

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PEDRO TARELO GALLEGOS,
Claimant,

File No. 5066131.01

vs.

SHELLY KRIEG, INC.,
Employer,

REVIEW-REOPENING

and

DECISION

GRINNELL SELECT INSURANCE
COMPANY,
Insurance Carrier,
Defendants.

Headnotes: 2905, 2907

Claimant Pedro Tarelo Gallegos filed a petition in arbitration on September 21, 2018, File Number 5066131, against Defendants Shelly Krieg, Inc. ("Shelly Krieg") and Grinnell Select Insurance Company ("Grinnell"), alleging he sustained injuries to his left lower extremity, bilateral shoulders, bilateral upper extremities, back, and body burns while working for Shelly Krieg on March 23, 2018. Gallegos later amended his petition alleging he was permanently and totally disabled under the statute and common law odd-lot doctrine and alleging he was entitled to penalty benefits. The matter proceeded to an arbitration hearing on October 1, 2019. At hearing, Gallegos also alleged he sustained a mental injury and buzzing in his ears caused by the work injury.

On February 20, 2020, I issued an arbitration decision finding Gallegos failed to meet his burden of proof he sustained buzzing in his ears or tinnitus caused by the March 2018 work injury. (JE 1) I found Gallegos failed to meet his burden of proof he sustained temporary or permanent impairment to his left shoulder. I found Gallegos failed to meet his burden of proof he sustained permanent impairments to his left lower extremity, face, or left arm from his burns, and that he failed to meet his burden of proof he sustained a permanent mental health impairment caused by the work injury. I found Gallegos met his burden of proof he sustained a permanent impairment to his right shoulder caused by the work injury and that the work injury aggravated, accelerated, worsened, or "lighted up" his low back condition. I found Gallegos sustained 60 percent industrial disability, entitling Gallegos to 300 weeks of permanent partial disability benefits at the weekly rate of \$596.64, commencing on July 30, 2019, and that he was not permanently and totally disabled under the common law odd-lot doctrine. Shelly Krieg and Grinnell appealed the decision. Gallegos filed a cross-appeal. On December 8, 2020, the workers' compensation commissioner affirmed the award.

On February 23, 2022, Shelly Krieg and Grinnell filed a review-reopening petition, alleging Gallegos has sustained a change of condition warranting a reduction of the prior award of 300 weeks of permanent partial disability benefits because Gallegos has improved and he is no longer disabled. Gallegos filed an answer denying he has sustained a change of condition warranting a reduction in the prior award.

A review-reopening hearing was held *via* Zoom video conference on February 8, 2023. Attorney Thomas Drew represented Gallegos. Attorney Stephen Spencer represented Shelly Krieg and Grinnell. Gallegos appeared and testified. Rafael Geronimo provided Spanish interpretation services during the hearing. Joint Exhibits ("JE") 1 through 3, and Exhibits 1 through 10 and A through K were admitted into the record. The record was held open through March 10, 2023, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

The parties submitted a hearing report listing stipulations and issues to be decided. The hearing report order was entered at the conclusion of the hearing. Shelly Krieg and Grinnell waived all affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed between Shelly Krieg and Gallegos at the time of the alleged injury.
2. Gallegos sustained an injury arising out of and in the course of his employment with Shelly Krieg.
3. The alleged injury is a cause of temporary and permanent disability.
4. Entitlement to temporary benefits is no longer in dispute.
5. The disability is an industrial disability.
6. The weekly rate is \$596.64.
7. Medical benefits are no longer in dispute.

ISSUES

1. Have Shelly Krieg and Grinnell established Gallegos sustained a change of condition warranting a reduction in the prior award of 300 weeks of permanent partial disability benefits?
2. Does the doctrine of issue preclusion apply because it was already established in the arbitration decision Gallegos was not working and he was not motivated to work, resulting in the award of 300 weeks of permanent partial disability benefits?

3. Is Gallegos entitled to recover the cost of the functional capacity evaluation ("FCE") report?

FINDINGS OF FACT

Gallegos is married and he has three children. (JE 1:3) Gallegos was born in Mexico and moved to the United States as a teenager. (JE 1:3) Gallegos completed the 10th grade in California. (JE 1:3) He did not do well in school because he did not understand English well. (JE 1:3) Gallegos can read and write in Spanish, but not in English. (JE 1:3) Gallegos has a valid driver's license. (JE 1:3) At the time of the original arbitration hearing Gallegos was 48. (JE 1:3).

