

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JULIE REINS,

Claimant,

vs.

ANDERSON NEWS,

Employer,

and

SPECIALTY RISK SERVICES,

Insurance Carrier,  
Defendants.

**FILED**

MAY 14 2015

WORKERS' COMPENSATION

File No. 5021351

REMAND DECISION

HEAD NOTES: 1803, 2905

STATEMENT OF THE CASE

This matter is before the Iowa Division of Workers' Compensation on remand from the Iowa Court of Appeals following a decision on appeal filed November 13, 2014.

This matter was first heard by Deputy Workers' Compensation Commissioner Jon Heitland on November 16, 2011. In a review-reopening decision (mis-captioned as an arbitration decision), filed February 10, 2012, the presiding deputy found, in part, that claimant had carried her burden of proof in review-reopening that she sustained a change in condition caused by a July 15, 2005 work injury not contemplated at the time of the settlement agreement. The decision found, in part, that claimant had not sustained a change in economic condition, but had sustained a change in physical condition. Based on that finding of fact and conclusion of law, the presiding deputy found claimant was due an additional 15 percent industrial disability and was due an additional 75 weeks of permanent partial disability benefits. (Review-Reopening Decision, page 9)

The review-reopening decision was affirmed on appeal by then Workers' Compensation Commissioner, Christopher Godfrey, on March 25, 2013.

That decision was appealed in a petition for judicial review to the District Court in and for Polk County. In a December 11, 2013, decision the District Court, in part remanded the case to the workers' compensation commissioner to determine whether

respondent had suffered a decrease in earning capacity warranting an increase in benefits.

The employer appealed the matter to the Iowa Supreme Court. In a November 13, 2014, decision, the Iowa Court of Appeals affirmed the District Court regarding remand decision back to the Iowa workers' compensation commissioner to determine whether respondent had suffered a decrease in earning capacity warranting an increase in benefits.

This decision constitutes the final agency decision on remand.

### ISSUE

Did claimant sustain a loss of earning capacity caused by the July 15, 2005 work injury not contemplated at the time of the 2009 settlement agreement that would entitle claimant to benefits in a review-reopening?

### FINDING OF FACTS

The record in this matter indicates the following:

Claimant had a stipulated right shoulder injury on July 15, 2005. At that time claimant worked for Anderson News in the Book Reorder Department. (Transcript pp. 14-16) Claimant left Anderson News when the company went out of business in February of 2009. (Tr. p. 9)

On June 15, 2009 claimant entered into an agreement for settlement regarding her right shoulder injury. Claimant was paid benefits based on a 10 percent industrial disability. (Joint Exhibit 12, p. 4) This agreement was based, in part, on the fact that claimant had been found to have a ten percent permanent impairment to the body as a whole by Mark Kirkland, D.O. (Jt. Ex. 12, p. 6)

In 2009 claimant treated with Dr. Kirkland due to increased pain in her right shoulder. (Jt. Ex. 11, pp. 19-20)

Claimant also treated with Delwin Quenzer, M.D. for increased shoulder pain. Dr. Quenzer testified, in deposition, that in comparing treatment notes from June 2006 to April 2010, claimant had decreased range of motion in the right shoulder. Claimant also had increased weakness in the right shoulder. (Jt. Ex. 2, p. 4)

In October 2010 claimant began employment with Data Vision doing data entry. Claimant was laid off in March of 2011 and was called back to work in August of 2011. At the time of the review-reopening hearing claimant worked 40 hours per week and sometimes worked overtime. (Tr. pp. 7-8; 54-55)

In January of 2011 Dr. Quenzer noted claimant had continued decrease in strength and range of motion of the right shoulder. Claimant was given an injection for pain. (Jt. Ex. 2, pp. 5-6)

In August of 2011 claimant returned to Dr. Quenzer. Claimant indicated difficulty with lifting a gallon of milk on the right. She also indicated difficulty with making a bed and could only use her right hand up to the waist level when unloading a dishwasher. Dr. Quenzer gave claimant restrictions of no lifting over the head on the right and no lifting more than one pound frequently. (Jt. Ex. 1, p. 30) In later correspondence Dr. Quenzer indicated these restrictions were only temporary in nature. (Jt. Ex. 1, p. 31)

Claimant was evaluated by Dr. Kirkland in October of 2011 for an independent medical evaluation (IME). He opined claimant had not been doing her wall walking exercises. Dr. Kirkland noted claimant's range of motion in the right shoulder had decreased since August of 2008. (Jt. Ex. 7)

