BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RHONDA TUCKER f/k/a RHONDA TUCKER-THOMAS, Claimant, vs. MENARDS, INC., Employer, and PRAETORIAN INSURANCE COMPANY, Insurance Carrier, Defendants.	FILED JAN 25 2018 WORKERS COMPENSATION	File No. 5039347 REVIEW–REOPENING DECISION Head Note Nos.: 1803, 2905

STATEMENT OF THE CASE

Rhonda Tucker, claimant, filed a petition for review-reopening, seeking an increase of the previous industrial disability award.

Claimant, Troy Tucker and Jessica Clark testified at the hearing. The evidentiary record also includes Claimant's Exhibits 1- 21 and Defendants' Exhibits A – K, M – Q and R.

ISSUES

The parties submitted the following issues for determination:

1. Whether claimant has sustained a change in condition that warrants an increase in the prior industrial disability award.

2. Whether claimant is entitled to payment of certain medical expenses.

3. Whether claimant is entitled to payment of an independent medical examination.

4. Assessment of costs.

STIPULATIONS

The parties filed hearing reports at the commencement of the review-reopening hearing. On the hearing reports, 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.

FINDINGS OF FACT

The deputy workers' compensation commissioner, having heard the testimony and considered the evidence in the record, finds that:

Rhonda Tucker was 56 years old at the time of the review-reopening hearing. (Transcript, page 13) Claimant obtained a GED and has no other additional education. (Tr. p. 17) Claimant sustained an injury that arose out of and in the course of her employment with Menards, Inc. (Menards) on December 5, 2011. Claimant had a fall at work and injured her neck and cervical spine.

The arbitration hearing was held on February 6, 2013. An arbitration decision was issued on June 25, 2013. Claimant was awarded a 40 percent industrial disability. The decision was affirmed entirely by the workers' compensation commissioner on November 25, 2013, except for the weekly workers' compensation rate: The rate was determined to be at a different rate than in the arbitration decision.

The 2013 arbitration decision found in the Finding of Facts, the following:

> On the same date [September 26, 2012], Tucker Thomas underwent a physical capacity evaluation at Dr. Gammel's request. The detailed findings appended to his report, which Dr. Gammel adopted as permanent recommended activity restrictions, include occasional lifting to 20 pounds, push/pull occasionally to 35 pounds, no use of the hands for pushing/pulling arm controls [this limitation is not well understood], no frequent flexion or rotation of the neck, no climbing ladders, only some squatting/crouching/crawling, only occasional bending/stooping, kneeling and stair climbing, and no working at heights or operation of heavy machinery. (Ex. B, pp. 15-16)
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> . . . .
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> At Menards, Tucker Thomas worked in freight, stocking shelves, and direct customer service, with lifting requirements up to 45 pounds. She has worked in the hardware, plumbing and paint departments during 22 years of service.

> Currently, Tucker Thomas complains of tightness in the shoulder, a "knot" in the shoulder blade, and tightness in the neck, as well as facial numbness on the right side and occasionally in the upper extremity. She has reduced ability to participate in some activities of daily living, such as housework and playing with grandchildren, and uses a heating pad on a daily basis for symptomatic relief.

(Ex. G, pp. 7, 8) In the Conclusions of Law portion of the 2013 arbitration decision the agency found the following:

> At age 52, with a high school (GED) education and 22 years of employment at Menards, Tucker Thomas seems unlikely to develop significant new skills or acquire significant further education. Her work experience is mostly in retail, including two national hardware stores. It is clear that her recommended activity restrictions will disable her from a substantial number of retail jobs because of stocking/lifting/shipping duties that will predictably exceed her physical limits – which were most thoroughly set forth pursuant to Dr. Gammel's functional capacity evaluation. Those recommendations are accepted as best outlining Tucker Thomas' residual abilities. Other retail jobs, however, predictably will not. It is noted that some of Tucker Thomas' physical complaints have not been established as work related.
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> Considering those factors of industrial disability set forth above, it is concluded that, by reason of the work injury sustained December 5, 2011, Rhonda Tucker Thomas has experienced loss of earning capacity on the order of 40 percent of the body as a whole, or the equivalent of 200 weeks of permanent partial disability benefits. Permanency benefits commence April 6, 2012.

