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order granting the motion to discharge count II did not completely dispose of the action and does not constitute a final order under § 29-2315.01. This court therefore lacks jurisdiction to hear the State's appeal.

CONCLUSION

Because the State did not appeal from a final order as required by § 29-2315.01, this court lacks jurisdiction over the appeal and the appeal must be dismissed.

APPEAL DISMISSED.

SUSAN JURGENS, APPELLEE, V. IRWIN INDUSTRIAL TOOL COMPANY, FORMERLY KNOWN AS AMERICAN TOOL CO., INC., APPELLANT, AND STATE OF NEBRASKA, WORKERS' COMPENSATION TRUST FUND, APPELLEE.

825 N.W.2d 820

Filed January 22, 2013. No. A-12-184.

1. **Workers' Compensation: Appeal and Error.** Neb. Rev. Stat. § 48-185 (Cum. Supp. 2012) provides that on an appeal of an award by the Nebraska Workers' Compensation Court, the award made by the compensation court shall have the same force and effect as a jury verdict in a civil case.
2. ____: ____. A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
3. **Workers' Compensation: Proof.** Neb. Rev. Stat. § 48-141 (Reissue 2010) provides that a party may apply for a modified award on the ground of increase or decrease of incapacity due solely to the injury. This is a two-part test. The moving party must prove (1) a change in incapacity and (2) that the change is due solely to the original work-related injury.
4. ____: ____. To establish a change in incapacity under Neb. Rev. Stat. § 48-141 (Reissue 2010), an applicant must show a change in impairment and a change in disability.
5. **Workers' Compensation: Words and Phrases.** In a workers' compensation context, impairment refers to a medical assessment whereas disability relates to employability.
6. **Workers' Compensation.** There is no requirement that an employee reach maximum medical improvement prior to modification of a workers' compensation award.

7. **Workers' Compensation: Proof.** A party seeking to modify a workers' compensation award because of increased depression must show that the party's depression increased solely because of the work-related injury.
8. **Workers' Compensation.** An injury is not compensable for workers' compensation purposes if it results solely from the process of compensation or litigation.
9. **Workers' Compensation: Judgments: Evidence: Appeal and Error.** Workers' Comp. Ct. R. of Proc. 11(A) (2006) requires the Workers' Compensation Court to write decisions that provide the basis for a meaningful appellate review. In particular, rule 11(A) requires the judge to specify the evidence upon which the judge relies.
10. **Workers' Compensation: Rules of Evidence: Appeal and Error.** The Workers' Compensation Court is not bound by the usual common-law or statutory rules of evidence; it has discretion to admit evidence, and its decision to admit or exclude evidence will not be reversed upon appeal absent an abuse of discretion.
11. **Workers' Compensation: Witnesses: Appeal and Error.** The Workers' Compensation Court has discretion to determine whether or not a witness is qualified to state his opinion, and its determination will not be disturbed on appeal absent an abuse of discretion.
12. **Evidence: Expert Witnesses.** An expert's opinion is relevant if it makes any fact of consequence more likely than it would be without the evidence.
13. ____: ____. An expert's opinion lacks foundation unless it has a factual basis and assists the trier of fact to understand the evidence or determine a fact in issue.
14. **Expert Witnesses: Testimony.** An expert witness may testify to facts outside the field of his specialty if he shows he is familiar with the specialties and the treatments provided.
15. **Expert Witnesses: Physicians and Surgeons: Testimony.** A physician need not examine a patient in order to provide testimony so long as the testimony is based on scientific, technical, or other specialized knowledge and assists the trier of fact to understand the evidence or to determine a fact in issue.

Appeal from the Workers' Compensation Court. Affirmed.

Bryan S. Hatch, of Stinson, Morrison & Hecker, L.L.P., for appellant.

Anne E. Winner, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., for appellee Susan Jurgens.

IRWIN, PIRTLE, and RIEDMANN, Judges.

RIEDMANN, Judge.

