BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KIM ZESCH, Claimant, vs. FISHER CONTROLS, INC./EMERSON ELECTRIC COMPANY, Employer, and OLD REPUBLIC INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5039320 REVIEW-REOPENING DECISION Head Note Nos.: 2905

STATEMENT OF THE CASE

Kim Zesch, claimant, filed a review-reopening petition in arbitration seeking additional workers' compensation benefits against Fisher Controls International, Inc. / Emerson Electric Company, employer, and Old Republic Insurance Co., insurer, for an accepted work injury dated September 1, 2010.

This case was heard on February 10, 2017, in Des Moines, Iowa, and was considered fully submitted on March 3, 2017, upon the simultaneous filing of briefs.

The record consists of Claimant's Exhibits 1-6, Defendants' Exhibits A-K, and the claimant's testimony.

ISSUES

Whether claimant has had a significant change in circumstances, either economic or physical, giving rise to a review-reopening; and

Extent of industrial disability.

STIPULATIONS

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.

Defendants have agreed to pay the medical bills attached to the hearing report.

FINDINGS OF FACT

Claimant was a 64 year old male at the time of the hearing. His background includes graduation from high school in 1970 followed by one year of post-secondary education. He received work training in electrical work and achieved journeyman status. His relevant work history is that of an electrician. He began working for defendant employer in 1973 and worked continuously until September 1, 2015.

On or about September 10, 2010, claimant was removing a damaged electrical distribution bar. It slipped and as claimant caught it, he felt a tear in his shoulder. That tear turned out to be a massive rotator cuff injury which was surgically repaired by Kyle Galles, M.D., on November 23, 2010. After surgery, he underwent physical therapy. (Exhibit G) After 37 visits, claimant testified that his authorized visits ended. He wished that they could have continued.

On June 28, 2011, claimant was placed at maximum medical improvement (MMI), given an 8 percent upper extremity impairment rating and work restrictions based on a June 2011 functional capacity evaluation (FCE) were adopted. (Ex. 1, pages 1-2; see also Ex. 3, Ex. 5, p. 33) The FCE showed that claimant had "significant deficits" with sustained overhead tasks, lifting objects overhead, and holding objects away from his body or overhead with the right upper extremity. (Ex. 2, p. 8) Claimant was placed in the medium level category for any work involving a single arm over his head or away from his body and that he should not lift more than three pounds with the right upper extremity. (Ex. 2, p. 8)

Dr. Galles anticipated claimant would continue to have achiness in the shoulder and some increased risk to developing a tear in the future. (Ex. 1, p. 1)

A December 14, 2012, employability assessment by Barbara Laughlin, MA, found claimant to have suffered a 50-70 percent loss of transferable occupations and should be placed in the light duty exertional work category. (Ex. 4, p. 12) A 2013 arbitration decision found that claimant had sustained a 30 percent industrial disability.

Oh July 16, 2013, claimant suffered a work injury to his left shoulder. In the May 7, 2014, FCE, he was doing well with both shoulders, but complained of low back stiffness and left knee pain. (Ex. 2, p. 8a) It was the left knee pain that was the most

limiting. (Ex. 2, p. 8b) On January 28, 2016, claimant was awarded a combined 40 percent industrial disability for both the left and right shoulder injuries. This decision is currently on appeal.

Claimant then filed a petition for review-reopening related to the right shoulder injury.

On January 25, 2016, claimant was seen by Joseph C. Pollpeter, M.D., for a check of claimant's blood pressure. (Ex. 6) During this visit, claimant reportedly continued to be active, playing pickle ball twice a week. He cared for 70 head of cattle on his acreage and took Tramadol once a day. (Ex. 6) During a later visit to Dr. Pollpeter, claimant had issues with his knees, but continued to play competitive pickle ball. (Ex. 6, p. 50)

He was seen by Mark B. Kirkland, D.O., for an IME on January 11, 2017. (Ex. A) At that time, claimant's symptoms consisted of decreased strength in the left upper extremity, difficulty sleeping, inability to lie on the left side, and decreased strength with overhead working. (Ex. A, p. 2) Claimant exhibited pain in the left upper extremity with range of motion exercises and radiographic studies of the left side showed weakness and/or a tear in the left rotator cuff. (Ex. A, p. 4)

Dr. Kirkland believed that the claimant could consider an excision of the distal clavicle and an MRI to evaluate the left rotator cuff for a possible re-tear. (Ex. A, p. 4) He opined that these issues arose out of the July 16, 2013, injury, and a 9 percent upper extremity impairment rating. (Ex. A, p. 4) Despite this, he agreed that the claimant continued to work his same job in the heavy work category. (Ex. A, p. 6)

Despite the work restrictions, claimant was asked to do tasks which required work overhead. He endured the pain. To self-accommodate, claimant does not do work which requires full extension reach away from his body. He also asserted a lack of strength arising out of his right shoulder injury. He further testified that he felt he was unfairly targeted by his employer from time to time. One example he gave was that he was not scheduled for NEC training necessary to maintain his journeyman license. The justification given was that his supervisor believed he was retiring. (Ex. 5, p. 46) It was company policy to pay for this training. (Ex. J, p. 13)

Claimant asked for his local union steward, Phillip Gavagan, for assistance. A step 1 grievance was filed. (Ex. K, Ex. 1) Ultimately, the grievance was dropped after the company agreed to provide the training. (Ex J, p. 17) Claimant did retire September 1, 2015.

