BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TIMOTHY GELLES, Claimant, vs. BIOSOLIDS MANAGEMENT GROUP, Employer, and AUTO-OWNERS INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File Nos. 5056091, 5056194, 5056195 REVIEW-REOPENING DECISION Head Note Nos.: 1804, 2905, 4100

STATEMENT OF THE CASE

Claimant, Timothy Gelles, has filed a review-reopening petition for arbitration seeking workers' compensation benefits against Biosolids Management Group, employer, and Auto-Owners Insurance, insurer, both as defendants, for a work injury to claimant's right lower extremity.

In accordance with agency scheduling procedures and pursuant to the Order of the Commissioner in the matter of the Coronavirus/COVID-19 Impact on Hearings, the hearing was held on September 28, 2020, via CourtCall. The case was considered fully submitted on October 19, 2020, upon the simultaneous filing of briefs.

The record consists of Joint Exhibits 1-3; Claimant's Exhibits 1-4; Defendants' Exhibits A-D and the testimony of the claimant and Ken Williams.

There were three claims filed by the claimant: File Nos 5056091, 5056194, and 5056195. At the start of the hearing, claimant moved to dismiss File Nos. 5056194 and 5056195 without prejudice. There was no objection and thus the motion to dismiss without prejudice was granted. The following decision pertains to only the issues raised for File No. 5056091.

ISSUES

Whether there has been a change of condition since the agreement for the original arbitration hearing on January 18, 2017, and subsequent arbitration decision issued March 15, 2017, that might entitle claimant to additional permanent partial disability under a review-reopening and, if so,

The extent of claimant's industrial disability;

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

Whether claimant is entitled to a second independent medical evaluation (IME).

STIPULATIONS

The parties agree claimant sustained an injury arising out of and in the course employment on or about July 28, 2015. The injury resulted in temporary disability and permanent disability although the parties disagree as to the extent.

The commencement date for permanent partial disability benefits is September 16, 2020.

At the time of the injury, claimant's gross earnings were $1,012.50 per week. The claimant was married and entitled to six exemptions. Based on the foregoing, the weekly benefit rate is $677.63.

Prior to the hearing, the claimant was paid 200 weeks of compensation at the rate of $677.63 per week.

FINDINGS OF FACT

Claimant was a 53-year-old person at the time of the hearing. The injury occurred on July 28, 2015, when he was overcome by ammonia fumes and passed out, falling from the top of a semi-tractor trailer. He sustained injuries to his back, pelvis, hip, ribs, lungs, and right ankle. A workers' compensation claim was brought and resolved by way of an arbitration hearing held on January 18, 2017,[1] and subsequent decision rendered on March 15, 2017.

The present claim is whether claimant's circumstances have changed since the original hearing such that claimant is entitled to a review of his previous award of benefits. For that reason, the factual summary is focused on those facts. The underlying injury and treatment and past factual findings contained in the March 15, 2017 decision are incorporated herein.

[1] The record was held open until February 8, 2017, for the receipt of post-hearing briefs.

Claimant was released to return to work on November 1, 2016 with restrictions of no lifting more than 10 pounds, no prolonged sitting or standing activities, no pushing greater than 20 pounds and no driving of commercial vehicles. (CE 1:19)

Claimant has not worked since February 2016 and is not currently working.

Ken Williams testified on behalf of the claimant. He has known the claimant for 20 years. Claimant began to work for Mr. Williams in 1996 or 1997 as an over-the-road truck driver hauling meat to the West Coast and product on the return trip. Claimant's physical labor varied in this position. At times he was called upon to unload and load the truck and other times hired labor would perform that task for him. Prior to the 2015 hearing, claimant was active and his Parkinson's disease affected primarily his right arm. Currently, Mr. Williams would not hire the claimant to work for him as he believes that claimant cannot do the work. There was no persuasive testimony from Mr. Williams regarding the post-2016 condition of the claimant as opposed to the pre-2017 condition. Mr. Williams' testimony was primarily focused on the pre-injury condition of claimant and the current condition of the claimant as opposed to a specific comparison of what claimant could do between the previous hearing and the current one.