I. INTRODUCTION

Irwin Industrial Tool Company, formerly known as American Tool Co., Inc. (Irwin Industrial), appeals the Workers' Compensation Court's further award of benefits to Susan

Jurgens. Irwin Industrial claims the court erred in making a further award because Jurgens failed to prove (1) a material change in the incapacity of her left shoulder and (2) a material change in incapacity in her "situational depression" due solely to her work-related injury. Irwin Industrial also argues that the court failed to issue a well-reasoned opinion and committed evidentiary errors. Because we find no merit to these claims, we affirm.

II. BACKGROUND

1. Procedural History

In 2002, Jurgens suffered two work-related injuries for which she sought workers' compensation benefits. In March of that year, she injured her right hand and upper extremity; in August, she injured her left hand, shoulder, and upper extremity.

In 2005, the Workers' Compensation Court entered an award, finding that these injuries occurred while Jurgens was working in the course and scope of her employment with Irwin Industrial. The court also found that Jurgens' injuries caused a compensable aggravation of preexisting depression that was not work disabling. The court awarded permanent partial disability benefits, past and future medical expenses, and vocational rehabilitation.

2. Vocational Rehabilitation Attempts and Continued Pain

In 2006, Jurgens began a vocational rehabilitation program in business administration, but she switched to early childhood education because of physical difficulties. Despite her continued pain, Jurgens enjoyed the program and excelled in it. By early 2009, however, her left shoulder pain was so severe that it prevented her from sleeping and from attending some of her classes.

Shortly thereafter, Jurgens began treating with Dr. Scott Strasburger, who administered cortisone shots and aqua therapy. In April 2009, after conservative treatment failed, Dr. Strasburger performed surgery on her left shoulder. The surgery did not reduce her pain, but according to Dr. Strasburger,

no further treatment options were available. Jurgens testified that when her shoulder did not heal, she felt sad and was not sure whether she was "going to get through it."

After taking time off to recover from surgery, Jurgens returned to the early childhood education program. She had "two quarters of school" left and needed to complete only three classes and a graduation seminar to finish the program.

The first quarter, Jurgens took one 8-hour class for which she received an A. The second quarter, she enrolled in three classes for a total of 17 credit hours. The heavy courseload required Jurgens to leave her home in Beatrice at 6:30 a.m. for an 8 a.m. class in Lincoln. Some days she did not return home until after 10:30 p.m. According to Jurgens, she was in constant pain and felt overwhelmed. As a result, she completed only one of the classes and dropped out with 11 credit hours left to complete the program.

3. Jurgens Seeks to Modify Her Prior Award

After dropping out of the vocational rehabilitation program, Jurgens sought a modification of her award, claiming an increase in incapacity due solely to her work-related injuries. Irwin Industrial and the State of Nebraska, Workers' Compensation Trust Fund, opposed the modification. Representatives for the trust fund have notified this court that no responsive brief or further participation would be undertaken with regard to the appeal.

At the modification hearing, Irwin Industrial objected to several medical reports and depositions. It sought to exclude Dr. Dean Wampler's report and portions of his deposition, arguing that Dr. Wampler testified outside the scope of his expertise when he discussed "fear avoidance." It also sought to exclude Dr. Walter Duffy's report and the treatment notes of his nurse practitioner. The trial court overruled the objections.

The parties introduced substantial medical evidence from several doctors, including Drs. Strasburger, Duffy, and Wampler and Dr. Jim Andrikopoulos. Dr. Strasburger's responses in correspondence with Jurgens' counsel stated that Jurgens' injuries

resulted from her work at Irwin Industrial. Dr. Strasburger testified by deposition that he began treating those injuries in 2003. He stated that he performed surgeries on both of Jurgens' shoulders and that Jurgens continues to report very high levels of pain. According to Dr. Strasburger, Jurgens' pain is the primary limitation on her functional abilities.

Dr. Wampler testified by deposition that he is a medical doctor and not a psychologist or psychiatrist. He treats patients with work-related injuries, including musculoskeletal injuries. He saw Jurgens in June 2010 for an independent medical evaluation and reviewed reports from both Dr. Duffy and Dr. Andrikopoulous.

