

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KENNETH FENTON,

Claimant,

vs.

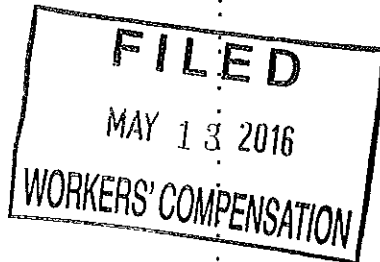
MENARD, INC.,

Employer,

and

ZURICH NORTH AMERICAN,  
INSURANCE COMPANY,

Insurance Carrier,  
Defendants.



File No. 5034943

REVIEW-REOPENING

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Defendants have filed a petition in review-reopening from an arbitration decision dated September 13, 2013, which awarded permanent partial disability benefits of 50 percent. That decision was affirmed on intra-agency appeal on March 31, 2014. The Iowa Court of Appeals affirmed the decision on August 19, 2015. Deputy workers' compensation commissioner, Stan McElderry, heard the review-reopening in Des Moines, Iowa.

ISSUES

1. Whether there has been a substantial change in circumstances or condition from the time of the original arbitration and appeal decisions for a reassessment of the extent of the claimant's permanent partial disability, and if so, the extent of industrial disability.

FINDINGS OF FACT

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

The claimant's education consists of a high school diploma. Claimant has worked as a saw operator for a window and door company. He has also welded and worked as a truck driver. Claimant began his employment with Menards in April of 2009. Claimant was an operator when he suffered an injury on or about November 8, 2010 arising out of and in the course of employment with Menards. Claimant worked in the operators' station when he first returned to work. At the time of the original arbitration hearing the claimant was working in a floater position. He did not feel secure in that job as a floater and did not believe the position was a permanent job. Menard's manager Lance Gessell testified at the original hearing that as a floater, claimant did a number of different jobs at Menards. He said claimant worked as a floater in the custom shop department. He also testified that claimant's job in custom shop could potentially be a permanent job. In his arbitration decision the deputy commissioner found the floater position was not permanent. At the time of the review-reopening hearing the claimant's position as a floater was permanent, and built into the employer's manufacturing structure such that if the claimant left the position another individual would have to be hired to fill the position.

The claimant has had no additional restrictions or limitations on his physical activities imposed since the time of the original hearing. Since the hearing, the claimant has had no significant treatment for his back. Neither claimant nor defendants claim that there had been any significant physical change to the claimant since the original arbitration decision. (Exhibits G, 1-3, Claimant's testimony). The basis of defendants' position is that the making of the floater position permanent is a change in economic position meriting a reduction in the earlier award. It is true that the original decision did not find the floater position permanent. But the employer testified it could be and so it became. The employer also testified that although the floater position was not necessarily permanent at the time of the original hearing, claimant's position with the company was considered permanent. (February 11, 2016 transcript p. 65) There has not been a significant change economically or physically to justify a review-reopening.

The claimant's weekly benefit rate was established by the prior arbitration decision at \$388.17 per week.

#### REASONING AND CONCLUSIONS OF LAW

The issue is whether claimant is entitled to additional permanent disability benefits via a claim for 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).

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

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).

The Iowa Supreme Court has held that a claimant does not need to prove that the change in the condition was not contemplated at the time of the original decision(s). Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387 (Iowa 2009).

The claimant has not had a substantial change of economic condition as evidenced by his continued employment with the same employer following this work injury. Also it was not established that he had substantial change in physical impairment or disability for better or worse. The review-reopening is denied.

#### ORDER

THEREFORE IT IS ORDERED:

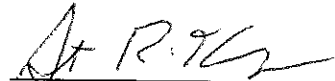
That the claimant take nothing further, but keep that already awarded.

Defendants shall pay the costs of this action pursuant to 876 IAC 4.33.

Defendants shall receive credit for benefits previously paid.

Defendants shall file subsequent reports of injury as required by the agency.

Signed and filed this 13<sup>th</sup> day of May, 2016.

  
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STAN MCELDERRY  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

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SRM/kjw

**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.