BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
JUL 21 2016
WORKERS' COMPENSATION

CARL WIESE,	:	
Claimant,	:	File No. 5017102
vs.	:	APPEAL
GRIFFIN PIPE,	:	DECISION
Employer, Self-Insured, Defendant.	:	Head Note Nos.: 1803; 2905

Claimant Carl Wiese appeals from a review-reopening decision filed on January 28, 2015, as modified by an order nunc pro tunc filed on January 30, 2015. Defendant Griffin Pipe Products Co., self-insured employer, responds to the appeal. The case was heard on December 4, 2014, and it was considered fully submitted in front of the deputy workers' compensation commissioner on December 22, 2014.

The underlying work-related injury in this matter occurred on February 6, 2004. The deputy commissioner found claimant failed to prove a change of condition occurred after an agreement for settlement was approved in this matter on April 18, 2006. Therefore, the deputy commissioner found claimant is not entitled to additional industrial disability benefits pursuant to review-reopening. The deputy commissioner awarded claimant nothing. The deputy commissioner ordered the parties to pay their own costs of the review-reopening proceeding.

Claimant asserts on appeal that the deputy commissioner erred in finding claimant failed to prove a change of condition occurred after the agreement for settlement was approved in April 2006. Claimant asserts the deputy commissioner erred in failing to award additional industrial disability benefits pursuant to review-reopening.

Defendant asserts on appeal that the arbitration decision should be affirmed in its entirety.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, pursuant to Iowa Code sections 86.24 and 17A.15, I reverse

the determination of the deputy commissioner and I find claimant did prove a change of condition which occurred after the agreement for settlement was approved on April 18, 2006. I find claimant is entitled to an additional 25 percent industrial disability, which entitles claimant to an additional 125 weeks of permanent partial disability (PPD) benefits, with a credit for 97.429 weeks of PPD benefits voluntarily paid to claimant by defendant from June 2, 2011, through April 14, 2013. I provide the following analysis:

ISSUES ON APPEAL

I. Whether claimant suffered a change of condition requiring an award of additional industrial disability benefits; and, if so,

II. The extent of claimant's entitlement to additional industrial disability benefits.

According to the hearing report submitted at the review-reopening hearing, claimant was seeking medical benefits as set forth in exhibit 10 and reimbursement for an independent medical evaluation (IME). However, the parties failed to complete the rest of the medical benefits section of the hearing report to set forth the nature of any medical benefits dispute. Exhibit 10 consists of a listing of medical mileage, which totals 192 miles to attend appointments in 2014 with Christopher Criscuolo, M.D., one of the authorized physicians in this case. Also, there is a bill from Alegent Creighton Health in the amount of $144.00. No record was made concerning these expenses at hearing. Neither party discussed such issues in their post-hearing briefs and in their appeal briefs and such issues were not discussed in the review-reopening decision. Therefore, no medical benefits or IME issues shall be considered on appeal.

STIPULATIONS AT HEARING

The parties agreed to the following matters in a written hearing report submitted at hearing:

1. On February 6, 2004, claimant sustained an injury arising out of and in the course of employment with defendant.

2. Claimant is not seeking additional temporary total or healing period benefits in this proceeding.

3. Clamant was previously paid 125 weeks of permanent disability benefits at the stipulated weekly rate of $506.67 for 25 percent industrial disability pursuant to the Agreement for Settlement which was approved on April 18, 2006.

4. Prior to the review-reopening hearing, defendant voluntarily paid additional weekly benefits at the stipulated weekly rate of $506.67 from June 2, 2011, through April 14, 2013, which totals 97.429 weeks, and claimant agreed defendants shall receive a credit for those payments against any award in this case.

FINDINGS OF FACT

Claimant was 63 years old at the time of the hearing. He has a high school diploma. (Transcript p. 9)

Claimant's past employment history includes work at ARMCO Steel as a truck driver and plant worker. (Tr. p. 10) He began working for defendant on March 25, 1985, and worked there until June 2, 2011. (Tr. pp. 10-11)

On May 2, 2014, defendant's plant closed.

While working for defendant, claimant performed a variety of jobs including general laborer, work on the duct line, charging crane operator, utility worker in the finishing and milling department, conductivity welder and restraint joint welder. (Tr. p. 11)

Over the years, claimant had a couple of prior work-related injuries. He had carpal tunnel surgery on both hands in 1991. (Exhibit 11, page 4) He had a prior left shoulder injury which occurred on August 15, 1994, which necessitated surgical repair. (Ex. 11, p. 8) In an arbitration decision filed by this agency filed on March 3 1997, claimant was awarded 125 weeks of permanent partial disability benefits for 25 percent industrial disability as a result of the 1994 left shoulder injury. (Ex. 11, p. 8) Claimant testified at the review-reopening decision on December 4, 2014, that he experiences ongoing problems in his left shoulder with pain and some limited range of motion. (Tr. p. 12) He testified he has had no ongoing problems from the 1991 carpal tunnel injury. (Id.)

