BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SCOTT EALY, Claimant, vs. WEITZ INDUSTRIAL, LLC, Employer, and ILLINOIS NATIONAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5054511.01 REVIEW-REOPENING DECISION Head Note Nos.: 2905, 1804, 2500, 2502

STATEMENT OF THE CASE

Claimant, Scott Ealy, has filed a review-reopening petition seeking workers' compensation benefits against Weitz Industrial, LLC, employer, and Illinois National Insurance Company, insurer, both as defendants.

In accordance with agency scheduling procedures and pursuant to the Order of the Commissioner the hearing was held on May 9, 2023, via Zoom.

The record consists of Joint Exhibits 1-8, Claimant's Exhibits 1-16, Defendants' Exhibits A-E, along with the testimony of the claimant. The case was considered fully submitted on June 12, 2023, upon the simultaneous filing of briefs.

ISSUES

1. Whether there has been a change of condition since the original arbitration hearing on September 15, 2016, that might entitle claimant to additional permanent partial disability benefits under a review-reopening and, if so:

   a) The extent of claimant's industrial disability;

b) Whether claimant is considered permanently disabled under the odd-lot doctrine;

c) The commencement date for permanent partial disability benefits, if any are awarded;

d) Whether claimant is entitled to payment of medical expenses itemized in Exhibit 13;

e) Whether claimant is entitled to an IME under Iowa Code section 85.39; and whether claimant is entitled to alternate care under Iowa Code section 85.27; and costs.

STIPULATIONS

The parties filed a hearing report at the commencement of the review-reopening hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this review-reopening decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The parties agree claimant suffered an injury on July 25, 2014, which arose out of and in the course of his employment with the defendant. The injury sustained by claimant on the aforementioned date is the cause of a permanent disability that is industrial in nature. The weekly benefit rate is $881.14.

In the prior decision dated January 25, 2017, claimant was found to be 85 percent industrially disabled.

FINDINGS OF FACT

At the time of the May 9, 2023, hearing, claimant was a fifty-seven-year-old person. He is married and currently lives in Tennessee. He testified at hearing and in deposition that he moved because he thought the warmer climate would be better for his health but primarily due to his wife's career as a photographer. His new home is located in Hohenwald, a small rural town of around three thousand people approximately an hour from Nashville, Tennessee. Towns with populations of five thousand or more are around thirty to thirty-five minutes from Hohenwald. He lives on a five-acre property in a one-level tiny house. Two of his four children live on the property. He testified that he used to accompany his wife on photo shoots and help with the lighting or hold the reflector but due to many falls, he has ceased these activities. He testified that due to less snow and ice he felt that the move was beneficial although his symptoms have not improved due to the warmer weather.

There is an extensive report from Apples of Gold in evidence regarding claimant's learning disabilities. (Claimant's Exhibit 1) The assessment of Elizabeth

Hoksbergen, an educational psychologist, was that claimant has a severe learning disability. (CE 1:42-43) However, the report is lacking any comparison between claimant's cognitive abilities prior to September 15, 2016, and post September 15, 2016, and there is nothing in the report that says that the claimant's learning abilities changed in the seven years. Claimant testified that he has had no additional schooling or training since the original hearing date. The report has limited evidentiary value as to claimant's alleged increased disability and whether a substantial change of circumstances has occurred since the original hearing date.

The post September 15, 2016, hearing medical visits begin with a June 14, 2017, consultation with Charlotte H. Koenig, M.D., for concerns regarding polyneuropathy. (Joint Exhibit 2:3) A five-finger dexterity exam was performed abnormally bilaterally by claimant. Id. He saw Dr. Keonig in follow up for hypertension on July 19, 2017. (JE 2:4) There was nothing remarkable about this visit.

On January 3, 2018, claimant was seen at Mahaska Health Partnership for lumbar pain. (JE 4:31) He had tenderness and limited range of motion on the right. Id. There was a workup that included an abdominal-pelvic CT scan, which was negative. (JE 4:76) He was given a work excuse and ordered to rest at home. (JE 4:33) He was also prescribed 440 mg of Aleve to be taken two times a day, 650 mg of Tylenol every four to six hours, and Percocet one to two pills every six hours as needed. Id. It was noted that the Percocet should be used sparingly as it causes drowsiness. Id.

On April 5, 2018, claimant was seen by Paul A. Riggs, M.D., for pre-bowel movement crampings and urgencies where he would find it challenging to get to the toilet in time. (JE 4:76) He attributed bleeding to hemorrhoids but did not feel any protrusion of tissues. Id. On April 11, 2018, Dr. Riggs performed a gastroscopy and colonoscopy with findings of a transverse colon polyp. Id. The gastroscopy findings were of bilateral distal esophageal erosions with a distal esophageal ring (mild chronic inflammation and benign reactive tissue without Barrett's) and with gastric biopsies "mild chronic gastritis, negative for Helicobacter." Duodenal biopsies were relatively negative. He was urged to be on an antipeptic regimen. Id.

On July 2, 2018 claimant was seen by John P. Albright, M.D. for a re-evaluation of his back pain, right hip pain, right knee pain, and radiation of pain and numbness down his entire right lower extremity into the bottom of his foot. (JE 3:6) It was two years status post-surgical decompression and implantation and fixation of PEEK implants, along with iliac crest bone marrow aspirate which allowed decompression of the right L3 nerve and stabilizing of that segment with open reduction and internal fixation. Id. His complaints on this date included back pain, right leg pain, and neurologic findings that were not anticipated at the time of Dr. Mendoza's follow up exam. Id.