Gallegos has worked as a farmhand, picking avocados and citrus fruit, preparing pizzas for a restaurant, and as a lawn care worker. (JE 1:3) Gallegos worked with hogs for two farming operations for many years. (JE 1:3) His agricultural work was heavy in nature and required bending, stooping, and lifting. (JE 1:3)

Shelly and David Krieg are married farmers who grow crops and raise livestock. (JE 1:3) In November 2011, Shelly Krieg hired Gallegos. (JE 1:3) Shelly Krieg is the owner of the hog operation where Gallegos worked. (JE 1:3) The operation is farrow-to-finish and produces roughly 35,000 hogs per year. (JE 1:3)

While working for Shelly Krieg, Gallegos was responsible for checking the nurseries and finish buildings, working with hogs weighing between 12 and 300 pounds, performing daily chores, including walking pens and alleys, climbing gates, checking and adjusting feeders, removing dead animals, sorting pens and animals, vaccinating hogs, maintaining rodent traps, washing livestock trailers and hog buildings, cleaning the shop area, and loading hogs for market. (JE 1:3) Gallegos reported he had to jump over pens and twist at the waist while performing his job duties. (JE 1:3)

On March 23, 2018, Gallegos was moving hogs at work when he noticed a heater was not working properly. (JE 1:3) Gallegos disconnected the heater and there was an explosion. (JE 1:3) Gallegos could not recall the explosion. (JE 1:3) After the explosion, Gallegos woke up 10 to 15 feet from the site of the explosion. (JE 1:3) The explosion destroyed the building where the heater was located. (JE 1:3)

Gallegos could not stand and called for help. (JE 1:4) He recalled having swelling and pain in his foot, burns on his face, and problems with his shoulder and lower back near his waistline. (JE 1:4) Gallegos was transported to the hospital by ambulance where he was admitted. (JE 1:4) A head computerized tomography exam, chest x-ray, and left foot x-ray were normal. (JE 1:4) Gallegos complained of pain in his face, a gritty feeling in his eyes, and he was assessed with partial-thickness facial burns. (JE 1:4) The hospital discharged Gallegos the next day. (JE 1:4) Gallegos testified after his discharge his foot was badly swollen, he could not walk, and he was experiencing bad back pain. (JE 1:4)

Gallegos received treatment for his burns and he developed a deep vein thrombosis in his left lower extremity. (JE 1:4) The deep vein thrombosis resolved with treatment.

Gallegos was dissatisfied with the care he was receiving and he sought a second opinion from Alexandria Kohn, ARNP, for right shoulder blade, mid back, low back, and left lower extremity pain, and itching and pain in his face. (JE 1:4) While his burns improved, Gallegos continued to complain of low back pain interfering with his ability to sleep. (JE 1:4) Kohn noted Gallegos' burns had improved, but he was having difficulty with flexion and extension of his back and bending to the right side. (JE 1:4-5) Kohn ordered lumbar spine magnetic resonance imaging and restricted Gallegos from working. (JE 1:5)

Gallegos underwent lumbar spine magnetic resonance imaging on May 2, 2018. (JE 1:5) The reviewing radiologist listed an impression of degenerative changes to the lumbar spine, resulting in mild thecal sac effacement and mild to moderate neural foraminal narrowing. (JE 1:5)

During a follow-up appointment with Kohn on May 11, 2018, Kohn noted Gallegos' range of motion in his low back had improved, but he continued to have problems with his low back when bending to the left. (JE 1:5) Kohn continued his medications and physical therapy and released him to return to work with restrictions of no work over four hours at a time, no lifting, bending, or twisting, occasional squatting and kneeling "very minimally," and sitting and standing, as needed. (JE 1:5)

Gallegos returned to work and testified his employer had him work on the mousetraps on the perimeter of the pens outside the finishers. (JE 1:5) Gallegos relayed when he changed the food in the traps he had to constantly bend down, which bothered his back. (JE 1:5) Gallegos testified he told his employer about the problems he was having and his employer sent him home. (JE 1:5)

On May 22, 2018, Bruce Elkins, M.D., an occupational medicine physician, performed an independent medical examination ("IME") for Shelly Krieg and Grinnell. (JE 1:5-6) Dr. Elkins noted Gallegos denied experiencing radiating pain from his low back, numbness or tingling. (JE 1:6) Dr. Elkins diagnosed Gallegos with resolving facial and left wrist burns, a right shoulder sprain, left foot and ankle sprain, history of left leg DVT, adjustment disorder, and symptomatic exacerbation of pre-existing lumbar degenerative disc disease related to the March 2018 work injury. (JE 1:6) Dr. Elkins recommended additional physical therapy and a gradual return to work for Gallegos' lumbar spine condition. (JE 1:6)

During an appointment with Kohn on May 29, 2018, Gallegos complained of increased back and shoulder pain, some tightness near his scapula, and left ankle pain with internal rotation and flexion. (JE 1:6) Kohn restricted Gallegos from working, ordered work hardening, continued his physical therapy, and referred Gallegos to a foot and ankle specialist. (JE 1:6)