Claimant also had surgical repair of his right shoulder, a hernia repair and he also underwent arthroscopic surgery of his left knee. (Ex. 2, page 8)

On February 6, 2004, claimant was working as a restraint joint welder. He slipped on ice and fell down. As a result, claimant sustained an injury to his low back with pain radiating down both legs, primarily the left side. (Ex. 1, p. 5)

On June 2, 2004, claimant was evaluated by James D. Mayer, M.D., of Comp Choice Occupational Health Services in Council Bluffs. Dr. Mayer noted in his medical records that claimant saw Dr. Trinh a year prior to the February 6, 2004, injury and underwent a lumbar MRI as well as several epidural steroid injections (ESIs). (Ex. A, p. 1) On his third visit with Dr. Mayer on June 17, 2004, claimant's history included lumbar strain with left leg sciatica symptoms. He had a lumbar spine MRI performed in December 2002 and it was concluded that the February 2004 incident was an aggravation of claimant's pre-existing condition. (Ex. A, p. 3) On June 22, 2004, claimant reported to Dr. Mayer that he had four to five aggravations or flares of his back while working for Griffin Pipe in the previous five years. (Ex. A, p. 4) During the June

22, 2004 visit, Dr. Mayer noted, "Carl clearly has significant chronic degenerative changes of the back." (Ex. A, p. 4)

In a July 27, 2004, medical note prepared by Julie Walsh, PA-C, of Midwest NeuroScience Center, it was noted claimant described chronic low back pain varying in intensity, which was aggravated when he fell in February 2004. (Ex. D)

In an August 6, 2004, clinical note, Dr. Mayer noted that following cortisone injections he prescribed, claimant reported a 60 percent improvement in his symptoms, but he continued to have constant pain radiating down the left leg and into his foot, with standing and sitting aggravating his pain. (Ex. A, p. 5)

On September 23, 2004, claimant was evaluated by a partner of Dr. Mayer, Dean Wampler, M.D. (Ex. A, p. 7) Claimant had undergone three ESIs which he told Dr. Wampler provided only short-term benefit. Claimant had also undergone facet injections which he reported provided no benefit. (Id.)

On October 26, 2004, Dr. Mayer noted that claimant's baseline back pain was 2 out of 10 on a 10 scale. Claimant had been using a TENS unit, along with receiving low back ESIs, which provided temporary relief. (Ex. A, p. 9)

On November 23, 2004, Dr. Mayer's assessment for claimant was chronic low back pain with left leg radiculopathy. Dr. Mayer placed claimant at maximum medical improvement (MMI) and he assigned claimant a ten percent whole body impairment rating based on the Fifth Edition of the AMA Guides to the Evaluation of Permanent Impairment. (Ex. 1, p. 5) In his report for that evaluation, Dr. Mayer noted the following, in pertinent part:

> HISTORY:
>
> Carl has had chronic low back pain dating back to an injury on February 6, 2004. I assumed the care of Carl from another physician after we opened our new clinic. Initial injury apparently occurred on February 6, 2004 around 6:30 A.M. when he was shoveling some snow and slipped on the ice injuring his lower back. Since that time, he has some radiation of pain into the left posterior thigh that would radiate down to the feet. Carl has been treated for this low back condition with left leg radiculopathy now for appropriately nine months.
>
> . . .
>
> ASSESSMENT: Chronic low back pain with left leg radiculopathy.
>
> . . .

> I suspect Carl's major leg problems are originating from the L5-S1 level since this is the level where he has the retrolisthesis and he does have some prominent osteophytes noted at this level. I have strongly encouraged Carl to continue to lose weight and to continue with his home exercise program. I suspect that he will have to use low dose Elavil indefinitely to control his low back pain symptoms. I feel Carl will continue to benefit from a TENS unit on an as needed basis to control his low back pain symptoms. Only time will tell if his left leg symptoms will ever resolve.
>
> This concludes my final report on Carl. He has been released to full work status with no restrictions. He has been discharge from my care.

(Ex. 1, pp. 5-6)

Dr. Mayer clearly indicated in this report that claimant would continue to have symptoms from his injury requiring additional treatment.

