BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KEVIN HOLZHAUSER,	:	File No. 5064585.01
Claimant,	:	
vs.	:	REVIEW-REOPENING
CITY OF DES MOINES,	:	DECISION
Self-Insured Employer, Defendant.	:	Head Note No.: 2905

STATEMENT OF THE CASE

Kevin Holzhauser, claimant, filed a petition for review-reopening against the City of Des Moines, as the self-insured employer. This case came before the undersigned for a review-reopening hearing on March 25, 2022.

Pursuant to an order from the Iowa Workers' Compensation Commissioner, this case was heard via videoconference using the CourtCall platform. All participants appeared remotely via the CourtCall videoconference.

The parties filed a hearing report prior to the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 and 2, Claimant's Exhibits 1 through 11, as well as Defendant's Exhibits A through K. All exhibits were received without objection.

Claimant testified on his own behalf. Claimant also called Santino Valadez and Theodore Crum to testify on his behalf. The City of Des Moines called Jimmie Bennett, Jr., its Facilities Maintenance Supervisor, and Allison Lambert, its Senior Human Resources Business Partner, to testify. The evidentiary record closed at the conclusion of the review-reopening hearing.

However, counsel for the parties requested an opportunity to file post-hearing briefs. This request was granted and both parties filed briefs simultaneously on May 16, 2022. The case was considered fully submitted to the undersigned on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained a substantial change in condition after entry and approval of his agreement for settlement with the City of Des Moines justifying an increase in his permanent partial disability award.

2. The extent of additional permanent partial disability benefits, if any, to which claimant is entitled.

FINDINGS OF FACT

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

Kevin Holzhauser, claimant, commenced employment with the City of Des Moines on May 16, 2011. (Tr., pp. 11-12; Defendant's Ex. G; Defendant's Ex. K, p. 166) Mr. Holzhauser applied for and was hired for a temporary position as a senior maintenance carpenter for the City of Des Moines. (Defendant's Ex. E) Claimant's position was created as a temporary position to address certain modifications and upgrades that needed to be made in the City of Des Moines pursuant to the Americans with Disabilities Act (ADA) and a settlement agreement with the United States Department of Justice. (Defendant's Exhibits C, D, E)

Mr. Holzhauser's position was initially anticipated to last only one year and that the position would be eliminated once the ADA compliance work was completed. (Defendant's Ex. D, p. 32) However, the extent of the ADA work exceeded that which could be accomplished in a year and claimant's term of employment was extended several times. He continued with the City of Des Moines for 8 years as a senior maintenance carpenter. (Defendant's Ex. G, H, I)

Unfortunately, on September 12, 2016, Mr. Holzhauser was involved in a motor vehicle accident while performing his duties for the City of Des Moines. (Defendant's Ex. A & B) He was stopped and rear-ended by another vehicle when the collision occurred. (Tr., p. 19) As a result of the collision, claimant sustained permanent injuries to his neck and upper back. (Claimant's Ex. 4, p. 17)

On September 16, 2019, Mr. Holzhauser executed an amicable settlement agreement with the City of Des Moines. The parties filed the Agreement for Settlement with the agency. The Iowa Workers' Compensation Commissioner approved the proposed agreement for settlement on September 18, 2019. (Defendant's Ex. A)

The agreement for settlement between the parties stipulates that claimant sustained a ten percent (10%) loss of earning capacity, or industrial disability, as a result of the September 12, 2016 work injuries. The parties agreed that claimant was

entitled to 50 weeks of permanent partial disability benefits. All parties waived a hearing on the claim as part of the settlement agreement. (Defendant's Ex. A, pp. 2-3)

Attached to the agreement for settlement was the July 3, 2019 independent medical evaluation (IME) report prepared by claimant's expert, Karen Kienker, M.D. (Defendant's Ex. A, pp. 7-12) In her IME report, Dr. Kienker recommended claimant rarely work above shoulder level or with his head tilted backwards. She also recommended that claimant rarely perform repeated shoulder movements or lift more than 30 pounds occasionally. Dr. Kienker also recommended claimant rarely bend or twist and suggested her restrictions would be permanent in nature. (Claimant's Ex. 4, p. 17; Defendant's Ex. A, p. 11)

At the time the agreement for settlement was approved, claimant testified that he believed he would continue to work for the City of Des Moines into the foreseeable future. (Tr., p. 44) However, the City of Des Moines noted the permanent restrictions identified by Dr. Kienker and scheduled a meeting with claimant, which occurred on August 12, 2019, six days after the agreement for settlement was approved. (Tr., pp. 51, 131-132; Claimant's Ex. 7) At that meeting, the City expressed concerns about claimant's permanent restrictions. (Tr., pp. 132-133) Claimant testified that he was not aware of the restrictions offered by Dr. Kienker when he entered that meeting. (Tr., p. 52)