Dr. Wampler opined that Jurgens' increase in incapacity was due to the work-related injury. He explained in a June 28, 2010, report that Jurgens' "chronic pain has further aggravated her anxiety and depression, leading to avoidance of activity and her physical exam evidence of progressive deconditioning." Although he believed that Jurgens may be exaggerating her pain, he explained that people with chronic pain lose perspective on the severity of their pain. He testified that Jurgens exhibited fear avoidance behavior, which is a pattern of behavior displayed in individuals with chronic pain, depression, and anxiety, wherein the individual starts avoiding activities for fear of more pain. Dr. Wampler testified that although fear avoidance is not a diagnosis, he has observed this behavior while treating patients over the past 4 or 5 years.

Dr. Duffy, a psychiatrist, and his nurse practitioner both treated Jurgens. Dr. Duffy testified that Jurgens exhibited symptoms of depression when he first met with her in April 2010. She was having difficulty sleeping at night, which she attributed to her pain. According to Dr. Duffy, Jurgens said she felt hopeless because she was unable to continue her classes in early childhood education. Jurgens cried throughout the session and was unmotivated.

Dr. Duffy opined that Jurgens' depression decreases her energy, interest, and motivation; therefore, it interferes with her ability to "function on a[n] optimal level on a daily basis." He concluded, with a reasonable degree of medical certainty, that "Jurgens has experienced an exacerbation of her

depressive symptoms associated with not being able to finish her classes and work in the area of Early Childhood education due to the increasing pain that relates back to her initial work-related injuries."

Dr. Andrikopoulous testified that he conducted an independent medical evaluation of Jurgens in September 2010. He opined that Jurgens' symptoms were either "exaggerated or factitious" and that she was likely malingering. According to Dr. Andrikopoulous, Jurgens displayed a level of cognitive impairment equivalent to that of an individual with a severe head injury. He stated that Jurgens would have been unable to complete her school if the symptoms she reported were true. He diagnosed her with malingering and stated, "Her prognosis seems poor due to lack of desire versus any objective evidence of any medical condition that might predict a poor prognosis."

Jurgens testified that she was treated for depression during the vocational rehabilitation program and continues to battle the disease. Jurgens believes that she is depressed. She testified, "[S]ome days I just don't care, and I'm sad and I don't — I don't have no motivation." She testified that she does not make the effort to do things she used to enjoy and that these feelings became worse after her shoulder surgery failed to alleviate her pain. Her husband confirmed that she became more depressed after the failed surgery.

The Workers' Compensation Court found that Jurgens suffered an increase in her incapacity due solely to the work-related injuries and had suffered periods of both temporary total disability and temporary partial disability. The court further found that Jurgens had not yet reached maximum medical improvement (MMI) for her depression and awarded benefits accordingly. The workers' compensation review panel affirmed.

III. ASSIGNMENTS OF ERROR

Irwin Industrial assigns, condensed and restated, that the trial court erred in (1) finding Jurgens suffered a material and substantial change in incapacity in her left shoulder and in her situational depression due solely to her work-related injury,

(2) failing to provide a well-reasoned decision under Workers' Comp. Ct. R. of Proc. 11(A) (2006), and (3) admitting opinion testimony from both Dr. Duffy and Dr. Wampler.

IV. STANDARD OF REVIEW

[1,2] On an appeal of an award by the Nebraska Workers' Compensation Court, the award made by the compensation court shall have the same force and effect as a jury verdict in a civil case. Neb. Rev. Stat. § 48-185 (Cum. Supp. 2012). A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Id*.

V. ANALYSIS

1. Increase in Incapacity Caused Solely by Work-Related Injury

Irwin Industrial's argument is twofold: It argues that a modification was not warranted (1) for Jurgens' left shoulder, because she failed to prove a material and substantial change in incapacity, and (2) for her situational depression, because she failed to prove a material and substantial change in incapacity due solely to the work-related injury. A change in incapacity for either condition is a sufficient basis for a modification if the change is due solely to the work-related injury. The trial court did not specifically state upon which condition it was modifying the award, which is the reason for Irwin Industrial's rule 11 argument discussed below. However, given the trial court's focus on Jurgens' depression, it is apparent the trial court based its further award on that condition. We will, therefore, limit our analysis to Jurgens' depression.