(Ex. G, pp. 10, 11)

In May 2012, prior to the arbitration decision, Eric Phillips, M.D., recommended neck surgery due to the work injury, but would not perform the surgery due to the claimant's smoking. (Ex. 1, pp. 5, 6)

At the time of the 2013 arbitration hearing, claimant was working at Menards. Claimant quit her job at Menards in August 2013, after working there 23 years. Claimant testified Menards was accommodating her work up until her January 2013 hearing. (Tr. p. 83) Claimant testified that she was required to work overtime and perform work that was beyond her restrictions. Menards' time record shows some weeks of overtime after the 2013 arbitration hearing, before she quit. (Ex. N, p. 1) She was also working overtime before the 2013 arbitration hearing. (Ex. F, p. 93) Claimant had restrictions limiting her to 8 hour days. (Ex. 2, pp. 15, 16) Claimant testified that she had to use a ladder and do frequent bending and twisting of her neck, in violation of her restrictions. (Tr. pp. 30, 31) Claimant's time records show that on some days she was working more than 8 hours in 2013. (Ex. 17, pp. 1 – 5)

Claimant's counsel sent a letter to Menards on August 13, 2013 informing Menards that she would not be returning to work. (Ex. O, p. 2) On September 12, 2013, Menards responded to the August 13 letter informing claimant that she was still considered an employee and could apply for FMLA leave. (Ex. O, p. 4) Claimant, in an undated email, presumably after defendants' September 13, 2013 letter, stated that she had resigned and did not want to be an employee of Menards. (Ex. O, p. 6)

Claimant went to a physical therapy appointment on August 5, 2013 at 2:00 and was done at 3:00 and did not return to work. The next day, Menards states she was asked to have a note from her provider if she was going to not be at work and that Menards wanted an updated listing of her restrictions. Claimant testified that she was not asked to provide a note, but was told she would have to go to physical therapy on her own time. (Tr. p. 92) Claimant left work that day and quit. Claimant applied for and was denied unemployment benefits[1]. (Ex. P, pp. 1 – 3) Claimant had health insurance until March 2016. After that time, claimant was only able to get general practice health care at a community health center. (Tr. p. 16)

Claimant went to the Mercy Medical Center on July 31, 2013. The portion of the record of that visit states,

> The patient is a 52 year old female who presents for a recheck of [n]eck pain. This condition occurred following a specific injury (a fall on 12/5/11). The injury occurred at work. Symptoms include neck pain, neck stiffness and impaired range of motion. Symptoms are located in the entire neck. The pain radiates to the left shoulder, left arm, left hand and right hand. The patient describes the pain as sharp. The patient describes symptoms as moderate in severity and worsening. Symptoms are exacerbated by use of the left arm and neck movement. By report there is good compliance with treatment (Gabapentin 300mg TID), good tolerance of treatment and poor symptom control. The patient was previously evaluated in this clinic. Past evaluation has included cervical spine MRI (at MMC). Past treatment has included physical therapy. Note for "[n]eck pain"

(Ex. 3, p. 1) On August 6, 2013, claimant went to the emergency department after physical therapy. (Tr. p. 40, Ex. 4, p. 1) Claimant had an MRI on that date. (Ex. 4, p. 1)

Claimant was examined by Charles Taylon, M.D., on September 13, 2013 for cervical radiculopathy. (Ex. 5, pp. 1 – 5) On September 20, 2013, Dr. Taylon wrote claimant's counsel. Claimant reported to Dr. Taylon she quit her job at Menards because of her pain and work conditions. (Ex. 5, p. 6) Dr. Taylon reviewed an MRI as well as the official reading. He did not completely agree with the official reading. Dr. Taylon noted,

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[1] Any finding in the unemployment appeal is not binding on the Division of Workers' Compensation. Iowa Code section 96.6(4).

> What is not stressed in the reading is that there is a tight cervical stenosis at C5-6 with significant spinal cord compression. The compression is from both a disc bulge as well as posterior ligamentous impression. There is also a significant disc bulge at C4-5 but not nearly the amount of spinal cord compression.
>
> All of my opinions are rendered with a reasonable degree of medical certainty. It is my opinion that Ms. Tucker Thomas either herniated a disc or aggravated a pre-existing degenerative condition as a result of her slip and fall at her employment on December 5, 2011. It appears that she is developing a progressive myelopathy secondary to that event. In reading through the records I have, I do not believe that people put enough stress on the cervical stenosis and the spinal cord compression as the diagnosis of cervical strain has been utilized. I also do not feel that the radiologist read the MRI scan strongly enough. From a pure medical point of view, she absolutely needs a follow up MRI scan. The degree of ongoing cervical stenosis needs to be reassessed. She then needs to be given correct and timely advice as to the dangers of her condition and options. If she continues to have spinal cord compression and signs and symptoms of a myelopathy then she should at least be offered surgery, whether she smokes or not.

