Section F

Review Reopening: Considerations In Light Of The 2017 Law Changes

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Review Reopening: Considerations Under the 2017 Legislative Changes

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We have often said the workmen's compensation law should be **liberally construed** in aid of accomplishing the object and purpose of the legislation. It is 'primarily **for the benefit of such worker and his dependents**.' Jacques v. Farmers Lumber and Supply Co., 242 Iowa 548, 551, 47 N.W. 2d 236, 238 (1951)(citing Pierce v. Bekins Van & Storage Co., 185 Iowa 1346, 172 N.W. 191 (1919); Secrest v. Galloway Co., 239 Iowa 168, 30 N.W.2d 793 (1948)).

The Traditional Statutory Framework

Iowa Code §85.26(2): "An award for payments or an agreement for settlement provided by section 86.13 for benefits under this chapter or chapter 85A or 85B, where the amount has not been commuted, may be reviewed upon commencement of review reopening proceedings by the employer or the employee within three years from the date of the last payment of weekly benefits made under the award or agreement."

Iowa Code §86.14(2): "In a proceeding to reopen an award for payments or agreement for settlement as provided by section 86.13, inquiry shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded or agreed upon."

> NOTE: There is no statutory requirement that either party demonstrate a change in condition or circumstances in order to alter the award or agreement.

The Common Law on Traditional Review Reopening

Section 1457 contains no provision for a re-examination of matters adjudicated by an award which is subject to review under it. It merely provides that "if on such review the commissioner finds the condition of the employee warrants such action, he may end, diminish, or increase the compensation so awarded or agreed upon." It seems to us that this language is subject to but one interpretation, namely, that the decision on review depends upon the condition of the employee, which is found to exist subsequent to the date of the award being reviewed. We can find no basis for interpreting this language as meaning that the commissioner is to re-determine the condition of the employee which was adjudicated by the former award. Stice v. Consolidated Indiana Coal Co., 228 Iowa 1031, 1038, 291 N.W. 452, 456 (1940).

It follows from what we have said that where compensation is paid for a temporary disability from an injury and it later develops that permanent partial disability results from the injury an additional award may be made under section 86.34. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 906, 76 N.W.2d 756, 759 (1956).

It further seems well settled in other jurisdictions that increased incapacity of the employee, due to the original injury, subsequent to the making of the first award entitles the employee to additional compensation under such statutes as 86.34. Bousfield v. Sisters of Mercy, 249 Iowa 64, 69, 86 N.W.2d 109, 113 (1957).

Review-reopening may be maintained when critical facts existed but were unknown and could not have been discovered by the exercise of reasonable diligence at the time of the prior settlement or award. Gosek v. Garmer & Stiles Co., 158 N.W.2d 731, 735 (Iowa 1968).

A compensable diminution of earning capacity in an industrial disability claim may occur without a deterioration of the claimant's physical capacity. Blacksmith v. All American, Inc., 290 N.W.2d 348, 354 (Iowa 1980)(Job transfer to lower paying position proximately caused by the original injury can be used to justify increase of award on review-reopening.)

A scheduled member injury that later leads to the development of an unscheduled injury justifies a review reopening. Mortimer v. Fruehauf Corp., 502 N.W.2d 12 (Iowa 1993).

To justify an increase in compensation benefits, 'the claimant carries the burden of establishing 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)(citing E.N.T. Associates v. Collentine, 525 N.W.2d 827, 829 (Iowa 1994))(emphasis in original).

Kohlhaas asserts the district court erred by declaring as a matter of law that review-reopening relief cannot be granted unless the employee has demonstrated a change in his condition *not anticipated* at the time of the original settlement. He contends the rule from Acuity that the change in condition "must not have been within the contemplation of the decision maker at the time of the original award" is obiter dictum and, therefore, not binding precedent. Id. We agree. The language in Acuity is ambiguous, and seems to condone an agency's consideration of, or speculation about, future changes in condition or earning capacity at the time of the initial award. What we attempted to say in Acuity is that a condition that has already been determined by an award or settlement should not be the subject of a review-reopening petition. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 391 (Iowa 2009).

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 claimant's 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. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009).

