BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DARIN VAN GORP, Claimant, vs. ANDERSON ERICKSON DAIRY, Employer, and TRAVELERS INDEMNITY CO. OF CT, Insurance Carrier, Defendants.	:	File No. 5068270 REVIEW-REOPENING DECISION Head Note Nos: 1302.1; 1402.40; 1704; 1803; 1808; 2501; 2502; 2701; 2905; 2907

STATEMENT OF THE CASE

Claimant Darin Van Gorp filed a petition for review-reopening, seeking additional permanent partial disability benefits from Anderson Erickson Dairy, employer, and Travelers Indemnity Company of Connecticut, insurer, for an accepted work injury date of October 9, 2014. Specifically, claimant seeks to review and reopen an agreement for settlement that was approved by this agency on May 11, 2016. The case came before the undersigned for a review-reopening hearing on August 19, 2020. This case was scheduled to be an in-person hearing occurring in Des Moines. However, due to the outbreak of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via video means, using Court Call. Accordingly, this case proceeded to a live video hearing via Court Call with all parties and the court reporter appearing remotely.

The parties filed a hearing report prior to the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 6, Claimant's Exhibits 1 through 5, and Defendants' Exhibits A and B.

Claimant testified on his own behalf. No other witnesses testified. The evidentiary record closed at the conclusion of the evidentiary hearing on August 19, 2020. The

parties submitted post-hearing briefs on September 4, 2020, and the case was considered fully submitted on that date.

ISSUES

1. Whether claimant has proven a change of condition and/or is entitled to additional permanency benefits under review-reopening;
2. If so, the extent of additional permanent disability to which claimant is entitled;
3. The proper commencement date for payment of additional benefits, if any;
4. The proper amount of credit to which defendants are entitled;
5. Payment of claimant's independent medical evaluation;
6. Alternate medical care pursuant to Iowa Code section 85.27; and
7. Taxation of costs.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Claimant's testimony was consistent as compared to the evidentiary record, and his demeanor at the time of hearing gave the undersigned no reason to doubt his veracity. Claimant is found credible.

Claimant was 49 years old at the time of hearing. (Claimant's Exhibit 2, p. 4) He has worked for Anderson Erickson Dairy in Des Moines, Iowa, for most of his adult life. At the time of hearing he had worked there for 26 years. (Hearing Transcript, p. 16) He has always been a full-time employee. (Tr., p. 27)

Claimant has done several different jobs over the course of his career with Anderson Erickson. Most of the jobs involved working in a cooler. (Tr., p. 25) In 2014, he was working in the plant as a gallon filler. (Tr., p. 17) He had started to have problems with both arms, and in 2014 he reported cumulative bilateral arm injuries to his employer. (Tr., p. 17)

Claimant had an EMG/NCS study on January 30, 2015. The study was performed at Capital Orthopaedics & Sports Medicine, by Donna Bahls, M.D. (Joint Exhibit 1, pp. 1-2) Dr. Bahls' impressions were moderately severe carpal tunnel syndrome bilaterally, and mild bilateral ulnar nerve entrapment at the wrist with sensory involvement only. She found no evidence of ulnar nerve entrapment at the cubital tunnels bilaterally, and no findings to suggest peripheral neuropathy or an acute radiculopathy. (Jt. Ex. 1, p. 2)

Following the EMG, claimant was sent to Iowa Ortho, where he saw Ze-Hui Han, M.D. His first visit with Dr. Han was February 12, 2015. (Jt. Ex. 2, p. 1) At that time, claimant reported bilateral hand pain, severity level 2, along with numbness and tingling. He also had difficulty fully extending his right elbow. Dr. Han reviewed the EMG, and

found that claimant had bilateral carpal tunnel syndrome that was severe, and right cubital tunnel syndrome. (Jt. Ex. 2, p. 1) It was decided that claimant would have right carpal and cubital tunnel releases. Claimant was released to return to regular work activities pending surgery. (Jt. Ex. 2, p. 1)

Claimant had right carpal tunnel release and right cubital tunnel release with ulnar nerve anterior transposition on February 24, 2015. (Jt. Ex. 3, pp. 1-2) He returned to Dr. Han on March 9, 2015. (Jt. Ex. 2, p. 2) At that time, claimant's symptoms were reported as being mild in both the right wrist and elbow. Dr. Han also noted "minimally reduced numbness and tingling" in the right hand. (Jt. Ex. 2, p. 2) Claimant was able to make a composite fist with full extension, and his elbow also had full range of motion. Claimant was to start occupational therapy for range of motion and strengthening, and continue with light duty work consisting of no use of the right hand. (Jt. Ex. 2, p. 2)

With respect to claimant's left arm, a left carpal tunnel release surgery was performed on April 14, 2015. (Jt. Ex. 3, p. 3) He followed up with Dr. Han on June 1, 2015, at which time claimant reported he was still having numbness in his left 4th and 5th digits, along with tingling in the 1st, 2nd, and 3rd digits of his left hand. (Jt. Ex. 2, p. 3) Dr. Han noted claimant had full range of motion, and released him to return to work with no restrictions. (Jt. Ex. 2, p. 3)