Claimant was using a right long leg brace with offset functional locking mechanism that also controlled his foot placement and provided support and a back brace. (JE 3:6, 8) This custom braced allowed claimant to walk a mile in 20 minutes. His complaints included right knee pain with what was diagnosed as mild osteoarthritis with

some synovitis. (JE 3:6) After walking 20 minutes, he experienced right calf pain with burning and tightness in the calf down to the foot on the plantar aspect. Id. He was unable to stand for any length of time, as to do so caused numbness and tingling and loss of muscle strength. Id. He had localized pain in the back at the L3-L4 level, which bothered him in the sitting position, when standing still, and when attempting to bend forward. Id. A lumbosacral corset did help. Id. Lateral hip pain increased when sitting with direct pressure on the buttock. Id.

Dr. Albright observed claimant walk on the tip of the toes and heels, cross both legs, and had negative straight leg raise tests bilaterally. (JE 3:7) Claimant had pain on palpation of the right hip and palpable tenderness across the lower back. Id. He had 2+ patellar reflexes on the left and 1+ on the right. Strength was 4/5 with iliopsoas on the right and 5/5 on the left. Id. Mentally he was feeling down or depressed. Id. He walked in an uneven manner and could not straighten his knee. (JE 3:8) He had a Trendelenburg gait when walking and weight bearing. Id. There was audible popping on the L3-L4 region. Id. Forward flexion was only tolerated to 15 or 20 degrees. Single leg-hyperextension produced increased hip pain. Id. In the greater trochanteric region lying on his side, he demonstrated a significant weakness of hip abductors. Id. He had approximately 20 percent weakness on the right side compared to the left. (JE 3:9) Straight leg raising in a supine position did not allow passive extension beyond 45 degrees due to hip pain and radiation down into his popliteal area and gastroc area, as well as his foot. Id. When seated over the edge of the table, attempts to straighten the knee resulted in decreased sensation along the posterior aspect of the calf. Id. His quad Reeve [*sic*] tendon reflex appeared to be diminished compared to the opposite side. Id. He also appeared to have decreased sensation in the plantar aspect of the foot in the posterior aspect of his calf starting at the knee joint.

Dr. Albright was concerned about the status of the L3-L4 region, L5-S1 radiculopathy and the role of the long leg extremity brace. (JE 3:9)

An MRI was conducted on August 22, 2018, that showed the surgical changes at L3–L4, however, the remainder of the study, except for some age-related degenerative changes, was unimpressive for significant nerve root impingement. (JE 3:15)

Claimant was referred to Cassim M. Ingram, M.D., and a consultation occurred on August 22, 2018, for ongoing right leg atrophy and radiculopathy following lumbar fusion in 2014. (JE 3:11) He was seen by Rhonda J. Dunn, ARNP, who shared with claimant that he did not have a new herniated disc or other pathology that warranted surgery, although he did have some atrophy of the right lower extremity. (JE 3:14) Ms. Dunn wrote that claimant did have permanent restrictions, and that it would be acceptable for him to return to work with these restrictions. Id.

These permanent restrictions were the ones imposed after his 2014 surgery:

He is able to lift 15 pounds on an occasional basis.
He is able to lift 7 pounds on a repetitive basis.

He is able to push or pull 30 pounds of force.
He is limited to occasional twisting, bending, reaching, stooping.
He is to avoid squatting or kneeling.
He requires a 5 minute break every 60 minutes in order to change positions and do specific stretches for pain management.

(JE 3:16)

On August 22, 2018, claimant had his stance control KAFO for the right lower extremity replaced due to wear and tear. (JE 3:17)

On March 5, 2019, claimant was provided a temporary supply of Gabapentin CAP 300 mg. (JE 4:35) The period of the prescription was from January 1, 2019, through December 31, 2019, and was for 180 capsules per 30 days. (JE 4:36)

On May 17, 2019, routine lumbar spine 3V x-rays were taken which showed a fusion at L3-L4 with no acute LS-spine pathology. (JE 4:40)

On September 18, 2019, claimant was seen at Mahaska Emergency Department for chest pain and to rule out the possibility of a stroke. (JE 4:42) He stated he was walking his dog when his right arm began to feel heavy and numb. (JE 4:42) He began to feel dizzy and light-headed. Id. Once at the emergency room, his symptoms resolved. (JE 4:44) The attending physician, Dr. Eric W. Miller, found no other weaknesses other than the chronic weakness to the right lower extremity and weakness in the right arm. Id. He had 3/5 strength in the right upper extremity and 4/5 strength in the right lower extremity. (JE 4:46) In the evaluation notes, the physical therapist Lauren Terpstra noted that he walked with a slightly antalgic gait because of his right lower extremity weakness, but that he was not wearing the brace that he typically uses for ambulation. (JE 4:52) There was heavy reliance on the cane but no loss of balance or instability. Id. It was noted that claimant and his wife live in an RV and travel. (JE 4:45) A CT scan of the head was conducted but there was no evidence of an acute intracranial process. (JE 4:47) He was kept overnight and discharged on September 19, 2019, with prescriptions for Gabapentin 600 mg three times a day; Amitriptyline 25 mg at bedtime; cyclobenzaprine 5 mg three times a day as needed; omeprazole 20 mg 1 tablet; and lisinopril-hydrochlorothiazide 10-12.5 mg. (JE 4:54)