On February 22, 2017, claimant saw Daniel C. Miller, D.O., with complaints of painful ribs, pain in the right low back radiating down into the right thigh and knee along with occasional numbness in the right thigh. (JE 1:1) His gait was minimally antalgic. (JE 1:1) Dr. Miller prescribed Norco 5/325 one twice per day as needed. On March 23, 2017, claimant returned to Dr. Miller with complaints of the same. The prescription for Norco was the same as well. (JE 1:7) During the September 9, 2017, visit, claimant maintained he was having a good day but that many symptoms remained the same as they were in February. (JE 1:11) He was taking 1.5 to 3 Norco tablets a day. (JE 1:11) Dr. Miller increased claimant's Norco prescription to 7.5/325 one every six hours. (JE 1:12) This represented an increase in dosage and well as frequency of the Norco. Dr. Miller increased claimant's prescription again on December 14, 2017, to 10/325 one pill twice per day. (JE 1:18) Claimant's symptoms were not markedly changed only that the claimant felt that the Norco was not effective anymore.

Because of the increase in chest pain where the claimant had a non-union of the ribs, Dr. Miller referred claimant to a surgical evaluation on May 22, 2017. (JE 1:47) Claimant received injections and a recommendation for ablation which he later underwent without much success. These treatments were administered by John W. Rayburn, M.D. (JE 2)

In the beginning of 2018, claimant returned to Dr. Miller with complaints that were "pretty much the same." (JE 1:21) His hydrocodone intake had decreased from 30-40 mg daily to 15-30 mg. (JE 1:22) Dr. Miller felt that claimant's pain was better controlled with Norco. (JE 1:22) On April 9, 2018, claimant returned with an increase of pain due to lack of Norco. (JE 1:25) The narcotic prescription was refilled. (JE 1:26) Claimant's overall symptoms remained the same. (JE 1:25) On July 2, 2018, claimant reported that

his left rib pain was "pretty much the same" and that he "still" suffered pain in the low back, toes, and groin. (JE 1:29) On September 26, 2018, claimant was "pretty much the same" again. (JE 1:33) During the rest of 2018 and into 2019, Dr. Miller's notes continue to be a recitation of the same symptoms and regions of concern. (JE 1) The words "same" and "still" and "continued" are used to describe claimant's complaints. (See e.g. JE 1) At times, claimant expressed an increase of pain in the rib area. (JE 1:39, 1:42, 1:46)

In Dr. Rayburn's 2019 records, claimant's pain was "worsening" with pain radiating to the left calf, leg foot, and left thigh. (JE 2:6) The back pain was two to three on a ten scale and it fluctuated. (JE 2:81, 94, 99) In a letter dated February 12, 2020, Dr. Rayburn opined that claimant's condition did not objectively worsen over the course of treatment between May 2019 and January 13, 2020, and that claimant's subjective complaints of back pain increased but the rib pain did not. (JE 2:109)

On January 2, 2020, claimant returned to Dr. Miller who recorded that claimant felt "about the same" and that the injections were having no positive impact. Claimant was not a surgical candidate. (JE 1:55)

Claimant's treating physician for Parkinson's, Dr. Struck, also issued an opinion on March 26, 2020, that claimant's decreased levels of exercise **could** lead to a material aggravation or acceleration of Parkinson's. (JE 3:111) (emphasis added)

Claimant was found to be disabled by the Social Security Administration (SSA) with the alleged onset date as July 28, 2015, and the established onset date as November 29, 2016. (CE 3:40) The difference was the age of the claimant as once he turned 50, the rules of borderline age apply. (CE 3:40-41)