On July 9, 2015, Dr. Han responded to a letter from the insurer seeking a permanent partial impairment rating. (Jt. Ex. 4, p. 1) Dr. Han stated that claimant reached maximum medical improvement on June 19, 2015. He provided a rating of 1 percent permanent partial impairment related to the left upper extremity, and 3 percent permanent partial impairment related to the right upper extremity. He did not assign any permanent restrictions, and did not recommend any additional medical care. (Jt. Ex. 4, p. 1)

Claimant testified that his symptoms on the right side did not improve after surgery. (Tr., p. 18) With respect to the left side, claimant testified that at first it seemed to get better, but after he returned to work, it seemed to get worse again. (Tr., p. 18) When claimant returned to work after surgery, he went back to working in the cooler, as opposed to the gallon filler job. (Tr., pp. 18-19) Initially his work in the cooler involved "picking yogurts." (Tr., p. 19) He said the gallon filler job was "a little less physical" than the work in the cooler. (Tr., p. 19)

On March 17, 2016, claimant returned to Dr. Han. (Jt. Ex. 2, p. 4) The record notes "follow up of bilateral hand pain," with gradual onset and moderate severity. Dr. Han noted the pain occurs constantly and is fluctuating. The pain is aggravated by bending, lifting, movement and night pain. He noted associated symptoms of joint tenderness, numbness, tingling in the arms, and weakness. On physical examination, Dr. Han found full range of motion. (Jt. Ex. 2, p. 5) Claimant was able to make composite fists with full extension. Dr. Han noted "EMG demonstrates a normal study."[1]

[1] There is no EMG study in evidence that corresponds with this date.

Dr. Han discussed claimant's condition with him, and advised that he "modify activity as needed." He was released to return to work with no restrictions, and Dr. Han stated that he is at MMI. (Jt. Ex. 2, p. 5)

Shortly thereafter, claimant entered into an agreement for settlement with defendants pursuant to Iowa Code section 85.35(2). (Defendants' Exhibit A) The settlement was approved by the agency on May 13, 2016. The parties agreed that claimant sustained an injury arising out of and in the course of his employment on October 9, 2014. The parties further agreed that the injury caused claimant to sustain permanent partial disability for 6 percent loss of his bilateral upper extremities, resulting in 30 weeks of compensation under Iowa Code section 85.34(2)(s).[2] Permanent benefits commenced on August 22, 2015. The parties further agreed to payment of certain temporary benefits. The weekly rate of compensation was agreed to be $618.42. (Def. Ex. A, p. 1)

It appears claimant had another work injury involving his left long finger in July of 2016. (Jt. Ex. 2, p. 6) Records indicate he had left trigger finger surgery on September 23, 2016, and was placed at MMI on October 21, 2016. (Jt. Ex. 2, pp. 6-7; Jt. Ex. 3, p. 4) That injury is not a part of the current claim.

Claimant testified that at the time of settlement in 2016, he was working in the cooler picking yogurts. (Tr., p. 19) Within about a year after settlement, he had changed from the yogurt-picking job to a job doing a few different things, including pulling carts, loading trailers, and running a forklift. (Tr., p. 19) Claimant stated that these job duties increased his symptoms in both arms. (Tr., p. 19)

Claimant did not make a claim until 2019 regarding his increased symptoms. He testified that he did not know if his symptoms were the result of a new injury or related to the 2014 injury, but he told his employer it was getting worse, and he was sent for medical treatment. (Tr., p. 20) On February 22, 2019, he saw Judith Nayeri, D.O., at Unity Point Occupational Medicine. (Jt. Ex. 6, pp. 1-2) Dr. Nayeri noted that claimant's job at that time was loading trailers. (Jt. Ex. 6, p. 1) She noted that he complained of problems with his hands, which have been an issue since 2014. She reviewed prior medical records, and noted his prior surgeries. Dr. Nayeri reported that claimant was continuing to have pain from the wrist to the palmar surface of the hand on the right, going into the first two fingers and tingling in those fingers. He was having pain in the palm of the hand, starting in the center of his anterior wrist. He reported that he had been dropping things and having problems with gripping. With respect to the left side, claimant said that his left arm "never felt right." He also said that he started noticing arm pain more over the past year, and has a constant ache starting in the upper arm. He stated that the pain comes down the arm and wraps around the back to the 4th and 5th fingers of the hand with tingling. He stated it involved the same fingers as the initial injury in 2014. When asked how he felt after surgery, claimant told Dr. Nayeri that he

[2] The injury occurred prior to the amendments to Iowa Code section 85.34; as such, the version in place at the time of injury is cited.

could hold things better and did not drop things as much, and that he thought the numbness and tingling resolved. He stated that the left upper extremity never improved, and that his symptoms started again the previous fall. (Jt. Ex. 6, p. 1)

Dr. Nayeri ordered a repeat EMG and allowed claimant to return to work with no restrictions. (Jt. Ex. 6, pp. 1-2) Claimant had a bilateral upper extremity EMG/NCV at Central Iowa Neurology on March 15, 2019. (Jt. Ex. 5) The EMG was performed by Irving Wolfe, D.O. Dr. Wolfe noted claimant presented with pain and numbness of his right and left upper limbs for the past year. (Jt. Ex. 5, p. 1) Dr. Wolfe found moderate dysfunction right and mild dysfunction of the left median nerve at wrist level consistent with bilateral carpal tunnel syndrome; mild slowing of the right and left median motor nerve condition velocity within the forearm consistent with bilateral pronator syndrome; and mild dysfunction of the right ulnar nerve at the level of the elbow consistent with right cubital tunnel syndrome. (Jt. Ex. 5, pp. 1-2)