Claimant sought treatment at Healthland, a Mahaska Health Partnership Clinic, on September 26, 2019 for right shoulder pain and arm weakness. (JE 4:57) Michael Johnston, PA-C, noted that it was the first visit claimant had to the clinic and that he was there for evaluation of multiple symptomatology. (JE 4:58) He felt his entire right arm had become weak and he complained of shoulder discomfort. Id. He had occasional neck discomfort, but it was not debilitating. Id. He referenced a fall out of the RV two and a half months prior but said that his pain symptoms existed prior to the fall. Id. At this visit, claimant used both a walking stick and his KAFO drop lock knee brace. Id. X-rays showed narrowing of C5-6 and C6-7 disk spaces as well as foraminal narrowing. Id. Mr. Johnston informed claimant that his symptomatology pointed toward a higher

level of nerve entrapment for the right upper extremity. (JE 4:59) Claimant was ordered to undergo an MRI of the cervical spine and an EMG of the upper right extremity. Id. He was prescribed 800 mg of Ibuprofen to be taken 2-3 times per day. Id.

On October 2, 2019, claimant returned to Healthland following the MRI and EMG. The EMG was consistent for right carpal tunnel syndrome, but no upper motor neuron abnormality was found. (JE 4:62) Mr. Johnston wrote that he was concerned that despite the fact that claimant was giving every effort during the examination, he had noticeable weakness in all muscle groups of the right upper extremity. Id. Mr. Johnston referred claimant to Iowa City for a neurology assessment. Id.

On December 17, 2019, claimant was seen by Andrea J. Swenson, M.D., for right upper extremity numbness and tingling. (JE 3:19) He also presented with cervical neck pain, which he attributed to the RV fall. Id. He explained he landed on his right shoulder and outstretched right hand. Id. According to the claimant, the fall was the result of dogs and his knee brace malfunction. Id. The initial assessment was likely musculoskeletal pain, but an EMG was ordered. (JE 3:22) Mild atrophy was noted in the right quad.

On July 27, 2020, claimant saw Dr. Eric W. Miller for incontinence complaints. (JE 4:66) Dr. Miller recommended claimant increase fiber in his diet and use Metamucil. (JE 4:67) Dr. Miller noted that claimant did have weakness in his anal sphincter, likely related to his previous back injury, and encouraged claimant to follow up with a neurosurgeon from Workmen's Compensation. (JE 4:67)

On December 7, 2020, a new lumbar MRI was conducted. (JE 6:86) Compared to the August 22, 2018, there did not appear to be any new changes. Id.

On March 22, 2021, claimant reported to Dr. Daniel C. Miller that he continued to have constant low back pain in the range of 2 to 3 on a 10 scale. (JE 6:84) He said a few weeks earlier he had tried to help a lady who had fallen, but in the process hurt himself a little as well. Id. He complained of ongoing incontinence. Id. After a review of the extensive medical records related to the injury, Dr. Miller did not think the rectal dysfunction or chronic diarrhea was related to the work injury. (JE 6:85) Dr. Miller noted that claimant had been taking his gabapentin inappropriately, which is why he ran out of medication earlier and had been very lethargic in the morning. Id.

On March 26, 2021, claimant saw Dr. Eric Miller for continued complaints of weakness and right leg atrophy. (JE 4:72) Gabapentin and amitriptyline calmed down paresthesias, but pain was still uncontrolled. Id. He said he tried to walk a mile a day in half-mile increments, but it was getting more difficult. (JE 4:72) He reported his fecal incontinence worsened if he bent down. Id. In the history provided by the claimant, Dr. Miller documents the following:

> Seen in 2018 by Dr. Igram for chronic lumbar radiculopathy, with repeated MRI lumbar spine showing only mild disc disease and no severe stenosis,

> no new surgical intervention recommended. He does continue to have chronic low back and right leg pain with residual right knee weakness. Describes flareups of the right buttock and lateral hip pain, previously attributed to gluteal pain and tendinopathy. He is now having trouble with fecal incontinence. There are times where he Lasix [*sic*] liquid stool between bowel movements. Sometimes he does not have the sensation that he can have a bowel movement: 30 [*sic*] having one. Otherwise, he often has residual leakage after going to the bathroom. He describes his stools. The Bristol 5 or 6 [sic]. He denies any blood in the stools. There is no mucus in his stools. He has occasional crampy abdominal pain. He has at least 2 BMs per day. Adding Metamucil made him constipated, but he continued to have fecal leakage.

(JE 4:72-73)

Claimant rated his pain in the lumbar spine, gluteus, and right lower extremity as 2 on a 10 scale. (JE 4:72)

On examination, he had back pain localized where the lumbar brace was positioned, and his right lower extremity strength was 4/5. (JE 4:74) A lumbar MRI was recommended.

