

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

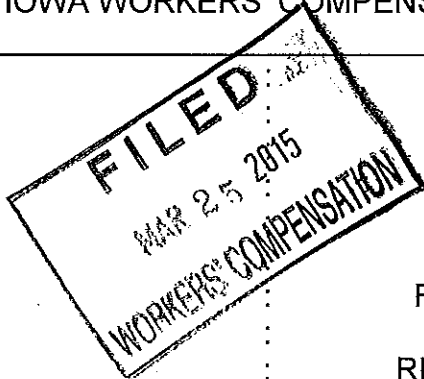
TINA LETTS,
Claimant,

vs.

KRAFT FOODS, INC.,
Employer,

and

INDEMNITY INSURANCE CO., N.A.,
Insurance Carrier,
Defendants.



File Nos. 5041472, 5041751

REVIEW - REOPENING
DECISION

Head Note Nos.: 2905, 2501, 2502

STATEMENT OF THE CASE

Claimant, Tina Letts, filed petitions in review-reopening, seeking workers' compensation benefits from Kraft Foods, Inc. (Kraft), employer, and Indemnity Insurance Co., N.A., insurer, both as defendants.

At hearing, claimant moved to dismiss File No. 5041472 (date of injury, March 6, 2012). That motion was granted at hearing. This review-reopening decision concerns only File No. 5041751 (date of injury, October 18, 2012).

The record in this case consists of claimant's exhibits 1-11, defendants' exhibits A-J, and the testimony of claimant, Jane Anderson, PA-C, Rick Garrels, M.D., and Rodney Warhank.

This matter was heard in Davenport, Iowa on February 17, 2015 with a final submission date of March 10, 2015.

ISSUES

1. Whether claimant sustained a change of condition, since the original arbitration decision, that would entitle her to benefits under a review-reopening; and if so
2. The extent of claimant's entitlement to permanent partial disability benefits.

3. Whether there is a causal connection between the injury and the claimed medical expenses.
4. Whether claimant is entitled to reimbursement for an independent medical evaluation (IME) under Iowa Code section 85.39.

FINDINGS OF FACT

Claimant was 46 years old at the time of hearing. Claimant graduated from high school. Claimant has mainly worked in factories.

Claimant began working for Kraft (f/k/a Oscar Meyer) in July of 2008. Claimant was assessed as having bilateral carpal tunnel syndrome in 2012. Claimant underwent a right carpal tunnel release on August 22, 2012 and a left carpal tunnel release on September 21, 2012. Claimant was paid temporary benefits for lost wages or time off work following her surgeries (Arbitration Decision, page 2).

The February 3, 2014 arbitration decision found claimant failed to carry her burden of proof that she had a permanent impairment for the bilateral carpal tunnel syndrome, and claimant took nothing in benefits for the injury for File No. 5041472 (date of injury, March 6, 2012). (Arb. Dec. p. 6)

Regarding the October 18, 2012 injury (File No. 5041751) claimant slipped and fell at work. Claimant had complaints of pain in the left shoulder, left arm, back and hip. Claimant eventually underwent surgery to the left shoulder performed by Suleman Hussain, M.D.

Claimant was evaluated, after her left shoulder surgery, by Rick Garrels, M.D., in August of 2013. Claimant testified, in both the underlying arbitration hearing, and in the review-reopening hearing, that Dr. Garrels, in assessing her range of motion, yanked her arms causing increased pain. (Exhibit H, p. 5; Tr. p. 10) After her evaluation with Dr. Garrels, claimant went to the emergency room at Genesis East Clinic. At Genesis, claimant's arm was placed in a splint, and claimant was given pain medication. (Tr. 10)

Claimant filed a petition in arbitration seeking workers' compensation benefits for an injury to her shoulder, neck, and back occurring on October 18, 2012. Hearing for this matter occurred on September 18, 2013.

