for him as it is likely he will continue to have problems if he continues such work as noted by Dr. McGuire. However, Vincente needs to work and will likely continue this work until he can no longer tolerate it. He is now looking for other jobs at Tyson. Vicente

remains at work without permanent loss of wages as a result of his injuries.

....

Vicente is 42 years old. He has very limited education. Given his language problems, age and limited education, he has little potential for retraining into a more skilled lighter duty job. His restrictions, which prohibit heavy work and difficulty with repetitive work, will severely limit those limited jobs open to non-English speaking immigrants.

(Ex. 1, p. 6)

After so finding, the presiding deputy determined claimant sustained a 40 percent loss of earning capacity as a result of the work injury of June 3, 2009. (Arbitration Decision)

Following issuance of the proposed decision in the arbitration matter, a rehearing decision was filed on February 25, 2011, on issues unrelated to the present action. The entire matter was appealed to the workers' compensation commissioner. On December 1, 2011, the commissioner issued final agency action affirming the arbitration and rehearing decisions, without additional analysis.

On August 28, 2013, claimant filed a review-reopening petition, seeking additional permanent disability benefits arising from the June 3, 2009, work injury. The review-reopening proceeded to hearing before the undersigned on September 15, 2014.

Claimant's testimony was consistent as compared to the evidentiary record and his deposition testimony. His demeanor at the time of evidentiary hearing gave the undersigned no reason to doubt claimant's veracity. Claimant is found credible.

At the time of the arbitration decision, claimant remained employed in his preinjury position as a low backer. Claimant remained in this position throughout the pendency of appeal before the commissioner. Following the appeal decision, defendant did not seek judicial review. Rather, defendant accepted the decision and implemented the permanent restrictions adopted by the presiding deputy and affirmed by the commissioner. Claimant was then removed from the low backer position as it did not comport with his permanent restrictions. Claimant agreed with defendant's decision to remove him from the low backer position, as he too believed the position was beyond his restrictions. Defendant placed claimant on light duty while attempting to locate a position within claimant's restrictions. (Claimant's testimony; Ex. A, p. 4)

Claimant testified he performed light duty work for approximately one month while defendant attempted to locate a job within claimant's permanent restrictions. While performing light duty, defendant notified claimant it had identified three potential positions and requested claimant review videos of these positions. Claimant testified he did not believe himself capable of performing one of the positions as it required

repetition. Defendant referred all three positions to Dean Wampler, M.D. for review. (Claimant's testimony; Ex. A, p. 5)

While awaiting receipt of Dr. Wampler's opinions, defendant initiated a new production line in January 2012, dubbed A 40 or tongue line. Claimant successfully bid into a regular bid position called "identifier" and began work on this A 40 line in February 2012. Claimant testified his duties involved writing the identification numbers of carcasses as they passed his location. Claimant testified the work was not physical and did not require heavy lifting or repetitive actions. He believes the work complied with his permanent restrictions, yet he continued to suffer with complaints. Claimant's pay decreased from \$14.00 per hour as a low backer to \$13.00 per hour as an identifier. (Claimant's testimony; Ex. A, p. 5)

In his answers to interrogatories, claimant stated he earned \$450.00 per week at defendant prior to implementation of the appeal decision in this case. He represented, after the resulting position change, claimant's earnings reduced to \$350.00 per week. (Ex. 16, p. 287) There is no documentary evidence in the record to support claimant's statements as to losing \$100.00 per week in earnings. No payroll records were admitted for consideration. The only evidence on claimant's loss of wages post-implementation of the appeal decision is claimant's testimony he moved from a \$14.00 per hour position to a \$13.00 per hour position as an identifier. The undersigned fails to compute how a \$1.00 per hour loss of hourly wage corresponds to \$100.00 less in earnings per week. There is no evidence claimant was working in excess of typical full-time employment in the range of 40 hours per week. Absent further evidence, the undersigned is unable to give any credence to claimant's estimate he lost \$100.00 per week, over 22 percent of his weekly earnings, by losing 7 percent of his hourly wage.