(Ex. 5, p. 7) Dr. Taylon stated that if claimant had no additional treatment she would be at maximum medical improvement, would have a 10 percent whole body rating and should be limited to 10-15 pounds and avoid repetitive bending and twisting. (Ex. 5, p. 7)

Claimant contacted Menards and requested additional treatment on June 18, 2013. On July 29, 2013, defendants informed claimant that they were arranging an examination of claimant by David Boarini, M.D. (Ex. 19, p. 4) On July 30, 2013, claimant informed Menards that she wanted surgery. (Ex. 19, p. 5) Claimant was seen by Dr. Boarini on September 4, 2013. He performed an independent medical examination (IME) and he issued a report on October 7, 2013. (Ex. C, pp. 1, 2) Dr. Boarini reviewed the MRI of the neck which he interpreted to show some spondylitic spurring, mainly at C5-6, with some mild cervical stenosis. He stated the findings were clearly degenerative in nature due to her age and probably exacerbated by smoking. (Ex. C, pp. 1, 2) Dr. Boarini did not believe that claimant needed surgery presently and if she needed surgery in the future it would be due to the degenerative nature of her condition, which was not related to her work injury. Dr. Boarini found that claimant could be assigned a five percent impairment rating. He recommended no additional treatment other than cessation of smoking. (Ex. C, p. 2) On November 4, 2013, defendants asked Dr. Boarini to review an updated MRI of the cervical spine of October 8, 2013. Dr. Boarini stated the updated MRI did not change his opinions and there was no significant change in the new MRI. (Ex. C, p. 3) The defendants notified claimant on October 24, 2013 that claimant's neck condition was not causally related to her work injury and that claimant would need to seek medical treatment on her own. (Ex. O, p. 7)

Claimant was not provided any additional medical care by the defendants after her IME by Dr. Boarini. (Tr. p. 44) Claimant obtained medical treatment on her own. (Tr. p. 44) She saw Todd Johnson, M.D., on January 20, 2014. Dr. Johnson noted that claimant had chronic neck pain for two years and had posterior neck pain and bilateral radicular symptoms to her shoulders, arms, forearms and hands. He also noted that an MRI showed a disk herniation at C5-6. (Ex. 6, p. 1) Dr. Johnson provided a cervical steroid injection on that date. (Ex. 6, p. 3) On February 3, 2014, Dr. Johnson provided a trigger point injection. Dr. Johnson's assessment of claimant's condition was myofascial pain syndrome. (Ex. 6, p. 6) Dr. Johnson provided additional cervical injections. On June 5, 2015, Dr. Johnson noted marked improvement with cervical injections and proceeded with right shoulder intraarticular injection. He stated that claimant had some degenerative changes in her shoulder and not all of her pain was from her neck. (Ex. 6, p. 20) On August 15, 2015, Dr. Johnson assessed claimant with active problems of myofascial pain syndrome and neuritis cervical and provided a cervical epidural injection. (Ex. 6, p. 28) Claimant testified in her December 2016 deposition that she had her last injections in March 2015 due to the fact she could not afford additional treatment. (Ex. A, p. 19; December 22, 2016 deposition) The record shows her last injection was March 2016. (Ex. 12, p. 1)

Claimant testified as a result of her injury at Menards she,

> A. Well, the tightness in the neck and across the shoulder blades and across the shoulders and then the arm pain and the pain and tingling through the fingers and weakness in the hands.
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> Q. Were those all symptoms that you described prior to the January 2013 hearing date?
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> A. Yes.

(Tr. p. 45) Claimant said that since her hearing in 2013 the symptoms are a little more intense. (Tr. p. 46) Claimant said her right arm pain is different than the pain she was experiencing during her 2013 hearing. (Tr. p. 48) Claimant testified that now she has more bad days than good and that before she had about equal good days and bad days. (Tr. p. 49) Claimant testified she now takes more prescription gabapentin than she did at her prior hearing. (Tr. p. 53) In an October 2015 deposition claimant described how she believed her condition was worse than what it was like in January 2013. The October 2015 deposition stated,

> Q. In your own words, how has your condition changed since June of 2013?
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> A. It's gotten a lot worse. It's the tightening of the neck and the burning and pain through the right arm, and numbness, and I get it through the left. With the trigger injections it kind of helps the left, but it's still present and it's – it helped the right a little bit, but it's still worse than the left with the injections. It went across the shoulder blades, it really –

pain, and across the shoulders, and the tight – real tightness against the neck.

Q. Any other conditions that have changed?

A. No, not – oh, and then across – when I get it across the shoulder blades it comes around the bottom of the chest and across the chest.