On November 17, 2016, Charles Goodhue, M.S., M.P.T., conducted a functional capacity evaluation (FCE) of the claimant. (Prior CE 3:37) In the subjective portion, claimant stated he was unable to walk and perform activities without an ankle immobilizer, that he limped and that his antalgic gait aggravated his low back. He used a single-point cane to assist with balance. (Prior CE 3:37-38) His low back pain and rib pain was one to two on a ten scale and his right ankle pain was a two on a ten scale. (Prior CE 3:38) At the conclusion of the testing, claimant's right ankle and low back pain increased to the five to six on a ten scale. (Prior CE 3:39)

Claimant gave maximal effort and worked through his pain. (Prior CE 3:38) Mr. Goodhue placed claimant in the upper end of the light work category to the lower end of the medium work category. (Prior CE 3:40) It was also recommended that claimant should avoid lifting waist to overhead on a constant basis, avoid activities which would require assuming and maintaining a deep-static crouch postural position, and be allowed frequent position changes. (Prior CE 3:40)

A December 16, 2016, FCE was conducted at Pella Regional Health Center. (Prior DE A) The following restrictions were recommended:

	Percent of 8 Hour Workday			
	1-5	6-33	34-66	67-100
WEIGHT CAPACITY IN POUNDS				
Floor to waist lift		55	44	33
Waist to overhead lift	55	50	30	27
Push (Static)	120	90	60	30
Pull (Static)	125	93	62	31
Right carry	65	57	42	11
Front carry	55	38	42	11
Left carry	65	57	22	8
Right hand grip (Static)	120	90	60	30

(Prior DE A:4) It was almost recommended that claimant be allowed frequent position changes, limitations in prolonged or frequent bending, and allowed frequent position changes. (Prior DE A:5)

During the January 18, 2017, hearing, claimant asserted he was permanently and totally disabled either under the traditional meaning or as an odd-lot employee. (See Arb. Dec. Jan. 18, 2017). The hearing deputy considered the expert opinions from Dr. Miller as well as Dr. Stoken.

In December 2016, Dr. Miller recommended permanent restrictions of lifting 20 pounds from floor to waist constantly, lifting 15 pounds from waist to overhead constantly, horizontal lifting 15 pounds constantly, 25 pounds pushing and pulling constantly, 10 pounds right and left carry constantly, 15 pounds front carry constantly, and right and left hand gripping of 110 pounds. (JE 1:74) Dr. Miller also found claimant could engage in frequent rotation while standing or sitting, walking and sitting and standing allowing for frequent position changes, occasional forward bending/standing, crawling, kneeling, stair climbing, step ladder climbing, and rare static crouching or repetitive deep crouching. (JE 1:74) Dr. Miller advised claimant to avoid commercial driving due to residual pain from the nonunion rib fractures and the sacral fracture. (JE 1:74)

In an opinion letter dated July 8, 2019, Dr. Miller opined claimant's continued treatment was for medical management of claimant's ongoing pain and there has been no objective change in claimant's condition, implying that claimant's subjective

complaints have varied. (JE 1:50-51) Dr. Miller maintained claimant's impairment and recommended restrictions were unchanged from his December 22, 2016 report. (JE 1:50)

On March 2, 2020, Dr. Miller signed off on another opinion, which indicated that since the FCE taken on February 10, 2020, claimant's functional limitations had increased since the last testing in 2016 and that Dr. Miller "would not be entirely surprised as Mr. Gelles' conditions are more likely to deteriorate than improve at this point in time post injury. Specifically, [he] note[s] that Mr. Gelles has become increasingly dependent on a crutch for ambulation." (JE 1:58) In another letter on March 10, 2020, Dr. Miller agreed that any decline in the claimant's physical abilities was due to his general deconditioning, the natural progression of his personal health condition including his Parkinson's disease. (JE 1:60) As to the restrictions arising from the work injury itself, the recommendations regarding physical exertion remained the same from the January 16, 2017 report. (JE 1:60)

Dr. Miller signed another letter on September 17, 2020. (CE 4) In the letter, Dr. Miller agreed that claimant's primary use of the cane is due to his pain and to help his balance and that those factors were related to the work injury and not Parkinson's disease. (CE 4:46) He further agreed that the non-healed ribs are significantly limiting claimant's attempts to engage in physical activity as shifting can cause debilitating pain.

