

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JAMES McCARTHY	:	File No. 5029888.01
	:	
Claimant,	:	A P P E A L
	:	
vs.	:	D E C I S I O N
	:	
JELD-WEN HOLDING, INC.,	:	
	:	
Employer,	:	
Self-Insured,	:	
Defendant.	:	Head Notes: 1402.40; 1804; 2905; 4100;

Defendant Jeld-Wen Holding, Inc., self-insured employer, appeals from a review-reopening decision filed on October 18, 2022. Claimant James McCarthy responds to the appeal. The case was heard on July 25, 2022, and it was considered fully submitted in front of the deputy workers' compensation commissioner on August 29, 2022.

In the review-reopening decision, the deputy commissioner found claimant met his burden of proof to establish he sustained a change of economic condition after the original 2011 arbitration hearing. The deputy commissioner found claimant proved he is permanently and totally disabled under the common law odd-lot doctrine and awarded claimant permanent total disability benefits commencing on June 15, 2020. The deputy commissioner found that pursuant to rule 876 IAC 4.33, claimant is entitled to reimbursement from defendant in the amount of \$100.00 for the filing fee and \$350.00 for the functional capacity examination (FCE) report.

On appeal, defendant asserts the deputy commissioner erred in finding claimant proved he sustained a change of condition after the original arbitration hearing resulting in a reduction of earning capacity. Defendant asserts the deputy commissioner erred in finding claimant proved he is permanently and totally disabled under the common law odd-lot doctrine. Defendant asserts the deputy commissioner erred in finding claimant is entitled to reimbursement from defendants for claimant's costs.

Claimant asserts on appeal that the review-reopening decision should be affirmed in its entirety.

Those portions of the proposed review-reopening decision pertaining to issues not raised on appeal are adopted as part of this appeal decision.

Some of the findings by the deputy commissioner in the arbitration decision were based on the deputy commissioner's findings regarding claimant's credibility. The deputy commissioner found claimant was a credible witness. I find the deputy commissioner correctly assessed claimant's credibility. While I performed a de novo review on appeal, I give considerable deference to the findings of fact which are impacted by the credibility findings, expressly or impliedly made, regarding claimant by the deputy commissioner who presided at the arbitration hearing. I find nothing in the record in this matter which would cause me to reverse the deputy commissioner's findings regarding claimant's credibility.

I have performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 17A.5 and 86.24, the review-reopening decision filed on August 18, 2022, is affirmed as modified with the following additional and substituted analysis.

Without further analysis, I affirm the deputy commissioner's finding that claimant proved he is permanently and totally disabled under the common law odd-lot doctrine, and I affirm the award of permanent total disability benefits commencing on June 15, 2020. I affirm the deputy commissioner's finding that pursuant to rule 876 IAC 4.33, claimant is entitled to reimbursement from defendant in the amount of \$100.00 for the filing fee and \$350.00 for the FCE report.

With the following additional and substituted analysis, I affirm the deputy commissioner's finding that claimant sustained a change of condition after the original arbitration hearing. On de novo review, I find claimant has not established a change of economic condition, but rather, I find claimant has established a change of physical condition.

Iowa Code section 86.14 governs review-reopening proceedings. When considering a review-reopening petition, the inquiry "shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded." Iowa Code § 86.14(2). The deputy workers' compensation commissioner does not re-determine the condition of the employee adjudicated by the former award. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 391 (Iowa 2009). The deputy workers' compensation commissioner must determine "the condition of the employee, which is found to exist subsequent to the date of the award being reviewed." Id. (quoting Stice v. Consol. Ind. Coal Co., 228 Iowa 1031, 1038, 291 N.W. 452, 456 (1940)). In a review-reopening proceeding, the deputy workers' compensation commissioner should not reevaluate the claimant's level of physical impairment or earning capacity "if all of the facts and circumstances were known or knowable at the time of the original action." Id. at 393.

The claimant bears the burden of proving, by a preponderance of the evidence that, "subsequent to the date of the award under review, he or she has suffered an *impairment or lessening of earning capacity proximately caused by the original injury.*" Simonson v. Snap-On Tools Corp., 588 N.W.2d 430, 434 (Iowa 1999) (emphasis in original).

The deputy commissioner found claimant established a worsening of his earning capacity after the time of the original arbitration hearing because claimant's treating pulmonologist found claimant's pulmonary condition had worsened and the FCE revealed claimant failed to meet the capacities of the sedentary category of physical demand. I agree with the deputy commissioner that claimant proved he sustained a change of condition after the original arbitration hearing in 2011, but I disagree claimant has proven a change of economic condition.

At the time of the original arbitration hearing claimant was not working. At the time of the review-reopening hearing, claimant was not working and had not looked for work. I find claimant did not prove he sustained a change of economic condition. I do find claimant proved he sustained a change of physical condition.

At the time of the original arbitration hearing, Patrick Hartley, M.D., a pulmonologist at the University of Iowa Hospitals and Clinics, opined claimant sustained 18 percent permanent partial impairment as a result of claimant's stipulated work-related respiratory condition. (Exhibit A, p. 3) Dr. Harley recommended claimant avoid exposures to irritating chemicals and imposed restrictions of lifting up to 40 pounds occasionally and up to 20 pounds frequently. (Ex. A, p. 3)

On June 9, 2020, Braden Powers, M.D., claimant's treating pulmonologist, responded to a check-the-box letter, agreeing that claimant's pulmonary condition is the result of his exposure to isocyanates while he was employed by defendant, and Dr. Powers agreed claimant's pulmonary condition had worsened after September 2011. (Joint Exhibit 1, p. 43) While Dr. Hartley opined claimant's condition may be multifactorial in etiology, using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides") Dr. Hartley found claimant's pulmonary function had decreased, and Dr. Hartley assigned claimant 25 percent permanent impairment, an increase of permanent impairment after 2011. Dr. Hartley did not assign claimant any additional restrictions.

I find Dr. Powers' opinion on causation most persuasive considering all the evidence, including claimant's testimony and the medical record, and I find Dr. Hartley's impairment rating persuasive. Based on the evidence, I find claimant has established a change of physical condition after the original arbitration hearing.

ORDER

IT IS THEREFORE ORDERED that the review-reopening decision filed on October 18, 2022, is affirmed as modified with my additional and substituted analysis.

Defendant shall pay claimant permanent total disability benefits at the stipulated weekly rate of three hundred seventy-five and 78/100 dollars (\$375.78), commencing on June 15, 2020, and continuing into the future during the period of claimant's total disability.


Defendant shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

Defendant shall receive credit for 400 weeks of permanent partial disability benefits paid at the weekly rate of three hundred seventy-five and 78/100 dollars (\$375.78).

Pursuant to rule 876 IAC 4.33, defendant shall reimburse claimant one hundred and 00/100 dollars (\$100.00) for the filing fee and three hundred fifty and 00/100 dollars (\$350.00) for the FCE report, and defendant shall pay the costs of the appeal, including the cost of the hearing transcript.

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

Signed and filed on this 22nd day of February, 2023.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Gary Nelson (via WCES)

Joe Quinn (via WCES)

Stephanie Techau (via WCES)