BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SUSAN ARTHUR, Claimant, vs. SUTHERLAND PRINTING, a/k/a NATIONAL ARGOSY SOLUTIONS, Employer, and TWIN CITY FIRE INSURANCE COMPANY, Insurance Carrier, and SECOND INJURY FUND OF IOWA, Defendants.	File No. 5051508 REVIEW-REOPENING DECISION Head Note No.: 2905

STATEMENT OF THE CASE

Claimant, Susan Arthur, filed a petition in review-reopening, seeking workers' compensation benefits from Sutherland Printing, a/k/a National Argosy Solutions (Sutherland), employer, Twin City Fire Insurance Company, insurer, and the Second Injury Fund of Iowa (Fund), all as defendants. This case was heard in Des Moines, Iowa on March 14, 2019 with a final submission date of April 4, 2019.

The record in this case consists of Joint Exhibits 1-3, Claimant's Exhibits 1-4, Defendants Sutherland and Twin City's Exhibits A through E, the Fund's Exhibits AA-DD, and the testimony of claimant.

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

ISSUE

Whether claimant sustained a change in condition that would entitle her to additional permanent partial disability benefits.

FINDINGS OF FACT

Claimant was 58 years old at the time of hearing. She graduated from high school. Claimant took some college courses, but she does not have a college degree. Claimant worked for 30 years at Sutherland Printing. At Sutherland, claimant worked various printing machines. Claimant worked 40-60 hours per week for Sutherland and earned $18.25 an hour at the highest rate of pay. (Arbitration Decision, page 2)

Claimant underwent carpal tunnel releases on her right and left upper extremities in 2012 and 2013. Surgery was performed by Melissa Young-Szalay, M.D. (Arb. Dec., p. 3)

Claimant had a 2006 injury to her right knee. Claimant underwent an independent medical evaluation (IME) with Irving Wolfe, D.O. in 2014. Dr. Wolfe found claimant had a three percent permanent impairment to the body as a whole for her right knee injury. The arbitration decision in this case found claimant had a five percent permanent impairment to the right lower extremity, based on Dr. Wolfe's opinion. (Joint Exhibit 2, p. 30; Arb. Dec, p. 6)

Dr. Wolfe also found claimant had a 20 percent permanent impairment to the body as a whole for her bilateral carpal tunnel surgeries. The arbitration decision adopted Dr. Wolfe's findings and found claimant had a 20 percent permanent impairment to both upper extremities as a result of her carpal tunnel syndrome. (Jt. Ex. 2, pp. 29-30; Arb. Dec, p. 5)

Dr. Wolfe gave claimant some permanent restrictions. Dr. Wolfe's report was accepted as the most convincing assessment of claimant's functional disability. While his report was accepted as the basis of the findings for permanent impairment, his permanent restrictions are not specifically adopted in the arbitration decision.

Claimant retained Phil Davis, M.S., for a vocational report for the arbitration hearing. Mr. Davis opined claimant had a 100 percent loss of access to the labor market as a result of a work injury. (Arb. Dec., p. 4) Michelle Holtz, B.A., was retained by defendant-employer. Ms. Holtz opined there were employment opportunities for claimant within her labor market. (Arb. Dec., p. 4) The arbitration decision found claimant had a 40 percent industrial disability, or loss of earning capacity. This finding entitled claimant to 100 weeks of permanent partial disability benefits from defendant-employer and insurer, and 89 weeks of permanent partial disability benefits from defendant Fund. (Arb. Dec. p. 8)

In a January 12, 2018 letter, claimant was notified by the Social Security Administration she qualified for Social Security Disability benefits. Claimant was found

to be under a disability, as defined by the Social Security Act, since March 5, 2012. Claimant was found disabled, under the Social Security Act, due to a degenerative disc disease in the lumbar spine and her carpal tunnel syndrome in both upper extremities. (Claimant's Ex. 4; Defendants' Ex. D, p. 6)

In a February 14, 2019 report Sunil Bansal, M.D., gave his opinions of claimant's condition following an IME. Dr. Bansal found claimant had a 24 percent permanent impairment to the right upper extremity, converting to a 14 percent permanent impairment to the body as a whole. He found claimant had a 16 percent permanent impairment to the left upper extremity, converting to a 10 percent permanent impairment to the body as a whole. The combined values for both upper extremities, according to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition resulted in a 23 percent permanent impairment to the body as a whole. (Cl. Ex. 3, pp. 45-46)