The workers' compensation statutory scheme contemplates that future developments (post-award and post-settlement developments), including the worsening of a physical condition or a reduction in earning capacity, should be addressed in review-reopening proceedings. See, Iowa Code §86.12(2). The review-reopening claimant need not prove, as an element of his claim, that the current extent of disability was not contemplated by the commissioner (in the arbitration award) or the parties (in their agreement for settlement). Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009).

Although we do not require the claimant to demonstrate the current condition was not contemplated at the time of the original settlement, we emphasize the principles of res judicata still apply--that the agency, in a review-reopening petition, should not reevaluate an employee'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. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 393 (Iowa 2009).

2017 Statutory Change (addition) to Review Reopening

Iowa Code §85.34(2)(u): "If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages or earnings than the employee received at the time of the injury , the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity. **Notwithstanding section 85.26, subsection 2**, if an employee who is eligible for compensation under this paragraph returns to work with the same employer and is compensated based only upon the employee's functional impairment resulting from the injury as provided in this paragraph and is **terminated from employment by that employer, the award or agreement for settlement for benefits under this chapter shall be reviewed upon commencement of reopening proceedings** by the employee for a determination of any reduction in the employee's earning capacity caused by the employee's permanent partial disability."

> NOTE: Nothing that was done in 2017 impacted the traditional review-reopening analysis. It simply added an additional avenue for pursuing a review-reopening. And this avenue does not have any time limit.

Other Applicable Statutory Changes in 2017

Iowa Code §85.34(2)(u): A determination of the reduction in the employee's earning capacity caused by the disability shall take into account the permanent partial disability of the employee **and the number of years in the future it was reasonably anticipated the employee would work** at the time of the injury.

> QUERY: Since age is one of the primary industrial disability factors, and the number of years the person was going to work into the future is now a necessary part of the industrial disability analysis, does this mean that every additional year a person ages can be used to justify a review reopening proceeding.

Iowa Code §85.34(2): Compensation for permanent partial disability shall begin when it is medically indicated that maximum medical improvement from the injury has been reached and the extent of loss or percentage of permanent impairment can be determined by used of the guides to the evaluation of permanent impairment, published by the American Medial Association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A.

> QUERY: As this establishes the point at which a person becomes entitled to benefits "under this paragraph" as contemplated in §85.34(2)(u), doesn't this also establish the point at which it is determined whether the injured worker has "return[ed] to work or is offered work for which the employee receive the same or greater salary, wages, or earnings than the employee received at the time of the injury."

The Common Law on the New Statute

FACT: This remains to be decided by those in this room.

First, the principal purpose of the workers' compensation statute is to benefit the worker. To that end, we liberally construe the workers' compensation statute in favor of the worker. Denison Mun. Utils. v. Iowa Workers' Comp. Comm., 857 N.W.2d 230, 234-235 (Iowa 2014)(citing Grundmeyer v. Weyerhauser Co., 649 N.W.2d 744, 750 (Iowa 2002); IBP, Inc. v. Harker, 633 N.W. 2d 322, 325 (Iowa 2001)).

We begin our analysis with the recognition that our workers' compensation law is for the benefit of working men and women, "and should be, within reason, liberally construed." Its beneficent purpose should not be defeated by reading something into a section which is not there, or by a narrow or strained construction." Univ. of Iowa Hosp. & Clinics v. Waters, 674 N.W.2d 92, 96 (Iowa 2004)(citing Barton v. Nevada Poultry Co., 253 Iowa 285, 289, 110 N.W. 660, 662 (1961); Orr v. Lewis Cent. Sch. Dist., 298 N.W. 256, 261 (Iowa 1961); Disbrow v. Deering Implement Co., 233 Iowa 380, 392, 9 N.W.2d 378, 384 (1943).

In keeping with the humanitarian objectives of the worker's compensation statute, we apply it broadly and liberally. The legislation is primarily for the benefit of the worker and the worker's dependents. Its beneficial purpose is not to be defeated by reading something into it which is not there, or by a strained and narrow construction. Thomas v. William Knudson & Son, Inc., 349 N.W.2d 124, 126 (Iowa App. 1984).