On April 18, 2005, claimant returned to Dr. Mayer reporting a flare of his symptoms. (Ex. A, p. 10) Claimant later reported this was due to a slip on railroad ties in February, 2005. (Ex. A, p. 11) He was directed to use ice, prescription medication and the TENS unit. (Ex. A, p. 10)

On May 16, 2005, Dr. Mayer wrote that claimant had chronic low back pain for nearly 18 months going back to an original injury date of February 6, 2004. (Ex. A, p. 13) Dr. Mayer noted the following in pertinent part:

> Carl has undergone comprehensive conservative therapy including work modification, medical and physical therapy, and has undergone three epidural steroid injections over the past year with little to no success.
>
> Carl is at the point now where he is requiring the use of Percocet on a routine basis. He states that the quality of life is interfered with due to the severity of his pain. He states that he and his wife have some marital discord due to the pain that he experiences on a daily basis.
>
> He states that he has 8/10 low back pain most days. He currently is on Arthrotec and Percocet 10 mg 1 tablet twice a day. He does have a TENS unit, which he uses at the end of the workday along with ice therapy to the low back area.

(Ex. A, p. 13)

Dr. Mayer noted on May 16, 2005, that while claimant had a ten percent permanent impairment rating assigned in November, 2004, his left leg sciatica symptoms were resolving at that time, but then those symptoms returned. (Ex. A, p. 14)

On June 7, 2005, claimant reported to Dr. Mayer that although he was having worsening low back pain, there was nothing at work which would aggravate his back pain. Claimant told Dr. Mayer he rarely lifted anything over 30 to 35 pounds. (Ex. A, p. 15)

At the request of Dr. Mayer, claimant was seen on June 23, 2005, at the Nebraska Spine Center in Omaha by Eric Phillips, M.D. (Ex, B, p. 1) Dr. Phillips noted claimant had previous back problems, including pain radiating into the lower extremities and those problems were not work-related. (Id.) Dr. Phillips did not recommend surgery. (Ex. C, p.1)

In a report dated July 11, 2005, from Lyal Leibrock, M.D., professor in the Department of Neurosurgery at the University of Nebraska Medical Center in Omaha, it was noted claimant's back and bilateral lower extremity pain started four to five years earlier and claimant attributed this problem to wear and tear on his back related to his job. (Ex. C, p. 1) Dr. Lebrock noted that an MRI done on June 7, 2005, showed modest spondylosis and degenerative disc disease from the thoracolumbar junction all the way down to the sacrum. (Ex. C, p. 2)

On August 30, 2005, claimant underwent a functional capacity evaluation (FCE). The work restrictions determined by that FCE included working in the medium-heavy to heavy duty work category, with lifting 90 pounds occasionally and 40 pounds frequently. (Ex. 1, p. 3) A job site evaluation was also performed and Dr. Mayer concluded there was nothing at the work site which persistently aggravated his low back symptoms. (Ex. A, p. 17)

On September 19, 2005, Dr. Mayer re-evaluated claimant and filled out a family medical leave form for claimant "since he does have a serious chronic health condition that may require intermittent leave. I have explained to Carl that he may require some occasional low back steroid injections if his condition should flare." (Ex. A, p. 17)

The agreement for settlement was approved April 18, 2006. (Ex. 1, p. 3) At that time claimant was working with the above-mentioned restrictions. He returned to his regular job as restraint joint welder, working approximately 40 hours per week with some overtime. (Tr. p. 16) He had intermittent treatment for flare-ups . (Tr. p. 17)

On December 27, 2006, due to increased problems in his back, claimant was evaluated by David M. Gammel, M.D., an occupational medicine physician with WorkFit Occupational Health in Omaha. (Ex. 2, p. 2) Dr. Gammel became the authorized treating physician for claimant's condition. (Tr. pp. 17, 21) Prior to Dr. Gammel's evaluation, claimant was receiving periodic ESIs, which provided relief for three to four months. Dr. Gammel noted that after the most recent ESI in late August, 2006, claimant's symptoms began to increase in mid-December. Dr. Gammel recommended another ESI to be followed by return to full duty work, with return to clinic as needed.

