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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-470 / 89-176

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LOUELLA BROWN,

Appellant,

vs.

JOHN DEERE WATERLOO TRACTOR WORKS,

Appellee.

Appeal from the Iowa District Court for Black Hawk County, Dennis D. Damsgaard, Judge.

Petitioner filed this review reopening action stating that because of a change in condition she was entitled to additional workers' compensation benefits. **AFFIRMED.**

Gary Papenheim, Parkersburg, for petitioner-appellant.

John W. Rathert of Beecher, Beecher, Holmes & Rathert, Waterloo, for respondent-appellee.

Considered by Oxberger, C.J., and Donielson and Hayden, JJ.

HAYDEN, J. 35

Petitioner filed this review reopening action asking for additional workers' compensation benefits because of a change in her condition. The industrial commissioner denied her further permanent partial disability benefits, while awarding her an additional three weeks of temporary total disability benefits. On judicial review the district court affirmed the industrial commissioner's decision. Petitioner now appeals. We affirm.

Petitioner Louella Brown is an employee of respondent John Deere Waterloo Tractor Works. She has been involved in two industrial accidents while working for John Deere. On January 11, 1978, she injured her back after attempting to lift a ladder off a wall. The ladder became top heavy, twisting Brown to the right. She suffered immediate pain in her lower back. On February 6, 1980, Brown was injured while seated at her machine when a trucker knocked over a basket of cooper tubing which then struck Brown on her head, neck, back, arm and hand.

Brown and John Deere entered into a settlement on both injuries on January 8, 1981. According to the agreement, which was based on her condition as of October 14, 1980, Brown was entitled to compensation for a fifteen percent permanent industrial disability to her body as a whole from the January injury and a five percent permanent industrial disability to her body as a whole for the February injury.

In December 1981, an orthopedic specialist determined she was unable to return to work because of pain. Although the doctor suspected Brown had a nerve root lesion which could be treated by a cervical fusion, surgery was not performed until April 1983, at which time this diagnosis was confirmed. Brown never returned to work.

She filed a review reopening requesting additional healing period benefits or permanent total disability benefits. Deputy Mueller, in his June 26, 1984, ruling concluded a change in condition since the January 1981 settlement prevented her from returning to work. She was awarded temporary total disability for the period of December 7, 1981, through June 15, 1983. Neither party appealed this ruling.

In September 1983, Brown submitted to a chemonuclealysis procedure. Although these injections initially provided her some relief, she eventually suffered a severe back spasm from this treatment. She was hospitalized from October 25 through November 10.

Brown filed a final petition for review reopening. Deputy Walleser's decision of November 20, 1985, concluded Brown's physical condition and physical restrictions were substantially the same as on October 14, 1980. She was denied any further benefits. Brown appealed this decision to the industrial commissioner, who awarded her three additional weeks of temporary total disability for the

temporary worsening of her back condition because of the muscle spasm resulting from the chemonuclealysis.

It is this decision which Brown now appeals. She claims Deputy Mueller's June 26, 1984, finding she had undergone a change of condition is res judicata on the issue of change in condition. Brown further argues if the issue is not res judicata, she did experience a change in condition from the original settlement and should be granted benefits from June 15, 1983, to October 12, 1984,as a matter of law.

Our scope of review was well set out in Henry v. Iowa Dep't of Transp., M.V.D., 426 N.W.2d 383, 385 (Iowa 1988):

> In reviewing a district court decision on the validity of an agency action, we decide only whether the district court has correctly applied the law. The district court itself acts in an appellate capacity to correct errors of law on the part of the agency. When we review such action by the district court, we merely apply the standards of section 17A.19(8) to determine whether our conclusions are the same as those of the district court. If the conclusions are the same, we affirm; otherwise we reverse. (Citations omitted.)

The district court correctly rejected Brown's contention Deputy Mueller's decision was res judicata on the issue of change of condition. The sole issue in that review reopening decision was a question of further temporary total disability. The only thing Deputy Mueller adjudicated was that the surgery proved Brown had undergone a change of condition which prevented her from working from December 7, 1981, to June 15, 1983, and therefore, she was

entitled to additional temporary total disability benefits for that period of time. Deputy Mueller's decision is res judicata that her disability ended June 15, 1983.

The issue before Deputy Walleser in the final review reopening was whether Brown was entitled to benefits because of a permanent change of condition. The Deputy denied further benefits based on the finding Brown's physical condition and restrictions were substantially those of October 14, 1980, the determinative date of the agreement. In Brown's appeal of the Walleser decision, the industrial commissioner ruled Mueller's decision on change of condition was not res judicata in the instant case because the instant case dealt with the issue of permanent total disability. The district court concurred with the industrial commissioner. We affirm.

Brown asks this court to find she has experienced a change of condition since the time of the original settlement and is entitled to additional benefits. We do not agree.

In a review reopening proceeding the claimant must prove a change in condition since the earlier award in order to be entitled to additional compensation. Stice v. Consolidated Ind. Coal Co., 228 Iowa 1031, 1041, 291 N.W. 452, 457 (1940). There must be more than a mere scintilla of evidence of increased disability, a difference of opinion of experts as to the percentage of disability

arising from the original injury would not justify a finding of change of condition. Bousfield v. Sisters of Mercy, 86 N.W.2d 109, 113 (Iowa 1957). Claimant has the burden of showing by a preponderance of evidence his right to compensation in addition to that awarded by a prior adjudication. Deaver v. Armstrong Rubber Co., 170 N.W.2d 455, 457 (Iowa 1969).

In reviewing the record, and comparing the medical information submitted at the time of the settlement and at the time of the Walleser hearing, we find substantial evidence to support the findings of the industrial commissioner. Brown has not established by a preponderance of evidence a right to additional benefits.

AFFIRMED.

Donielson, J., concurs; Oxberger, C.J., dissents.

OXBERGER, C.J. (dissenting)

I respectfully dissent.