

IN THE COURT OF APPEALS OF IOWA

No. 9-664 / 09-0428
Filed September 17, 2009

BEN KREMENAK,
Petitioner-Appellant,

vs.

**STEINER CONSTRUCTION and
GRINNELL MUTUAL INSURANCE COMPANY,**
Respondents-Appellees.

Appeal from the Iowa District Court for Linn County, Sean W. McPartland,
Judge.

A workers' compensation claimant appeals from a review-reopening
decision denying additional permanent partial disability benefits. **REVERSED
AND REMANDED.**

Thomas Wertz of Wertz & Dake, P.C., Cedar Rapids, for appellant.

John Bickel of Shuttleworth & Ingersoll, P.C., Cedar Rapids, for appellees.

Considered by Vaitheswaran, P.J., Mansfield, J., and Schechtman, S.J.*

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

MANSFIELD, J.

On August 21, 1996, Kremenak suffered a low back strain while loading sheets of plywood in the course of his employment with Steiner Construction. Following the injury, Kremenak underwent an MRI, which demonstrated degenerative changes at L4-5 and L5-S1, asymmetric disc bulging at L4-5 affecting the L5 nerve root, and a central disc bulge at L5-S1 that was of questionable clinical significance.

As a result of his injuries, Kremenak filed a petition for workers' compensation benefits. This claim resulted in an appeals decision by the Iowa Workers' Compensation Commissioner on October 28, 1999. After determining Kremenak's permanent work restrictions to be no lifting above seventy-five pounds and avoidance of repetitive bending with the back, Kremenak was awarded weekly benefits based on a fifteen-percent industrial disability.

While this decision was on appeal to the supreme court, the parties entered into an "Agreement for Settlement" vacating the appeals decision and awarding Kremenak a loss of earning capacity equal to a permanent partial industrial disability of 22.740184 percent. The settlement agreement was approved by the workers' compensation commissioner on November 28, 2000.

On November 25, 2003, Kremenak filed a petition for review-reopening pursuant to Iowa Code section 86.14 (2003). He claimed that he had sustained a worsening of his back and economic condition and that he was entitled to additional permanent partial disability benefits.

In defense of Kremenak's claim, Steiner Construction argued that Kremenak could not prove by a preponderance of the evidence that subsequent

to the settlement agreement (1) he suffered an impairment or lessening of earning capacity proximately caused by the original injury and (2) any such change was not contemplated by the parties at the time of settlement. See *Acuity Ins. v. Foreman*, 684 N.W.2d 212, 217 (Iowa 2004).

At an evidentiary hearing on June 13, 2006, the parties submitted the medical records and opinions of four doctors as to whether Kremenak suffered a change in condition proximately caused by the 1996 workplace injury. First, Dr. David Durand noted “significant changes” when comparing MRIs taken in 1996 and 2003, but opined, “I do not believe that [Kremenak’s] current pain can be attributed to his previous work injury in the 1990’s. I believe this is a new process.” Second, in response to a letter from Kremenak’s attorney, Dr. Loren Mouw stated, “I believe Mr. Kremenak’s current back pain is simply [a] continuation of his prior discomfort, which started August 21, 1996 and was work related.” Dr. Mouw also answered yes to whether he would consider the 1996 injury a substantial factor with respect to Kremenak’s current complaints and symptoms and that Kremenak’s current complaints and symptoms were consistent with the 1996 injury. Third, in an independent medical evaluation report, Dr. Ray Miller found that “Kremenak’s current complaints and symptoms are believed to be related to the work injury of 08/21/1996” and “a slow progression of changes from the previous injury.” Finally, Dr. Craig Dove opined after neurodiagnostic studies that Kremenak was suffering from meralgia

paresthetica of an unknown etiology, but that is often associated with obesity and tight tool belts.¹

On December 15, 2006, a deputy workers' compensation commissioner filed a review-reopening decision denying Kremenak additional permanent partial disability benefits. The deputy commissioner ruled as follows:

Claimant must prove he has had an increase in impairment, increase in a loss of function or lessening of earning capacity proximately caused by the work injury on August 22, 1996. He has failed to do so

. . . .

When all the evidence is considered, claimant has failed to prove he has had a physical or economic change of condition since the agreement for settlement approved on November 28, 2000 that might entitle him to permanent partial disability benefits. Accordingly, all other issues are moot.

From this language it appears the deputy commissioner simply concluded that Kremenak failed to prove he had undergone a change in his physical or economic condition attributable to the 1996 injury, and that the deputy commissioner did not need to reach the second *Acuity* prong, namely, that any change was not contemplated by the parties at the time of settlement. However, in reference to Dr. Mouw's opinion, the deputy commissioner stated:

In September 2004, Dr. Mouw opined that claimant's then current back pain was simply a continuation of his prior discomfort. A careful reading of Dr. Mouw's September 2004 letter reveals that he really never answered the question whether claimant's condition had worsened or deteriorated in a manner not contemplated at the time of the agreement for settlement.

¹ Kremenak also testified at the review-reopening hearing, and the deputy commissioner seemed to have some concerns about his credibility: "Claimant's somewhat selective memory of events since 2000, such as not remembering he had medical treatment after sliding off a roof and after falling off a deck and only a vague recollection of a motor vehicle accident and treatment following it, does not help his cause."

Thus, it does appear the deputy commissioner referenced the second prong of the *Acuity* test in discussing Dr. Mouw's testimony.

On February 12, 2008, the workers' compensation commissioner affirmed and adopted the review-reopening decision of the deputy as the final agency action. Upon judicial review, the district court determined the commissioner's decision to deny additional benefits was supported by substantial evidence. Kremenak appealed this determination.

While this case was pending on appeal, the supreme court issued an opinion clarifying the requirements for a review-reopening petition. See *Kohlhaas v. Hog Slat, Inc.*, ___ N.W.2d ___ (Iowa 2009). In *Kohlhaas*, the court stated:

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).

A compensable review-reopening claim requires proof that, after the award or settlement, the claimant's physical disability has increased in a scheduled member case, or his earning capacity has changed in an industrial disability case.

Id. at ____. In short, the supreme court expressly "disavowed" the second requirement for review-reopening set forth in *Acuity*. Regarding the case before it, the court went on to conclude:

Although it could be argued there is substantial evidence in the record supporting the deputy commissioner's conclusion that "[t]here has been no appreciable physical worsening in the claimant's physical condition from the time of the settlement in 2002 to the present time," it is fair to conclude the determination may have been influenced by the language in *Acuity* that we have just disavowed. In that we have clarified the requirements for a review-reopening petition, we reverse and remand the case to the commissioner to determine on the record already made whether

Kohlhaas has met the burden of proof required for a review-reopening petition under the standard we have set forth today.

Id. at ____.

We think this case presents the same situation. As in *Kohlhaas*, although it appears there is substantial evidence in the record to affirm the deputy commissioner's determination that the claimant failed to prove a deterioration of his physical or economic condition proximately caused by the original injury, "it is fair to conclude the determination *may have been* influenced by the language in *Acuity*." *Id.* at ____ (emphasis added). Therefore, out of an abundance of caution, we reverse and remand to allow the commissioner to determine and clarify whether Kremenak has met the burden of proof under the standard set forth in *Kohlhaas*.

REVERSED AND REMANDED.