(Ex. 2, pp. 2-3) Claimant had rechecks with Dr. Gammel on March 5 and March 12, 2007 (Ex. 2, pp. 4-5)

On November 2, 2007, Dr. Gammel re-evaluated claimant and noted claimant was doing quite well until October 10, 2007, having been treated with additional ESI injections during 2007. Because it was too soon for another ESI as of November 2, 2007, claimant returned to Dr. Gammel for assessment. (Ex. 2, p. 6) Dr. Gammel gave a prescription for Celebrex and OxyContin and he returned claimant to work without restrictions. (Ex. 2, pp. 6-7)

In January 2008, claimant was referred to Patricia J. Chudomelka, M.D., a pain management physician. Dr. Chudomelka periodically administered the ESI injections claimant needed for his back and left leg pain. (Ex. 3) The injections provided temporary relief. Between taking prescription medications and receiving the injections, claimant was able to continue performing the essential duties of his job. (Tr. pp. 18-19) Claimant's most recent ESI before the hearing in December 2014 was on April 2, 2013. (Ex. 3, pp. 25-26)

On August 22, 2008, claimant returned to Dr. Gammel's office, where he was evaluated by John Olin, PA-C. On that date, claimant complained of exacerbation of left and right lumbar pain, greater on the right than the left. Claimant was placed on light duty until re-evaluation on August 25, 2008. Claimant was given samples of Flector patches and a prescription for Percocet. (Ex. 2, pp. 8-9)

When claimant returned to Mr. Olin on August 25, 2008, claimant reported his low back pain felt better. Mr. Olin noted, "Only time he is having pain is when he is sitting still too long or when he bends over at the waist. The patient states that he has been taking his regular medications and Percocet 5/325 mg as needed for pain." (Ex. 2, p. 10) Mr. Olin released claimant to return to regular duty with no restrictions. (Ex. 2, p. 11)

On October 8, 2008, claimant returned to Mr. Olin reporting he was doing fine with regular duties following an ESI ten days prior. He reported he was able to perform all of his work activities without difficulty, although he reported constant back pain at 5/10 out of 10 on the pain scale. (Ex. 2, pp. 12-13)

On December 4, 2008, claimant was re-evaluated by Dr. Phillips, the neurosurgeon, for ongoing back pain which radiated down both legs, greater on the left than the right. Claimant also reported cramping in his right leg which was keeping him awake at night. (Ex. 4, p. 2) Upon examination, claimant had negative straight leg tests and non-painful full internal and external rotation of his hips. He had some limited reduced range of motion and diminished sensation over the left lateral foot and left lateral calf. (Ex. 4, p. 4) Dr. Phillips again concluded claimant's condition could not be treated surgically and he told claimant he should exercise and lose weight. (Ex. 4)

Claimant returned to Dr. Gammel on April 20, 2009. Claimant reported his symptoms flared on April 17, 2009, and by April 20, 2009, the date of the evaluation, his pain had become progressively worse to where he was unable to walk across the parking lot at his place of employment. (Ex. 2, p. 14) This time, claimant's primary pain was in the left lower extremity. He underwent an injection on April 22, 2009, and on April 27, 2009, he reported to Dr. Gammel that the relief was significant enough that he could return to full duty work. (Ex. 2, p. 16)

On February 5, 2010, claimant returned to Dr. Gammel reporting an acute exacerbation of his left lumbar radiculopathy after slipping on ice. (Ex. 2, p. 18) He was advised to go home and rest for the day, he was given a prescription for Opana and he was told to seek out additional care from Dr. Chudomelka should he need another injection. (Ex. 2, p. 18)

Claimant was re-evaluated by Mr. Olin on April 19, 2010, complaining that his lower back had been aggravated from long hours of working. He received an injection of Toradol at the emergency room the previous Saturday. Mr. Olin recommended to claimant that he begin light duty until his pain was manageable. (Ex. 2, pp. 19-20)

On April 28, 2010, Dr. Gammel re-evaluated claimant and noted claimant received an ESI, following which claimant was doing quite well. Dr. Gammel noted the following, in pertinent part:

> . . . He does have recurrent left lumbar radiculopathy for which he does receive intermittent ESIs. He does get good relief for a period of time and then his symptoms do occur. On this date, it was recommended that he return to regular duty as of April 29, 2010, and to return to clinic as needed. He understands and agrees.

(Ex. 2, p. 21)

Dr. Gammel's next evaluation of claimant was on July 15, 2010. Dr. Gammel noted the following, in pertinent part:

> . . . He has been working long hours and radicular symptoms are slowly becoming more intolerable. He has been taking anti-inflammatories and Tylenol with virtually no relief recently. He did get good relief from Opana in the past. He would like to hold off getting another ESI for at least another month. On this date, he is recommended that he get a refill of his Opana and see if that gives him some relief. He is going to attempt to not work over the weekend. If he does not get adequate relief, he is to call the office . . .