In the February 3, 2014 arbitration decision, claimant was found to have a 35 percent industrial disability entitling her to 175 weeks of permanent partial disability benefits commencing on September 3, 2013. This was based on findings that Richard Kreiter, M.D. found that claimant had a 22 percent permanent impairment to the body as a whole; that claimant was still working at Kraft in a light duty job due to work restrictions; and on claimant's age, education and work experience. (Arb. Dec. pp. 10-12)

On October 2, 2013 claimant was evaluated by Dr. Hussain. Claimant complained of pain in the left arm after Dr. Garrels had yanked her arm. Claimant was given an injection in the left shoulder. She was continued on work restrictions. (Ex. D, pp. 1-2)

Claimant returned to Dr. Hussain on November 1, 2013. Claimant complained of left shoulder pain with some activities. Claimant had full range of motion. A review of the MRI of claimant's shoulder was normal for a postoperative procedure. Dr. Hussain did not believe any exam made by Dr. Garrels aggravated claimant's shoulder. Claimant was returned to work under current restrictions. (Ex. D, pp. 3-4)

On November 5, 2013 claimant was evaluated by Winthrop Risk, M.D. Nerve conduction studies and EMGs performed on claimant were normal. (Ex. 1, p. 3) Claimant's symptoms suggested a nervous system involvement, but Dr. Risk noted claimant's nerve conduction studies and MRIs were normal. (Ex. 1, pp. 1-3)

On November 6, 2013 claimant was again evaluated by Dr. Risk. Claimant had continued complaints of left shoulder pain. Claimant reported her left arm going numb when her head turned to the right. Dr. Risk believed this was indicative of cervical involvement. An MRI of the cervical spine and EMG/NCV studies were recommended. (Ex. 1, pp. 4-7)

On December 3, 2013 claimant was evaluated by Jane Anderson, PA-C. Claimant was evaluated by Physician's Assistant Anderson, as she requested not to be treated by Dr. Garrels. Claimant was returned to work at regular duty and found to be at maximum medical improvement (MMI). (Ex. A, pp. 3-4)

Physician's Assistant Anderson testified she works at Genesis Occupational Health. She testified Dr. Garrels oversees her work. She testified claimant had been treated by Dr. Garrels and had requested to be treated by someone other than Dr. Garrels. Physician's Assistant Anderson testified she did evaluate claimant's shoulder and believed claimant could return to work without restrictions. She said she did not know why claimant did not return to work.

On December 3, 2013 claimant went to the emergency room at Genesis West. Claimant was given a slip by Genesis to return to work on December 5, 2013 with restrictions. (Ex. G, pp. 1-2)

Rodney Warhank testified he is an assistant human resources manager at the Kraft plant where claimant works. Mr. Warhank testified that once an employee is found to be at MMI from an injury, the procedure at Kraft, is to have a conversation with the employee and the union to make attempts to return the employee to suitable work. (Tr. 64-66)

Mr. Warhank said on or about December 4, 2013 he was called to the Kraft Medical Department. He said when he arrived, claimant told him she had restrictions

from a doctor. Mr. Warhank testified he tried to explain that he wanted to work with her and the union to return claimant to work, but claimant would not give him an opportunity to do so. He said he told claimant her behavior was inappropriate for work. He said claimant then stormed out of the Kraft plant. (Tr. 66-68; Ex. F, p. 4)

In a note dated December 9, 2013, Dr. Risk indicated claimant could not work for six months. (Ex. 1, p. 15) Mr. Warhank testified Dr. Risk was not an authorized physician to treat claimant. (Tr. 68)

Mr. Warhank testified he has not had further conversations with claimant since the December 9, 2013 note was delivered. Mr. Warhank testified claimant is still employed with Kraft. He said Kraft is willing to employ claimant and provide her with a job. He said claimant would need to engage in a dialogue with Kraft, involving the union, to return to work. He said claimant has not made any attempts to return to work. (Tr. 68-71)

Claimant testified Kraft has not let her return to work given Dr. Risk's work restrictions. She testified it was her understanding she was on extended leave with Kraft. Claimant testified she believed there are jobs she can do at Kraft, but Kraft has failed to rehire her.

