BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



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| DIANE MCBURNEY,<br><br>Claimant,<br><br>vs.<br><br>SEARS HOLDINGS CORPORATION,<br><br>Employer,<br><br>and<br><br>INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,<br><br>Insurance Carrier,<br>Defendants. | File Nos. 5041223, 5041224<br><br>REVIEW-REOPENING<br><br>DECISION<br><br>Head Note No.: 2905 |

## STATEMENT OF THE CASE

Claimant, Diane McBurney, filed petitions in review-reopening seeking workers' compensation benefits from Sears Holdings Corporation (K-Mart), employer, and Indemnity Insurance Company of North America, insurer, both as defendants. This case was heard in Des Moines, Iowa on December 1, 2015, with a final submission date of December 22, 2015.

The record in this case consists of claimant's exhibits 1-4, defendants' exhibit A, and the testimony of claimant. Defendants' exhibits were paginated by the undersigned for clarity of the record.

## ISSUES

For File No. 5041223 (date of injury August 1, 2011):

Whether claimant has had a change in condition that would entitle her to additional benefits under a review-reopening proceeding.

In the underlying arbitration decision, claimant originally plead two distinct work injuries, File No. 5041224 (date of injury July 15, 2011) and File No. 5041223 (date of injury August 1, 2011). The arbitration decision did not make any finding of fact or conclusion of law which date of injury caused claimant's permanent impairment. The

arbitration decision did not make any finding of fact or conclusion of law which date of injury defendants were liable for payment of permanent partial disability benefits. The decision merely indicated: "The injury manifested on or about July 15, 2011 and was reported on August 1, 2011." (Arbitration decision, p. 4)

The arbitration decision found claimant had a 50 percent industrial disability and that claimant was due 250 weeks of permanent partial disability benefits. As noted, the decision made no finding of fact or conclusion of law which date of injury caused claimant to have a 50 percent industrial disability.

In an attempt to remedy the oversight of the underlying arbitration decision, this decision will find that any change of condition claimant might have that would entitle her to additional permanent partial disability benefits will only be under File No. 5041223 (date of injury August 1, 2011).

## FINDINGS OF FACT

Claimant was 58 years old at the time of hearing. Claimant graduated from high school in 1975. Claimant was working at K-Mart when she graduated from high school. She went to college for a semester and then returned to work at K-Mart. Claimant testified she worked at the same K-Mart store that she began with, in 1975, for approximately 40 years.

The arbitration decision noted Timothy Vermillion, D.O., Steve Quam, D.O., and Jacqueline Stoken, D.O., all opine claimant's work at K-Mart materially aggravated claimant's pre-existing back condition. Dr. Stoken found claimant had an 8 percent permanent impairment to the body as a whole from her back injury. A 2013 FCE restricted claimant to lifting 20 pounds rarely and 10 pounds occasionally. As noted above, the arbitration decision found claimant had a 50 percent loss of earning capacity or industrial disability. (Arbitration decision, pp. 2, 9)

Claimant testified at the time of the arbitration hearing, she was working 7 hours a day. Claimant said at the time of the arbitration hearing, she worked a pricing job. Claimant testified the pricing job involved pricing merchandise, counting merchandise, stocking shelves and putting up signs. Claimant said she thought the pricing position was the easiest job physically at K-Mart.

Claimant said she went from 7-hour to 4-hour days doing pricing. She said she dropped to 4 hours a day doing pricing approximately a year before the review-reopening hearing. Claimant testified she moved to 4-hour days due to pain. Claimant said when she went to a 4-hour days doing pricing, her pay decreased from approximately $1,100.00 every 2 weeks working 7-hour days, to approximately $600.00 to $800.00 dollars every two weeks working a 4-hour day.

Claimant testified that approximately in July or August of 2015 she was told there were no part-time jobs in pricing, and claimant was moved to a "re-set" job. Claimant

said the re-set job required her to take merchandise off a shelf, and re-set a shelf unit. The job also required her to stock the re-made shelves with new merchandise. Claimant testified she relied on the help of coworkers to do this job approximately three to four times a day. She said she relied on coworkers to help move pallet jacks, move merchandise and to help re-set shelves. Claimant said the "re-set" job required her to get on her knees. She said she found it difficult getting off the floor due to back and knee pain.

Claimant said her last day at K-Mart was on November 6, 2015. Claimant testified she did not plan on retiring at 58. She also testified that at the time of the arbitration hearing, held in April of 2013, she planned on retiring after she worked 40 years at K-Mart.

Claimant has not looked for work since leaving K-Mart.

On June 26, 2013 claimant was evaluated by Dr. Quam for increasing lower back pain. Claimant was given a lumbar medial branch block at the L5 level. (Ex. 2, pp. 18-19)

Claimant returned to Dr. Quam on August 14, 2013. Claimant had increasing back pain. Claimant indicated little improvement in pain following the June 2013 lumbar block. Claimant had another lumbar medial branch block using a different steroid. (Ex. 2, pp. 22-24)

In an October 22, 2015 report, Joshua Kimelman, D.O. gave his opinions of claimant's condition following an independent medical evaluation (IME). Dr. Kimelman specializes in orthopedic surgery. Claimant complained of worsening back pain. Activity and walking aggravated her back pain. Dr. Kimelman assessed claimant as having chronic back pain. He found claimant fell in the DRE category II under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. This assessed claimant as having 5 to 8 percent permanent impairment to the body as a whole from her back condition. Dr. Kimelman did not make a change in claimant's permanent restrictions.