(Ex. 2, p. 22)

On October 15, 2010, Dr. Gammel re-evaluated claimant and his impression was chronic lumbar radiculopathy with increasing symptoms. Dr. Gammel changed claimant's restrictions to modified duty or five days per week, no lifting over 20 pounds, no bending and no squatting. (Ex. 2, p. 24)

At a recheck on October 22, 2010, Dr. Gammel continued the restrictions given on October 15, 2010, he continued claimant's medications and he recommended an MRI. (Ex. 2, pp. 25-26) The MRI was performed on October 25, 2010, at Nebraska Health Imaging. (Ex. 4, p. 10)

At a recheck on December 16, 2010, Dr. Gammel noted the following, in pertinent part:

> HISTORY OF PRESENT ILLNESS: This problem has been bothering the patient since 2-20-2004. Symptoms are constant and worse at times in quality. Severity of pain is 4-10 on a 0-10 scale. There are associated symptoms of burning. Problem pain towards end of the day, depending on how much pulling and lifting he does at work for that day. The symptoms started when at work. The condition is better when taking pain medication and injection helps a little.
>
> . . .
>
> PLAN: Will recheck mid-January if remains unchanged plan on referral back to the spine surgeon.
>
> PRESCRIPTIONS: Continue medications.
>
> WORK STATUS: Regular Duty.

(Ex. 2, pp. 27-28)

Dr. Gammel did not indicate in his note for December 16, 2010, whether he reviewed the MRI results with claimant.

On January 20, 2011, claimant returned to Dr. Phillips, neurosurgeon. Dr. Phillips noted the following, in pertinent part:

> . . . At this time he presents with complaints of burning, deep ache pain in his low back with burning, numbness radiating down both legs left worse than right. In the left leg it radiates from the anterior thigh into the lateral ankle and the posterior leg to the ankle. His leg feels weak. Both his feet burn. He feels clumsy. He has been getting epidural injections with Dr. Chudomelka for the last several years three times a year. The last injection was on December 8th. These typically give significant relief of his

> symptoms. He also reports today that he has been waking up at night with cramps in his legs.
>
> Today he rates his pain a 7, at worst a 10, at best a 3. Back pain, leg pain are constant and daily.
>
> . . .
>
> Medications tried:
>
> Advil, Celebrex, ibuprofen, Motrin, Tylenol, fentanyl patch, OxyContin, Tylenol with codeine are of no benefit. Opana is helpful.
>
> . . .
>
> MRI scan 10/25/10 from Nebraska Health Imaging. Sagittal images demonstrate degenerative changes multilevel L1 through S1. There is a prominent central protrusion at L2-3 and a degenerative spondylolysis without significant stenosis at L3-4. Official report of this study by Dr. Moore states: "Multilevel degenerative lumbar spondylosis which is slightly increased at L3-4, new early degenerative spondylolisthesis, and slightly increased mild-moderate central canal narrowing.

(Ex. 4, pp. 7-10)

Dr. Phillips noted claimant's major concern that day was worsening burning in his feet. Dr. Phillips referred claimant for an EMG/NCV. (Ex. 4, pp. 10-11) On February 24, 2011, Dr. Phillips' physician's assistant contacted claimant and advised claimant the EMG/NCV showed chronic nerve damage and peripheral neuropathy for which there was no surgical solution. Claimant was told to see his primary care physician for pain management and for medication for his peripheral neuropathy. (Ex. 4, p. 12)

Claimant returned to Dr. Gammel on March 2, 2011. Dr. Gammel noted, "Pt states he is having major pain. Pt states he has been falling over things." Dr. Gammel placed claimant on modified duty with restrictions and he told claimant to follow up p.r.n. (Ex. 2, pp. 31-32)

On June 2, 2011, claimant was called in by defendant's production manager and the HR manager, who advised claimant that defendant could no longer comply with his restrictions. Claimant was sent home that day and defendant re-started claimant's weekly benefits. (Tr. pp. 24-25) The parties stipulated that those benefits were paid from June 2, 2011, through April 14, 2013. (Arbitration Decision, p. 2)

On July 19, 2011, claimant was re-evaluated by Dr. Gammel. Dr. Gammel noted claimant's pain was still present. Dr. Gammel recommended a pain clinic second opinion. (Ex. 2, pp. 34-35)

On August 31, 2011, claimant was evaluated by Christopher Criscuolo, M.D., of Alegent Health Pain Medicine in Omaha. (Ex. 7, pp. 2-3) Dr. Criscuolo began managing claimant's prescriptions and he eventually took over claimant's care from Dr. Gammel. Dr. Criscuolo treated claimant on the following dates after August 31, 2011:

September 28, 2011

November 22, 2011

February 28, 2012

August 21, 2012

February 20, 2013

May 28, 2013

August 14, 2013

November 5, 2013

March 5, 2014

June 3, 2014

(Ex. 7, pp. 4-29)

The medical records from Patricia J. Chudomelka, M.D., document that she administered ESIs to claimant on the following dates:

January 16, 2008

May 14, 2008

September 30, 2008

November 11, 2008

April 22, 2009

August 19, 2009

January 20, 2010

April 21, 2010

August 11, 2010

December 8, 2010

March 27, 2013

July 24, 2013.