Dr. Kirkland opined claimant had an increase of four percent permanent impairment in her right upper extremity based upon loss of range of motion. He also opined the increased impairment could be addressed by claimant doing her exercises. (Jt. Ex. 6, p. 9)

Claimant was also evaluated by Sunil Bansal, M.D. for an IME. Claimant indicated difficulty with sleep due to her right shoulder pain. Claimant had difficulty doing her data entry job. Claimant had difficulty with making beds and difficulty with reaching above her right shoulder. Dr. Bansal found claimant had a 24 percent permanent impairment at the right upper extremity converting to a 14 percent permanent impairment to the body as a whole. He limited claimant to no lifting above the heart level and no lifting frequently greater than one pound on the right. (Ex. 1, pp. 1-17)

Claimant testified at hearing that given her limitations with her right shoulder, she could not return to work at her prior job at Anderson News. (Tr. pp. 34, 42) She said she would have a difficult time working at a job where she had to lift five pounds ten times a day. (Tr. p. 68) Claimant testified she has had increased pain and decreased strength in her right shoulder since 2009. (Tr. pp. 19, 22, 32)

Claimant testified she has difficulty driving for more than 45 minutes due to her right shoulder pain. (Tr. p. 36) She said she had difficulty doing household chores due to increased pain in her right shoulder. (Tr. pp. 35-36) Claimant also testified she slept very poorly due to right shoulder pain. (Tr. p. 32)

#### CONCLUSIONS OF LAW

The only issue on remand is if claimant has carried her burden of proof that she sustained an increased loss of earning capacity caused by the July 15, 2005, work injury, not contemplated at the time of the 2009 settlement agreement in this matter.

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).

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).

Impairment of physical capacity creates an inference of lessened earning capacity. Changes in actual earnings are a factor to be considered but actual earnings are not synonymous with earning capacity. Bergquist v. MacKay Engines, Inc., 538 N.W.2d 655, 659 (Iowa App. 1995); Holmquist v. Volkswagen of America, Inc., 261 N.W.2d 516, 525 (Iowa App. 1977); 4-81 Larson's Workers' Compensation Law sections 81.01[1] and 81.03. The loss is not measured in a vacuum. Such personal characteristics as affect the worker's employability are considered. Ehlinger v. State, 237 N.W.2d 784, 792 (Iowa 1976). Earning capacity is measured by the employee's own ability to compete in the labor market. An award is not to be reduced as a result of the employer's largess or accommodations. U.S. West v. Overholser, 566 N.W.2d 873, 876 (Iowa 1997); Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 617 (Iowa 1995).

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).

In a review-reopening procedure the claimant has the burden of proof to prove whether she has suffered an impairment of earning capacity proximately caused by the original injury. E.N.T. Associates v. Collentine, 525 N.W.2d 827, 829 (Iowa 1994).

On June 15, 2009, claimant entered into an agreement for settlement for her right shoulder. Claimant was paid benefits based on a ten percent industrial disability. (Jt. Ex. 12, p. 4) This agreement was based, in part, on claimant's unemployment. It was also based, in part, on the fact that claimant had been found to have a ten percent permanent impairment to the body as a whole by Dr. Kirkland. (Joint Ex. 12, p. 6)

The record indicates claimant left her employment with Anderson News due to a company shutdown. (Tr. p. 9)

At the time of hearing, subsequent to the settlement agreement, claimant was working full time at Data Vision. (Tr. pp. 7-8, 54-56)

The record indicates Dr. Kirkland, Dr. Quenzer, and Dr. Bansal all found claimant had sustained a decrease in range of motion to her right shoulder since 2009. This decrease in range of motion was due, in part, to claimant's 2005 work injury. (Jt. Ex. 1, p. 16; Jt. Ex. 2, pp. 5-6; Jt. Ex. 7; Jt. Ex. 6, p. 9; Ex. 1, pp. 14-15) Dr. Quenzer and Dr. Bansal also found claimant had a loss of strength due to the right shoulder injury since the 2009 settlement agreement. (Ex. 1, pp. 14-15; Jt. Ex. 1, p. 16; Jt. Ex. 2, pp. 5-6) Dr. Quenzer was a physician authorized by defendants to treat claimant. (Tr. p. 21)

Claimant's un rebutted testimony is that given her current limitations with her right shoulder, she could not return to work to Anderson News even if the job were still available. (Tr. pp. 34, 42)