Claimant returned to Dr. Han on March 28, 2019, following Dr. Wolfe's EMG. Dr. Han noted bilateral hand pain with a severity level of 3. (Jt. Ex. 2, p. 8) The pain radiated to the left elbow, and was described as aching and tingling. The pain was aggravated by holding things for too long. Associated symptoms included numbness. Claimant reported increasing pain and weakness that started about one year prior. (Jt. Ex. 2, p. 8) On physical exam, he was noted to have decreased strength in his right and left hands, and abnormal sensation with respect to his right ulnar nerve at the elbow. (Jt. Ex. 2, p. 9) Dr. Han's assessment was bilateral carpal tunnel syndrome and bilateral pronator syndrome. He reviewed Dr. Wolfe's EMG, and noted that claimant had "almost left normal ulnar nerve. Sensory function has not resumed." Dr. Han stated claimant's symptoms were clinically more related to the ulnar nerve, and he needed a "valid EMG" to compare the EMG from 2015. (Jt. Ex. 2, p. 10) He ordered a new EMG and advised claimant to follow up in two weeks. (Jt. Ex. 2, p. 10)

Claimant had another EMG/NCS with Dr. Bahls on April 4, 2019. (Jt. Ex. 1, p. 3) Dr. Bahls noted under "history" that claimant had numbness and tingling in the left ulnar hand distribution to the elbow. Symptoms were getting worse over the past 6 months. Claimant had some numbness and tingling and pain in the right hand, and occasional neck pain. (Jt. Ex. 1, p. 3) Dr. Bahls' impressions after performing the testing included moderately severe carpal tunnel syndrome bilaterally; left cubital tunnel syndrome; and mild right ulnar nerve entrapment at the wrist with sensory involvement only, no evidence of right cubital tunnel syndrome. (Jt. Ex. 1, p. 4)

Claimant returned to Dr. Han on April 15, 2019. (Jt. Ex. 2, p. 11) Dr. Han reviewed Dr. Bahls' EMG, and compared it to the study from 2015. (Jt. Ex. 2, p. 12) Dr. Han opined that "[t]he RIGHT cubital tunnel is the same, RIGHT carpal tunnel has improved, LEFT carpal tunnel is the same, and LEFT cubital is worse." (Jt. Ex. 2, p. 12) Left cubital tunnel surgery was recommended, and claimant was allowed to return to full duty work pending surgery. (Jt. Ex. 2, p. 12)

Claimant had left cubital tunnel release with ulnar nerve anterior transposition on July 30, 2019. (Jt. Ex. 3, p. 5) On October 22, 2019, Dr. Han responded to a letter from Attorney Michael Roling, who was representing the employer regarding claimant's 2019 injury claim.[3] (Jt. Ex. 4, pp. 2-3) Dr. Han agreed to the statements in Attorney Roling's letter, which summarized their recent phone conversation. Dr. Han agreed that after comparing the EMG studies from 2015 and 2019, his opinion, to a reasonable degree of medical certainty, was that claimant's right cubital tunnel was the same, and right carpal tunnel had improved. With respect to the left arm, his opinion was that the left carpal tunnel was the same, and the left cubital tunnel was worse. As such, a new injury was diagnosed with respect to the left upper extremity, and treatment was provided for the new injury. (Jt. Ex. 4, p. 2)

On December 5, 2019, Dr. Han provided a letter regarding permanent impairment related to the 2019 left cubital tunnel surgery. (Jt. Ex. 4, p. 4) Dr. Han noted that claimant reached MMI on November 8, 2019, and assigned a 4 percent impairment rating. There were no permanent work restrictions. (Jt. Ex. 4, p. 4)

Claimant had an independent medical evaluation (IME) with John Kuhnlein, D.O., on March 4, 2020. (Cl. Ex. 1) His report is dated June 22, 2020. (Cl. Ex. 1, p. 1) Dr. Kuhnlein reviewed claimant's prior job descriptions, including Federal Operator and Cooler Loader. (Cl. Ex. 1, pp. 1-4) He noted that claimant worked the Federal Operator job between approximately 2013 and 2015. (Cl. Ex. 1, p. 1) Then, from 2015 to 2017, claimant worked in the cooler picking yogurt orders. (Cl. Ex. 1, p. 3) After that, he moved to the Cooler Loader job. (Cl. Ex. 1, p. 3) He noted that the cooler loader job involved working 4 days per week loading product into trailers. The fifth day was spent running a forklift for half the day, and picking product for the other half of the day. (Cl. Ex. 1, p. 3) This is consistent with claimant's testimony. (Tr., pp. 18-19) He further noted that in 2019, claimant changed to a job that involves covering for people on their breaks, and he rarely works in the cooler now. (Cl. Ex. 1, p. 10) This is also consistent with claimant's testimony. (Tr., p. 25)

Dr. Kuhnlein provided a detailed summary of the medical records and his interview with claimant. (Cl. Ex. 1, pp. 4-10) He notes several times that the records indicated claimant's symptoms initially improved following the surgeries in 2015. (Cl. Ex. 1, pp. 6, 7) While claimant continued to have complaints of numbness and tingling, he was able to do his job. He notes that in 2017 when claimant moved to the cooler loader position, his symptoms started to get worse. (Cl. Ex. 1, p. 8) Dr. Kuhnlein recorded that at the time of his examination, claimant described more left upper extremity symptoms than right. (Cl. Ex. 1, p. 10) He described constant pain in the left medial elbow extending through the forearm to the left ulnar hand and ring and small fingers. He also complained of intermittent numbness and tingling in all fingers on his left hand, and pain in the left medial elbow when compressed. He had no right elbow symptoms, but described "rare pain" in the right ulnar wrist and palmar hand areas with gripping and