Q. Is there anything else you can think of?

A. No.

(Ex. A, pp. 9, 10; October 6, 2015 deposition) In this deposition claimant testified that climbing stairs was now worse than in January 2013. (Ex. A, p. 11; October 6, 2015 deposition) In a December 2016 deposition claimant testified that her pain had become worse since her 2015 deposition. (Ex. A, pp.10, 110; December 22, 2016 deposition)

Claimant has looked for work after she left Menards. Claimant said that she looked for receptionist type of jobs, banking jobs and working in call centers. (Tr. p. 68) Claimant listed her restrictions on her resume. (Tr. p. 103) She has not been hired. Claimant applied for a number of positions recommend by René Haigh, MS, CRC, that she put in her November 16, 2016 report. (Tr. pp. 70 – 73) Claimant's relevant vocational history shows she worked for Menards from 1991 through 2013, she worked at a True Value Hardware, in customer service and accounts payable, from 1982 through 1990 and as a receptionist from 1978 through 1981. (Ex. J, p. 1)

Up until about Christmas of 2016 claimant would walk about three miles three times a week. She now feels that she cannot walk that far. (Tr. p. 79)

Troy Tucker, claimant's son, testified at the 2017 hearing. He said that since the 2013 hearing claimant was not able to attend her grandson's wrestling tournaments. (Tr. p. 123) He noted that prior to 2013 claimant was active in her church, attending three days a week. He said that post 2013 she hardly attends church. (Tr. p. 125) He said that he would carry heavy items and do some housework for claimant. On cross-examination Mr. Tucker acknowledged that claimant might go to church up to three times a month. (Tr. pp. 130, 131)

Jessica Clark was the second assistant hardware manager at Menards in 2013. (Tr. p. 140) She was one of claimant's supervisors. Ms. Clark did not remember anyone forcing the claimant to work overtime and said that claimant never complained to her that she was required to work beyond her restrictions. (Tr. p. 141)

Robert Adams, M.D., examined the claimant on April 12, 2013. Dr. Adams' impression was,

> Cervical neck strain and posttraumatic cervical arthritic change is present with severe neck stiffness and rigidity. She has radicular discomfort affecting her arms, and radicular impingement is symptomatic

> in this case. She has referred pain from her neck affecting the jaw and face. This is a common neurological phenomenon and sequelae of neck injuries. Her facial dysesthesias, numbness, and jaw discomfort is directly related to and caused by the December 5, 2011, accident when she fell on the ice[2].
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> It should be also clarified that she did not have active ongoing problems with her neck before the fall on the ice. It is likely that she did have some degree of degenerative age-related change before the fall. However, she had no symptomatic neck disease before the fall, and her cervical arthritic change, cervical neck pain, referred jaw and facial discomfort, and arm numbness and pain are all related to, caused by, and sequelae of the December 5, 2011, fall.

(Ex. R, p. 4) Dr. Adams recommended additional testing, possible neck surgery, pain management and medication such as gabapentin. (Ex. R, pp. 4, 5)

John Treves, M.D., examined claimant on December 2, 2013. Dr. Treves reviewed the October 8, 2013 MRI. Dr. Treves wrote,

> While her work-related events/accident in 2011 did not directly cause a multilevel spondylosis and stenosis that we see on the MRI scan, I think it could be said that her work-related fall fared up her underlying previously asymptomatic cervical spondylosis and stenosis. We discussed treatment options which would include doing nothing further, simply living with and tolerating symptoms as they are.
>
> She could stay the conservative course, but unfortunately her symptoms have persisted and perhaps progressed despite the passage of time and a fair amount of conservative treatment for the problem. The stenosis at C5-6 is concerning.
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> If it came to surgery, I think she would be looking at a C5-6 anterior cervical discectomy and fusion with plating to take care of disc degeneration, spondylosis, foraminal narrowing and stenosis at C5-6. We made it clear to Rhonda that if it ever came to such an effort, this may not be the perfect fix for all of her pain complaints particularly her headaches which may or may not be related to her cervical spondylosis and stenosis. One could certainly make the case that a lot of her ongoing neck, shoulder, and arm symptoms are related to the spondylosis, foraminal narrowing and stenosis.

(Ex. H, pp. 2, 3) On January 15, 2015, Dr. Treves examined claimant. He noted that claimant had multifactorial chronic pain and ordered an MRI. (Ex. 9, p. 2) On

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[2] The agency decision in this case found that the facial dysesthesias was not related to her work injury.