December 13, 2013

April 2, 2014

(Ex. 3, pp. 2-26)

Dr. Criscuolo's records indicate claimant received additional ESIs from Dr. Chudomelka in October or November, 2011, (Ex. 7, pp. 3-5) and on May 30, 2012, (Ex. 7, pp. 7-9) Treatment records for those two ESIs apparently were not introduced into evidence at the hearing.

On May 13, 2013, claimant was evaluated by Dr. Gammel's partner, Thomas Dunbar, M.D. On June 11, 2013, Dr. Gammel issued a report which states the following, in pertinent part:

> Based upon review of my past office records as well as Dr. Dunbar's most recent office notes dated 13 May 2013, it is my opinion Mr. Wiese is capable of return to work within the parameters of restrictions I recommended on 19 July 2011 and Dr. Dunbar advised again on 13 May 2013. He should work modified duty with no lifting over 20 pounds, no bending and no squatting. These restrictions are permanent in nature.

(Ex. 2, p. 39)

Claimant underwent an independent medical examination with Sunil Bansal, M.D., on October 15, 2014. (Ex. 8) Dr. Bansal opined that claimant has sustained a substantial change in his circumstances and his injury has worsened. Dr. Bansal pointed to the difference between the MRIs of the lumbar spine of January 7, 2005, and October 5, 2010. In the October 25, 2010, MRI, there was mild to moderate central canal stenosis slightly increased due to early degenerative spondylolisthesis on L3 and L4 as well as mild diffuse disc bulge and moderate bilateral facet arthroplasty at L4 - L5. (Ex. 8, p. 23) Based on the change in the MRI, as well as claimant's objective complaints, Dr. Bansal indicated claimant has a 15 percent whole-body impairment rating, which is five percent higher than Dr. Mayer's 2004 impairment rating of ten percent. Dr. Bansal recommended work restrictions of no lifting greater than 20 pounds occasionally and no lifting greater than 10 pounds frequently. Dr. Bansal also recommended claimant should not frequently bend, squat, climb or twist. Further, claimant should avoid sitting or standing more than 60 minutes and no more walking than about half a mile at a time. (Ex. 8, p. 24)

Dr. Bansal undertook a thorough examination of the medical records and noted the times when claimant suffered aggravations of his symptoms. However, in the opinion section, Dr. Bansal never refers back to those aggravations and he never indicates whether those aggravations have any impact on his opinion. It appears the only thing Dr. Bansal actually relies upon in coming to his conclusions is the difference between the MRIs of 2005 and 2010. (Ex. 8, pp. 20-25)

Defendant closed its plant on May 2, 2014. (Tr. p. 27) Claimant has not worked full-time since he last worked for defendant in June 2011, and he admitted he has not looked for full-time work. (Tr. pp. 27, 37) Defendant has not offered to assist claimant in finding work. (Tr. p. 27)

At the hearing on December 4, 2014, claimant testified he was taking Meloxicam, a pain reliever, every day, and Opana, a narcotic, on an as-needed basis, usually two to four times per month. Claimant also stated he stated he is able receive ESIs up to three times per year. (Tr. pp. 26-27)

At the time of the hearing, claimant was working as a part-time greeter at Bass Pro Shop. He works approximately eight to 12 hours per week at $9.29 per hour. Claimant stated the lengthy time he stands for that job does increase his back discomfort. He stated he does not desire to increase his hours at Bass Pro Shop. (Tr. pp. 29, 37)

A valid FCE done in November 2014 places claimant into the light-medium physical demand level. (Ex. 9, p. 2) There is no vocational expert report in evidence.

Based on all of the medical evidence and claimant's testimony, I find claimant has suffered a significant worsening of his low back condition which relates back to the work injury of February 6, 2004. The deputy commissioner did not make such a finding because Dr. Bansal did not opine the extent to which the various aggravating events may have contributed to the current condition and because the deputy commissioner felt those aggravation events might be separate work injuries which were not pleaded. I disagree with that analysis of Dr. Bansal's views and I find there has been such a worsening of the condition regardless of Dr. Bansal's opinion.