However, the City of Des Moines noted its concerns about whether claimant could safely perform his job duties and remain within the restrictions imposed by Dr. Kienker. According to claimant, the City expressed a desire that claimant continue to work and encouraged him to remain productive. Claimant left the meeting understanding that he would discuss his restrictions and job duties with Jimmie Bennett, the City of Des Moines' Facilities Maintenance Supervisor. (Tr., p. 119) Claimant testified there was no discussion at the August 12, 2019 meeting about the ADA work he was performing being completed, lack of funding, or a potential that claimant would lose his job. (Tr., pp. 55-56)

Although Mr. Bennett disputed the claim, claimant testified that there was never a follow-up on his restrictions or the ability to perform his job duties with Dr. Kienker's restrictions. Instead, on October 23, 2019, claimant was summoned to another meeting at which he received a letter of termination from the City of Des Moines. The termination letter indicates that claimant was terminated because the ADA work he was hired to perform was completed and his position was no longer needed. (Defendant's Ex. H)

Mr. Holzhauser speculates and believes that his termination by the City of Des Moines was actually because of his work injury and his permanent restrictions. (Tr., p. 62) He points to the fact that another employee of the City was also injured in the motor vehicle accident on September 12, 2016 and was also terminated in October 2019. (Tr., p. 63) Mr. Holzhauser asserts that he and others were reassured of their job security and told they had no need to apply for other civil service-covered positions with the City of Des Moines. (Tr., pp. 64, 98, 112-113) Moreover, claimant believes that

additional ADA work was performed by the City of Des Moines after his termination, suggesting that the alleged basis for his termination was a pretext to terminate claimant for a reason other than his work injury. (Tr., pp. 57, 64, 99)

After his termination, Mr. Holzhauser filed an appeal of his termination with the Des Moines Civil Service Commission. A formal hearing was held before the Civil Service Commission in December 2019 and a copy of that lengthy transcript is included within the evidentiary record at Defendant's Exhibit K. Ultimately, claimant lost his appeal before the Des Moines Civil Service Commission. It was determined that claimant's position was a temporary position, though it lasted approximately 8 years, and that claimant never obtained civil service protections in his position with the City of Des Moines. (Defendant's Ex. K, p. 156)

The crux of claimant's argument before the Des Moines Civil Service Commission was that he should be protected as a civil servant and be permitted to "bump" other employees within the City of Des Moines to retain his employment. (Tr., pp. 79-82) In making this argument before the Des Moines Civil Service Commission, claimant did not assert that his termination was the result of his filing a workers' compensation claim or that he was terminated because of permanent work restrictions imposed by Dr. Kienker. (Tr., p. 82)

Interestingly, at the review-reopening hearing before the undersigned, claimant admitted that he would not have the right to "bump" another employee if he was laid off or terminated due to work restrictions. (Tr., p. 82) In other words, implicit in his argument before the Civil Service Commission was the assumption that claimant was terminated for reasons other than his permanent work restrictions. Having lost that appeal, claimant then changed his argument before this agency to urge that his termination was actually the result of his permanent work restrictions resulting from his work injury.

The City of Des Moines has consistently urged before both the Civil Service Commission and this agency that claimant's termination was the result of the completion of the ADA work required under the settlement agreement with the United States Department of Justice. (Tr, pp. 122-125, 145) The timing of the personnel action against Mr. Holzhauser is suspicious and potentially troubling. Yet, the City of Des Moines gave claimant written notice several times that his position was temporary in nature and that his employment would come to an end at some point once the ADA work was completed. (Defendant's Ex. G)

While I view the City's actions somewhat suspiciously, I view claimant's changing positions to fit whatever forum he is in with much more suspicion. I find that claimant did not believe he was fired for his work restrictions when he brought and argued his Civil Service Commission appeal. Only after he lost that appeal did claimant pursue a review-reopening claim, arguing that he was terminated as a result of his work restrictions. I find the evidence and testimony of the City's witnesses more credible than that of Mr. Holzhauser, Theodore Crum, or Santino Valadez. Ultimately, I find claimant failed to prove that his termination was the result of his work injury or work

restrictions. Accordingly, I find that claimant failed to prove a substantial change in condition that is related to his work injury of September 12, 2016. This finding of fact renders all other findings unnecessary.

CONCLUSIONS OF LAW

Claimant's petition seeks review-reopening of the underlying agreement for settlement. Therefore, the initial dispute for resolution is whether claimant has proven a claim for review-reopening. Upon review-reopening, claimant has the burden to prove 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. Bousefield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957).

The claimant need not prove that the current extent of his disability was not contemplated by the prior arbitration or appeal decision. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009). In fact,

> In determining a scheduled or unscheduled award, the commissioner finds the facts as they stand at the time of the hearing and should not speculate about the future course of the claimants' condition. The functional impairment and disability resulting from a scheduled loss is what it is at the time of the award and is not based on any anticipated deterioration of function that might or might not occur in the future. . . . Likewise, in an unscheduled whole-body case, the claimant's loss of earning capacity is determined by the commissioner as of the time of the hearing based on the factors bearing on industrial disability then prevailing—not based on what the claimant's physical condition and economic realities might be at some future time.

Id. (internal citations omitted).