Dr. Bansal found claimant had a five percent permanent impairment to the right lower extremity. (Cl. Ex. 3, p. 46) He restricted claimant from lifting no more than five pounds occasionally and no frequent gripping, grasping, or pinching with either hand. He also restricted claimant to no kneeling, squatting, or twisting with the right knee. (Cl. Ex. 3, p. 46)

Claimant testified her knee is painful. She says weather and walking aggravate pain in her right knee. (Transcript p. 38)

Claimant testified in deposition she has sharp pain in her hands and wrists every day. She said in deposition she has shooting pains down her hands to her wrists that were new since 2016. (Ex. BB, pp. 9-11)

Claimant testified she no longer vacuums due to pain in her upper extremities. She said she uses pump bottles, as it hurts her hands to squeeze bottles. Claimant says she no longer uses a hair dryer, as it hurts her hands. (Tr. pp. 24-26) Claimant testified in deposition she tries to wear clothes that do not have buttons or zippers, as using buttons or zippers causes her hand pain. (Ex. BB, p. 15)

Claimant testified she has not actively treated for upper extremity conditions since her arbitration hearing, but she has gone to a physician for refills of medication. (Tr. p. 28)

CONCLUSIONS OF LAW

The first issue to be determined is whether claimant has a change in condition that would entitle her to additional permanent partial disability benefits under a review-reopening proceeding.

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).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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).

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 proceeding 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).

The only new medical evidence in the record regarding an alleged change in condition is Dr. Bansal's February 15, 2019 IME report. Dr. Bansal found claimant had a five percent permanent impairment to the lower extremity. (Jt. Ex. 3, p. 15) This was the same permanent impairment that was used in the arbitration decision. (Arb. Dec. p. 6)

In his October 13, 2014 report, Dr. Wolfe found claimant had a 13 percent permanent impairment to the body as a whole regarding the right upper extremity. He also found claimant had a 9 percent permanent impairment to the body as a whole regarding the left upper extremity. (Jt. Ex. 2, pp. 27-28) Using the conversion tables found in the Guides, at page 439, Table 16-3, Dr. Wolfe found claimant had a 21 percent permanent impairment to the right upper extremity and a 15 percent permanent impairment to the left upper extremity.

Dr. Bansal found claimant had a 24 percent permanent impairment to the right upper extremity and a 16 percent permanent impairment to the left upper extremity. (Ex. 3, pp. 45-46)

Dr. Bansal also found claimant had permanent restrictions of no lifting more than five pounds, no frequent gripping, grasping, or pinching with either hand. He also limited claimant to no kneeling or squatting with the knee. (Cl. Ex. 3, p. 46)

Dr. Bansal's opinions regarding permanent impairment and permanent restrictions are problematic for several reasons.

Dr. Bansal gave new permanent restrictions for claimant as detailed above. Dr. Wolfe found claimant had permanent restrictions and found claimant could work in a light to medium work category. Dr. Wolfe's recommendations regarding permanent restrictions were based upon a functional capacity evaluation (FCE) performed on claimant in March of 2013. (Jt. Ex. 2, p. 29)

Dr. Bansal's restrictions are far more rigorous than those imposed by Dr. Wolfe. Dr. Wolfe's permanent restrictions were based on an FCE. Dr. Bansal did not rely on an FCE for her permanent restrictions. It is unclear, from his report, how Dr. Bansal set his permanent restrictions. There is no explanation in Dr. Bansal's records why his new restrictions are dramatically different from those imposed by Dr. Wolfe.

Second, it is unclear why Dr. Bansal's permanent restrictions and permanent impairments, are dramatically different from those given by Dr. Wolfe and Dr. Young-

Szalay. Dr. Bansal offers no rationale or discussion as to why claimant has increased permanent restrictions and permanent impairment since the February 15, 2016 arbitration hearing. Claimant has not worked since the arbitration hearing. Based on claimant's testimony at the arbitration hearing, depositions since the arbitration hearing, and testimony at the review-reopening hearing, claimant does little in the way of housekeeping or other activities that require the use of both hands. Claimant does not work. Claimant limits the use of both upper extremities. It is unexplained in Dr. Bansal's report how or why claimant's physical condition has deteriorated since the February of 2016 hearing, if claimant limits the use of her upper extremities. Given this lack of explanation or analysis for claimant's alleged deterioration in her physical condition, and for the other reasons detailed above, Dr. Bansal's opinions regarding permanent impairment and permanent restrictions are found not convincing.