[3] At the time of the 2019 injury, Anderson Erickson had workers' compensation insurance through Sentry.

grasping, along with waxing and waning numbness and tingling in the right ring and small fingers. (Cl. Ex. 1, p. 10)

Dr. Kuhnlein further notes that claimant described problem with material handling functions of more than 50 pounds, especially lifting boxes. He has problems with the left elbow when working above shoulder height. He has difficulty using hand and power tools because of the gripping and grasping. (Cl. Ex. 1, p. 10) He has similar problems at home. (Cl. Ex. 1, p. 11) In the three months prior to Dr. Kuhnlein's exam, claimant's left elbow symptoms had gotten worse, while his other symptoms had mainly stayed the same. (Cl. Ex. 1, p. 11)

After his physical examination, Dr. Kuhnlein provided diagnoses of right carpal tunnel syndrome and cubital tunnel syndrome with related surgeries; right pronator syndrome; left carpal and cubital tunnel syndrome with related surgeries, left middle finger trigger finger with related surgery, and left pronator syndrome. (Cl. Ex. 1, pp. 13-14) With respect to causation, Dr. Kuhnlein opined that claimant's work at Anderson Erickson was a substantial factor in the development of the right carpal and cubital tunnel syndrome surgically addressed by Dr. Han in February 2015, as well as the left carpal tunnel syndrome surgically addressed in April of 2015. (Cl. Ex. 1, p. 14) He further related claimant's left cubital tunnel syndrome back to the 2014 injury date. (Cl. Ex. 1, p. 14) He noted that when claimant moved to the cooler loader job in 2017, he had to perform significant gripping and grasping throughout the workday while loading trailers or picking products in the cooler, and had to use a hook in the right hand and hand-held computer in the left hand, demonstrating frequent narrow pinching and gripping to move product. (Cl. Ex. 1, p. 15) This caused increased soreness in both arms. (Cl. Ex. 1, p. 15)

Dr. Kuhnlein noted that the incident report from February 21, 2019, noted complaints of pain in the right wrist and hand, and the left arm from the elbow down. (Cl. Ex. 1, p. 15) The incident report further noted that "the left arm and right hand symptoms never fully recovered after the previous surgeries, and had gradually worsened after time." He also told Dr. Nayeri that he had been noticing more arm pain over the previous year, when performing his duties as a cooler loader. (Cl. Ex. 1, p. 15) Dr. Kuhnlein specifically noted that there were "issues in the record with Mr. VanGorp stating that his symptoms improved after the surgeries, then stating that the symptoms never completely resolved, and then describing the start of symptoms after a previous fall about a year ago. . . The recurring theme is that Mr. VanGorp's symptoms never fully resolved even though they improved." (Cl. Ex. 1, pp. 15-16)

Dr. Kuhnlein provided impairment ratings for both upper extremities. (Cl. Ex. 1, p. 17) With respect to the right upper extremity, he assigned a combined total rating of 8 percent of the upper extremity, which converts to 5 percent of the whole person. (Cl. Ex. 1, p. 17) With respect to the left upper extremity, he assigned a combined total rating of 8 percent of the upper extremity as well. (Cl. Ex. 1, p. 17) Dr. Kuhnlein did not specify whether his rating was in addition to the prior ratings provided by Dr. Han. Dr. Kuhnlein recommended restrictions of lifting 50 pounds occasionally from floor to waist, waist to

shoulder, and over the shoulder. (Cl. Ex. 1, p. 17) He recommended claimant lift with the palms up as much as possible, using his hands underneath boxes rather than gripping boxes by the edges if possible. (Cl. Ex. 1, p. 17) He recommended only occasional crawling due to his upper extremity problems. (Cl. Ex. 1, p. 18) He is not restricted from ladders as long as he can demonstrate the ability to maintain a three-point safety stance. He should limit work at or above shoulder height to an occasional basis, and grip or grasp occasionally. He should only use hand or power tools occasionally, and should consider using anti-vibration gloves if working with power or vibrating tools. (Cl. Ex. 1, p. 18)

Claimant subsequently entered into an agreement for settlement with his employer and Sentry Insurance for the February 20, 2019 injury to his left upper extremity. (Def. Ex. B) The settlement was approved by the agency on August 17, 2020. The parties agreed that claimant sustained permanent partial disability of 4.2 percent loss of the left upper extremity, resulting in 10.5 weeks of compensation commencing on November 8, 2019. (Def. Ex. B, p. 1) The parties included a stipulation with the settlement agreement, which acknowledged the parties' agreement that claimant has ongoing subjective complaints regarding his left upper extremity, and while he has not been assessed permanent restrictions that preclude him from returning to his job with the employer, there may be positions that claimant may have difficulty performing due to his left upper extremity injury. (Def. Ex. B, p. 4)