On April 20, 2021, claimant's incontinence complaints were reviewed by Dr. Riggs. The note states:

> [H]e saw me in the office and reported being on PPI therapy only as he felt needed it, that might be only once weekly. He seemed to be unaware that we had done a gastroscopy showing some signs of acid reflux in the lower esophagus . . . He reports having "heartburn, it has been while lying down." He has early satiety and has to eat very slowly or else he will have multiple bites of food trapping where it just "sits behind my breast bone and I have to wait until a few sips of chaser liquids seem to make things go down." He "had these troubles because I pay poor attention to what food I eat and so I eat quickly," and this happened about 5 times a week. Despite that, he is only taking the pantoprazole about once weekly.

(JE 4:76)

Dr. Riggs went on to note that claimant was reporting fecal incontinence or at least soiling of his perineum with mucus feces occurring between bowel movements and soiling his pants. Id. On April 30, 2021, claimant underwent another colonoscopy. (JE 4:77)

On May 25, 2021, a CT of the lumbar spine was performed. (JE 7:95) He was seen by Dr. Nelson who did not have any surgical solution for pain.

On July 13, 2021, claimant was seen by Alison Weisheipl, M.D., at the Central States Pain Clinic. (JE 7:93) He complained of muscle aches, muscle weakness, arthralgias/joint pain, back pain, neck pain and difficulty walking. (JE 7:95) He reported no incontinence, no GERD, no constipation. Id. He had right quad and calf atrophy, reduced range of motion of the right knee and was unable to perform a heel to toe walk. (JE 7:96) Dr. Weisheipl found claimant to have facetogenic etiology as well as post laminectomy syndrome. Id. She thought claimant might be a candidate for dorsal column stimulation for the lower extremity symptoms. Id. When asked by claimant whether the atrophy would improve, Dr. Weisheipl advised that so long as he was not using his lower extremity, the atrophy would not likely improve and may worsen. Id. She also noted claimant was significantly depressed and believed he would benefit from a trial of duloxetine for pain but that he also needed a therapist to treat his depression. Id.

Claimant was seen by Dr. Miller on August 4, 2021. (JE 4:78) At this visit, claimant presented for lumbar and gluteal pain. Id. In the history section, it stated that "pertinent negatives include no bladder incontinence, bowel incontinence, chest pain, dysuria, fever or headaches." Id. He suffered a laceration on the left gluteus due to a rusty nail. Id. He was administered a new tetanus shot, continued on Cymbalta, amitriptyline, and gabapentin. (JE 4:81) The Cymbalta was a new prescription. He was also continued on omeprazole for gastroesophageal reflux disease. Id.

On September 3, 2021, Dr. Miller issued a letter in response to the defendants' third-party administrator. (JE 6:86) In the letter, Dr. Miller stated that he first saw claimant on November 19, 2020, per the defendants' request for four issues: chronic back pain, which awakened him at night, stool incontinence, erectile dysfunction, and right foot drop. Id. Prior to consulting with Dr. Miller, claimant had been receiving pain management treatment from UIHC but had since been discharged. Id. He was also being seen by a GI specialist for the bowel issues. Id. Dr. Miller opined that based on a review of the medical records, he did not see that the erectile dysfunction or GI issues were casually related to the back injury; however, the chronic pain and foot drop were related. Id. Dr. Miller agreed to continue to treat the chronic pain and prescribed amitriptyline and gabapentin. (JE 6:87) Claimant was to return to the clinic after one month but did not return following his March 22, 2021 appointment and thus, prescriptions were discontinued. Id.

Claimant then returned to Dr. Miller on September 24, 2021. (JE 6:89) Claimant relayed that pain management administered an injection but claimant had a panic attack as a result. Id. Claimant testified that he is afraid of needles. He did not believe that the injection helped him. (JE 6:89) Pain management also started him on duloxetine 30 mg daily for pain control and depression, which he did believe helped a little. Id. Again, the notes state that "Pertinent negatives include no bladder incontinence, bowel incontinence, chest pain, dysuria, fever or headaches." Id. Dr. Miller continued claimant on amitriptyline and gabapentin and increased claimant's Cymbalta prescription to 60 mg at the next refill. (JE 6:91)

Following this visit, claimant moved to Tennessee and began care with Jawaid Kamal, M.D., on April 27, 2022. (JE 8:99) Dr. Kamal diagnosed claimant with chronic neuropathic pain, anxiety and depression, hypertension, GERD without esophagitis, and muscle atrophy from disuse. (JE 8:100). His anxiety and depression and hypertension were well controlled with the current prescription medication. Id. For the chronic neuropathic pain, Dr. Kamal prescribed 300 mg of gabapentin to be taken two tablets in the morning and three in the evening. Id. At the May 26, 2022, visit, a trial of Percocet was instituted to treat claimant's pain and baclofen 10 mg twice a day for muscle spasm and pain. (JE 8:102) It was not clear that the baclofen was prescribed for the low back and leg pain, as claimant also described neck pain. Id. X-rays were ordered due to the complaints of cervical and lumbar pain. (JE 8:105) Both showed degenerative changes without acute abnormalities or significant disc space narrowing. Id.

On June 7, 2022, Percocet was incorporated as a permanent part of claimant's pain treatment regimen with Dr. Kamal prescribing 7.5mg of Percocet twice a day. (JE 8:108) There was no mention of any incontinence issues at the visits with Dr. Kamal despite discussions about his past colonoscopies. Id. At the July 6, 2022, visit with Dr. Kamal, claimant reported improvement in the quality of his life and pain relief. (JE 8:110) He was sleeping better as well. Id. Dr. Kamal recommended claimant go to a pain clinic but claimant did not want to, even though he understood that the pain clinic might be able to help him more than Dr. Kamal could. Id.