In an undated note claimant indicated she was resigning from K-Mart effective two weeks from October 23, 2015. (Ex. 3, p. 27)

In a November 3, 2015 note, written by claimant's counsel, Dr. Vermillion indicated claimant should be allowed to sit, stand and walk when needed. He indicated he did not believe claimant could work an 8-hour day unless given the opportunity to periodically recline. Dr. Vermillion was supportive of claimant's decision to terminate her job with K-Mart. (Ex. 1, p. 1)

## CONCLUSIONS OF LAW

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).

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).

A loss of earning capacity due to voluntary choice or lack of motivation to return to work is not compensable. Copeland v. Boone Book and Bible Store, File No. 1059319 (App. November 6, 1997); Snow v. Chevron Phillips Chemical Co., File No. 5016619 (App. October 25, 2007). See Also Brown v. Nissen Corp., 89-90 IAWC 56, 62 (App. 1989) (no prima facie showing that claimant is unemployable when claimant did not make an attempt for vocational rehabilitation).

Claimant contends she is permanently and totally disabled. (Claimant's post-hearing brief, pp. 3-8) Defendants contend claimant has failed to carry her burden of proof she sustained a change in condition, not anticipated at the time of the arbitration hearing, that would entitle her to additional permanent partial disability benefits.

Claimant's unrebutted testimony at hearing was that she went from working 7-hour days, at the time of the arbitration hearing, to 4-hour days. Claimant testified her earnings decreased from $1,100.00 bi-weekly to $600.00 to $800.00 bi-weekly. Claimant testified she began working lesser hours due to pain. Claimant testified in approximately the summer of 2015, she was told she could not work part-time in pricing and was required to move to a "re-set" position. Claimant's unrebutted testimony was that the re-set position was slightly more physically demanding than her pricing job. Claimant testified she required help from her coworkers doing her job in re-set approximately three to four times a day.

Dr. Kimelman opined, in an October 2015 IME, claimant had a 5 to 8 percent permanent impairment to the body as a whole. This is approximately the same permanent impairment rating given by Dr. Stoken in her May of 2013 IME. Dr. Kimelman reviewed Dr. Stoken's 2013 IME, the 2013 FCE, the arbitration decision, as well as other medical records. He opined claimant's functional impairment was ". . . not measurably worse," and found no reason for change of permanent restrictions. (Ex. A, p. 4)

No vocational expert has opined claimant has a loss of earning capacity, since the 2013 arbitration hearing. No vocational expert has opined claimant is unemployable. Claimant voluntarily terminated her employment with K-Mart. No doctor has opined claimant cannot return to work. No doctor has opined claimant had a material change or worsening of her back condition since the arbitration hearing.

Claimant testified she did not expect to retire at the age of 58. She also testified that, at the time of her arbitration hearing, she expected to retire after working 40 years at K-Mart. (Tr. pp. 25, 44)

Claimant has not looked for work since leaving K-Mart. (Tr. p. 44)

Dr. Vermillion did indicate, in a note written by claimant's attorney, claimant should be allowed to recline, as needed, if she were to work an 8-hour day. (Ex. 1, p. 1) Dr. Vermillion's November 3, 2015 note is problematic for several reasons. First, the note references to both the back and knee condition. Claimant is only alleging a change in condition in these files regarding her back condition. Second, it appears from the records the last time Dr. Vermillion evaluated claimant for her back condition was on March 27, 2014, when he revaluated claimant for her OxyContin medication. (Ex. 1, p. 4) Dr. Vermillion did not change claimant's work restriction at the March 27, 2014 evaluation. The alleged change in work restrictions occurred over a year and a half after Dr. Vermillion last saw claimant for her back condition, and only at claimant's counsel's request. Finally, claimant gave notice of her retirement on October 23, 2015. Dr. Vermillion did not give restrictions to claimant until November 3, 2015, approximately two weeks after claimant gave notice of retirement.

For the reasons detailed above, it is found Dr. Vermillion's opinions, that claimant needs to recline as needed if she works 8 hours a day, are not convincing.

The record reflects claimant has had no change in functional impairment or permanent restrictions. No doctor has opined claimant's back condition has worsened. No vocational expert has opined claimant has a loss of earning capacity or is unemployable. Claimant voluntarily terminated her employment with K-Mart. Claimant has not looked for work since leaving K-Mart. No expert has opined that claimant should not work. Given this record, claimant has failed to carry her burden of proof she is permanently and totally disabled. Based on the same criteria, claimant has also failed to carry her burden of proof she is an odd-lot employee.

However, claimant's unrebutted testimony is she had to decrease her working hours at K-Mart due to back pain. The record does show a decrease in earnings due to increases in pain. Based on this, claimant has carried her burden of proof she has sustained an increase in impairment of earning capacity proximally caused by the original injury. When all relevant factors are considered, claimant has an additional 10 percent loss of earning capacity or industrial disability.

ORDER

THEREFORE IT IS ORDERED:

Regarding File No. 5041224 (date of injury July 15, 2011):

Claimant shall take nothing.

Regarding File No. 5041223 (date of injury August 1, 2011):

That defendants shall pay claimant fifty (50) additional weeks of permanent partial disability benefits at the rate of three hundred eighty-seven and 98/100 dollars ($387.98) per week commencing on November 6, 2015.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits as ordered above and as set forth in Iowa Code section 85.30.

Regarding both File Nos. 5041223 and 5041224:

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

That defendants shall pay the costs of this matter as required under rule 876 IAC 4.33.

Signed and filed this 29th day of February, 2016.

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.