The primary treating and authorized occupational medicine physician since the 2006 settlement, Dr. Gammel, has clearly stated that the worsening of the condition relates back to the original work injury. This is the same condition described by Dr. Mayer in the report attached to the 2006 settlement documents. (Ex. 1, pp. 5-6) On October 15, 2011, when Dr. Gammel gave claimant revised work restrictions which ultimately caused claimant to lose his job with defendant in June, 2011, Dr. Gammel's clinical note stated as follows:

> HISTORY OF PRESENT ILLNESS: This problem has been bothering the patient for 6 years. Symptoms are burning pain, constant in quality.

> Severity of pain is 8/10. Problem is continuous. The symptoms started when at work.

(Ex. 2, p. 23)

Over the next several months, as he treated claimant, Dr. Gammel reported the following history for claimant's condition: [The date of each visit is shown in brackets]

> This problem has been bothering the patient for 5 or more years. Symptoms are constant in quality. [10/22/10]

(Ex. 2, p. 25)

> This problem has been bothering the patient for 2-20-2004. Symptoms are constant and worse at times in quality. [12/16/10]

(Ex. 2, p. 27)

> This problem has been bothering the patient for 2-20-2004. Symptoms are constant and worse at times in quality. [1/12/11]

(Ex. 2, p. 29)

> This problem has been bothering the patient for 2,567 days. Symptoms are constant and worse at times in quality. [3/2/11]

(Ex. 2, p. 31)

> This problem has been bothering the patient for 2,658 days. Symptoms are chronic, constant, sharp pain in quality. [7/19/11]

(Ex. 2, p. 34)

On referral from Dr. Gammel, the pain management specialist who has treated claimant since August 2011, Dr. Criscuolo, has typically referred to claimant as follows:

> Carl Weise is a 62 y.o. male who presents for follow-up of her [sic] Back Pain with diagnosis of lumbar spondylosis and degenerative disc disease status post work injury.

(Ex. 7, p. 24)

> The patient is here today for follow-up of his chronic back pain status post work injury.

(Ex. 7, p. 26)

Turning to the views of Dr. Bansal, he states in his report as follows:

> . . . On February 6, 2004, Mr. Wiese had a severe fall which "lit up" and aggravated his otherwise quiescent lumbar spondylosis or degenerative disc disease. He has had progressive worsening symptomatology. Review of the records indicates that Mr. Wiese was never completely pain free but has had progressive back pain and radicular symptoms. The pain generators are in the same lumbar disc levels that were aggravated by the 2004 injury. Pathophysiologically, there has been worsening at those levels consistent with known medical literature of accelerating changes occurring after traumatic injuries.

(Ex. 8, p. 20)

I find the opinions of Dr. Bansal consistent with the records of Dr. Gammel and with the other physicians who have treated claimant since 2006.

Finally, the record does not show any medical opinion that claimant's current condition is not causally related to the 2004 work injury.

Therefore, I find there has been a significant worsening of claimant's work-related low back condition after the 2006 Agreement for Settlement. I find that worsening relates back to the work injury of February 6, 2004.

Upon re-evaluation of claimant's lost earning capacity, while claimant is older, I am unable to find that the worsened low back condition causes total disability. The last valid FCE, which was performed in November 2014 shows claimant is capable of work in the light-medium physical demand category. (Ex. 9) No doctor or vocational expert has opined claimant is unable to work. Claimant has not shown a reasonable effort to seek suitable full-time employment. Claimant is working part-time as a greeter. There has been no showing he could not work full time in such a job, or in a similar light duty job, or that such full-time jobs are not available to him.

However, claimant's physical condition has worsened and he now has some additional functional impairment with more severe work restrictions which adversely impact his earning capacity. I find that given claimant's worsened back condition and his current restrictions, he has a 50 percent loss of earning capacity.

Claimant was permanently restricted to lifting no more than 50 pounds at waist level, for no more than 5 ½ hours per day, as a result of the prior left shoulder injury which occurred on August 15, 1994, which limited his ability to perform many jobs at defendant's plant. (Arbitration Decision of March 3, 1997, Ex. 11, p. 7)

I find that the combined industrial disability from both the prior work-related left shoulder injury in 1994 (25 percent), and the current low back condition caused by the 2004 work injury (50 percent), is 75 percent.