January 29, 2015, Dr. Treves noted that the MRI showed a worsening cervical spine. He recommended a cervical discectomy and a fusion of the C5-6 and C6-7 levels. He informed claimant that her condition was progressing and that was the etiology of her condition. (Ex. 9, p. 6)

On September 26, 2012, Donald Gammel, M.D., performed an evaluation of the claimant. In his report he stated claimant sustained a permanent aggravation of a cervical degenerative disease due to her work injury of December 5, 2011, and adopted restrictions from the FCE. (Ex. 2, pp. 11, 12, 15, 16) Dr. Gammel agreed that claimant's post-injury treatment and proposed surgery was casually related to her work injury. Dr. Gammel noted that claimant had a permanent aggravation to her neck rather than a temporary exacerbation. (Ex. 2, p. 12)

On June 30, 2015, Dr. Gammel performed an evaluation of the claimant and issued a report on August 5, 2015. The purpose of the report was to ascertain the nature, extent and current status of claimant's complaints of neck and upper back due to the December 5, 2011 injury. (Ex. B, p. 1) Dr. Gammel reviewed a number of medical reports including his September 26, 2012 independent medical examination (IME). (Ex. B, p. 4) Dr. Gammel wrote in about the 2012 IME,

> Performed an Independent Medical Examination that revealed a diagnosis of permanent aggravation of a cervical degenerative disc disease with C4-5 herniated nucleus pulposus and C5-6 disc protrusion. She had complaints of jaw, upper back, posterior head, between shoulder blade pain; constant numbness of her right face; a chocking [*sic*] feeling in the front of her neck and numbness and tingling in the bilateral ring finger. She described her pain as occasional (posterior neck); frequent (across shoulder blades) and constant (right face numbness and choking feeling in neck). She scored 28-30% disabled per Oswestry Function Test and 52 on the Pain Disability Questionnaire. She was presently working full time, light duty for Menards. She was currently taking Gabapentin and Ibuprofen.

(Ex. B, p. 4)

Dr. Gammel was told by claimant in the 2015 examination that she felt her pain had increased since he performed the IME in 2012. (Ex. B, p. 14)

Dr. Gammel noted claimant's pain drawing and her Oswestry Function Test and Pain Disability Questionnaire show some increase in pain. (Ex. B, p. 16)

Dr. Gammel wrote that his examination on June 2015 did not show a worsening of claimant's condition, but claimant's subjective complaints and imaging studies indicate a worsening of her condition. (Ex. B, p. 16) In comparing the MRI of December 2011 and the January 2015 MRI Dr. Gammel noted the MRI images showed a material worsening of the pre-existing cervical spine condition. (Ex. B, p. 17)

Dr. Gammel opined,

> Given all the above information it is my opinion that there is a material worsening of the cervical spine condition. It is my opinion that it is more likely than not attributable to personal, non-work related factors such as smoking, genetics and degenerative condition pre-existing the 12/5/11 work injury.

(Ex. B, p. 17) Dr. Gammel did not believe that claimant's previous rating of eight percent needed to be raised and claimant needed no new restrictions. Dr. Gammel did agree that the surgery recommended by Dr. Treves was appropriate, but it was related to the pre-existing cervical spine condition. (Ex. B, p. 17)

On September 16, 2015, Sunil Bansal, M.D., performed an IME. Dr. Bansal's diagnosis was, "Aggravation of multi-level cervical spondylosis. (Ex. 11, p. 17) Dr. Bansal said that the claimant's falls at work, "[A]ggravated her underlying, yet symptomatically quiescent spondylosis with resultant cervical disc bulging." (Ex. 11, p. 18) He provided a 17 percent whole body impairment rating and recommended restrictions of 10 pounds occasionally and 5 pounds frequently and she should avoid lifting more than 5 pounds overhead. (Ex. 11, p. 20)

Claimant's application for Social Security Disability was denied by an administrative law judge on July 6, 2016. The decision, which is not binding on this agency, found the claimant could perform light work with some limitations. (Ex. Q. p. 4) The decision found she could not perform her past relevant work, but there were jobs in the national economy she could perform. (Ex. Q, pp. 7 – 9)

On November 16, 2016, René Haigh, MS, CRC, issued a vocational assessment of the claimant. Ms. Haigh reviewed a number of medical reports. She noted that Dr. Gammel performed an IME in 2012. Ms. Haigh summarized Dr. Gammel's 2012 IME as follows,

> An IME was completed by Dr. Gammel in which he reviewed records, interviewed and evaluated Ms. Tucker-Thomas 9/26/2012 and delineated the results in a report dated 10/9/2012. Ms. Tucker-Thomas reported constant pain, stiffness in her jaw and upper back, pain in the back of her head, across her shoulder blades, tingling/numbness in her finger when stressed or with a lot of walking, numbness on the right side of her face, pain made worse with stress, too much walking, car rides, symptoms affected her ability to perform activities of daily living, heavy lifting, pulling/pushing the ladder, bending and lifting overhead. Dr. Gammel provided diagnosis of permanent aggravation of cervical degenerative disc disease with C4-C5 herniated nucleus pulposus and C5-6 disc protrusion. Dr. Gammel indicated if Ms. Tucker-Thomas did not cease smoking and proceed with surgery, he opined she reached MMI 5/21/2012, and sustained an 8% whole person impairment related to her cervical spine secondary to herniated nucleus pulposus and radicular symptoms.