On June 5, 2018, Gallegos attended an appointment with Michael Nguyen, M.D., a sports medicine physician. (JE 1:6) Dr. Nguyen ordered right shoulder magnetic resonance imaging. (JE 1:6) The reviewing radiologist listed an impression of mild supraspinatus tendinosis without demonstrated rotator cuff tear, suspected posterior labral tear, and mild acromioclavicular arthrosis. (JE 1:6)

Gallegos returned to Dr. Nguyen to discuss the imaging. (JE 1:6) Dr. Nguyen assessed Gallegos with left foot and ankle tendinitis, a right posterior labral tear, and low back pain, ordered physical therapy, and referred Gallegos to Brian Johnson, M.D., an orthopedic surgeon, for evaluation and treatment. (JE 1:6-7)

On July 23, 2018, Gallegos attended an appointment with Dr. Nguyen complaining of right shoulder, low back, and left foot and ankle pain. (JE 1:7) Dr. Nguyen assessed Gallegos with low back pain with facet hypertrophy and left foot and ankle tendinitis and recommended an immobilization belt, injections, and therapy for his low back. (JE 1:7) During a follow-up appointment, Gallegos relayed the back brace was helpful. (JE 1:7)

Gallegos returned to work and complained of pain while power washing. (JE 1:7) During a follow-up appointment, Dr. Nguyen assessed Gallegos with L5-S1 bilateral foraminal stenosis and a left peroneal strain and recommended an epidural flood for his low back. (JE 1:7) Dr. Nguyen opined Gallegos' injuries were related to the explosion. (JE 1:7)

On October 12, 2018, Gallegos attended an appointment with Dr. Johnson regarding his right shoulder pain. (JE 1:7) Dr. Johnson noted Gallegos had received injections for his right shoulder pain. (JE 1:7) Dr. Johnson assessed Gallegos with a right shoulder SLAP tear with associated impingement, biceps tendinopathy, and symptomatic AC degenerative joint disease, discussed treatment options, and noted Gallegos wanted to proceed with surgery. (JE 1:7)

Dr. Johnson performed a diagnostic arthroscopy and biceps tenotomy on Gallegos' right shoulder on October 30, 2018. (JE 1:7) Dr. Johnson listed post-operative diagnoses of right shoulder impingement syndrome, SLAP tear, symptomatic AC degenerative joint disease, and anterior and superior labral tearing. (JE 1:7)

On November 27, 2018, Gallegos underwent lumbar spine magnetic resonance imaging. (JE 1:7) The reviewing radiologist listed an impression of multilevel degenerative changes, most notable at L5-S1 where there is a moderate to large disc bulge/osteophyte complex, bilateral facet arthrosis, and bilateral foraminal narrowing. (JE 1:7-8)

Gallegos returned to Dr. Nguyen on December 5, 2018, complaining of low back pain. (JE 1:8) Dr. Nguyen noted the imaging showed a worsening of Gallegos' L5-S1 foraminal stenosis with an increasing disc bulge, combined with bilateral facet arthropathy, and "a little bit more worsening on the left than the right for foraminal

stenosis, which actually probably corresponds to that lingering pain he has had from his ankle.” (JE 1:8) Dr. Nguyen assessed Gallegos with bilateral foraminal stenosis, left worse than right, with left leg radicular features, and he referred Gallegos to Michael Espiritu, M.D., an orthopedic spine surgeon, for a surgical evaluation. (JE 1:8)

On December 19, 2018, Gallegos attended an appointment with Dr. Espiritu. (JE 1:8) Dr. Espiritu reviewed Gallegos’ imaging and examined him, assessed him with lumbosacral disc degeneration at L5-S1, noted he did not believe Gallegos was a surgical candidate, and he found Gallegos had reached maximum medical improvement (“MMI”) for his back. (JE 1:8)

Gallegos attended a follow-up appointment with Dr. Johnson on January 4, 2019, reporting he had noticed swelling or fluid on his right elbow over the last month. (JE 1:8) With respect to his right shoulder, Dr. Johnson administered an injection, continued Gallegos’ physical therapy, and imposed restrictions of lifting up to 50 pounds, occasional overhead reaching, and frequent pushing, pulling, gripping, and pinching. (JE 1:8) Dr. Johnson assessed Gallegos with right elbow bursitis and recommended waiting three months before performing an aspiration. (JE 1:8)

Shelly Krieg and Grinnell offered Gallegos modified work at Mission of Messiah, 30 hours per week, starting on January 23, 2019. (JE 1:8) Gallegos sorted merchandise, placed prices on merchandise, and helped with sweeping. (JE 1:8)

On February 1, 2019, Gallegos returned to Dr. Johnson reporting the shoulder injection dramatically helped his shoulder pain. (JE 1:8) Dr. Johnson assessed Gallegos with right shoulder impingement and biceps tendinitis, and olecranon bursitis of the right elbow, recommended home therapy exercises, and imposed restrictions of lifting up to 50 pounds, occasional overhead reaching, and frequent pushing, pulling, gripping, and pinching with the right shoulder, and he aspirated the right elbow. (JE 1:8)