On January 14, 2014 claimant was evaluated by Richard Kreiter, M.D. for complaints of left shoulder pain. Claimant was assessed as having degenerative arthritis in the left AC joint. Dr. Kreiter recommended exercises for claimant and recommended claimant be evaluated at the University of Iowa Hospitals and Clinics (UIHC) for evaluation of the shoulder. (Ex. 5, p. 6)

Claimant returned to Dr. Risk on January 8, 2014. Claimant indicated she had very little use of her shoulder. Dr. Risk found Dr. Kreiter's permanent impairment, issued in September of 2013, was too conservative. Dr. Risk opined claimant was 100 percent disabled from any employment from any job requiring the use of both hands. (Ex. 1, pp. 12-13)

In a January 29, 2014 letter, Dr. Hussain indicated he read Dr. Risk's medical records. He indicated that when he evaluated claimant on November 1, 2013, he found no objective findings to indicate claimant needed to remain off work for six months. He did find claimant did not reinjure her arm from Dr. Garrel's exam in August of 2013. (Ex. D, pp. 7-8)

On February 4, 2014 claimant was evaluated at the UIHC by Carolyn Hettrich, M.D. Claimant indicated her shoulder was worse after shoulder surgery. Claimant had left shoulder pain. Claimant had numbness and tingling in the hand. Claimant was given a steroid injection. Dr. Hettrich found no evidence of impingement in the left shoulder. She reviewed claimant's MRI and found nothing in the MRI to explain claimant's complaints. Claimant was told to begin on physical therapy. Claimant was assessed as having left shoulder pain. (Ex. 4)

Claimant returned to Dr. Risk on March 4, 2014. Claimant had continued shoulder pain. Claimant indicated no benefit from the steroid injection. Dr. Risk allowed claimant to return to work with the use of the right arm only. He indicated claimant could return to work at Kraft pushing a button on an assembly line and performing light dusting as before. (Ex. 1, pp. 16-17)

On April 28, 2014 Dr. Garrels indicated he reviewed Dr. Risk and the UIHCs records. He noted the UIHC records showed claimant had no sign of impingement and that the MRI gave no indication of rotator cuff problems. He opined claimant could return to work at full duty. (Ex. A, p. 5)

Dr. Garrels testified at hearing he has been treating claimant since 2012. He testified he believed claimant was malingering.

On December 16, 2014 Dr. Kreiter gave his opinions of claimant's condition following an IME. He opined his rating given in his September of 2013 report was still accurate of claimant's shoulder and spine. He found claimant had chronic left shoulder pain. (Ex. 5)

In a report dated January 16, 2015, Lana Sellner, MS, CRC, gave her opinions of claimant's vocational opportunities. When considering the restrictions imposed by Dr. Risk, Ms. Sellner found five jobs claimant could perform within those restrictions. Using restrictions imposed by Dr. Kreiter, Ms. Sellner found five additional jobs claimant could do within her geographic labor market. Using Dr. Hussain and Dr. Garrels' opinions, that claimant had no permanent restrictions, she found an additional four jobs claimant could perform. Ms. Seller opined claimant continues to be employable. (Ex. I)

Claimant testified at hearing she could not do any of the jobs detailed in Ms. Sellner's report, given the limitations in the left shoulder.

On January 22, 2015 claimant was evaluated by Paul Hartmann, M.D. Claimant complained of left shoulder pain. Claimant was assessed as having chronic left shoulder and low back pain. Claimant should not work over head. She should not be involved with repetitive stooping, climbing, or kneeling. (Ex. 7)

Claimant testified at hearing that at the time of her arbitration hearing, she was pushing a button for an assembly line and doing dusting at Kraft. She testified, at the review-reopening hearing, she could still perform that job today. (Tr. 23; Ex. 1, p. 17)

Claimant testified, at hearing, she believed the incident where Dr. Garrels "yanked on my arm," is the basis for her review-reopening claim. (Tr. p. 30)

Claimant testified she has not made a job search since she last worked for Kraft.

CONCLUSIONS OF LAW

The first issue to be determined is if there has been a change in claimant's condition, not contemplated at the time of the initial arbitration decision, that would entitle claimant to additional benefits under a review-reopening procedure.

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).

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).

A condition that has already been determined by an award or settlement should not be the subject of a review-reopening petition. Kohlhaas v. Hogslat, Inc., 777 N.W.2d 387, 392-393 (Iowa 2009). The Iowa Supreme Court noted, in Kohlhaas, that:

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 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 there to, minimize appeals, and afford an efficient and speedy tribunal to determine and award compensation under the terms of this act."