In its 2005 award, the court found that Jurgens suffered an aggravation of her preexisting depression and awarded benefits

for its treatment. The parties stipulated that at the time, it was not work disabling.

In her petition to modify the award, Jurgens claims that she "suffered an increase in her incapacity due solely to the injuries for which compensation was awarded." She did not plead any specifics. A review of the record indicates, however, that Jurgens claimed that the pain in her left shoulder had increased, causing an aggravation of her preexisting depression that had now become disabling. The trial court agreed, and we affirm.

[3] Neb. Rev. Stat. § 48-141 (Reissue 2010) provides that a party may apply for a modified award "on the ground of increase or decrease of incapacity due solely to the injury." This is a two-part test. The moving party must prove (1) a change in incapacity and (2) that the change is due solely to the original work-related injury. *McKay v. Hershey Food Corp.*, 16 Neb. App. 79, 740 N.W.2d 378 (2007).

(a) Jurgens Established Change in Incapacity in Her Situational Depression

Jurgens claimed that she suffered a change in incapacity due to her depression. The trial court found that her depression had become disabling and that she had not reached MMI and awarded temporary benefits. Irwin Industrial argues that a finding of incapacity cannot be made prior to the employee's reaching MMI. This contention is incorrect.

[4,5] Section 48-141 allows the Workers' Compensation Court to modify any agreement or award payable periodically at the request of either party "on the ground of increase or decrease of incapacity due solely to the injury." To establish a change in incapacity, an applicant must show a change in impairment and a change in disability. See *Bronzynski v. Model Electric*, 14 Neb. App. 355, 707 N.W.2d 46 (2005). Impairment refers to a medical assessment whereas disability relates to employability. See *id.*

Dr. Wampler reported that Jurgens had suffered a worsening of her anxiety and depression over time, which was manifested by increasing difficulty with sleep, by progressively worsening

tolerance of her pain, and by increasing fear avoidance behaviors. He further reported that her "incapacity has increased over the past 1-1/2 to 2 years." This evidence is sufficient to establish a change in impairment.

[6] Dr. Duffy iterated Dr. Wampler's opinions and further stated that before "reintroducing" Jurgens to the workforce, she would require reconditioning. Since Jurgens' depression had not previously been work disabling, Dr. Duffy's statements regarding the need for depression treatment prior to "reintroduction" to the workplace establish the necessary change in disability. The evidence is sufficient to establish a change in incapacity. There is no requirement that an employee reach MMI prior to modification of the award. See, *Hohnstein v. W.C. Frank*, 237 Neb. 974, 468 N.W.2d 597 (1991); *Hubbart v. Hormel Foods Corp.*, 15 Neb. App. 129, 723 N.W.2d 350 (2006) (remanding award of temporary total disability benefits for further factual findings unrelated to duration).

In *Hohnstein, supra*, the Nebraska Supreme Court affirmed the Workers' Compensation Court's further award, granting temporary total disability benefits under § 48-141. The court was not required to find the plaintiff suffered a permanent injury to prove a change in incapacity. Addressing the "'increase in incapacity'" requirement, the court stated that the applicant must "prove by a preponderance of the evidence that 'there now exists a material and substantial change for the worse in the applicant's condition—a change in circumstances that justifies a modification, distinct and different from that for which an adjudication had been previously made.'" *Hohnstein*, 237 Neb. at 979-80, 468 N.W.2d at 602.

Likewise, in *Bronzynski, supra*, the employee sought a modification of a prior award. Although the employee had reached MMI, his modification petition requested temporary total disability benefits that he incurred prior to reaching MMI. Addressing this claim, the court stated:

> [The employee's] request for further temporary total disability benefits would have properly been the subject of an application for modification when he became aware of the need for further medical treatment. An application to modify the original award is essential before a

> determination can be made as to the merit of a claim for further temporary benefits. As such, temporary total disability benefits cannot be awarded retroactively prior to the date on which the application to modify was filed in this case.

Bronzynski, 14 Neb. App. at 368, 707 N.W.2d at 58.