On March 8, 2019, Gallegos returned to Dr. Johnson reporting the aspiration resolved his right elbow issue, the surgery had helped his right shoulder, but it was still stiff, and his back was bothering him more than his right shoulder. (JE 1:9) Dr. Johnson recommended a FCE and recommended a referral to a psychologist. (JE 1:9)

When he returned to Dr. Johnson, Dr. Johnson noted the FCE he ordered was invalid. (JE 1:9) Given the FCE was invalid, Dr. Johnson deferred to Dr. Elkins on permanent restrictions and noted Gallegos reported his main complaint was his low back. (JE 1:9)

On April 18, 2019, Dr. Elkins conducted a second IME for defendants. (JE 1:9) Dr. Elkins diagnosed Gallegos with status post right shoulder arthroscopy, adjustment disorder versus primary mood disorder, and symptomatic exacerbation of pre-existing lumbar degenerative disc disease related to the March 2018 work injury. (JE 1:9) Dr. Elkins found Gallegos was not at MMI for the adjustment/mood disorder or his right shoulder injury, and recommended restrictions of no lifting over 20 pounds with

occasional bending and twisting. (JE 1:9) Dr. Elkins issued an addendum to his second IME on July 25, 2019, finding Gallegos had reached MMI and he recommended no permanent restrictions. (JE 1:11)

Jacqueline Stoken, a physiatrist, conducted an IME for Gallegos on July 17, 2019. (JE 1:11) Dr. Stoken opined the March 2018 explosion caused or aggravated Gallegos' injuries to his left lower extremity, bilateral shoulders, bilateral upper extremities, back, body burns, and post-traumatic stress. (JE 1:11) Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Stoken did not assign impairment ratings for Gallegos' lower extremity, burns, or mental health condition. (JE 1:11) Referring to Table 15-13, page 384 of the AMA Guides, Dr. Stoken found Gallegos fell into DRE Lumbar Category II for his low back pain, with a five to eight percent whole person impairment due to chronic lumbar pain, and noted Gallegos was able to work full duty without restrictions before the work injury and that his pain restricted his functioning. (JE 1:11)

With respect to his right shoulder, Dr. Stoken assigned Gallegos 10 percent impairment of the left upper extremity due to deficits in range of motion, 13 percent for loss of strength, and 10 percent for the distal clavicle excision for a combined 28 percent left upper extremity or 17 percent whole person impairment. (JE 1:11-12) Dr. Stoken assigned permanent restrictions of lifting up to 18 pounds on a frequent basis, 25 pounds on an occasional basis, and 35 pounds on a rare basis, placing Gallegos into the light to medium category of work. (JE 1:12)

Gallegos attended a FCE with Todd Schemper, PT, DPT, on July 26, 2019. (JE 1:12) Schemper opined Gallegos gave maximum effort on the exam and he found the results were valid. (JE 1:12) Schemper opined:

1. These projections are for 8 hours per day and 40 hours per week at the levels indicated on the FCE Test Results and Interpretation grid.
2. The client's capabilities are in the light category of (waist to floor lifting up to 20 pounds on an occasional basis and 30 pounds on a rare basis) of physical demand characteristics. Specific capabilities are noted with the FCE Test Results and Interpretation grid.
3. His ability to front carry did fall within the medium category, carrying up to 30 pounds occasionally and 40 pounds rarely.

(JE 1:12) No physician adopted Schemper's findings.

Jeff Johnson, M.S., conducted a vocational evaluation for Gallegos on July 17, 2019. (JE 1:12) Johnson found Gallegos had performed medium to heavy work throughout his life and noted his work restrictions placed him in the light category of work. (JE 1:13) Johnson opined Gallegos had incurred an 85 percent loss of access to employment as a result of the March 2018 work injury. (JE 1:13) Johnson identified job

openings that may fall within Gallegos' permanent restrictions, including grounds crew earning \$13.00 per hour, groundskeeper/gardener earning \$11.00 to \$14.00 per hour, janitorial worker earning \$10.50 per hour, dishwasher earning \$10.50 per hour, and custodian earning \$9.00 per hour. (JE 1:13)

Gallegos' placement with Mission of Messiah ended in August 2019. (JE 1:13) Gallegos requested to return to work with Shelly Krieg. (JE 1:13) David Krieg informed Gallegos he did not have any work for him. (JE 1:13)

On August 27, 2019, Dr. Elkins issued an impairment rating. (JE 1:13) Gallegos reported he was continuing to experience low back pain associated with right leg pain radiating into the bottom of his right foot that is worse with activity, but without numbness or tingling, right shoulder discomfort worse since his surgery, and left shoulder discomfort from overuse due to the right shoulder injury without numbness or tingling, left foot and ankle discomfort that is more pronounced and frequent since he was released to return to work, and a buzzing sensation in both ears that began at the time of the work incident. (JE 1:13)