Kohlhaas 773 N.W. 2d at 393

The doctrine of res judicata includes both claim preclusion and issue preclusion. Winnebago Industries, Inc. v. Haverly, 727 N.W.2d 567, 571 (Iowa 2006). Principles of res judicata are applicable to administrative decisions. Bd. of Sup'rs. Carroll Cty. v. Chi. & N.W. Transp. Co., 260 N.W.2d 813, (Iowa 1977). Under issue preclusion, once a

court has decided an issue of fact or law necessary to its judgment, the same issue cannot be re-litigated in later proceedings. The doctrine of issue preclusion applies if:

1. The issue determined in the prior action is identical to the present issue;
2. The issue was raised and litigated in prior action;
3. The issue was material and relevant to the disposition and the prior actions;
4. The determination made of the issue in the prior action was necessary and essential to the resulting judgment.

Winnebago Industries, Inc. v. Haverly, 727 N.W.2d at 571-572 (Iowa 2006).

The doctrine of res judicata provides that:

A final judgment rendered by a court of competent jurisdiction on merits is conclusive as to the rights of the parties . . . , and as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action.

(Blacks Law Dictionary, 1305 (6th Edition) 1990).

To establish the bar under the doctrine of res judicata, the party asserting the bar must establish that the former case involves:

1. The same parties or parties in privity;
2. The same cause of action;
3. The same issues.

Bloom v. Steeve, 165 N.W.2d 825, 827-828 (Iowa 1969).

Claimant contended, at hearing, that the basis for her review-reopening proceeding was the incident where Dr. Garrels allegedly "yanked on my arm." (Tr. p. 30) Claimant presented no other evidence of any other incident affecting her physical condition, which occurred after the September 18, 2013 arbitration hearing as the basis for her review-reopening claim.

The record in this case indicates claimant already presented evidence at the arbitration hearing regarding the alleged claim that Dr. Garrels further hurt her arm by yanking on it at exam. (Ex. H, p. 5) This testimony was already considered in the underlying arbitration decision that awarded claimant permanent partial disability benefits. (Arb. Dec. pp. 3-4, 9) Claimant is precluded from re-litigating this alleged injury by Dr. Garrels in a review-reopening under both standards defined in Kohlhaas, and the principals of res judicata. Given this, claimant has failed to carry the burden of

proof she sustained a physical change of condition that would entitle her to additional benefits under a review-reopening procedure.

Regarding an economic change in condition, although claimant did not articulate this, the record suggests claimant may have sustained an economic change of condition since the arbitration hearing in this case. The arbitration decision, in this case, indicates claimant was still working at Kraft as of September 18, 2013. (Arb. Dec. p. 3) Claimant testified, at the review-reopening hearing, she was not working at Kraft.

Claimant testified Kraft would not let her return to work with Dr. Risk's restrictions. (Tr. pp. 13-14)

The record indicates Physician's Assistant Anderson, Dr. Garrels, and Dr. Hussain all returned claimant to work with no restrictions. (Ex. A, pp. 3-5; Ex. D, pp. 7-8)

Mr. Warhank testified that when an employee of Kraft returns to work, with restrictions, a discussion is held involving the employee, the union and Kraft as to what jobs the employee can perform within the restrictions. Mr. Warhank testified that when claimant returned with a work slip from Genesis in early December of 2013, he tried to explain this procedure to claimant, but that claimant stormed off. Mr. Warhank's testimony is supported by Exhibit F, page 4. Claimant had no evidence that was contrary to Mr. Warhank's testimony or the note found at Exhibit F, page 4. Given this record, I find Mr. Warhank's testimony regarding this particular factual matter more convincing than the testimony of claimant.

Mr. Warhank testified that Kraft was willing to find work for claimant and that Kraft had jobs claimant could perform. He testified claimant has not contacted Kraft regarding returning to work.