Following review of medical records and video of three job positions, Dr. Wampler ultimately opined the positions of "betcher spinal vacuum," "segregator," and "washing and load beef feet," were all consistent with claimant's permanent restrictions. (Ex. 6, pp. 72, 74)

Due to continued complaints, defendant designated Jeremy Poulson, D.O., of the Siouxland Pain Clinic, as an authorized provider. Dr. Poulson began examining claimant regularly and implemented a course of conservative care. The extended course of treatment included medications, TENS unit, trigger point injections, a topical gel, physical therapy, epidural steroid injection, chiropractic visits, and temporary work restrictions. (Ex. 8, pp. 82-83, 88-89, 98, 101-103, 113, 117-119; Ex. 9, pp. 124-133, 179-186)

In June 2012, Dr. Poulson also ordered an MRI of claimant's cervical spine and referred claimant for a surgical evaluation by orthopedic spine surgeon, Wade Jensen, M.D. (Ex. 8, pp. 96, 99, 106; Ex. 9, p. 123; Ex. 10, p. 190) Following evaluations in late 2012, Dr. Jensen opined claimant was not a surgical candidate. He did recommend an ergonomic evaluation of claimant's work station which would allow claimant to maintain his neck in a more neutral position, as well as a padded mat below claimant's feet. Dr.

Jensen opined claimant had achieved maximum medical improvement (MMI) and should follow his existing permanent restrictions. (Ex. 8, p. 107; Ex. 10, pp. 200-201)

Claimant reengaged the services of board certified occupational medicine physician, Sunil Bansal, D.O., who had offered opinions in the original arbitration proceeding. Dr. Bansal performed an evaluation in January 2013, following which he opined claimant would benefit from a C5-6 discectomy. (Ex. 13, pp. 231-233) Dr. Bansal acknowledged Dr. Jensen's lack of surgical recommendation, yet opined his recommendation for surgery remained unchanged. (Ex. 13, p. 235)

Claimant remained in the identifier position from February 2012 until January 31, 2013. (Claimant's testimony; Ex. 16, p. 288; Ex. A, p. 4) Effective February 1, 2013, the entire A 40 line was eliminated, leading to the elimination of the positions held by claimant and many other employees. (Claimant's testimony; Ex. 17, pp. 292-293; Ex. A, pp. 5-6) Defendant advised claimant he needed to attempt to locate another position within his restrictions via the bid program. In the meantime, defendant placed claimant on a leave of absence. (Claimant's testimony; Ex. 17, p. 296)

Following an extended course of care, Dr. Poulson opined claimant had achieved MMI, at least as of December 11, 2013. Dr. Poulson recommended continued medication use, but released claimant without restrictions. (Ex. 8, pp. 117-119, 121-122)

Claimant then returned to Dr. Bansal in January 2014. At that time, Dr. Bansal opined claimant's condition had not improved since the time of his original IME. However, Dr. Bansal opined claimant's impairment rating and need for restrictions had also not changed. (Ex. 13, p. 242)

Claimant was 46 years of age at the time of review-reopening hearing. His education level and English-language skills remain at the same levels as at the time of arbitration hearing. Claimant's work history also remained unchanged with the exception of the addition of one year of experience as an identifier at defendant, post appeal decision. (Claimant's testimony; Ex. 16, pp. 283-287) Claimant continues to labor under the same permanent restrictions adopted by the deputy commissioner and affirmed by the commissioner in this file; namely, a 20 to 30 pound weight restriction and no overhead activity. Claimant also continues to suffer with difficulty with repetitive work, just as noted by Dr. McGuire and adopted by the presiding deputy at arbitration hearing. (Claimant's testimony)

Since January 31, 2013, claimant has continued to return to defendant weekly and seek bid positions. (Claimant's testimony; Ex. 19, pp. 302-305; Ex. A, p. 6) Claimant has successfully bid into four positions at defendant, yet claimant was not medically cleared to perform the positions. (Claimant's testimony; Ex. A, pp. 7-9) As recently as April 2014, claimant successfully bid into the position of pack offail, but following review of video of the position, a physical therapist opined the job did not fall within claimant's restrictions of no lifting, pushing, or pulling over 20 to 30 pounds and no overhead work. (Claimant's testimony; Ex. 20, p. 307; Ex. A, p. 10) Claimant

testified he continues to present to defendant weekly and in the event he wins a bid and is cleared for duty, he intends to return to work. (Claimant's testimony)

Claimant has also sought employment at other local employers. As of the date of review-reopening hearing, claimant has been unsuccessful in his search. (Claimant's testimony; Ex. 19, pp. 302-305)

CONCLUSIONS OF LAW

The first issue for determination is whether there has been a change of condition since the original arbitration hearing on December 9, 2010, that might entitle claimant to additional permanent partial disability under a review-reopening.

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. 6.14(6).

This is a review-reopening case. In a proceeding to 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). 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).