Dr. Gammel opined the surgery recommended by Dr.'s Samuelson or Phillips would be related to her injury and recommendations for future treatment were home exercise, continued medications for symptomatic treatment, and in the absence of smoking cessation no further medical evaluation, diagnostic testing or surgical intervention was recommended. Dr. Gammel recommended permanent restrictions as follows in an 8 hour day:

- Maximum Light Work Lifting 20 lbs. occasionally with varying position as needed
- Sit and stand 4 hours at a time and walk 1 hour at a time and a total of 8 hours
- Lift occasionally up to 20 lbs. and frequently 5 lbs.
- Push/pull occasionally up to 35 lbs. and frequently up to 10 lbs.
- Simple grasp, fine grasp, fine manipulate bilateral hands and no push/pull of arm controls
- Repetitively use feet bilaterally
- Cane use head and neck in static position and no frequent flexing and rotating
- No working at unprotected heights or operating heavy machinery
- Can operate desk machines, perform precise manual dexterity, be exposed to dust, fumes, gases, chemicals, be exposed to extreme heat, cold to liquids or extreme humidity, caustic chemicals, moderate loud noise or vibrations

(Ex. E, pp. 2, 3) Ms. Haigh also reviewed Dr. Gammel's 2015 examination, which found no increase in rating and the need for surgery was not related to her work injury. (Ex. E, p. 3) She also reviewed Dr. Bansal's September 2015 IME which opined claimant had a diagnosis of aggravation of multi-level cervical spondylosis and that claimant had an industrial impairment rating of 17 percent and restrictions of no lifting frequently of more than 5 pounds and no frequent lifting overhead. (Ex. E, p. 4)

Ms. Haigh opined that if she used the restrictions of Dr. Bansal claimant could perform job types of customer service representatives, receptionists, and information clerks. (Ex. E, p. 12) Ms. Haigh identified a number of job openings in claimant's labor market including telemarketing/call centers, insurance and financial sales, receptionist. (Ex. E, pp. 12 – 18)

Using the restrictions from Dr. Gammel she identified additional job categories that claimant could perform in addition to the ones she identified using Dr. Bansal's

restrictions. She found retail salesperson and hosts/hostesses for restaurants to be additional job types. She identified retail sales for AT&T, host positions and eyeglass sales as positions available in the claimant's labor market. (Ex. E, pp. 18 – 22) Ms. Haig also recommended a number of resources that could be of help to claimant in obtaining employment. Claimant testified she has applied for a number of positions that Ms. Haig identified and she did not obtain employment. (Tr. pp. 70 – 73)

Rick Ostrander, LPC, CRC, CDMS, provided a vocational evaluation. Using Dr. Gammel's restrictions he opined claimant would have approximately 25 to 30 percent loss of earning capacity. Using the restrictions of Dr. Bansal claimant would have at least a 65 to 70 percent loss of earning capacity. Using the restrictions of Dr. Adams he said claimant would have lost access to the labor market and would not be employable. (Ex. 14, p. 14)

On November 15, 2016, claimant underwent an FCE. The results were considered valid. The results showed claimant could perform exertion at the sedentary level. (Ex. 16, p. 10)

Dr. Bansal performed a second IME on December 9, 2016. He stated that claimant's condition was slightly worse than her last IME and provided a 17 percent whole body rating. He adopted the restrictions recommended by the November 2016 FCE. (Ex. 11, p. 27) On December 29, 2016, Dr. Bansal responded to a letter from claimant's counsel, and stated that the care provided by physicians, Dr. Treves, Dr. Johnson and Dr. Hatten were reasonable and necessary and related to claimant's work injury. He also continued to recommend surgery and pain management and prescriptions such as gabapentin. (Ex.11, p. 29) Dr. Bansal charged claimant $2,695.00 for the 2015 IME and $1,762.00 for the 2016 IME. (Ex. 11, pp. 34, 35) There is a duplicate bill as Exhibit 11, page 36 in the amount of $1,762.00. (Ex. 11, p. 26) It is possible the claimant intended to submit the bill for the December 29, 2016 letter; however the bill is not in evidence.