Claimant's un rebutted testimony is that she has increased pain and loss of strength in the right shoulder since the settlement agreement. (Tr. pp. 19, 22, 31-32) Claimant's un rebutted testimony at hearing was that she is limited in her ability to drive due to right shoulder pain. (Tr. p. 36) Claimant testified she would have difficulty working a job where she had to lift five pounds ten times a day. (Tr. p. 68) She testified her right shoulder problems have caused her difficulty in her current job. (Tr. p. 34) Claimant testified she is limited in performing simple household duties due to her right shoulder. (Tr. p. 35-36) She testified she sleeps poorly due to right shoulder pain. (Tr. p. 32)

Dr. Kirkland opined claimant had an additional four percent permanent impairment to the right upper extremity due to loss of range of motion in the shoulder since the 2009 settlement agreement. (Jt. Ex. 6, p. 9) He testified claimant's condition would improve if she did her exercises. (Jt. Ex. 6, p. 9) Dr. Bansal also found claimant had an increased permanent impairment since her 2009 settlement agreement. (Ex. 1, pp. 16-17)

Dr. Bansal found claimant had permanent restrictions of no lifting above heart level on the right and no frequent lifting more than one pound on the right. (Ex. 1, p. 17)

These were the same restrictions given by Dr. Quenzer. (Jt. Ex. 1, p. 30) It is true, that when prompted by defendants' counsel, Dr. Quenzer did indicate the

restrictions given in August of 2011 were “. . . temporary acknowledgment of her continued symptoms.” (Jt. Ex. 1, p. 31) However, there is no indication claimant's condition has improved since her evaluation of August 11, 2011, with Dr. Quenzer. There is also no record that Dr. Quenzer lifted those restrictions. These facts, along with the permanent restrictions given by Dr. Bansal, suggest claimant's day-to-day function with her right shoulder is very limited.

At the time of the review-reopening hearing, claimant was fortunate to have been able to return to full-time work. However, between the time of her 2009 settlement agreement and her 2011 review-reopening hearing, claimant had increased loss of range of motion and strength attributed to the underlying work injury. Dr. Kirkland grudgingly acknowledged claimant had a four percent increase in the permanent impairment to the right upper extremity. Dr. Bansal also found claimant's permanent impairment to the body as a whole had increased. Claimant has restrictions, suggested by Dr. Quenzer, and given by Dr. Bansal, that severely limited the use of claimant's right shoulder. Claimant's un rebutted testimony is that she could not return to work at her prior job at Anderson News. Claimant's un rebutted testimony is that she is severely limited in her daily activities regarding the use of her right shoulder. Claimant's un rebutted testimony is that she would have a difficult time doing a job where she would be required to lift five pounds ten times a day. All of these factors occurred after the 2009 settlement agreement. All of these factors indicate claimant has a reduction in her general earning capacity.

The record indicates that between the 2009 settlement agreement and the 2011 review-reopening hearing, claimant sustained a further reduction in earning capacity not anticipated at the time of the 2009 settlement agreement. Based on the factors detailed above, it is found, on remand, claimant has carried her burden of proof she sustained a 15 percent increase in loss of earning capacity, or industrial disability. For these reasons, I affirm the review-reopening decision in the matter filed in this case on February 10, 2012, as it relates to claimant's increased loss of earning capacity.

#### ORDER

THEREFORE, IT IS ORDERED on remand that after review of the remand exhibits, the division's prior finding in the review-reopening decision of February 10, 2012, and the appeal decision of March 25, 2013, related to the increased loss of earning capacity are affirmed, and that:

Defendants shall pay claimant seventy-five (75) weeks of permanent partial disability benefits at the rate of two-hundred thirty-two and 26/100 dollars (\$232.26) per week from the date of the last payment of permanent partial disability benefits under the prior agreement for settlement.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded as set forth in Iowa Code section 85.30.

Defendants shall pay the costs of this action under rule 876 IAC 4.33 including the hearing transcript and other appellate costs.

Defendants shall file reports with this agency on the payment of this award under rule 876 IAC 3.1.

Signed and filed this 14th day of May, 2015.



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JOSEPH S. CORTESE II  
WORKERS' COMPENSATION  
COMMISSIONER

Copies To:

Ryan T. Beattie  
Attorney at Law  
4300 Grand Ave.  
Des Moines, IA 50312-2426  
[ryan.beattie@beattielawfirm.com](mailto:ryan.beattie@beattielawfirm.com)

Stephen W. Spencer  
Christopher S. Spencer  
Attorneys at Law  
6800 Lake Dr., Ste. 125  
West Des Moines, IA 50266  
[steve.spencer@peddicord-law.com](mailto:steve.spencer@peddicord-law.com)  
[Christopher.spencer@peddicord-law.com](mailto:Christopher.spencer@peddicord-law.com)

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