Using the AMA Guides, Dr. Elkins found Gallegos fell into DRE Category I for his low back and assigned zero percent permanent impairment. (JE 1:13) Dr. Elkins found Gallegos' current complaints had not been consistently present since the time of his injury and his current complaints of low back pain and right radicular symptoms were distinctly different medically from his prior symptoms with left radicular complaints and opined given there was no confirmation of the specific source of the pain Gallegos did not meet the Category II criteria. (JE 1:13) Dr. Elkins assigned no rating for Gallegos' right lower extremity. (JE 1:13-14)

With respect to Gallegos' right shoulder, using the AMA Guides, Dr. Elkins opined:

shoulder flexion and extension (impairment percentage of the upper extremity): FF 3%; extension 1%; Abduction 4%. These add to yield 8% of the upper extremity for range of motion loss. Distal clavicle excision is applicable under "other conditions", Section 16.7: 10% of the upper extremity from Table 16-7, page 506. These values combine to 17% of the upper extremity. This would convert to a 10% of the whole person for the right shoulder.

(JE 1:14)

Gallegos did not seek work after the work injury. (JE 1:14) During the arbitration hearing, Gallegos testified he did not believe he could perform his regular job for Shelly Krieg because he could not sort the small pigs, pull dead pigs, climb ladders to check the food, jump the pens, or twist his back. (JE 1:14) Gallegos testified he did not believe he could perform any of his past work with his current problems. (JE 1:14)

At the time of the arbitration hearing Gallegos was taking gabapentin, naproxen, Lisinopril, and duloxetine. (JE 1:15) Gallegos relayed his shoulder pain was better, but his foot and back pain were the same. (JE 1:15)

In the arbitration decision, I found Gallegos did not meet his burden of proof he sustained permanent impairments to his left lower extremity, to his face or left arm from his burns, or mental health caused by the work injury. (JE 1:17-19) I found Gallegos did not meet his burden of proof he sustained buzzing in his ears or tinnitus, or left shoulder impairment caused by the work injury. (JE 1:17) I found Gallegos met his burden of proof the work injury aggravated, accelerated, worsened, or "lighted up" his back condition and that he sustained permanent impairment to his right shoulder caused by the work injury, finding Dr. Stoken's opinion most persuasive. (JE 1:20-21) Considering all of the factors of industrial disability, including Gallegos' lack of motivation to work, and Gallegos' vocational opinion showing there were available positions within Gallegos' restrictions, I found Gallegos sustained 60 percent industrial disability, entitling him to 300 weeks of permanent partial disability benefits at the weekly rate of \$596.64, commencing on July 30, 2019. (JE 1:23-25)

Following the arbitration hearing Gallegos attended an appointment with Dr. Espiritu on April 7, 2020. (Ex. C:16) Dr. Espiritu noted Gallegos had undergone nerve conduction studies which were normal with no electrographic evidence of compression neuropathy or lumbosacral radiculopathy of his left lower extremity. (Ex. C:17) He also noted Gallegos had a positive diskogram, "which I take to mean that L5-S1 is symptomatic degenerative disk level causing discogenic axial low back pain." (Ex. C:17) Dr. Espiritu noted his symptoms are "exactly the same" as when he saw him before and he assessed Gallegos with lumbosacral disc degeneration, lumbar spine pain, left leg pain, and lumbosacral stenosis without neurogenic claudication. (Ex. C:17) Dr. Espiritu found Gallegos was not at MMI, he offered Gallegos an L5 laminectomy with left-sided transforaminal lumbar interbody fusion, insertion of an interbody cage, allograft, autograft, bone marrow aspiration, posterolateral fusion with instrumentation L5-S1, and found he did not require permanent restrictions. (Ex. C:18-19)

On May 13, 2020, Dr. Espiritu opined the surgical procedure he had recommended "is no longer causally connected to" the March 2018 work injury, finding Gallegos "has discogenic back pain with degenerative findings on the patient's MRI, as well as foraminal lumbar spinal stenosis of primarily degenerative cause secondary to facet arthropathy and disk protrusion." (Ex. C:21)

On March 8, 2021, Gallegos attended an appointment with William Samuelson, M.D., a pain specialist, complaining of bilateral leg pain radiating down his bilateral buttocks, laterals, anterolateral calves and shins to the top of his bilateral feet that is worse with standing and walking and is improved or completely relieved with sitting. (Exs. D:23; 7:27) Dr. Samuelson listed an impression of spinal stenosis with neurogenic claudication, noted no pain management modalities had provided him any lasting relief, and recommended updated imaging to determine if injections were indicated. (Exs. D:25; 7:29)