Claimant credibly testified that his symptoms in his bilateral upper extremities have progressively worsened since the time of the 2016 agreement for settlement. (Tr., pp. 18-20; 25-28; 30-33) His testimony is supported by the medical records. (Jt. Ex. 6; Jt. Ex. 2, pp. 8-12; Cl. Ex. 1) His symptoms have worsened such that he sought out a second opinion on his own after Dr. Han indicated there was nothing more he could do. (Tr., pp. 22-23)

Claimant testified that some of the things he could do before, he is no longer able to do. (Tr., p. 25) For example, at the time of the 2016 settlement, claimant worked in the cooler picking yogurts. (Tr., pp. 18-19) Claimant does not feel capable of working in the cooler any more, as those jobs are more physical. (Tr., pp. 25; 35) Picking in the cooler involves grabbing certain cartons and containers and his hands "just don't work with the cartons that you have to grab and whatnot." (Tr., p. 25) When the opportunity arose for claimant to move to a job outside of the cooler, he took it. (Tr., pp. 25; 35-36) Claimant still makes the same amount of money, and is not claiming an economic change in condition. (Tr., p. 26)

At the time of the settlement in 2016, no physician had assigned any permanent restrictions with respect to claimant's upper extremities. (Tr., p. 26) Dr. Kuhnlein has since recommended permanent restrictions, noted above, after a thorough examination of claimant and review of the medical records. (Cl. Ex. 1) Claimant also has increased functional impairment since the settlement agreement. Dr. Kuhnlein provided an 8 percent upper extremity rating to each arm, which included specific ratings for range of motion deficits, ulnar nerve sensory deficits, and the carpal tunnel syndrome in each

arm. (Cl. Ex. 1, p. 17) At the time of settlement, Dr. Han had provided a 1 percent left upper extremity rating, and 3 percent right upper extremity rating. (Jt. Ex. 4, p. 1)

Dr. Kuhnlein's increased impairment rating is supported by the medical evidence. Claimant had a normal EMG in March of 2016, shortly before the settlement was approved. (Jt. Ex. 2, p. 5) However, his EMG in April of 2019 showed moderately severe carpal tunnel syndrome bilaterally; left cubital tunnel syndrome; and mild right ulnar nerve entrapment at the wrist. (Jt. Ex. 1, p. 4) Additionally, claimant demonstrated full range of motion in both upper extremities at the time of the 2016 settlement, while Dr. Kuhnlein noted some deficits in range of motion during his examination. (Jt. Ex. 2, pp. 2-7; Cl. Ex. 1, p. 2) Dr. Kuhnlein also provided ratings related to claimant's sensory deficit, which has gotten worse since the 2016 settlement. (Cl. Ex. 1, p. 17)

Claimant also testified that at his last visit with Dr. Han, he advised that he would not perform any additional surgeries because "it wouldn't do any good." (Tr., p. 23) Claimant requested a second opinion, and was told he could return to Dr. Han. (Cl. Ex. 4, p. 1; Tr., pp. 10-15; 23) Rather than return to Dr. Han, claimant sought a second opinion on his own at Des Moines Orthopaedic Surgeons (DMOS). (Tr., p. 23)[4] Claimant testified that the surgeon at DMOS said he would be willing to do surgery, but agreed with Dr. Han that it might not do any good, and he would not know until he was actually performing the surgery. (Tr., pp. 23-24) Based on that, claimant decided against further surgery at that time. (Tr., pp. 24, 28-29) He did state that if he was presented with a surgical option that could make his symptoms better, he would want to do it. (Tr., p. 24)

Based on claimant's testimony and the medical records, I find that claimant's symptoms in his bilateral upper extremities began to worsen in approximately 2017, about one year after the agreement for settlement was approved. His symptoms continued to worsen until he finally went to his employer to request treatment in 2019. Claimant has increased permanent restrictions and additional impairment per Dr. Kuhnlein's report. While he continues working for the employer, he has fortunately been able to bid into a less physical position. He does not believe he would be able to do the jobs in the cooler any longer. As such, I find that claimant has proven a change in his physical condition. While a new injury related to left cubital tunnel syndrome was discovered and treated, no physician has offered any additional treatment of substance for the ongoing symptoms caused by the right carpal and cubital tunnel and left carpal tunnel related to the 2014 injury. Given that claimant's symptoms have persisted, I find that this change of condition is permanent in nature. As such, I find that claimant has sustained a permanent worsening of his physical condition since the agreement for settlement was filed in 2016.

Dr. Kuhnlein provided an 8 percent impairment rating to each upper extremity. Using the combined values chart in the AMA Guides to the Evaluation of Permanent Impairment, total impairment comes to 15 percent of the bilateral upper extremities.

[4] At hearing, claimant could not remember the name of the physician he saw at DMOS. Dr. Kuhnlein's report indicates he saw Shane Cook, M.D., on March 10, 2020. The DMOS record is not in evidence and was not available at the time of Dr. Kuhnlein's report.

Using Table 16-3 of the AMA Guides, 15 percent of the upper extremity converts to 9 percent of the whole person. Therefore, I find that claimant is entitled to 9 percent of the whole person, or 45 weeks of benefits, pursuant to Iowa Code section 85.34(2)(s).

CONCLUSIONS OF LAW

This is a review-reopening case. In a proceeding to reopen an award for payments or agreement for settlement as provided by section 86.13, inquiry shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded or agreed upon. Iowa Code section 86.14(2). Upon review-reopening, claimant has the burden to show a change in condition related to the original injury since the original award or settlement was made. The change may be either economic or physical. Blacksmith v. All-American. Inc., 290 N.W.2d 348 (Iowa 1980); Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959).