A note, dated December 9, 2013, from Dr. Risk, indicated claimant was taken off of work for six months. There is no evidence indicating why Dr. Risk gave claimant this note. Dr. Risk's records from November of 2013 and January of 2014 make no reference to this note, and give no rationale as to why claimant was taken off work for six months. (Ex. 1, pp. 4-7, pp. 12-13) Because there appears to be no basis for claimant being taken off work for six months in December of 2013, I find the note, found at Exhibit 1, page 15, not convincing evidence of a change in economic circumstances.

Dr. Risk indicated claimant could return to work at Kraft pushing a button on a production line and doing sweeping, even given his work restrictions. (Ex. 1, pp. 16-17) Claimant testified she believes she could return to work at Kraft doing these tasks. (Tr. pp. 13-14) The record indicates claimant has not made any effort to return to work at Kraft. Claimant has not looked for work outside of Kraft.

The record indicates Kraft is willing to return claimant to work. Claimant testified she could return to work even with restrictions given by Dr. Risk. Dr. Risk's records

indicate claimant can return to work at Kraft given his restrictions. Claimant has made no effort to return to work at Kraft. Claimant has not looked for other work. Drs. Hussain and Garrels, and Physician's Assistant Anderson all opine claimant can return to work with no restrictions. Given this record, claimant has failed to carry her burden of proof she sustained an economic change of condition that would entitle her to additional benefits under a review-reopening procedure.

Claimant has failed to carry her burden of proof she sustained a physical or economic change of condition not contemplated at the time of the initial arbitration decision. Given this record, claimant has failed to carry her burden of proof she is entitled to additional benefits under a review-reopening procedure.

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

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

Under Iowa Code section 85.27, the employer has the right to choose medical care as long as it is offered promptly and reasonably suited to treat the injury without undue inconvenience to the employee. An employer is not responsible for the costs of medical care not authorized by section 85.27. A claimant can seek payment of unauthorized medical care by a preponderance of the evidence that care was reasonable and beneficial. Bell Bros. Heating v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010). To be beneficial, the medical care must provide a more favorable medical outcome than would likely have been achieved by the care authorized by the employer. Id. at 206. The claimant has a significant burden to prove the care was reasonable and beneficial. Id. at 206.

Claimant indicates she has incurred medical bills with Dr. Risk and the UIHC. She has also incurred medical bills with the Radiology Group and the Genesis Medical Center. (Ex. 8-11)

The bills incurred with Dr. Risk and the UIHC were not authorized by defendants. There is no evidence in the record that the care provided by Dr. Risk and the UIHC were more favorable than the care authorized by defendants. Defendants are not liable for the charges incurred with Dr. Risk or the UIHC.

Regarding the bills with Genesis and the Radiology Group, Exhibits 10 and 11, if any of these charges found at Exhibit 10 and 11 were authorized by defendants,

defendants shall pay those charges. Regarding the charges found in Exhibit 10 and 11 not authorized by defendants, defendants are not liable for those charges, as claimant has failed to prove the unauthorized care was more beneficial than the care authorized by defendants.

The final issue to be determined is if defendants are liable for reimbursement for an IME with Dr. Kreiter.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Physician's Assistant Anderson found claimant could return to work with no permanent restrictions in a record dated December 3, 2013. (Ex. A, pp. 3-4) Dr. Garrels agreed with that opinion. (Ex. A, p. 5) Dr. Kreiter performed an IME on claimant in December of 2014. (Ex. 5) Claimant is due reimbursement for the IME by Dr. Kreiter.

ORDER

THEREFORE IT IS ORDERED:

That claimant shall take nothing from these proceedings in the way of additional permanent partial disability benefits.

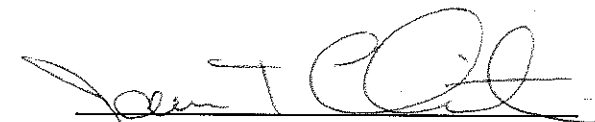
That defendants shall pay only the authorized medical bills found in Exhibits 8-11.

That defendants shall reimburse claimant for the costs involved with Dr. Kreiter's IME.

That each party shall pay their own costs.

That defendants shall file subsequent reports of injury as required under rule 876 IAC 3.1(2).

Signed and filed this 25th day of March, 2015.



JAMES F. CHRISTENSON
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.