As evidenced by *Hohnstein* and *Bronzynski*, § 48-141 does not require that the employee reach MMI prior to a modification. In fact, *Bronzynski* instructs that an employee cannot receive temporary total disability benefits retroactively prior to the date on which the application for modification is filed. Therefore, if an employee is seeking temporary total disability benefits, the employee must file a petition for modification as soon as the employee becomes totally disabled.

In the present action, Jurgens presented testimony that she had suffered an increase in incapacity. The trial court accepted the testimony of Drs. Duffy and Wampler and awarded benefits accordingly. It was not necessary for Jurgens to prove she had reached MMI prior to modification of the original award.

(b) Finding That Jurgens' Depression Related Solely to Her Work-Related Injury

Irwin Industrial argues that the trial court erred in finding that the change in incapacity in Jurgens' situational depression was due solely to her work-related injury. Irwin Industrial first alleges that Jurgens' poor course-management skills caused her to leave the early childhood development program, which leaving made her depressed. Second, Irwin Industrial argues that Jurgens could not establish a change in incapacity without showing a permanent disability. We find no merit to either argument.

[7,8] A party seeking to modify a workers' compensation award because of increased depression must show that the party's depression increased solely because of the work-related injury. See *Hubbart v. Hormel Foods Corp.*, 15 Neb. App. 129, 723 N.W.2d 350 (2006). An injury is not compensable if it results solely from the process of compensation or litigation. *Sweeney v. Kerstens & Lee, Inc.*, 268 Neb. 752, 688 N.W.2d 350 (2004).

Irwin Industrial contends that *Sweeney* requires a finding in its favor. In *Sweeney*, the Nebraska Supreme Court held that an individual who became depressed after hearing an expert testify as to his projected lost earnings could not attribute his depression to the work-related injury. The court refused to make the causal connection, stating that the depression "'was not triggered . . . by pain or disability, but rather, by unhappiness with a court ruling.'" *Id.* at 759, 688 N.W.2d at 355.

Irwin Industrial's reliance upon *Sweeney* is misplaced. Unlike that in *Sweeney*, the record in this case shows that Jurgens' depression was related solely to her injury. Dr. Wampler responded to an e-mail inquiry from Jurgens' attorney, specifically stating that the change in incapacity was due solely to the work-related injury. Dr. Duffy opined that the exacerbation of depressive symptoms was associated with the inability to finish the early childhood education program and that the increased pain that caused this inability related back to the work-related injury. Jurgens continually stated that her increased pain caused her depression. Both Dr. Duffy and Dr. Wampler concurred that Jurgens' depression increased because of pain from her injury, and Jurgens' husband testified that she became hopeless after surgical treatment failed to alleviate her pain. Furthermore, Dr. Duffy, Dr. Wampler, and Jurgens all stated that Jurgens had to leave the early childhood education program because of the pain she experienced while working to complete it.

The record contains sufficient evidence to affirm the trial court's finding that Jurgens' depression increased due solely to her work-related injury. This argument is without merit.

2. Well-Reasoned Opinion Under Rule 11

Irwin Industrial argues that the trial court failed to provide a well-reasoned opinion under rule 11 because the court blurred the analysis between Jurgens' left shoulder injury and her situational depression. See rule 11(A). We find no merit to the assigned error.

[9] Rule 11(A) requires the Workers' Compensation Court to write decisions that "provide the basis for a meaningful

appellate review." In particular, rule 11(A) requires the judge to "specify the evidence upon which the judge relies."

The trial court specifically discussed the evidence it relied on to support its finding that Jurgens suffered an increase in incapacity due solely to her work-related injury. Although the court did not separately address both the left shoulder and the depression, it is apparent from the further award that the court was awarding benefits for the depression. The award provided a basis for meaningful appellate review and was, therefore, sufficient for purposes of rule 11(A).

3. Receipt of Medical Evidence

[10] Irwin Industrial assigns error to the trial court's decisions to receive medical evidence provided by Drs. Duffy and Wampler. We find no merit to this assigned error. The Workers' Compensation Court is not bound by the usual common-law or statutory rules of evidence; it has discretion to admit evidence, and its decision to admit or exclude evidence will not be reversed upon appeal absent an abuse of discretion. Neb. Rev. Stat. § 48-168(1) (Reissue 2010); *Olivotto v. DeMarco Bros. Co.*, 273 Neb. 672, 732 N.W.2d 354 (2007).