The Iowa Supreme Court provided guidance on this change of condition requirement in Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387 (Iowa 2009). The supreme court held:

In determining a scheduled or unscheduled award, the commissioner finds the facts as they stand at the time of the hearing and should not speculate about the future course of the claimant's condition. The functional impairment and disability resulting from a scheduled loss is what it is at the time of the award and is not based on any anticipated deterioration of function that might or might not occur in the future. See Iowa Code § 85.34(2); Second Injury Fund v. Bergeson, 526 N.W.2d 543, 548 (Iowa 1995) ("a scheduled injury is evaluated by determining the loss of physiological capacity of the body part"). Likewise, in an unscheduled whole-body case, the claimant's loss of earning capacity is determined by the commissioner as of the time of the hearing based on the factors bearing on industrial disability then prevailing—not based on what the claimant's physical condition and economic realities might be at some future time. See Iowa Code § 85.34(3); Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 157 (Iowa 1996) ("Factors that should be considered include the employee's functional disability, age, education, qualifications, experience, and the ability of the employee to engage in employment for

which the employee is fitted."); Second Injury Fund v. Nelson, 544 N.W.2d 258, 266 (Iowa 1995) (stating "the concept of industrial disability rests on a comparison of what the injured worker could earn before the injury as compared to what the same person could earn after the injury"). The workers' compensation statutory scheme contemplates that future developments (post-award and post-settlement developments), including the worsening of a physical condition or a reduction in earning capacity, should be addressed in review-reopening proceedings. See Iowa Code § 86.14(2). The review-reopening claimant need not prove, as an element of his claim, that the current extent of disability was not contemplated by the commissioner (in the arbitration award) or the parties (in their agreement for settlement).

A compensable review-reopening claim filed by an employee requires proof by a preponderance of the evidence that the claimant's current condition is "proximately caused by the original injury." See Simonson, 588 N.W.2d at 434 (original emphasis omitted) (quoting Collentine, 525 N.W.2d at 829). While worsening of the claimant's physical condition is one way to satisfy the review reopening requirement, it is not the only way for a claimant to demonstrate his or her current condition warrants an increase of compensation under section 86.14(2). See Blacksmith v. All-Am., Inc., 290 N.W.2d 348, 354 (Iowa 1980) (holding a compensable diminution of earning capacity in an industrial disability claim may occur without a deterioration of the claimants physical capacity).

Therefore, we have held that awards may be adjusted by the commissioner pursuant to section 86.14(2) [then section 86.34] when a temporary disability later develops into a permanent disability, see Rose v. John Deere Ottumwa Works, 247 Iowa 900, 906, 76 N.W.2d 756, 759(1956), or when critical facts existed but were unknown and could not have been discovered by the exercise of reasonable diligence at the time of the prior settlement or award, see Gosek v. Garmer & Stiles Co., 158 N.W.2d 731, 735 (Iowa 1968). We have also previously approved a review-reopening where an injury to a scheduled member later caused an industrial disability. See Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 13, 17 (Iowa 1993) ("[A] psychological condition caused or aggravated by a scheduled injury is to be compensated as an unscheduled injury.").

Although we do not require the claimant to demonstrate his current condition was not contemplated at the time of the original settlement, we emphasize the principles of res judicata still apply—that the agency, in a review-reopening petition, should not reevaluate an employee's level of physical impairment or earning capacity if all of the facts and circumstances were known or knowable at the time of the original action. As this court has explained, a contrary view would tend to defeat the intention of the legislature. "The fundamental reason for the enactment of

this legislation is to avoid litigation, lessen the expense incident thereto, minimize appeals, and afford an efficient and speedy tribunal to determine and award compensation under the terms of this act."

Stice, 228 Iowa at 1038, 291 N.W. at 456 (quoting Flint v. City of Eldon, 191 Iowa 845, 847, 183 N.W. 344, 345 (1921)). Therefore, "once there has been an agreement or adjudication the commissioner, absent appeal and remand of the case, has no authority on a later review to change the compensation granted on the same or substantially same facts as those previously considered." Gosek, 158 N.W.2d at 732. For example, a "mere difference of opinion of experts or competent observers as to the percentage of disability arising from the original injury would not be sufficient to justify a different determination by another commissioner on a petition for review reopening." Bousfield v. Sisters of Mercy, 249 Iowa 64, 69, 86 N.W.2d 109, 113 (1957). Likewise section 86.14(2) does not provide an opportunity to relitigate causation issues that were determined in the initial award or settlement agreement.

Kohlhaas, 777 N.W.2d at 392-393.

The supreme court in Kohlhaas thus identified five ways the change in condition review-reopening requirement can be satisfied: (1) a worsening of the claimant's physical condition; (2) a reduction of the claimant's earning capacity; (3) a temporary disability developing into a permanent disability; (4) a critical fact existed but was unknown or could not have been discovered by the exercise of reasonable diligence at the time of the prior settlement or award; or (5) a scheduled member injury later causes an industrial disability. See Verizon Business Network Services, Inc. v. McKenzie, No. 2-394/11-1845, (Ct. of App. October 17, 2012).