At the November 2, 2022, visit, Dr. Kamal noted claimant's wife "endorses his mental status to be stable and very pleasant." (JE 8:118) He was active despite his disability and "does a lot of work around the house." Id.

Claimant sees Dr. Kamal approximately once a month for a refill of his prescriptions. He has not had any other treatment, such as physical therapy or injections since moving to Tennessee. He testified that he had two visits to a pain clinic since the fall of 2022.

On November 15, 2022, claimant underwent an IME with Robin L. Sassman, D.O. (CL Ex 3) At the visit, he reported constant pain in his back and atrophy in the right leg. (CE 3:108) He had pain that radiated to the groin, right thigh numbness and burning, right foot numbness, pain in the right knee medially, depression symptoms, and left leg pain. Id. Since the September 2016 decision, claimant's pain has increased in intensity, he has increased weakness, some leakage of the bowels, pain with defecation, increased atrophy, pain in the right arm due to a fall in 2019, and left leg pain. Id. He was not sleeping well either. ID. This is a contradiction from the notes from Dr. Kamal.

Dr. Sassman concluded claimant had an increase in prescription medications including Duloxetine, Lisinopril, Omeprazole, Oxycodone, and Baclofen. (CE 3:108) Duloxetine, Lisinopril, and Omeprazole are prescribed for conditions unrelated to claimant's pain symptomatology.

On examination, he was tender to palpation over the lumbar spinous processes but nontender over the bilateral SI joints. (CE 3:109) He exhibited 10 degrees of lumbar flexion, 10 degrees of extension, 10 degrees of right lateral motion and 10 degrees of left lateral motion of the lumbar spine. Id. Reflexes were 1+/4 at the patella and ankle bilaterally. Id. Strength in the lower extremities was within 4/5 on the right and 5/5 on the left. Id. Sensation in the right lower extremity was decreased in the L3, L4 and L5 dermatomes. Calf circumference was 38 cm on the right, whereas in 2016 the right calf measured 39 cm. Id.

Dr. Sassman opined claimant did undergo a change in his physical condition since the January 25, 2017 decision. (CE 3:110) His medications increased, including dosages for Gabapentin and Amitriptyline, as well as the addition of Oxycodone and Baclofen. Id. Claimant had an increase in atrophy and loss of sensation. Id.

With regard to restrictions, she said claimant should not lift, push, pull, or carry due to the use of the cane and the AFO brace. Id. He should limit standing and walking, sitting on a rare basis, and use stairs rarely. Id. He should avoid walking on uneven surfaces or ladders and should not kneel, crawl or squat. Id. She said claimant's impairment has increased from 31 percent in 2016 to 33 percent. (CE 3:111)

Dr. Peter G. Matos performed an IME on November 18, 2022. (Defendants' Exhibit A) At the examination, claimant ambulated with the assistance of a right knee brace. (DE A:4) He had tenderness at the right medial epicondyle, otherwise all other upper extremity tests were normal. Id. He also had tenderness at the clavicle and AC joint, but special tests were negative and he had normal range of motion and strength. Id. Reflexes in the right lower extremity were slightly diminished and strength was 4/5. (DE A:5) Muscle wasting of the right lower extremity was noted and there was decreased 2-point discrimination in the right lower foot. Id.

Dr. Matos did not find claimant had sustained a substantial change in physical or mental condition since 2016, nor that he needed any additional permanent work restrictions. (DE A:5) Dr. Matos did not recommend further treatment for injuries sustained on July 25, 2014, and assigned no additional impairment. Id. There was some implication that Dr. Albright did not agree that there was a correlation between claimant's ongoing leg complaints and the work injury, which impacted Dr. Matos' opinions. (DE A:5)

Dr. Matos did not provide any measurements for range of motion for the lower extremities, nor atrophy of the right leg, nor did he provide any comparison between the claimant's current medications and past medications, beyond including the kind of prescriptions claimant was given in the medical visit summary section. (See DE A:6-16).

On January 17, 2023, Kent A. Jayne provided a preliminary vocational economic assessment, and wrote in part that, "Mr. Ealy was found incapable of substantial, gainful activity in June 2016. This disability status continues." (Cl. Ex. 7, p. 129) Mr. Jayne opined claimant has been precluded from any reasonably stable branch of the labor

market but that was true in 2016 according to Mr. Jayne. (Cl. Ex. 7, p. 132) The new restrictions of Dr. Sassman did remove even sedentary work according to Mr. Jayne. Id. He concluded:

> His restriction from Dr. Chen to "occasional reaching" would preclude him from returning to same or similar work to that which he has performed in the past, as well as more than 90% of the labor market overall. He has been precluded from sedentary bench assembly based on his failed manual dexterity. He has been precluded from entry level clerical work based on his failure in clerical perception testing.