The Iowa Supreme Court provided guidance on this change of condition requirement in Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387 (Iowa 2009). The Supreme Court held:

> In determining a scheduled or unscheduled 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 functional impairment and disability resulting from a scheduled loss is what it is at the time of the award and is not based on any anticipated deterioration of function that might or might not occur in the future. See Iowa Code § 85.34(2); Second Injury Fund v. Bergeson, 526 N.W.2d 543, 548 (Iowa 1995) ("a scheduled injury is evaluated by determining the loss of physiological capacity of the body part"). Likewise, in an unscheduled whole-body case, the claimant's loss of earning capacity is determined by the commissioner as of the time of the hearing based on the factors bearing on industrial disability then prevailing—not based on what the claimant's physical condition and economic realities might be at some future time . . . The workers' compensation statutory scheme contemplates that future developments (post-award and post-settlement developments), including the worsening of a physical condition or a reduction in earning capacity, should be addressed in review-reopening proceedings. See Iowa Code § 86.14(2). 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).
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> A compensable review-reopening claim filed by an employee requires proof by a preponderance of the evidence that the claimant's current condition is "proximately caused by the original injury." See Simonson, 588 N.W.2d at 434 (original emphasis omitted) (quoting Collentine, 525 N.W.2d at 829). While worsening of the claimant's physical condition is one way to satisfy the review-reopening requirement, it is not the only way

for a claimant to demonstrate his or her current condition warrants an increase of compensation under section 86.14(2). See Blacksmith v. All-Am., Inc., 290 N.W.2d 348, 354 (Iowa 1980) (holding a compensable diminution of earning capacity in an industrial disability claim may occur without a deterioration of the claimants [*sic*] physical capacity).

Therefore, we have held that awards may be adjusted by the commissioner pursuant to section 86.14(2) [then section 86.34] when a temporary disability later develops into a permanent disability, see Rose v. John Deere Ottumwa Works, 247 Iowa 900, 906, 76 N.W.2d 756, 759 (1956), or when critical facts existed but were unknown and could not have been discovered by the exercise of reasonable diligence at the time of the prior settlement or award, see Gosek v. Garmer & Stiles Co., 158 N.W.2d 731, 735 (Iowa 1968). We have also previously approved a review-reopening where an injury to a scheduled member later caused an industrial disability. See Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 13, 17 (Iowa 1993) ("[A] psychological condition caused or aggravated by a scheduled injury is to be compensated as an unscheduled injury.").

Although we do not require the claimant to demonstrate his current condition was not contemplated at the time of the original settlement, we emphasize the principles of res judicata still apply—that the agency, in a review-reopening petition, should not reevaluate an employee'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. As this court has explained,

> a contrary view would tend to defeat the intention of the legislature [:]... "The fundamental reason for the enactment of this legislation is to avoid litigation, lessen the expense incident thereto, minimize appeals, and afford an efficient and speedy tribunal to determine and award compensation under the terms of this act."

Stice, 228 Iowa at 1038, 291 N.W. at 456 (quoting Flint v. City of Eldon, 191 Iowa 845, 847, 183 N.W. 344, 345 (1921)). Therefore, "once there has been an agreement or adjudication the commissioner, absent appeal and remand of the case, has no authority on a later review to change the compensation granted on the same or substantially same facts as those previously considered." Gosek, 158 N.W.2d at 732. For example, a "mere difference of opinion of experts or competent observers as to the percentage of disability arising from the original injury would not be sufficient to justify a different determination by another commissioner on a petition for review reopening." Bousfield v. Sisters of Mercy, 249 Iowa 64, 69, 86 N.W.2d 109, 113 (1957). Likewise section 86.14(2) does not provide an opportunity to relitigate causation issues that were determined in the initial award or settlement agreement.

Kohlhaas, 777 N.W.2d at 392-393.

The supreme court in Kohlhaas thus identified five ways the change in condition review-reopening requirement can be satisfied: (1) a worsening of the claimant's physical condition; (2) a reduction of the claimant's earning capacity; (3) a temporary disability developing into a permanent disability; (4) a critical fact existed but was unknown or could not have been discovered by the exercise of reasonable diligence at the time of the prior settlement or award; or (5) a scheduled member injury later causes an industrial disability. See Verizon Business Network Services. Inc. v. McKenzie, 823 N.W.2d 418, (Iowa App. 2012).

I found that claimant has proven a permanent worsening of his physical condition since the agreement for settlement was filed in 2016. As such, he has established entitlement to reopening his prior agreement for settlement. Iowa Code section 86.14(2).

The next issue to determine is the extent of additional permanent partial disability to which claimant is entitled. Benefits for permanent partial disability of two members caused by a single accident is a scheduled benefit under section 85.34(2)(s); the degree of disability must be computed on a functional basis with a maximum benefit entitlement of 500 weeks. Simbro v. DeLong's Sportswear, 332 N.W.2d 886 (Iowa 1983).