On December 21, 2021, Jerry Gravatt, M.A., a vocational expert, prepared a job availability report for defendants. (Ex. I:31- 35) Gravatt did not meet or speak with Gallegos before issuing his report. (Ex. I:34) Gravatt listed positions that were available in the last 60 days in Sioux City, Iowa and North Sioux City, South Dakota, including production operator, hand packer, assembler, delivery driver, auto parts delivery, courier, production assistant, production operator, customer service specialist bilingual Spanish, bilingual production trainer, outlet associate, job skill training, and warehouse associate. (Ex. I:32-34) Gravatt opined the positions were within Gallegos' restrictions and limitations, but his report does not list the physical requirements for any of the jobs. (Ex. I:35)

Shelly Krieg and Grinnell filed a review-reopening petition, alleging Gallegos sustained a change of condition warranting a reduction of the prior award of 300 weeks of permanent partial disability benefits because Gallegos had improved and he was no longer disabled.

Douglas Martin, M.D., an occupational medicine physician, performed an IME for defendants on June 23, 2022. (Ex. A) Dr. Martin used a goniometer and found for the right shoulder, Gallegos has flexion to 150 degrees, extension to 50 degrees, abduction to 140 degrees, adduction to 50 degrees, internal rotation to 50 degrees, and external rotation to 60 degrees. (Ex. A:4) Dr. Martin found his strength was 5/5 without evidence of upper extremity muscle tone loss, atrophic change, or spasm. (Ex. A:4) Dr. Martin noted his left shoulder range of motion was normal, but he did not record his findings. (Ex. A:4) For Gallegos' lumbar spine Dr. Martin noted he could forward flex to 70 degrees, extend to 20 degrees, and "rightwardly and leftwardly and laterally flex to 25 degrees." (Ex. A:4) Dr. Martin opined Gallegos' right shoulder range of motion and strength were better, which was "not terribly surprising." (Ex. A:5)

Dr. Martin opined Gallegos' right shoulder problems "could be due to age, genetics, and anthropomorphic factors." (Ex. A:5) He agreed with Dr. Espiritu that Gallegos' spine problems were not due to trauma, but "instead due to genetic [*sic*] primarily, age secondarily, and anthropomorphic factors thirdly." (Ex. A:5) The issue of causation was determined during the initial arbitration proceeding. The appeal decision was not appealed and the decision became final. I am bound by the final decision.

Dr. Martin also challenged the impairment ratings given by Dr. Elkin and Dr. Stoken, challenging, in part, the rating for a distal clavicle excision, and range of motion findings with strength loss. (Ex. A:5-6) Again, the decision adopting Dr. Stoken's opinion became final. I am bound by the final decision. Dr. Martin opined the shoulder impairment should be six percent based on flexion angle, abduction angle, and internal rotation angle of two percent. (Ex. A:6) He also opined Gallegos' current lumbar spine problems are not injury related and he assigned no impairment. (Ex. A:6)

Dr. Martin opined Gallegos' right shoulder range of motion and strength have improved and while his back symptoms have become worse, "I think this is because his degeneration is worse. This is not because of the injury, but instead due to normal wear

and tear processes that aging and the conditions of genetics play with regard to how it typically goes as its impact to the lumbar spine area.” (Ex. A:6)

Dr. Martin completed a second IME for defendants on December 28, 2022. (Ex. K) Dr. Martin noted Gallegos’ range of motion and strength findings were the same as his first IME. (Ex. K:39) Dr. Martin did not modify his prior opinions and noted outcomes from spinal fusion surgery for degenerative disc disease are poor. (Ex. K:40)

On September 12, 2022, Schemper conducted a second FCE, which he determined was valid. (Ex. 1) Schemper opined Gallegos now meets the light category of physical work, and that his ability to lift waist to crown and front carry falls within the medium category. (Ex. 1:2) Schemper found Gallegos can lift floor to waist 20 pounds on an occasional basis and 25 pounds on a rare basis, waist to crown 25 pounds occasionally and 35 pounds rarely, and front carry up to 40 pounds occasionally and 50 pounds rarely. (Ex. 1:2-1:3) During the 2019 FCE, Schemper found Gallegos could floor to waist 20 pounds on an occasional basis and 30 pounds on a rare basis and front carry up to 30 pounds occasionally and 40 pounds rarely. (JE 3:46) Schemper compared the 2019 FCE with the 2022 FCE and found “[t]he comparison to his function from three years ago shows minimal variance in his abilities with no substantial improvements or decreases noted.” (Ex. 1:2)

Gallegos completed a Nebraska Department of Transportation flagger certification course on October 21, 2021. (Ex. H:30) During his deposition he reported he had applied for a flagging job in 2022 but he was not called for an interview or offered the job. (Ex. J:10-11) Gallegos reported he had not applied for any other jobs. (Ex. J:11)