During the June 18, 2020, visit preceding the hearing, the subjective complaints articulated by the claimant were substantially similar to his June 30, 2016 subjective complaints. (See e.g. JE 1:40 and JE 1:65)

	June 30, 2016	June 18, 2020
Ribs	Patient states the ribs are tender dependent on activity. Twisting is still difficult and painful.	Patient states the ribs still hurt. Pain is "2-3" and when flares up a "5-7" on a 0-10 pain scale
Left bruised lung	Patient still notes wheezing but not as bad as before. Still getting winded with getting dressed and certain activities	Patient states still wheezing
Low back	Patient states the back is still sore. States that when he rides in a	Patient states the injections are wearing off. States back to not

	bumpy truck and gets "jarred" around or with any kind of lifting he will have more pain.	sleeping very well. Activities increase the pain. Pain is a constant "2-3" and increases with activity. Having right buttock pain that wraps around the front of the right thigh. States when the right hip area flares up there is no way of getting comfortable.
Left 2nd and 3rd Toes	Toe still feels like it is "sticking out of a hole in the sock." States sometimes gets a little better or worse, but never completely goes away	Patient states still feels like the "sock is rolled up underneath."
Groin	Still has pain occ[asionally]	Patient states is still tolerable
Right ankle	Patient states the ankle still swells. When he gets on uneven ground the ankle will roll so he will be walking on the side of his foot. Flexion and extension is still difficult. Will be very painful at times. The main area of pain is still on the outside of the ankle	Patient states still swells, painful, feels like it wants to roll, states the pain is a "0" and goes up to a "5-6" on a 0-10 pain scale

Claimant was evaluated by Jacqueline Stoken, D.O., on November 17, 2016, with a report of that visit issued on November 28, 2016, and then again on March 3, 2020. Because this case rests upon the claimant's alleged change of circumstances, the two examinations are juxtaposed for comparison

November 17, 2016 (Prior CE 3)	March 3, 2020 (CE 1)

Current Status: Currently he complains of pain in his back that he describes as aching, stabbing, burning, exhausting, continuous, and miserable. It ranges from 2-7/10. It averages 5/10. Right now it is 5/10. Sitting, medication, and heat make him feel better. Walking, standing, twisting, lifting, jarring, and sitting make it worse.	Current Status: Currently, he complains of pain in his back that he describes as aching, stabbing, sharp, burning, continuous, nagging, miserable, and unbearable. It ranges from 2-7/10. It averages 4/10. Right now, it is 3/10. Rest, stretching, standing and sitting make it better. Lifting, bending, twisting, sitting and standing make it worse.
He complains of pain in his pelvis that he describes as intermittent, sharp, and nagging. It ranges from 0-3/10. It averages 1/10. Right now, it is 0/10. Stretching the tendon makes it worse.	
He complains of pain in his ribs that he describes as aching, gnawing, continuous, and nagging. It ranges from 1-6/10. It averages 3/10. Right now it is 2/10. Medication takes the edge off. Jarring, sitting too long, lifting, and twisting makes it worse.	He complains of pain in his left ribs that he describes as stabbing, gnawing, sharp, tender, continuous, nagging, miserable, and unbearable. It ranges from 2-8/10. It averages 4/10. Right now, it is 4/10. Nothing makes it better. Lifting, bending, twisting, pulling and sitting makes it worse.
He complains of no pain in the left hip.	
He complains of pain in the right ankle that he describes as stabbing, sharp, and miserable. It ranges from 2-8/10. It averages 5/10. Right now it is 4/10. Wearing a brace and staying off of it make it better. Walking, driving, and standing make it worse.	He complains of pain in his right leg that he describes as aching, gnawing, tender, and nagging. It ranges from 1-6/10. It averages 2/10. Right now, it is 1/10. An ankle brace and support make it better. Walking, standing, driving and uneven ground make it worse.
He states that the hydrocodone, Belbuca, and Hysingla gave him a mild amount of relief. He states that the pain interferes mildly with walking one	He states that hydrocodone and back injections gave him a mild amount of relief. Rib injections and burnt nerve ends did not help at all. He states that