Dr. Kuhnlein provided an 8 percent impairment rating to each upper extremity. Using the combined values chart in the AMA Guides to the Evaluation of Permanent Impairment, total impairment comes to 15 percent of the upper extremities. Using Table 16-3 of the AMA Guides, 15 percent of the upper extremity converts to 9 percent of the whole person. Pursuant to Iowa Code section 85.34(2)(s), claimant is entitled to a proportional award equivalent to 9 percent of 500 weeks. Blizek v. Eagle Signal Co., 164 N.W.2d 84 (Iowa 1969). Therefore, I found that claimant is entitled to 45 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(s).

Pursuant to the prior agreement for settlement, claimant was paid 30 weeks of compensation at the rate of $618.42. (Def. Ex. A, p. 1) The parties stipulated that defendants are entitled to that credit. (Hearing Report) Claimant also received 10.5 weeks of compensation, at the rate of $727.30 per week, related to the 2019 left cubital tunnel injury. (Def. Ex. B, p. 1) Defendants argue they are entitled to additional credit for those 10.5 weeks of benefits. Claimant disagrees, and argues that Iowa Code 85.34(7) provides no authority for credit for a subsequent injury, only prior injuries or disabilities.

The legislature enacted amendments to Iowa Code chapter 85 in 2017. See 2017 Iowa Acts ch. 23. The amendments included changing the language of Iowa Code section 85.34. See id. at § 13. This amendment applies to injuries that occur on or after July 1, 2017, so it does not apply to the current case. See id. at § 24. The version of Iowa Code section 85.34(7) in effect between the effective dates of the 2004 and 2017 amendments applies here.

Iowa Code section 85.34(7), as it was then in effect, states:

> a. An employer is fully liable for compensating all of an employee's disability that arises out of and in the course of the employee's employment with the employer. An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment with a different employer or from causes unrelated to employment.
>
> b. If an injured employee has a preexisting disability that was caused by a prior injury arising out of and in the course of employment with the same employer, and the preexisting disability was compensable under the same paragraph of section 85.34, subsection 2, as the employee's present injury, the employer is liable for the combined disability that is caused by the injuries, measured in relation to the employee's condition immediately prior to the first injury. In this instance, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer.
>
> If, however, an employer is liable to an employee for a combined disability that is payable under section 85.34, subsection 2, paragraph "u", and the employee has a preexisting disability that causes the employee's earnings to be less at the time of the present injury than if the prior injury had not occurred, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer minus the percentage that the employee's earnings are less at the time of the present injury than if the prior injury had not occurred.
>
> c. A successor employer shall be considered to be the same employer if the employee became part of the successor employer's workforce through a merger, purchase, or other transaction that assumes the employee into the successor employer's workforce without substantially changing the nature of the employee's employment.

Nothing in section 85.34(7) applies to the situation in this case. The 2019 injury, for which defendants seek credit, is not a preexisting disability, and was not compensable under the same paragraph of section 85.34(2) as the 2014 injury.[5] Additionally, this case does not present a scenario in which claimant acquires a double recovery if defendants are not allowed a credit for the 2019 payment. The parties agreed that the 2019 injury was a new injury, not compensated or claimed in the settlement of the prior 2014 injury. While it involved the left upper extremity, the 2019 injury was specifically only related to the left cubital tunnel syndrome, while the 2014 injury specifically only includes the carpal tunnel syndrome on the left. As such, I find

[5] The 2014 injury was compensated pursuant to Iowa Code section 85.34(2)(s). The 2019 injury was compensated pursuant to section 85.34(2)(m).

that defendants are not entitled to a credit for the 10.5 weeks of benefits paid to claimant for the 2019 left upper extremity injury.

Defendants are entitled to credit for 30 weeks of compensation at the rate of $618.42. I found claimant is entitled to 45 weeks of benefits. As such, defendants shall pay claimant an additional 15 weeks of benefits. The parties dispute the proper commencement date for those benefits. Claimant asserts the proper commencement date is January 30, 2020, when Dr. Kuhnlein determined claimant reached MMI for the right upper extremity and left carpal tunnel syndrome. Defendants did not present a different date for consideration. As such, benefits shall commence on January 30, 2020.

The next issue to determine is whether claimant is entitled to alternate medical care pursuant to Iowa Code section 85.27(4).

Iowa Code section 85.27(4) provides, in relevant part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

Iowa Code § 85.27(4).

Defendants' "obligation under the statute is confined to *reasonable* care for the diagnosis and treatment of work-related injuries." Long v. Roberts Dairy Co., 528 N.W.2d 122, 124 (Iowa 1995) (emphasis in original). In other words, the "obligation turns on the question of reasonable necessity, not desirability." Id.

Similarly, an application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. See Iowa Code § 85.27(4). Thus, by challenging the employer's choice of treatment and seeking alternate care, claimant assumes the burden of proving the authorized care is unreasonable. See Iowa R. App. P 14(f)(5); Long, 528 N.W.2d at 124.

Ultimately, determining whether care is reasonable under the statute is a question of fact. Long, 528 N.W.2d at 123.

In this case, claimant produced no evidence to establish that the care offered by defendant to date has been inferior or less extensive than other available care. In fact, claimant failed to prove that any alternative medical care is available or recommended for his conditions. Claimant testified that the physician he saw at DMOS told him that while he could do surgery, he would not know if it would help until he had "gotten in there, but more than likely, it wouldn't improve." (Tr., pp. 23-24) Essentially, the doctor at DMOS had a similar opinion as Dr. Han. The main difference was the doctor at DMOS was willing to do surgery if claimant chose, while Dr. Han did not provide that choice. (Tr., p. 29) Ultimately, claimant chose not to have any additional surgery based on what the doctors told him. (Tr., pp. 24, 29-30, 34-35)

While claimant clearly has ongoing symptoms, the record shows that no specific additional medical care is currently being recommended. Additionally, defendants continue to authorize Dr. Han, and have not abandoned care. For this reason, I find claimant failed to prove that any additional medical treatment exists with another physician that is likely to improve his condition or reduce his symptoms. Therefore, I find that claimant is not entitled to alternate medical care at this time.