(CE 7:132)

Mr. Jayne also stated that based on the results of tests administered by Mr. Jayne, claimant had a "collapse of his cognitive and vocational capacities in the context of chronic pain and depression." (CE 7:133) However, this seems to be at odds with the findings of Apples of Gold, which determined claimant to suffer from learning disabilities which were not associated with depression and chronic pain. Mr. Jayne did not provide evidentiary support for his claim that depression and chronic pain led to a post September 2016 decline, if that is what he meant. Id. Mr. Jayne also opined that it was unlikely any vocational rehabilitation plan would have a reasonable likelihood of success in returning claimant to a competitive employability absent a significant increase in his physical and vocational capacities and a significant decrease in his pain. (CE 7:140) Mr. Jayne went on to conclude that claimant needed assistance to perform instrumental activities of daily living, which was not reflected by claimant's testimony. (CE 7:140) Mr. Jayne's opinions are given low weight, as they are not reflected by the medical records or claimant's testimony, but instead appear to be part of his own beliefs regarding pain and how he perceives pain to impact day-to-day life and employability.

On March 7,2023, Dr. Kamal signed off an opinion letter drafted for him, wherein he stated claimant had an unsteady gait, had lost muscle in his right lower extremity, that claimant was not likely to improve, and that he did not believe claimant was capable of gainful employment. (CE 5:119)

Claimant seeks reimbursement for the reports of Dr. Robin Sassman in the amount of $3,795.00, the Apples of Gold evaluation for $1,475.00, and the expert report by Kent Jayne of $4,550.00. (CE 15:221) Claimant also seeks reimbursement for the filing fee in the amount of $103.00 and the deposition fee of $124.20. Id.

CONCLUSIONS OF LAW

The matter before the agency is a review-reopening. A hearing (File No. 5054511) was held on September 15, 2016, which resulted in a finding that claimant was 85 percent industrially disabled. At the time of the hearing, claimant argued that he was fully disabled and entitled to permanent total disability benefits.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" refer to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

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). A mere difference of opinion of experts as to the percentage of disability arising from an original injury is not sufficient to justify a different determination on a petition for review-reopening. Rather, claimant's condition must have worsened or deteriorated in a manner not contemplated at the time of the initial award or settlement before an award on review-reopening is appropriate. Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957). A failure of a condition to improve to the extent anticipated originally may also constitute a change of condition. Meyers v. Holiday Inn of Cedar Falls, Iowa, 272 N.W.2d 24 (Iowa App. 1978).

The pertinent facts pertain to what, if any, physical or economic changes occurred since the September 15, 2016 hearing, and whether those changes are significant enough to warrant a review-reopening.

Defendants complained in their brief that this current case was an attempt to re-litigate issues that were decided in the previous hearing, and to some degree the report about claimant's learning disabilities did feel like an effort by claimant to present evidence during this new hearing that had more applicability to the first hearing. The focus of the evidence should be on what changes occurred in the past seven years rather than long-standing issues that existed at the time of the September 15, 2016 hearing that impacted claimant's ability to work.

The report from Apples of Gold authored by Elizabeth Hoksbergen, an educational psychologist, concluded claimant had a severe learning disability. However, because there was no delineation between claimant's cognitive abilities prior to September 15, 2016, and post September 15, 2016, this evidence provided little insight into whether claimant is entitled to a review re-reopening. Claimant testified that he has had no additional schooling or training since the original hearing date. Defendants objected to testimony on this subject during the hearing and were overruled at the time on the grounds that it was relevant to the issue of extent of industrial disability. However, in reviewing the law and the evidence that was presented, the defendants' objection is more convincing.

It is the claimant's responsibility to prove that "current extent of disability was not contemplated by" by the prior decision or agreement for settlement. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392-93 (Iowa 2009). Claimant's educational difficulties were contemplated in the previous hearing. The new evidence brought at this hearing is, as the claimant describes in his brief, "to substantiate" the 2016 hearing testimony, which would not be appropriate in a review-reopening. (See Claimant's Brief, p. 13)

The primary focus in the findings of fact is on the medical status of claimant, as economically his condition is unchanged. He was not working at the time of the September 15, 2016 hearing, and he has not worked since. His job searches preceding the September 15, 2016 hearing were anemic and they were not much more robust in 2022 and 2023. The claimant's evidence showed he applied for several jobs, from retail to fast food in May and June 2022, as well as March 2023, but was not hired at any of them. (CE 9:144-157) Many of the applications were repeats at the same locations, which is unsurprising given the location of claimant's new home where there is little opportunity for employment and claimant's professed lack of ability to drive due to medications that make him drowsy, as well as lack of sensation because of the brace he wears on his right leg. Claimant admitted that there was no medical professional that has restricted him from driving, but that this was a choice he made. He shared that he had tried to drive without his brace, but while trying to move the car approximately ten feet he was unable to hit the brake fast enough and ran into his wife's car. He blamed this on slow reaction time, but not drowsiness or because of his brace.

He was uncertain which of his medications rendered him drowsy, but he thought it might be the depression pills, the muscle relaxant pills, or the Percocet.

Additionally, claimant testified that when he spoke on the phone during interviews, he relayed his physical condition, and his physical condition was often cited as the reason he was not offered employment. This is similar to how he presented himself prior to the September 15, 2016 hearing. His job searches appear cursory and not designed to obtain real employment.