Claimant does not argue he sustained any physical change of condition following the arbitration hearing. Rather, claimant argues he sustained an economic change in condition in the form of a loss of earning capacity post-award. His economic change of condition argument has two potential bases: (1) claimant's loss of the low backer job, moving claimant from a \$14.00 per hour job to a \$13.00 per hour job as an identifier and (2) claimant's loss of the identifier job when A 40 line was eliminated, thus removing claimant from the labor force.

Defendant argues neither basis represents a change in earning capacity from the time of the arbitration hearing. Defendant argues the loss of a position as the result of an arbitration award cannot form the basis of a review-reopening petition. Specifically, defendant argues the permanent restrictions in place formed the basis of the underlying award and since the restrictions remain the same, the restrictions cannot represent a change in economic condition. Defendant also argues claimant's loss of the identifier position on the A 40 line does not represent a change in earning capacity as (1) the position did not exist at the time of arbitration hearing and no longer exists at the time of review-reopening hearing and (2) the loss of the position had no relationship to the work injury.

In determining an injured workers' industrial disability, which is the loss of earning capacity, consideration is given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, functional impairment, 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). An injured person's loss of earning capacity is properly viewed "in terms of the injured worker's present ability to earn in the competitive job market without regard to the accommodation furnished by one's present employer." Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 617 (Iowa 1995).

Therefore, the question of a workers' earning capacity properly involves consideration of multiple factors. The presiding deputy clearly took into consideration multiple contributing factors in arriving at his determination of 40 percent loss of earning capacity. He specifically cited to claimant's age, education, English-language skills, possibility for retraining, functional impairment, lack of demonstrable loss of earnings, and permanent work restrictions.

In the instant review-reopening proceeding, the deputy's consideration of these final two factors is of vital importance. Claimant cites the deputy's recitation claimant remained at work "without permanent loss of wages" as support for his position he sustained a loss of earning capacity when he lost his preinjury position and moved to a lower-paying position. Defendant argues the deputy clearly considered the role of claimant's permanent work restrictions upon his employability broadly and in the incompatibility of claimant's preinjury job with those restrictions.

In his decision, the deputy indicated the role of claimant's permanent restrictions was more important in consideration of industrial disability than claimant's functional impairment. He found claimant suffered a permanent aggravation injury to his neck, left shoulder and chest which "caused significant permanent impairment to the body as a whole and *more importantly in his industrial claim*, permanent work restrictions against lifting, pushing, or pulling over 20-30 pounds and no overhead work." (Emphasis mine) The deputy went on to state claimant's restrictions "will severely limit those limited jobs open to non-English speaking immigrants." Therefore, the deputy clearly considered the impact of claimant's permanent work restrictions upon his ability to engage in the labor market generally.

The deputy also considered the incompatibility between claimant's low backer position and the permanent work restrictions. The deputy found claimant's continued low backer work was "not suitable" for claimant and would likely result in continued problems as noted by Dr. McGuire. During arbitration hearing, claimant testified he continued to perform his low backer position, but replied "bad" when asked how doing so was impacting his conditions. (Arbitration Hearing Transcript page 45) At arbitration hearing, claimant also testified he continued to work in pain and had begun to look into and bid for other easier-nature positions at defendant. (Arb. Tr. pp. 46-49)

While pursuant to Kohlhaas, a review-reopening claimant need no longer prove, as an element of his claim, that the current extent of disability was not contemplated by the commissioner, the principles of *res judicata* still apply. As also explained in Kohlhaas, the agency, in a review-reopening petition, should not reevaluate an employee's physical impairment or earning capacity if all of the facts and circumstances were known or knowable at the time of the original action. Therefore, in order to successfully prove a change in condition, claimant must prove a change in his earning capacity after the arbitration award. The parties admit claimant's physical condition, permanent restrictions, and impairment ratings remain unchanged. All these factors were therefore known or knowable at the time of arbitration hearing.

With respect to claimant's first basis for a change in condition, the loss of earnings as a result of being medically disqualified from the position held at the time of the arbitration hearing, the essence of claimant's argument is that adherence to the arbitration decision resulted in a change in earning capacity. Yes, following the arbitration decision, claimant lost earnings and that loss of earnings is directly attributable to permanent restrictions resulting from the work injury. However, the permanent restrictions which led to disqualification from the position were known to the parties at the time of arbitration hearing. It cannot be said that the parties were unaware of the conflict between claimant's work duties and permanent restrictions. Even the claimant testified he had sought easier-natured employment at defendant. The deputy clearly considered the impact of these restrictions upon claimant's ability to engage in the labor market generally, as well as his ability to remain in the low backer position indefinitely.