On January 13, 2017, Ms. Haigh issued another letter responding to a vocational report by Mr. Ostrander. She did not agree with some of his analysis of claimant's past relevant work and D.O.T. Codes he used in his report. Ms. Haigh disagreed with Mr. Ostrander's opinions as to loss of employability. Ms. Haig stated that claimant lost 4 percent loss of access to employment opportunities if she were limited to LIGHT work and 51 percent if she were limited to SEDENTARY work. (Ex. E, p. 28)

On February 13, 2017, claimant was seen for a functional capacity examination. The examiner concluded that the results were invalid and no limitations could be established. (Ex. D, pp. 2, 4)

Claimant submitted medical expenses she has incurred in treatment for her cervical condition and medical lien. (Ex. 20 and 21) I find these medical expenses are related to claimant's work injury of December 2011.

I find that claimant's cervical condition is significantly worse since her arbitration decision in 2013. I find that claimant is limited to work in the sedentary range as found by the valid FCE of November 2015.

Claimant worked for Menards for well over 20 years. She quit due to her increasing difficulty in performing her job and some of her misunderstanding about the employer's request for documentation from physical therapy. It does not appear that claimant or Menards did a great job of communicating and understanding restrictions. The work at Menards was somewhat accommodated at the time she quit. Given claimant's current restrictions claimant would not be able to work at Menards without significant accommodations.

I find that claimant has a 60 percent of loss of earning capacity considering she is restricted to sedentary work and has limited mobility with her neck.

RATIONALE AND CONCLUSIONS OF LAW

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). However, the party bringing the review-reopening proceeding has the burden of showing that the employee's condition has changed since the original award or settlement was made and that that change in condition relates back to the original injury. 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 is not sufficient to justify a different determination on a petition for review-reopening.

To establish a compensable review-reopening claim, claimant must prove by a preponderance of the evidence that the current condition is causally related to the original work injury. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009). The principles of res judicata apply, and the agency should not reevaluate facts and circumstances that were known or knowable at the time of the original action. Id.

A mere difference of opinion of experts as to the percentage of disability is not sufficient to justify a different determination on a petition for review-reopening.

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).

When an injury occurs in the course of employment, the employer is liable for all of the consequences that "naturally and proximately flow from the accident." Iowa Workers' Compensation Law and Practice, Lawyer, section 4-4. The Supreme Court has stated:

> If the employee suffers a compensable injury and thereafter suffers further disability which is the proximate result of the original injury, such further disability is compensable. Where 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 v. Scofield & Welch, 222 Iowa 764, 767, 266 N.W. 480, 481 (1936). The Oldham Court opined that a claimant must present sufficient evidence that the disability was naturally and proximately related to the original work injury.

Claimant had a pre-existing cervical spine condition when she had her work injury in 2012. The condition was asymptomatic until her two falls on December 5, 2011. Her pre-existing condition was permanently aggravated by her work injury. Dr. Gammel found in 2012 that the fall at work caused a permanent aggravation of her cervical spine condition. He also opined that surgery was appropriate at that time. While claimant had a pre-existing degenerative condition, it was made worse by her fall. This was found by this agency in the arbitration decision and commissioner's decision.

Dr. Gammel stated in 2015 claimant's condition was materially worse, although attributed the worsening to the degenerative nature of her condition. Claimant's condition was asymptomatic before her injury. She has never returned to baseline, i.e. her condition before her fall. Her condition has slowly and steadily gotten worse. When defendants authorized treatment or claimant had insurance she received active, non-surgical treatments, injections, physical therapy and medications. Not surprisingly

with less medical care and a degenerative condition claimant's medical condition and ability to work have gotten worse.

I accept Dr. Bansal's opinion that claimant's current condition is related to her work injury and is not just a natural progression unrelated to her work injury.

Additionally, when a pre-existing degenerative work condition is made permanently worse by a work injury the employer is responsible for the condition even though eventually the claimant would have reached the same condition through "natural" process. The fact that claimant may have needed surgery in the future even without the work injury in not material. Because her condition is worse due to the work injury the employer is responsible for additional compensation and medical care.

In this case claimant has shown her medical condition is significantly worse than at the time of the arbitration decision. Defendants are responsible for the increase in industrial disability, medical care and medical expenses she has incurred.

Dr. Boarini's IME in October 7, 2013 did not find causation for claimant's current symptoms. I do not find his opinion convincing based upon the medical report of Doctors Adams, Bansal, and Gammel's 2012 opinion. The commissioner's decision, which was the final agency action, was issued on November 25, 2013 and affirmed claimant's cervical condition was work related and she had permanent impairment in the cervical spine.