At the time of the September 15, 2016 hearing, claimant asserted he was incapable of working and in support of this presented, along with other evidence, the July 25, 2016 letter of therapist Janet L. Walker, who opined that it was doubtful claimant would be able to maintain gainful employment. (JE 1:1-2)

The change in claimant's medical condition include increases in the dosages of his prescription drugs, increased atrophy in the right leg, and, per claimant's subjective reports, increase in back pain, right leg pain, and loss of bowel control. Claimant currently wears a KAFO brace that extends from his thigh to under his foot. He began wearing this brace post the September 15, 2016 hearing. The brace is mechanical and runs on batteries that last approximately three hours. It has a learning module that learned how claimant walks and prevents him from falling.

He testified that he is unable to sit comfortably and that he has shooting pains down the back of his leg into the bottom of his foot. He also testified that he has increased numbness and tingling in his toes.

In regard to his issues of incontinence, he testified that he loses control of his bowels twice or three times a week. The recent medical records from Dr. Kamal, claimant's chosen physician in Tennessee, do not reflect any bowel or incontinence concerns. Claimant did not know why. Claimant testified that he believed the falls caused him to start to lose control of his bowels due to nerve damage from the falls. This was not supported by medical evidence, and incontinence was a symptom raised at the September 15, 2016, hearing.

Claimant also testified that he is suffering falls on a more frequent basis since September 15, 2016. He fell once trying to help a woman, another time walking on uneven ground, while stepping out of an RV, and while assisting his wife with a reflector. He testified that he did not re-injure his low back or leg, but that the pain associated with the falls was primarily in the neck and upper extremity. When he fell while assisting his wife, he hit a curb and broke a tooth.

He testified that his depression is worsening due to his inability to do anything or go anywhere, but Dr. Kamal noted in his records that claimant's depression was well maintained through the medication. Despite claimant's professed worsening depression, he has not sought out treatment, despite being recommended to do so.

Part of the problem is that claimant's desire to get better or be employed is lacking. He did not agree to pain clinic treatment until recently despite repeated recommendations. He did not agree to any mental health therapy despite recommendations, as well as an order in the previous decision allowing him to receive more care. He has sought out no job retraining or job counseling. He does not appear motivated to re-enter the workforce. His right leg atrophy is caused by disuse, which is due to the brace he wears. He has some credibility issues which were addressed in the previous decision, but are relevant here as well. He spent some time on the issues of his incontinence, but it was not mentioned to Dr. Kamal, despite even discussing colonoscopies. Claimant attributed new pains to falls, but also reported to medical professionals that the pains started before he fell. He stated he was in a debilitating depression, but Dr. Kamal recorded his mental status via his wife as stable and very pleasant.

There is no medical testimony, not even from Dr. Sassman, claimant's chosen IME examiner, that left leg pain, neck pain, upper extremity pain, or incontinence are work related. The only conditions related to the work injury that are supported by medical evidence and testimony are to claimant's left leg and low back.

However, despite all of the above, claimant has sustained a change in physical condition. While Dr. Matos opined differently, claimant does have new prescriptions for Baclofen and Percocet, as well as increased dosages for amitriptyline and gabapentin. Dr. Matos' opinion did not provide any comparisons for pre September 15, 2016 conditions, and post September 15, 2016 conditions, whereas Dr. Sassman did note a 2 cm increase in atrophy and Dr. Kamal prescribed new medications. The opinions of Dr. Sassman and Dr. Kamal are adopted herein.

It was found that the claimant proved by a preponderance of the evidence that there has been a change in the condition of the claimant that was not anticipated at the time of the original decision.

The next issue is the extent of the claimant's entitlement to disability pursuant to Iowa Code section 85.34(2)(v).

A finding of impairment to the body as a whole found by a medical evaluator does not equate to industrial disability. Impairment and disability are not synonymous. The degree of industrial disability can be much different than the degree of impairment because industrial disability references to loss of earning capacity, and impairment references to anatomical or functional abnormality or loss. Although loss of function is to be considered and disability can rarely be found without it, it is not so that a degree of industrial disability is proportionally related to a degree of impairment of bodily function.

Factors to be considered in determining industrial disability include the employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity, and the length of the healing period; the

work experience of the employee prior to the injury and after the injury and the potential for rehabilitation; the employee's qualifications intellectually, emotionally, and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. Likewise, an employer's refusal to give any sort of work to an impaired employee may justify an award of disability. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980). These are matters which the finder of fact considers collectively in arriving at the determination of the degree of industrial disability.

There are no weighing guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulas which can be applied and then added up to determine the degree of industrial disability. It, therefore, becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 State of Iowa Industrial Commissioner Decisions 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3, State of Iowa Industrial Commissioner Decisions 654 (App. February 28, 1985).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Functional impairment is an element to be considered in determining industrial disability, which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which the employee is fitted. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Dr. Kamal opined claimant’s condition would only continue to worsen. Dr. Kamal also opined he did not believe claimant was employable in his current state and given that claimant’s current state is not expected to improve, it is reasonable to assume that claimant will not be employable in the future given his physical condition. Drowsiness is a side effect of Percocet, which impacts claimant’s ability to drive. The constant back and leg pain affect claimant’s ability to work all jobs that are non-sedentary, and likely the sedentary ones as well. Claimant’s education, age and background in labor do not give rise to many non-marketable skills.

While it is with reluctance, given the caveats and problems found above, it is determined that claimant is permanently and totally disabled.