Gallegos testified since the original arbitration hearing his symptoms have become worse and he has pain all the time. (Tr.:12-13) Gallegos relayed he had not obtained any substantial employment since October 2019. (Tr.:13) He reported he applied for a flagger position a friend told him about, but the employer never called him to ask him to work. (Tr.:13-14) Gallegos testified he did not believe he would be able to work full-time due to his physical conditions. (Tr.:14)

CONCLUSIONS OF LAW

I. Review-Reopening

Iowa Code section 86.14 governs review-reopening proceedings. When considering a review-reopening petition, the inquiry “shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded.” Iowa Code § 86.14(2). The deputy workers’ compensation commissioner does not re-determine the condition of the employee adjudicated by the former award. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 391 (Iowa 2009). The deputy workers’ compensation commissioner must determine “the condition of the employee, which is found to exist subsequent to the date of the award being reviewed.”

Id. (quoting Stice v. Consol. Indus. Coal Co., 228 Iowa 1031, 1038, 291 N.W. 452, 456 (1940)). In a review-reopening proceeding, the deputy workers' compensation commissioner should not reevaluate the claimant'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." Id. at 393.

Shelly Krieg and Grinnell filed the current review-reopening action and bear the burden of proving, by a preponderance of the evidence that Gallegos' condition has improved since the original arbitration hearing. See Simonson v. Snap-On Tools Corp., 588 N.W.2d 430, 434 (Iowa 1999).

Shelly Krieg and Grinnell aver Gallegos' physical condition has significantly improved and he has refused vocational/placement services, warranting a reduction in the prior industrial disability award. As noted above, in a review-reopening action, the moving party bears the burden of proving the claimant has sustained a change of physical condition or economic condition. Gallegos avers the doctrine of issue preclusion applies in this case and alternatively that he has not sustained a change of condition warranting a reduction in the prior award.

The doctrine of res judicata includes claim and issue preclusion. Pavone v. Kirke, 807 N.W.2d 828, 835 (Iowa 2011). Under issue preclusion or collateral estoppel, if a court has decided an issue of fact or law necessary to the judgment, the same issue cannot be relitigated in a subsequent proceeding. Winnebago Indus., Inc. v. Haverly, 727 N.W.2d 567, 572 (Iowa 2006). The purpose of issue preclusion is to protect litigants from relitigating identical issues with identical parties or with individuals having a significant connected interest to the prior litigation and to "further 'the interest of judicial economy and efficiency by preventing unnecessary litigation.'" Id. Under claim preclusion, "a valid and final judgment on a claim bars a second action on the adjudicated claim or any part thereof." Pavone, 807 N.W.2d at 835. The purpose of claim preclusion is to prevent a party from splitting or trying his or her case piecemeal, thus requiring the party to present his or her entire claim or defense in the case on trial. Lambert v. Iowa Dep't of Transp., 804 N.W.2d 253, 257 (Iowa 2011).

Issue preclusion protects a litigant from having to relitigate identical issues. This case concerns whether Gallegos has sustained a change of condition since the original arbitration hearing. Shelly Krieg and Grinnell aver he has sustained a change of economic and physical condition. The issues are not identical. The doctrine of issue preclusion does not apply.

At the time of the original arbitration hearing Gallegos was not working and he had not looked for work. After the hearing, Gallegos obtained a flagger certificate and he applied for a job as a flagger. He did not obtain the position and did not look for any additional work.

Shelly Krieg and Grinnell presented a vocational report listing jobs Gallegos is allegedly capable of engaging in. The report did not list the physical

requirements of the jobs. Gallegos was not working at the time of the original hearing; he was not working at the time of the review-reopening hearing. Gallegos was not motivated to work during the original arbitration hearing; he remains unmotivated to work. I find Shelly Krieg and Grinnell have not established Gallegos sustained a change of economic condition.

Shelly Krieg and Grinnell next allege Gallegos has sustained a change of physical condition, relying on Dr. Martin's IMEs. In providing his opinions, Dr. Martin spent a great deal of time challenging the opinions of the prior experts, Dr. Elkins and Dr. Stoken. During the first hearing, I found Dr. Stoken's opinion more persuasive than Dr. Elkins' opinion. The time for challenging their opinions was during the original proceeding on appeal. The appeal decision in this case became final. Findings and conclusions from the first hearing cannot be reevaluated in the subsequent review-reopening action.

Dr. Martin opined Gallegos' right shoulder range of motion findings have improved from the time of the original arbitration hearing.