It is this purported forced retirement that is the crux of this review-reopening. Claimant argues that Ronald "Chip" Uhde, Fisher's maintenance facilities manager developed "personal animus" toward claimant and essentially forced claimant to retire. (See Claimant's Brief, p. 4)

Claimant was issued work restrictions that his supervisor, Rodney Buhr, believed would make it difficult for the claimant to perform his job duties. (Ex. 5, p. 33) It was Buhr's opinion that claimant could not meet the requirements of an electrician with the 2011 work restrictions. (Ex. 5, p. 33) Claimant testified that he returned to his full duty work but that defendant employer wanted him to either "sign off" on his injury or agree to no longer work as an electrician. (Transcript pp. 29-30) Claimant proceeded to grieve this event. (Ex. B, p. 15) Claimant then obtained a note from Dr. Pollpeter which allowed claimant to maintain his duties as an electrician. (Ex. D, pp. 32-33)

After his 2013 injury, claimant returned to his duties as the sole electrician working third shift. He self-limited but was asked, from time to time, to engage in overhead work such as servicing fluorescent lights and doing some machine work.

When he was denied the training, claimant testified that the harassment from Mr. Uhde was causing him pain, stress, and loss of sleep. As a result, claimant chose to retire. Claimant proceeded to file an age discrimination claim.

Claimant also testified that after his retirement he came across one of his co-workers who passed on unflattering information regarding Mr. Uhde's behavior. Specifically, this former co-worker purportedly said that Mr. Uhde did not like the claimant and wanted him to retire. Conversely, Mr. Uhde claimed that this same former co-worker was the one who indicated that claimant intended to retire.

The co-worker was not presented at hearing to testify and be subjected to cross-examination. This second hand testimony on both sides is given low weight.

CONCLUSIONS OF LAW

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 Rule of Appellate Procedure 6.14(6).

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).

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Claimant's argument is premised on an economic change in his condition rather than a physical change. He argues he was compelled to resign and therefore suffered an economic change not originally contemplated at the time of the initial award.

> "Constructive discharge exists when the employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation." First Judicial Dist. Dep't of Correctional Servs. v. Iowa Civil Rights Comm'n, 315 N.W.2d 83, 87 (Iowa 1982). Generally, trivial or isolated acts of the employer are not sufficient to support a constructive discharge claim. Haberer v. Woodbury County, 560 N.W.2d 571, 576 (Iowa 1997). Rather, the "working conditions must be unusually `aggravated' or amount to a `continuous pattern' before the situation will be deemed intolerable." Id. (citation omitted). In addition, conditions will not be considered intolerable unless the employer has been given a reasonable chance to resolve the problem. Breeding v. Arthur J. Gallagher & Co., 164 F.3d 1151, 1159 (8th Cir.1999); see First Judicial Dist. Dep't of Correctional Servs., 315 N.W.2d at 89. On the other hand, an employee need not stay if he or she reasonably believes there is no possibility the employer will respond fairly. Kimzey v. Wal-Mart Stores, Inc., 107 F.3d 568, 574 (8th Cir.1997). In determining whether a constructive discharge has occurred, the fact finder uses an objective standard. Haberer, 560 N.W.2d at 575.

Van Meter Indus. v. Mason City, 675 N.W.2d 503, 511 (Iowa 2004).

There is no continuous pattern of behavior by the defendant employer. Most of the testimony at hearing and much of the evidence argued in claimant's brief centers around a single act: defendants' failure to place claimant on the training schedule to maintain his journeyman license.

Claimant maintains that there are other acts of bad behavior including trying to move him from his electrician position and assigning him work outside of his restrictions.

While there were times that claimant was asked to do work that may have been outside his work restrictions (which were contemplated in previous arbitration decisions), claimant himself insisted that he was capable of meeting all his job tasks as an electrician and even went so far as to obtain a doctor's clarification so as to not be eliminated from his position as an electrician while in the defendants' employ.

It was claimant who wished to stay in the electrician position because of its high pay despite some concerns by supervisors that the position was outside of claimant's restrictions. Claimant actively grieved, pursued, and obtained medical permission to remain an electrician.

It is challenging to see how defendant employer's attempts to observe more strict work restrictions was retaliatory or hostile to the claimant.

While claimant was not placed on one training calendar, claimant did do training in Marshalltown. Further, claimant dropped his grievance against the employer over the training issue.

Claimant maintained that he had emotional and mental distress causing stress and loss of sleep arising out of his treatment at work. There are no medical records supporting this. In the 2016 medical evaluation by Dr. Kirkland, claimant's loss of sleep was more attributable to claimant's left shoulder issues.

Claimant did not carry his burden in proving that his retirement was involuntary. There was not sufficient evidence that there was a continuous pattern of behavior that forced claimant to retire.

ORDER

THEREFORE IT IS ORDERED

Claimant shall take nothing.

Defendants have agreed to pay the medical expenses attached to the hearing report.

Each party shall bear their own costs.

Signed and filed this 11th day of May, 2017.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
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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.