Initially, I must determine whether the termination of employment, if related to the work injury and restrictions, would be sufficient to justify an increase in claimant's permanent disability award in a review-reopening proceeding. Certainly, Dr. Kienker's permanent restrictions were contemplated as part of the agreement for settlement. They were attached to that agreement when filed with the agency and clearly considered as part of the parties' negotiations and settlement terms.

The industrial disability award or agreement necessarily contemplated claimant's earning capacity in the general labor market at the time the agreement for settlement was entered and approved. Id. Little time passed between the settlement and claimant's termination, making a substantial change in condition less likely. Claimant certainly did not prove a physical change in condition and now relies on the same

restrictions offered by Dr. Kienker as part of his review-reopening claim. Dr. Kienker's restrictions were considered and made a part of the agreement for settlement shortly before it was approved. Mr. Holzhauser has not sought additional treatment for his injuries since the agreement for settlement was approved. No restrictions changed after the agreement for settlement was approved and there were no other changes in condition, other than claimant losing his employment. (Tr., p. 71)

Therefore, to recover additional permanent partial disability benefits in this review-reopening claim, claimant must prove an economic change in condition that is related to his work injury. Mr. Holzhauser testified that he expected to keep working at his job with the City of Des Moines at the time he entered into the agreement for settlement. (Tr., pp. 44, 112-113) No such promises were made by the City as part of the settlement agreement. However, it is reasonable to expect that continued employment with the employer is one factor that was measured, weighed, and relied upon in entering a settlement agreement. In fact, the inability of an employer (particularly the size of the City of Des Moines) to employ an injured worker after a work injury is a factor that demonstrates a significant industrial disability. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 192 (Iowa 1980). Therefore, I conclude it is possible that a termination shortly after entry of an agreement for settlement may constitute a substantial economic change in condition sufficient to justify a review-reopening and an increase in a permanent disability award.

That conclusion does not end the analysis in this case, however. Claimant must also prove that the economic change in condition (his termination) is related to his work injury. Kohlhaas, 777 N.W.2d at 391. In this case, there is some circumstantial evidence that could lead to a finding that the City of Des Moines terminated claimant as a result of his permanent work restrictions. Certainly, the fact that the City took its employment action very shortly after approval of claimant's agreement for settlement makes its actions somewhat suspect. If claimant's testimony is accepted on the issue, not following-up with claimant to discuss restrictions before terminating claimant is suspicious and suspect. Nevertheless, it is claimant's burden to establish that he sustained a substantial change in condition as a result of his work injury.

On this record, the City of Des Moines has maintained a consistent explanation for claimant's termination. The City asserted throughout this case and the prior Civil Service Appeal that Mr. Holzhauser was terminated because the work envisioned by his temporary employment was substantially completed and his position was no longer needed by the City. (Tr., pp. 122-125, 145) Throughout his employment, the City sent claimant correspondence reiterating that his position was temporary in nature and expected to end at some time. (Defendant's Ex. G)

By way of contrast, claimant has taken inconsistent positions in the Civil Service Appeal hearing and this hearing. Claimant's initial action was to appeal his termination and seek civil service protections that would allow him to "bump" another employee and maintain his employment with the City of Des Moines. However, in taking this action, claimant knew that he could not exercise "bumping" rights under civil service if his termination was the result of his inability to perform his job due to work restrictions

caused by a work injury. (Tr., p. 82) Therefore, claimant did not raise or argue this as a basis for his termination at the time of the civil service appeal hearing. (Tr., pp. 79-82) Only after that hearing concluded and he obtained an adverse result did claimant argue that his termination was the result of his work restrictions. In other words, claimant has taken inconsistent position in these two hearings, seeking any possible personal or financial advantage in each hearing without regard to the arguments made in the other proceeding.

Claimant's assertion in this proceeding carries much less weight given his prior testimony and assertions in the Civil Service Appeal. Ultimately, I found that claimant failed to prove his termination was the result of the imposition of permanent work restrictions by Dr. Kienker. Therefore, I conclude claimant failed to prove a substantial change in condition related to the work injury that would support an increase in his permanent disability award.

I acknowledge this is a harsh result for Mr. Holzhauser. He entered into an agreement for settlement for a very reasonable sum given his age and restrictions, among other industrial disability factors that would be considered. He then lost his employment with the City of Des Moines shortly thereafter and will suffer significant economic loss as a result. Nevertheless, my analysis leads me to the conclusion that claimant has not proven a substantial change in condition related to his work injury that justifies an increase in his permanent disability award.

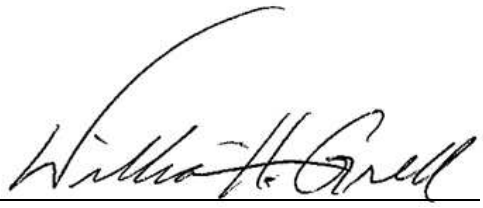
ORDER

THEREFORE, IT IS ORDERED:

Claimant takes nothing further.

All parties shall pay their own costs.

Signed and filed this ___16th___ day of September, 2022.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Thomas Spellman (via WCES)

Elizabeth Pudenz (via WCES)

Luke DeSmet (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.