In the original proceeding, Dr. Stoken assigned six percent impairment for loss of flexion, three percent impairment for loss of abduction, two percent impairment for loss of adduction, and two percent for loss of internal rotation. (JE 1:12)

Dr. Martin recorded right shoulder range of motion findings of flexion to 150 degrees, extension to 50 degrees, abduction to 140 degrees, adduction to 50 degrees, internal rotation to 50 degrees, and external rotation to 60 degrees. (Ex. A:4) Dr. Martin did not assign any permanent impairment for loss of extension, adduction, or external rotation, and assigned two percent impairment for loss of flexion, two percent impairment for loss of abduction, and two percent impairment for loss of internal rotation for a total of six percent impairment. (Ex. A:6)

In 2019, Schemper recorded right shoulder loss of motion findings. He recorded Gallegos had forward flexion to 135 degrees, abduction to 109 degrees, internal rotation to 56 degrees, and external rotation to 49 degrees. (JE 3:49) In 2022, he recorded shoulder range of motion findings of forward flexion to 161 degrees, extension to 53 degrees, abduction to 118 degrees, internal rotation to 61 degrees, and external rotation to 71 degrees. (Ex. 1:7)

Both Dr. Martin's findings and Schemper's findings show improvement in Gallegos' right shoulder range of motion. This reflects a change of physical condition.

I do not find Gallegos' low back condition has improved, but rather it has become worse. Dr. Martin agreed Gallegos' low back condition is worse and opined "I think this is because his degeneration is worse. This is not because of the injury, but instead due to normal wear and tear processes that aging and the conditions of genetics play with regard to how it typically goes as its impact to the lumbar spine area." (Ex. A:6) I do not

find his opinion persuasive. Dr. Martin cites to no literature supporting his bare assertion.

Likewise, I do not find the opinion of Dr. Espiritu persuasive. When he recommended surgery in 2020, Dr. Espiritu opined the surgical procedure he had recommended “is no longer causally connected to” the March 2018 work injury, finding Gallegos “has discogenic back pain with degenerative findings on the patient’s MRI, as well as foraminal lumbar spinal stenosis of primarily degenerative cause secondary to facet arthropathy and disk protrusion.” (Ex. C:21) He did not cite to any literature supporting his findings or explain his findings. Contrary to defendants’ assertion, I find Gallegos’ low back condition has become worse, not better, since the original arbitration hearing.

Assuming Shelly Krieg and Grinnell have established a change of physical condition, I do not find the extent of his industrial disability has decreased.

“Industrial disability is determined by an evaluation of the employee’s earning capacity.” Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 852 (Iowa 2011). In considering the employee’s earning capacity, the deputy commissioner evaluates several factors, including “consideration of not only the claimant’s functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment.” Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (Iowa 2010). The inquiry focuses on the injured employee’s “ability to be gainfully employed.” Id. at 138. The statute also requires the factfinder “to take into account . . . the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury.” Iowa Code § 85.34(2).

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(v).

The original arbitration decision adopted Dr. Stoken’s permanent restrictions of no lifting over 18 pounds on a frequent basis, no lifting over 25 pounds on an occasional basis, and no lifting over 35 pounds on a rare basis. (JE 1:24-25) Gallegos has limited education. (JE 1:25) Since the original hearing Gallegos obtained a certificate as a flagger. He applied for a flagger position, but the employer never called him to start work. At the time of the original hearing he had not applied for any work. As noted above, the vocational report submitted by defendants does not list the physical requirements of the jobs the expert identified. Gallegos was not motivated to work during the original arbitration hearing; he remains unmotivated to work. I find Gallegos’ extent of industrial disability has not changed.

II. Costs

Iowa Code section 86.40, provides, “[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.” Rule 876 Iowa Administrative Code 4.33, provides costs may be taxed by the deputy workers’ compensation commissioner for: (1) the attendance of a certificated shorthand reporter for hearings and depositions; (2) transcription costs; (3) the cost of service of the original notice and subpoenas; (4) witness fees and expenses; (5) the cost of doctors’ and practitioners’ deposition testimony; (6) the reasonable cost of obtaining no more than two doctors’ or practitioners’ reports; (7) filing fees; and (8) the cost of persons reviewing health service disputes.

Gallegos seeks to recover the \$620.00 cost of the FCE report. (Ex. 10). The cost of a FCE that is not ordered by a treating or evaluating physician cannot be assessed as a medical expense under Iowa Code section 85.27, but may be assessed as a cost under 876 IAC 4.33(6). Jasper v. Nordstrom, Inc., 2020 WL 6060322, File Nos. 5052714, 5063163 (Iowa Workers’ Comp. Comm’r Oct. 7, 2020). Using my discretion, I find defendants should reimburse Gallegos \$620.00 for the cost of the FCE report.

ORDER

IT IS THEREFORE ORDERED, THAT.

Defendants’ review-reopening petition is denied.

Defendants shall reimburse Claimant six hundred twenty and 00/100 dollars (\$620.00) for the cost of the FCE report.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 15th day of May, 2023.



HEATHER L. PALMER
DEPUTY WORKERS’
COMPENSATION COMMISSIONER

The parties have been served as follows:

Tom Drew (via WCES)

Stephen Spencer (via WCES)