block and sitting for ½ hour. He pain interferes moderately with standing for ½ hour, sleep, social activities, traveling up to one hour by car, daily activities, relationships, chores around the house, showering and bathing, dressing, sexual activities, concentration, and his mood.	the pain interferes mildly with lifting 10 pounds, traveling up to 1 hour by car, his dressing and concentration. The pain interferes moderately with walking 1 block, sitting for ½-hour, sleep, social activities, daily activities, his chores around the house, showering and bathing, sexual activities. The pain interferes moderately to severely with standing for ½ hour, his relationships.
November 17, 2016 (Prior CE 3)	March 3, 2020 (CE 1)
Reflexes in the upper and lower extremities are 1+/4 and symmetrical. Muscle tone and bulk are within normal limits. Muscle strength is 5+/5. Sensation is intact to light touch, pinprick, and proprioception. Periphery has no cyanosis, clubbing, or edema.	Reflexes in the upper and lower extremities are 1+/4 and symmetrical. Muscle tone and bulk is within normal limits. Muscle strength is 5+/5. Sensation is intact to light touch, pinprick, and proprioception. Periphery has no cyanosis, clubbing, or edema.
Lumbar flexion is 60°, extension is 5°, and sidebending to the right is 30° and to the left is 20°. He has a negative straight leg raise bilaterally. He is able to heel and toe walk. He ambulates with a normal gait. There are muscle spasms in the lower lumbar paraspinal muscles.	Lumbar flexion is 60°, extension is 5°, and sidebending to the right is 30° and to the left is 20°. He has a negative straight leg raise bilaterally. He can heel and toe walk. He ambulates with a normal gait.
Left hip flexion is 60°, extension is 5°, internal rotation is 10°, external rotation is 45°, adduction is 30°, and abduction is 40°.	Left hip flexion is 60 degrees, extension is 5 degrees, internal rotation is 20 degrees, external rotation is 45 degrees, abduction is 40 degrees, and adduction is 40 degrees.
Right hip flexion is 60°, extension is 5°, internal rotation is 15°, external rotation is 40°, adduction is 30°, and abduction is 50°.	Right hip flexion is 60 degrees, extension is 5 degrees, internal rotation is 15 degrees, external rotation is 40 degrees, adduction is 40 degrees, abduction is 50 degrees.

Right ankle plantar flexion is 50°, extension is 0°, inversion is 20°, and eversion is 0°. He is very tender over the right lateral ligament area of his ankle. He is wearing a right ankle brace.	Right ankle plantarflexion is 50 degrees, extension is 0 degrees, inversion is 20 degrees, and eversion is 0 degrees. He is slightly tender under the right lateral malleolus.
His lung inspiration is symmetrical. He is tender in the left anterior thorax.	Thoracic rotation to the right is 40 degrees and left is 45 degrees. He has full and symmetrical excursion of the ribs on inhalation and exhalation.
November 17, 2016 (Prior CE 3)	March 3, 2020 (CE 1)
He states it is minimally difficult to get up and down from a chair or bed, dress, lift and carry up to 10 lbs., and drive.	He states it is minimally difficult to do food prep, cook and eat, groom, dress, lift and carry up to 10 pounds, reach above his head or across his body, and drive.
He states it is moderately difficult to go up and down stairs, do food prep, cook and eat, groom, tie his shoes and button his shirt, sit for normal periods of time, reach above his head or across his body, and engage in recreational activity.	He states it is moderately difficult to go up and down stairs, get up and down from a chair or bed, sit and stand for normal periods of time.
He states it is very difficult to walk, stand for normal periods of time and squat down to pick up an item.	He states it is very difficult to sleep normally, walk, tie his shoes and button his shirt, and engage in recreational activity.
He states he is unable to sleep normally and run and jog.	He states he is unable to squat down to pick up an item and run and jog.