CONCLUSIONS OF LAW

A review-reopening claim initiated pursuant to Iowa Code section 86.14(2) requires proof that, after the award or settlement, the claimant's physical disability has increased in a scheduled member case, or his earning capacity has changed in an industrial disability case as a result of a worsened physical or non-physical condition caused by the original work injury. Although we do not require the claimant to demonstrate his change in 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 at the time of the original action. Kohlhass v. Hog Slat, Inc, 777 N.W.2d 387 (Iowa 2009)

The facts of this case invoke years of agency and court precedent for a sequelae injury which began with the Iowa Supreme Court's classic holding in Oldham v. Scofield & Welch, 222 Iowa 764, 266 N.W. 480 (1936). See also, Workers' Compensation, Iowa Practice 15, (2014-2015), section 4:4. The Court stated as follows in Oldham:

> If an employee suffers a compensable injury and thereafter suffers further disability which is the proximate result of the original injury, such further disability is compensable. If an employee suffers a compensable injury and thereafter returns to work and, as a result thereof, his first injury is aggravated and accelerated so that he is greater disabled than before, the entire disability may be compensated for.

Oldham, 222 Iowa 764 at 767, 266 N.W. 480 at 481;

In this case, I find there has been a significant change in claimant's physical condition warranting a re-assessment of his industrial disability.

Industrial disability was defined in Diederich v. Tri-City Ry. Co., 219 Iowa 587, 258 N.W.2d 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. However, consideration must also be given to the injured workers' medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured worker's qualifications intellectually, emotionally and physically; the worker's earnings before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted; Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616, (Iowa 1995); 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).

Although claimant is closer to a normal retirement age than younger workers, proximity to retirement cannot be considered in assessing the extent of industrial disability. Second Injury Fund v. Nelson, 544 N.W.2d 258 (Iowa 1995). However, this agency does consider voluntary retirement or withdrawal from the work force unrelated to the injury. Copeland v. Boones Book and Bible Store, File No. 1059319 (App. November 6, 1997). Loss of earning capacity due to voluntary choice or lack of motivation is not compensable. Id.

Claimant had a prior industrial disability of 25 percent resulting from his left shoulder injury which occurred in 1994. Therefore, the successive disabilities provisions of Iowa Code section 85.34(7) must be applied. According to subsection (b) of that section, this agency is to assess the combined disability caused by both the prior and present injuries and then provide a credit against the employers' liability for the combined disability to the extent of the percentage of industrial disability for which the claimant has been previously compensated.

I find the combined industrial disability from claimant's 1994 and 2004 work-related injuries with defendant is 75 percent. In a 1997 arbitration decision, Claimant was compensated for 25 percent industrial disability for his 1994 left shoulder injury. Claimant was compensated with an additional 25 percent industrial disability for his February 6, 2004, back injury pursuant to the 2006 agreement for settlement in this case. Therefore, claimant needs to be compensated for the additional industrial loss of 25 percent in this review-reopening proceeding for his 2004 injury. The additional 25 percent industrial disability entitles claimant to 125 additional weeks of permanent partial disability benefits as a matter of law under Iowa Code section 85.34(2)(u). 125 weeks is 25 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in that subsection. The parties stipulated that defendants shall receive a credit against this award for the 97.429 weeks voluntarily paid to claimant by defendants from June 2, 2011, through April 14, 2013.

ORDER

IT IS THEREFORE ORDERED that the review-reopening decision of January 28, 2015, is REVERSED and it is found that claimant did prove a change of condition occurred after the Agreement for Settlement was approved on April 18, 2006, such that claimant is entitled to an additional 25 percent industrial disability.

1. Defendant shall pay claimant 125 weeks of permanent partial disability benefits at the stipulated rate of $506.67 per week from June 2, 2011. Pursuant to the

stipulation of the parties, defendants shall receive a credit against this award for the 97.429 weeks of benefits paid to claimant from June 2, 2011, through April 14, 2013.

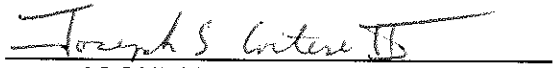
2. Defendants shall pay accrued weekly benefits in a lump sum.

3. Defendants shall pay interest on unpaid weekly benefits awarded herein pursuant to Iowa Code section 85.30.

4. Pursuant to rule 876 IAC 4.33, the parties shall pay their own costs of the review-reopening proceeding and defendant shall pay the costs of the appeal, including the cost of the hearing transcript.

5. Defendants shall file subsequent reports of injury (SROI) as required by our administrative rule 876 IAC 3.1(2).

Signed and filed this 21st day of July, 2016.



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