Regarding her right knee injury, claimant testified, in 2015, her right knee was painful during changes in weather. (Ex. AA, p. 7) At the review-reopening hearing, claimant testified her right knee is painful depending on the weather and her level of activity. (Tr. p. 38)

Regarding her upper extremities, claimant told Dr. Wolfe in 2013, she had constant pain in both hands. (Jt. Ex. 2, p. 9) In 2015 claimant testified she had shooting pains from her hands to her wrists. (Ex. AA, p. 3) In 2018 claimant testified she had shooting pains from her hands to her wrists. (Ex. BB, p. 10-11)

At the arbitration hearing, claimant testified she was limited in many activities for fear of dropping things. (Ex. E, p. 10) At the review-reopening hearing, claimant also testified she limited her activity for fear of dropping things. (Tr. pp. 24-25, 31-32)

At the arbitration hearing claimant testified her husband cooked and prepared meals. (Ex. E, p. 10) At the review-reopening hearing, claimant testified she no longer cooked. (Tr. p. 24; Ex. BB, p. 17)

At the arbitration hearing, claimant testified her husband did most of the vacuuming at home. (Ex. E, p. 10) In the review-reopening hearing, claimant said she no longer vacuumed. (Tr. pp. 26-27)

At the arbitration hearing, claimant testified she had pain in her hands with squeezing bottles. (Ex. E, p. 19) At the review-reopening hearing, claimant testified she now uses pumps for shampoos due to pain with squeezing bottles. (Tr. pp. 25-26)

At the arbitration hearing, claimant testified she had difficulty drying her hair and had difficulty with holding a hair dryer. (Ex. E, p. 9) At the review-reopening hearing, claimant testified she no longer used a hair dryer. (Tr. pp. 24-26)

At the arbitration hearing, claimant testified she wore clothes without buttons or zippers, due to problems with her hands. (Ex. E, pp. 10, 22) In 2018, claimant testified

she only wore clothes she could slip on, as zippers and buttons caused her hand pain. (Ex. BB, p. 15)

Claimant testified she had only returned to a doctor regarding her upper extremities for medication refills. She said she had not undergone any medical evaluations for her upper extremities except for her IME with Dr. Bansal since the time of the arbitration hearing. (Tr. p. 28)

The opinions of Dr. Bansal regarding claimant's increased permanent impairment and permanent restrictions are found not convincing. Claimant's testimony at the arbitration hearing, in deposition in 2018, and the review-reopening hearing, suggests claimant's functional limitations are essentially unchanged. Given this record, claimant has failed to carry her burden of proof she sustained a change in her physical condition since the time of hearing.

Regarding her economic condition, at the time of the arbitration hearing, claimant was unemployed and not looking for work. (Arb. Dec. p. 7; Ex. E, p. 22; Deposition p. 21) At the time of her review-reopening hearing, claimant was still unemployed and not looking for work. (Ex. BB, p. 10; Tr. p. 29) At the time of the arbitration hearing, claimant was receiving long-term disability benefits. At the time of the review-reopening hearing, claimant was receiving Social Security Disability benefits. (Cl. Ex. 4, p. 17)

It is true claimant was found entitled to Social Security Disability benefits after the February of 2016 arbitration hearing. However, the decision specifically relates claimant's date of disability back to March 5, 2012. As claimant's date of disability relates back to a date before the arbitration hearing, the finding that claimant qualifies for Social Security Disability benefits cannot be said to be a change of condition occurring after the arbitration award.

Given this record, claimant has failed to prove a change in physical or economic condition related to her original injury since the arbitration award was made.

I recognize claimant has a painful condition in her wrists and both of her hands that limit her in a number of activities. However, the only change that has occurred since claimant's arbitration hearing, is that she underwent an IME with Dr. Bansal. Dr. Bansal's opinions regarding permanent impairment and permanent restrictions are found not convincing, as detailed above. Even if Dr. Bansal's opinions were accepted, there is no evidence claimant has suffered an increase in loss of earning capacity proximally caused by the original injury, that has occurred since February 25, 2016.

For these reasons, and the others detailed above, it is found claimant has failed to carry her burden of proof she sustained a change in condition that would entitle her to additional benefits under a review-reopening proceeding. As a result, claimant is not entitled to additional permanent partial disability benefits from either the employer or the Fund in this case.

ORDER

Therefore, it is ordered:

That claimant shall take nothing from these proceedings.

That all parties shall pay their own costs.

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

Signed and filed this 24th day of April, 2019.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JFC/sam

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.