Dr. Stoken's diagnosis remains unchanged from the previous 2016 report she issued and the impairment remains the same. (CE 1:11)

Claimant also underwent FCE woith Charles Goodhue on December 21, 2016 (DE A) and with Melanie Wrabeck on February 10, 2020. (CE 2)

	December 21 2016 FCE (Prior DE A)	February 10, 2020 (CE 2)
Floor to waist	Fifty pounds rarely, forty pounds occasionally, twenty-five pounds frequently, ten pounds constantly	25 pounds occasionally, 20 pounds frequently, and 10 pounds constantly
Waist to overhead	35 pounds rarely, 25 pounds occasionally, and 15 pounds frequently	20 pounds occasionally, 15 pounds frequently
Horizontal lift	50 pounds rarely, 40 pounds occasionally, 30 pounds frequently in 20 pounds constantly	30 pounds rarely, 25 pounds occasionally, 15 pounds frequently and 10 pounds constantly
Push	50 pounds rarely, 40 pounds occasionally, 30 pounds frequently, 20 pounds constantly	50 pounds rarely, 40 pounds occasionally, 25 pounds frequently, 15 pounds constantly
pull	50 pounds barely, 45 pounds occasionally, 35 pounds frequently and 25 pounds constantly	45 pounds rarely, 40 pounds occasionally, 30 pounds frequently and 20 pounds constantly
Right and left carry	45 pounds rarely, 35 pounds occasionally, 20 pounds frequently and 10 pounds constantly	(R) 20 pounds rarely, 15 pounds occasionally, 10 pounds frequently and 5 pounds constantly (L) 35 pounds rarely, 25 pounds occasionally, 20 pounds frequently, 10 pounds constantly

Front carry	50 pounds rarely, 40 pounds occasionally, 30 pounds frequently, 20 pounds constantly	Pounds rarely, 35 pounds occasionally 25 pounds frequently, 10 pounds constantly
Right hand grip	Maximum 110 pounds	Maximum 80 pounds
Left hand grip	Maximum 110 pounds	Maximum 102 pounds
	Claimant can occasionally engage in elevated work, tolerate prolonged forward trunk posturing while sitting or standing, engage in repetitive rotation while sitting or standing, crawl, kneel, repetitively squat, sit, stand, walk, stair climb and step ladder climb	Claimant should avoid performing work activities that require prolonged sitting, standing, walking or overhead lifting.

In the February 2020 FCE report, it notes that claimant says he is limited by back pain and left side rib pain that impedes his ability to walk, sit and stand as well as drive and ride in a car. He has difficulty dressing and tying his shoes due to pain with forward bending at the trunk. (CE 2:19) Because of his back pain he is unable to carry out hobbies such as hunting, bowling or engage in household activities such as carrying groceries or bags of dog food. (CE 2:20) Claimant was deemed to have given maximal effort and the results placed him in the sedentary work category. (CE 1:23)

CONCLUSIONS OF LAW

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 Rule of Appellate Procedure 6.14(6).

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).

Claimant appears to argue that the review-reopening should be granted on the basis of claimant's increased pain. Dr. Miller was the primary treating physician for claimant's non-union left rib fractures. Since the 2017 hearing, Dr. Miller has increased claimant's Norco pain prescription medication. As a result of the increased pain medications, claimant is drowsy during the day and his driving is adversely affected. The increased medications have affected claimant's concentration and made it more difficult to breathe.

Claimant has also had other treatment such as hip injections, rib injections, and ablation. These treatments were not helpful. Claimant testified that his pain has increasingly worsened and that this is the primary limiting factor for physical activities.

