

**IN THE COURT OF APPEALS OF IOWA**

No. 9-1058 / 09-0914  
Filed February 24, 2010

**DAVID HODSON,**  
Petitioner-Appellant,

**vs.**

**WYKOFF INDUSTRIES, Employer**  
**and BITUMINOUS INSURANCE,**  
Respondents-Appellees.

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Appeal from the Iowa District Court for Polk County, Eliza A. Ovrorn,  
Judge.

Workers' compensation claimant appeals a denial of benefits in a review-  
reopening proceeding. **REVERSED AND REMANDED.**

Kyle T. Reilly of Thomas J. Reilly Law Firm, Des Moines, for appellant.

William D. Scherle, Alexander E. Wonio, and Jay D. Grimes of Hansen,  
McClintock & Riley, Des Moines, for appellees.

Considered by Eisenhauer, P.J., and Potterfield, J., and Huitink, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

**EISENHAUER, P.J.**

In October 2003, David Hodson was awarded workers' compensation permanent partial disability benefits. In April 2005, Hodson filed a review-reopening petition seeking additional benefits for his prior injury. In November 2007, the deputy ruled Hodson was entitled to additional healing period benefits, but denied his request for additional permanent disability benefits. The deputy stated Hodson had to prove his condition "worsened or deteriorated in a manner not contemplated at the time of the initial award or settlement" to receive additional permanent benefits. The industrial commissioner summarily adopted the deputy's decision as the final agency action.

The district court upheld the agency decision in May 2009. Citing *Acuity Ins. v. Foreman*, 684 N.W.2d 212, 217 (Iowa 2004), the court ruled Hodson's burden of proof required a showing:

[H]e has suffered an impairment or lessening of earning capacity proximately caused by the original injury. . . . Further, "the circumstances giving rise to a decrease in earning capacity *must not have been within the contemplation* of the decision maker at the time of the original award."

(Emphasis added).

Hodson appealed, and while his case was pending, the Iowa Supreme Court issued an opinion clarifying a claimant's burden of proof in a review-reopening proceeding. See *Kohlhaas v. Hog Slat, Inc.*, \_\_\_ N.W.2d \_\_\_ (Nov. 24, 2009). The *Kohlhaas* court stated *Acuity's* "must not have been within the contemplation" language,

is "obiter dictum," and, therefore, not binding precedent. . . . 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.

In determining [an] 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 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.)

*Id.* at \_\_\_\_.

Accordingly, we reverse and remand Hodson's review-reopening petition to the agency for the commissioner to determine, on the record already made, whether Hodson has met the newly-clarified burden of proof. See *id.* at \_\_\_\_ (stating remand to agency for reconsideration on the record already made is appropriate "[i]n that we have clarified the requirements for a review-reopening petition").

**REVERSED AND REMANDED.**