Having found that claimant established an increase in disability, I conclude that claimant is entitled to an award of additional permanent partial disability benefits. Iowa Code sections 86.14(2) and 85.34(2)(u).

I do not find that claimant has proven she is permanently and totally disabled. The valid FCE provided she can perform sedentary work. While claimant has applied for work and not found any, she testified she included her restrictions as part of her application/resume process. While it is proper to disclose restrictions to potential employers, doing so at the application process will discourage most employers from interviewing. Based upon the valid FCE restrictions and the application process used, claimant did not prove she is totally disabled.

The Social Security decision found she could not do her past relevant work[3]. I also find claimant's current condition prevents her from returning to work in her prior position at Menards.

Claimant was a long term employee at Menards. She has a limited education. She was having more difficulty at work due to her medical conditions and quit. She has a limited education, but a long work history. Her age is not a positive factor.

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[3] For Social Security purposes Past Relevant Work is generally work that was performed in the last 15 years.

I previously found claimant has a 60 percent loss of earning capacity. I find the claimant has a 60 percent industrial disability. This entitles claimant to 300 weeks of permanent partial disability benefits. Claimant was previously paid 200 weeks of permanent partial benefits. As such, defendants shall pay claimant an additional 100 weeks of benefits.

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).

I find that claimant is entitled to medical care for her cervical condition. Defendants shall authorize Dr. Johnson to provide pain management. Claimant is also entitled to continuing medical care including cervical surgery.

Defendants shall pay for the medical care claimant received after Menards denied medical care. Defendant shall pay the medical expenses found in Exhibits 20 and 21 and reimburse claimant any out-of-pocket expenses she has incurred.

Claimant has requested payment of certain costs. (Attachment to Hearing Report)

Iowa Code 85.39 provides in part;

> If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination. The physician chosen by the employee has the right to confer with and obtain from the employer-retained physician sufficient history of the injury to make a proper examination.

Claimant has request payment for Dr. Bansal's IME of $2,695.00 and a follow up report of $1,762.00. I find claimant is entitled to an IME cost for Dr. Bansal's IME and award $2,695.00 to the claimant.

The follow up report is another IME. Claimant is not entitled to two IME expense reimbursements. That request is denied. There is no itemization as to how much was charged for writing the report, as opposed to examining claimant, so the follow-up report does not qualify for reimbursement under 876 IAC 4.33(6).

Iowa Code section 86.40 states:

> **Costs.** All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states in part:

> **Costs.** Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be . . . (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, . . .

Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. In this instance, claimant has prevailed on her claim for review-reopening disability benefits and I conclude that it is reasonable to assess any appropriate costs sought.

Claimant identified her requested costs as being attached to the hearing report.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010). The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

Claimant has requested payment for the vocational reports of Mr. Ostrander and the FCE of November 2015.

As for the vocational report, claimant's requested costs are:

Vocational report	$1,568.00
Follow up reports	$630.00 & $392.00

The request for the FCE expense is $ 990.00. There is no breakdown of the time to do the report and the time spent on the examination. The FCE was not ordered by a physician. Only the expense of preparing the FCE report is a taxable expense. 876 IAC 4.33(6); Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015).

Under agency precedents reasonable expenses of a practitioner's report can be awarded. One of the vocational reports was in response to an adverse Social Security decision and none of that expense should be awarded.

I find that the reasonable amount of the vocational report, using agency experience pursuant to Iowa Code 17A.(14)5, is $1,000.00.

Claimant is awarded a total of $3,695.00 in costs and IME expenses.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant an additional twenty percent (20%) industrial disability at the weekly rate of three hundred fifty-eight and 46/100 dollars ($358.46) commencing December 11, 2014.

Claimant is awarded one thousand and 00/100 dollars ($1,000.00) in costs.

Claimant is awarded two thousand six hundred ninety-five and 00/100 dollars ($2,695.00) in IME expenses.

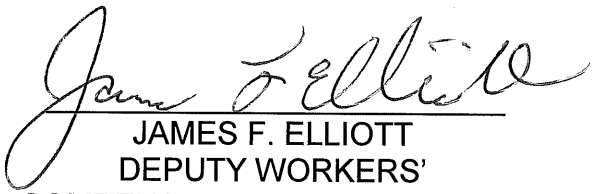
Defendants shall reimburse claimant for any past medical expenses paid directly by claimant to medical providers, shall either pay to claimant or directly to the medical providers any outstanding past medical expenses, and shall hold claimant harmless for any medical expenses outlined in Claimant's Exhibit 20 and 21

Defendants shall receive credit for benefits previously paid.

Defendants shall pay any past due amounts in a lump sum and interest as provided by law.

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

Signed and filed this 25th day of January, 2018.



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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.