The next issue to determine is whether claimant is entitled to reimbursement for his IME with Dr. Kuhnlein. In this case, defendants did not seek any opinion regarding additional permanent disability related to the 2014 injuries prior to Dr. Kuhnlein's IME. Claimant argues that Dr. Han's opinion that the right upper extremity and left carpal tunnel were not new injuries in 2019, but rather related back to the original 2014 date, is essentially a zero percent rating, which triggers claimant's right to an IME under section 85.39. Defendants disagree.

The Iowa Workers' Compensation Commissioner has noted that the Iowa Supreme Court adopted a strict and literal interpretation of Iowa Code section 85.39 in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015) (hereinafter "DART"). See Cortez v. Tyson Fresh Meats. Inc., File No. 5044716 (Appeal December 2015). The Commissioner has taken a similar strict interpretation of the pre-requisites set forth in Iowa Code section 85.39. See Reh v. Tyson Foods, Inc., File No. 5053428 (Appeal March 2018).

Prior to the court's decision in DART, this agency had held that a release to full-duty work coupled with the failure to expressly opine as to impairment produces an inference that the employer-retained physician did not believe the injured worker sustained permanent impairment related to the injury. Countryman v. Des Moines Metro Transit Authority, File No. 5009718 (App. March 16, 2006); Kuntz v. Clear Lake Bakery, File No. 1283423 (Rehearing July 13, 2004).

The supreme court's decision in DART, as well as several recent appeal decisions, support a finding that said inference is no longer applicable to open the door for injured workers to obtain a section 85.39 examination. Instead, there must be a definitive permanent impairment rating rendered by a physician selected by the defendants before the injured worker qualifies for an independent medical evaluation pursuant to Iowa Code section 85.39.

In cases where defendants have denied liability, the commissioner has concluded that medical opinions or reports obtained for the purposes of determining causation, regardless of whether they are obtained from a treating or expert physician, are not the equivalent of an impairment rating for purposes of Iowa Code section 85.39. See Reh, File No. 5053428 (App. March 2018); Soliz v. Farmland Foods, Inc., File No. 5047856 (App. March 2018).

If an injured worker wants to be reimbursed for the expenses associated with a disability evaluation by a physician selected by the worker, the process established by the legislature must be followed. This process permits the employer, who must pay the benefits, to make the initial arrangements for the evaluation and only allows the employee to obtain an independent evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. DART, 867 N.W.2d at 847 (citing Iowa Code § 85.39).

In this case, defendants did not obtain a new permanent impairment rating for claimant's 2014 injury. Instead, they asked Dr. Han to address causation. Unless a claimant can establish the prerequisites of Iowa Code section 85.39, the defendants are not obligated to pay for the claimant's evaluation. DART, 867 N.W.2d at 843-844. Under the circumstances of this case, claimant is not able to establish the prerequisites of Iowa Code section 85.39 to qualify for an evaluation at defendants' expense. Therefore, I conclude that claimant's request for reimbursement of Dr. Kuhnlein's evaluation under Iowa Code section 85.39 must be denied.

That being said, the Supreme Court in DART noted that in cases where Iowa Code section 85.39 is not triggered to allow for reimbursement of an IME, a claimant can still be reimbursed at hearing for the costs associated with the preparation of the written report as a cost under rule 876 IAC 4.33. DART, 867 N.W.2d at 846-847. Assessment of costs is a discretionary function of this agency. Iowa Code § 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33.

Dr. Kuhnlein provided an itemized bill breaking down the cost for the IME exam, and the cost for preparing the written IME report. (Cl. Ex 1, p. 21) As such, I find that the cost of $2,671.90 for the preparation of Dr. Kuhnlein's written report is reimbursable as a cost pursuant to 876 IAC 4.33.

With respect to the remainder of claimant's requested costs, I find that claimant was generally successful in his claim, and an award of additional costs is appropriate. I exercise my discretion and award claimant the additional cost of the $100.00 filing fee.

ORDER

THEREFORE, IT IS ORDERED:

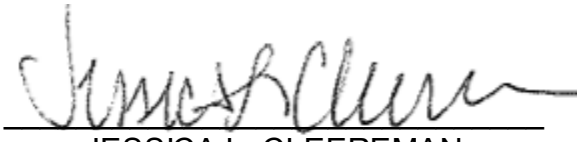
Defendants shall pay claimant an additional fifteen (15) weeks of benefits at the stipulated rate of six hundred eighteen and 42/100 dollars ($618.42) commencing on January 30, 2019.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

Defendants shall reimburse claimant's costs in the amount of two thousand seven hundred seventy-one and 90/100 ($2,771.90), which includes the cost of Dr. Kuhnlein's written report and the filing fee.

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

Signed and filed this 16th day of August, 2021.



JESSICA L. CLEEREMAN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Nick Platt (via WCES)

James Bryan (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.