Furthermore, the undersigned is uncomfortable adopting a position that adherence to an agency decision alone can result in a loss of earning capacity. The agency is asked to determine the extent of industrial disability given a set of factors. In doing so, we often are required to determine the weight to be given to conflicting medical opinions and recommendations for permanent restrictions. In adopting the opinion of a medical provider, the agency is not changing the facts present at the time of the arbitration hearing nor at the time of implementation of the arbitration decision. To find that adherence to an agency decision is sufficient on its own to give rise to a review-reopening action violates the spirit behind the *res judicata* concept: to avoid litigation, lessen the expense incident thereto, minimize appeals, and afford an efficient and speedy tribunal to determine and award compensation under the terms of the act.

Determination of loss of earning capacity requires one to view an injured workers' loss of access to and ability to compete in the labor market generally. The presiding arbitration deputy, as affirmed by the commissioner, properly considered the factors of industrial disability, including the role of claimant's permanent work restrictions. Upon receipt of final agency action, defendant agreed to adhere to the decision. Defendant following an agency decision is not a change in condition, even though it resulted in medical disqualification of claimant from the position he held at the time of the arbitration hearing. Claimant's permanent restrictions were considered by the deputy at the time of arbitration hearing. The potential impact of imposition of work restrictions

was knowable at the time of evidentiary hearing; the parties could have presented evidence as to the number of positions available at defendant which comported with proposed permanent restrictions or other vocational evidence as to the impact of claimant's permanent restrictions. These facts existed at the time of evidentiary hearing and remain unchanged.

At arbitration hearing, claimant advocated for a determination of work-related conditions and adoption of resultant permanent restrictions. Claimant prevailed at arbitration and intra-agency appeal. The permanent restrictions were imposed and resulted in claimant losing a position and the higher earnings it brought. Something strikes the undersigned as fundamentally unfair about the claimant advocating for imposition of permanent restrictions, knowing those restrictions would foreclose his current employment position, and then turning around and filing for additional benefits when the cause and effect scenario advocated proved to be true.

It is determined claimant has failed to prove the loss of his employment as a low backer and resultant loss of wages qualifies as a change of condition since the arbitration hearing on December 9, 2010, that might entitle claimant to additional permanent disability benefits under a review-reopening.

The undersigned now turns to claimant's second argued change in condition, the loss of employment on the A 40 line and resultant removal from the labor market.

The Iowa Supreme Court denied a review-reopening in a case involving a claimant whose physical condition remained unchanged and her earning capacity decreased solely because of factors outside of the award, including downsizing by the employer. U.S. West v. Overholser, 566 N.W.2d 873 (Iowa 1997). Claimant attempts to distinguish from Overholser by stating the claimant in Overholser was downsized after taking a different job as a result of non-work related injuries. Claimant asserts a but-for argument should be applied in this matter to reach a different result, i.e. but-for the work injury, claimant would not have been on the A 40 line when it was discontinued. Although this factual difference does exist, the undersigned does not believe this factual nuance has any bearing on the issue at hand, loss of earning capacity. Where an employee's change in economic circumstances is caused by factors other than the original injury, such as downsizing by the employer, the employee is not entitled to increased benefits in a review-reopening proceeding. See Bright v. SuperValue, Inc., No 7-100/06-0753, (Ct. of App. April 11, 2007).

It is determined claimant has failed to prove the loss of his employment on the A 40 line and resultant removal from the labor market qualifies as a change of condition since the arbitration hearing on December 9, 2010, that might entitle claimant to additional permanent disability benefits under a review-reopening.

Having determined claimant failed to carry his burden of establishing a change of condition since the arbitration hearing on December 9, 2010, consideration of the extent of claimant's earning capacity is moot. As defendant prevailed in this matter, the costs of the proceeding, including the costs detailed at Exhibit 21, shall be borne by claimant.

ORDER

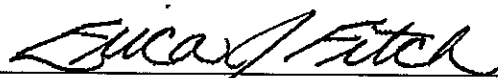
THEREFORE, IT IS ORDERED:

Claimant shall take nothing from these proceedings.

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

Costs are taxed to claimant pursuant to 876 IAC 4.33 as set forth in the decision.

Signed and filed this 28th day of August, 2015.



ERICA J. FITCH
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.