However, both Dr. Miller and Dr. Stoken have maintained the same impairment ratings. Dr. Stoken did modify her restrictions but this is based primarily on claimant's statements of worsening pain. Claimant's range of motion results are the same in both reports. His complaints of pain and discomfort were largely the same with small variances with some pain increased and some pain decreased. His back pain averaged five out of ten in 2016 and four out of ten in 2020. His left rib pain, the primary source of claimant's pain, averaged a three out of ten in 2016 and a four out of ten in 2020. His right ankle pain averaged a five out of ten in 2016 and a two out of ten in 2020.

In 2016, his pain interfered moderately with walking one block, standing for one-half hour, sleep activities, traveling up to one hour by car, daily activities, relationships, chores around the house, showering and bathing, dressing, sexual activities, concentration and mood. In 2020, the pain interfered moderately with walking one block, sitting for one-half of an hour, sleep, social activities, daily activities, chores around the house, showering, bathing and sexual activities. He had an increase in pain interfering with standing one-half hour and his relationships. Post the 2017 hearing, claimant increased his usage of a crutch for ambulation, although in the November 2016 FCE claimant was using the single point cane to assist with balance and when the back pain increased. (CE 3:38)

Claimant's weight was unchanged from his examination prior to the 2017 hearing wherein he weighed 348 pounds and his last examination prior to the present hearing wherein he also weighed 348 pounds. (CE 10:169, JE 1:65)

Dr. Miller was returned to time and again by both sides. In the end, he agreed that claimant's non-union of ribs was physically debilitating because the shifting of ribs caused pain that would make other activities impossible to complete. However, claimant had that complaint about his ribs preceding the 2017 hearing. It is not a new complaint nor a substantial change in circumstances.

The claimant was moved from the upper end of the light and lower end of the medium category of work to the sedentary category as a result of the FCE; however, this is based on the claimant's subjective reports of pain and as can be seen by the medical reports, the expert witness reports and examination, the subjective reports of pain have been similar pre the 2017 hearing and post the 2017 hearing. The slight increases in pain and the increased use of the crutch do not rise to the level of a substantial change in circumstances.

Claimant's claims today are the same allegations he made in the previous underlying hearing and he has not carried his burden to prove that there has been a substantial change in his circumstances necessitating a review-reopening.

The remaining issues are moot but for the determination of entitlement to a reimbursement of the Dr. Stoken's IME. This is not briefed by the claimant and thus I will reiterate the same analysis written in Bunch v. EFCO Corp., as cited by the defendants as the same principles apply in this case. This is a review-reopening and the appellate courts have disallowed reimbursement of a second IME even in a review-reopening.

> Claimant was encouraged to provide case law to support his entitlement to two examinations, but not case law directly on point was provided. The claimant argues that both examinations and reports of Dr. Bansal are appropriate because there are two injuries and two expert opinions. There is only one injury date and one file. Thus, this is a single injury with a sequelae. There is no holding in DART that would allow for the assessment of two examinations. The code specifically allows for a single examination. In Sheriff v. Intercity Express, the commissioner disallowed a second medical evaluation during a review-reopening procedure. In Kohlhaas v. Hog Slat, Inc., the Iowa Supreme Court disallowed reimbursement of a second IME after claimant had settled a claim and then subsequently sought a review-reopening. While neither case addresses the exact matter at hand, all three cases show a reluctance to deviate from the strict reading of the statute permitting only one examination. Thus, until such time as the Supreme Court directs otherwise, the undersigned will hew to the strict language of the code. Only one IME is permitted per injury and therefore, in this case, only one of Dr. Bansal's examinations qualifies for reimbursement under 85.39.

Bunch v. Efco, Corp., File No. 5055768 (Arb. Dec. Feb. 8, 2019).

Given that the claimant has not prevailed, the requested costs, including the FCE report, will not be awarded.

ORDER

THEREFORE, it is ordered:

Claimant shall take nothing.

That each party shall pay their own costs with the parties sharing the cost of the hearing transcript equally.

Signed and filed this 28th day of January, 2021.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

John Dougherty (via WCES)

Matthew R. Phillips (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.