[11] The Workers' Compensation Court also has discretion to determine whether or not a witness is qualified to state his opinion, and its determination will not be disturbed on appeal absent an abuse of discretion. See *Bristol v. Rasmussen*, 249 Neb. 854, 547 N.W.2d 120 (1996).

(a) Admitting Dr. Duffy's Opinion

Irwin Industrial argues that the trial court erred in admitting portions of Dr. Duffy's reports. In particular, Irwin Industrial argues that Dr. Duffy makes no objective medical findings, simply repeats Jurgens' subjective complaints, and does not base his opinion on a reasonable degree of medical certainty. We find no merit to these arguments.

[12,13] An expert's opinion is relevant if it makes any fact of consequence more likely than it would be without the evidence. Neb. Rev. Stat. § 27-401 (Reissue 2008); *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996). An expert's opinion lacks foundation unless it has a factual basis and

assists the trier of fact to understand the evidence or determine a fact in issue. See *Olivotto, supra*.

In his report, Dr. Duffy stated that it was his opinion, within a reasonable degree of medical certainty, that Jurgens' incapacity increased due to her work-related injury. Dr. Duffy based his expert opinion on medical records and examination. The medical records and examination provided him with an appropriate factual basis for his opinion. See *Gibson v. City of Lincoln*, 221 Neb. 304, 376 N.W.2d 785 (1985) (holding that expert physician may base opinion on reports of other physicians). His opinion makes it more probable that Jurgens suffered increased incapacity due solely to her work-related injury than it would be without his opinion. The assigned error is without merit.

(b) Admitting Dr. Wampler's Opinion

Irwin Industrial argues that the trial court erred in admitting Dr. Wampler's testimony regarding fear avoidance. It further argues that Dr. Wampler lacked foundation because he saw Jurgens only once, in preparation for litigation, and made determinations based on her functional capacity evaluation and her subjective statements about what she believed her physical capacity to be. We find no error.

[14] Irwin Industrial claims that Dr. Wampler's testimony regarding fear avoidance was outside the scope of his expertise. An expert witness may testify to facts outside the field of his specialty if he shows he is familiar with the specialties and the treatments provided. *Stukenholtz v. Brown*, 267 Neb. 986, 679 N.W.2d 222 (2004). In *Sheridan v. Catering Mgmt., Inc.*, 5 Neb. App. 305, 558 N.W.2d 319 (1997), we held that a physician who had experience treating patients with symptoms similar to the plaintiff's was qualified to testify even without proving the medical community universally recognized the diagnosis he assigned.

[15] In this case, Dr. Wampler does not seek to diagnose Jurgens with fear avoidance, but instead uses the term to describe a pattern of behavior he observed in many of his patients. Dr. Wampler's experience working with patients with similar symptoms in the course of his practice is sufficient

foundation for his testimony. We also reject Irwin Industrial's argument that Dr. Wampler did not have proper foundation to form a medical opinion because he saw Jurgens only once and based his opinion partially on her opinion of her condition. A physician need not examine a patient in order to provide testimony so long as the testimony is based on "'scientific, technical, or other specialized knowledge'" and "'assist[s] the trier of fact to understand the evidence or to determine a fact in issue.'" *Gibson*, 221 Neb. at 309-10, 376 N.W.2d at 789 (quoting Neb. Rev. Stat. § 27-702 (Reissue 1979)).

In *Gibson*, the testifying physician based his testimony solely on medical data and medical records obtained from third parties, which the court found sufficient.

In the present case, Dr. Wampler examined Jurgens and reviewed the opinions and records of other physicians. This provided Dr. Wampler with sufficient foundation upon which to base his opinions. The trial court did not abuse its discretion in admitting his testimony.

VI. CONCLUSION

The Workers' Compensation Court properly determined that Jurgens suffered an increase in incapacity in her situational depression due solely to her work-related injury. We further find that the trial court adequately complied with rule 11(A) and properly ruled on the evidentiary issues before it. We, therefore, affirm the decision of the Workers' Compensation Court.

AFFIRMED.