Benefits shall commence as of the date claimant filed the petition for review-reopening which is January 18, 2022. Verizon Business Network Services, Inc. v. McKenzie, 823 N.W.2d 418 (Iowa Ct. App. 2012) (Table).

Claimant seeks reimbursement for an IME. Pursuant to Iowa Code section 85.39 only exposes the employer to liability for reimbursement of the cost of a medical evaluation when the employer has obtained a rating in the same proceeding with which the claimant disagrees. Dr. Sassman's IME was conducted on November 15, 2022, with the report issued on January 5, 2023. At the time of Dr. Sassman's IME on November 15, 2022, there was no other opinion regarding claimant's condition, other than the ones in the underlying hearing. No rating had been obtained as of November 15, 2022. Dr. Matos did not perform an IME until November 18, 2022. Claimant did not meet the threshold requirements of Iowa Code 85.39, and is not entitled to reimbursement of Dr. Sassman's examination.

The next issue is payment of medical expenses.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-reopen October 16, 1975).

Iowa Code section 85.27 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.

There are essentially two periods of medical expenses at issue that are distinguished by defendants' awareness of claimant's treatment or desire to receive treatment.

As discussed above, Iowa Code section 85.27 bestows both an obligation and a right upon defendants: defendants have a duty to furnish medical care following notice of an injury, and in return defendants acquire the right to control medical care. See Iowa Code § 85.27. That said, Iowa Code section 85.27 also provides protections for claimants that "modify the employer's right to choose medical care in three ways": (1) in an emergency when the employer cannot be reached immediately; (2) when the employee and employer consent to alternative care; and (3) when ordered to provide alternative care by the commissioner after an alternate medical care proceeding. See

Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 203-204 (Iowa 2010) (citing Iowa Code § 85.27(4)). "Beyond these circumstances, the employer has the right to select the medical care." Id. at 204.

In this case, while defendants denied claimant had sustained a worsening of his condition entitling him to review-reopening, defendants were not disputing the compensability of the underlying injury. In fact, they could not do so, as the underlying arbitration decision was not appealed and became final agency action. Thus, the first circumstance is not applicable to this case.

"The second circumstance under which an injured employee may select his or her own medical care is when the employee abandons the protections of section 85.27 or otherwise obtains his or her own medical care independent of the statutory scheme." Id. In this scenario, defendants remain responsible for unauthorized care only "upon proof by a preponderance of the evidence that such care was reasonable and beneficial," meaning "it provides a more favorable medical outcome than would likely have been achieved by the care authorized by the employer." Id. at 206

Exhibit 13 itemizes the medical expenses the claimant has incurred as a result of his injury. Claimant sought treatment with Mahaska Health Partnership and Lewis Health Center in Tennessee; however, the medical expenses incurred by claimant were not authorized. While in Iowa, claimant had authorized treating physicians such as Dr. Miller, but opted to seek additional care outside of defendants' choices. There was no evidence as to why he opted for those choices, nor that defendants refused to provide care requested. At one point, claimant did not return to Dr. Miller but opted to seek care on his own without notice to the defendants. Dr. Miller was prescribing medications such as Amitriptyline and Gabapentin and even increased claimant's Cymbalta prescription to 60 mg at the last visit claimant made to Dr. Miller. Dr. Miller also recommended claimant to pain management, which is no different than the treatment recommendations of Dr. Kamal.

Claimant made no showing that he requested care and that care was denied, or that the care he received was a more favorable outcome than would likely have been achieved by the care authorized by the employer. Thus the medical expenses are not awarded due to lack of authorization.

Claimant sought alternate care under Iowa Code section 85.27 but did not present argument on this issue. It is not clear claimant requested care and was denied. Claimant is entitled to ongoing care for his low back and right lower extremity, but that care is under the direction of the defendants until such time as it can be shown that defendants have abandoned care.

Finally, claimant seeks reimbursement of costs including the reports from Dr. Robin Sassman in the amount of $3,795.00, the Apples of Gold evaluation for $1,475.00, and the expert report by Kent Jayne in the amount of $4,550.00. (CE 15:221) Claimant also seeks reimbursement for the filing fee in the amount of $103.00

and the deposition fee of $124.20. Id. The Apples of Gold evaluation and the expert report of Kent Jayne provided little assistance to the undersigned. Both appeared to be attempts to re-litigate decisions made in the January 2017 decision. Neither report spoke to any changes post the September 2016 hearing, and both appeared to indicate claimant was fully disabled with significant learning disabilities at the September 2016 hearing, and therefore those reports are not awarded. Dr. Sassman's report is awarded, as are the filing fee and deposition fee.

ORDER

THEREFORE, it is ordered:

Defendants shall pay claimant permanent total disability benefits commencing on January 18, 2022 at the stipulated rate of eight hundred eighty-one and 14/100 dollars ($881.14).

Defendants shall pay accrued weekly benefits, including but not limited to the underpayment of the weekly rate, in a lump sum together with interest. All interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable 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. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Defendants shall reimburse claimant's costs for the report of Dr. Sassman, the filing fee, and the deposition fee. The transcript fee has already been paid by defendants, and no further award or division is made herein.

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 27th day of September, 2023.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Daniel Anderson (via WCES)

Dillon Besser (via WCES)

Emily Anderson (via WCES)

Timothy W. Wegman (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, 10A) 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.