BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOSEPH PHIPPS,	:	
	:	File Nos. 5066050.01
Claimant,	:	20005453.01
	:	20700369.01
vs.	:	
	:	REVIEW-REOPENING
MIDAMERICAN ENERGY CO.,	:	
	:	DECISION
Employer,	:	
Self-Insured,	:	Head Notes: 1803, 2905
Defendant.	:	

STATEMENT OF THE CASE

Claimant, Joseph Phipps, filed petitions in arbitration and review-reopening seeking workers' compensation benefits from MidAmerican Energy Company (MidAmerican), self-insured employer. This matter was heard on June 24, 2021, with a final submission date of August 5, 2021.

The record in this case consists of Joint Exhibits 2 through 5, Claimant's Exhibits 1 through 7, Defendant's Exhibits A through F, and the testimony of claimant and Otis Crain.

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 arbitration 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.

ISSUES

FILE NUMBER 5066050.01 (Date of Injury 04/24/2017)

1. Whether claimant is entitled to additional permanent partial disability benefits under review-reopening proceeding.
2. Whether claimant is entitled to reimbursement for an independent medical evaluation (IME) under Iowa Code section 85.39.
3. Costs.

FILE NUMBER 20700369.01 (Date of Injury 11/03/2019)

1. Whether the injury resulted in a permanent disability; and if so,
2. The extent of claimant's entitlement to permanent partial disability benefits.

3. Whether claimant is entitled to reimbursement for an IME under Iowa Code section 85.39.
4. Whether apportionment under Iowa Code section 85.34(7) is applicable.
5. Costs.

FILE NUMBER 20005453.01 (Date of Injury 02/28/2020)

1. Whether claimant sustained an injury that arose out of and in the course of employment.
2. Whether the injury resulted in a permanent disability; and if so,
3. The extent of claimant's entitlement to permanent partial disability benefits.
4. Whether the injury is an occupational hearing loss or is analyzed as an industrial disability.
5. The commencement date of permanent partial disability benefits.
6. Whether the claimant is entitled to reimbursement of an IME under Iowa Code section 85.39.
7. Whether apportionment under Iowa Code section 85.34(7) is applicable.
8. Costs.

FINDINGS OF FACT

Claimant was 67 years old at the time of hearing. Claimant graduated from high school. Claimant was in the Marines. Most of claimant's work life has been as an electrical lineman. Claimant testified most of the work he does as a lineman involves working overhead. Claimant began employment with MidAmerican in 2003 as a journeyman lineman. (Arbitration Decision, page 2)

Claimant's prior medical history is relevant. In 2002 claimant had an elbow injury while at work. In 2015 claimant had bilateral shoulder injuries. There is no evidence claimant had any permanent restrictions or permanent impairments from the 2015 shoulder injury. Claimant settled his right elbow injury on April 20, 2012, in an agreement for settlement. (Arbitration Decision, p. 2)

On April 24, 2017, claimant was opening overhead electrical switches when he injured both shoulders. (Arbitration Decision, p. 2)

Claimant was eventually assessed as having complete rotator cuff tears on the left and right shoulder. Claimant had a left rotator cuff repair and a distal clavicle resection on September 14, 2017. Claimant had a right rotator cuff repair on April 3, 2018. Both surgeries were performed by Brian Crites, M.D. (Arbitration Decision, p. 3)

Claimant returned to full duty work on June 25, 2018. (Joint Exhibit 3, page 59)

In a July 6, 2018 report, Dr. Crites found claimant had a 6 percent permanent impairment to both the left and right shoulders.

In an August 15, 2018 report, Sunil Bansal, M.D., gave his opinions of claimant's condition following an IME. Dr. Bansal found that claimant had an 11 percent permanent impairment to the right upper extremity, converting to a 7 percent permanent impairment to the body as a whole. He found claimant had a 13 percent permanent

impairment to the left upper extremity, converting to an 8 percent permanent impairment to the body as a whole. (Exhibit 3, page 16) This report was not made a part of the record in the arbitration hearing but was made a part of the record in the review-reopening hearing.

At the time of his arbitration hearing, claimant testified he had reduced range of motion and strength in the shoulder. (Arbitration Decision, p. 7; Ex. D, p. 42, deposition p. 49) Claimant also testified at the arbitration decision that he had continued shoulder pain. (Arbitration Decision, p. 7)

Claimant returned to work as a journeyman lineman/serviceman. Claimant worked full time without restrictions and performed the same job duties he had before the April 2017 date of injury. (Ex. D. p. 43, depo pp. 18-19) Between July of 2018 and January of 2020, claimant worked approximately 650 hours of overtime. (Tr., p. 97) After his return to work following the April 2017 injury, claimant did not miss any time due to his shoulders. (Ex. D, p. 43, depo p. 28)

Otis Crain testified he was claimant's manager. In that capacity, Mr. Crain is familiar with claimant and the work claimant performed at MidAmerican. Mr. Crain testified claimant did not have difficulty performing his job when he returned to work. Mr. Crain said that when claimant returned to work, he did not request any accommodations. (Tr., p. 97)

Claimant's bilateral shoulder case went to an arbitration hearing on September 26, 2018. A November 21, 2018 arbitration decision found claimant had a 10 percent permanent impairment and was due 50 weeks of permanent partial disability benefits. (JE 1, p. 7) That decision was not appealed.

On November 3, 2019, claimant was stripping insulation from wire with a knife when he felt a pop in his wrist. Claimant completed his shift. Claimant said that overnight he developed a lump in his right wrist. (Tr., p. 30)

On November 26, 2019, claimant was evaluated by Joanne Harbert, ARNP, for a lump in the right wrist. Claimant was assessed as having a ganglion cyst. He was found to be at maximum medical improvement (MMI). Nurse Practitioner Harbert found claimant had no permanent impairment and released claimant from care. (JE 4)

Claimant said he approached the company nurse and indicated that he was unhappy with the care provided by Nurse Practitioner Harbert. Claimant said he requested to be seen by a doctor. Claimant said the company nurse told him that he would be sent to a doctor. Claimant testified that he was not authorized by MidAmerican to see a doctor for the lump in his wrist. (Tr., p. 31) Claimant testified he still has a lump in the right wrist and has decreased grip strength as a result. (Tr., p. 31)

On December 10, 2019, claimant was evaluated by Todd Peterson, D.O., for right hip pain. Claimant indicated pain for two weeks with loss of balance. An MRI was recommended. (JE 5, pp. 79-81)

Claimant returned to Dr. Peterson on January 7, 2020. Claimant's MRI showed a disc bulge at L4-5. Claimant was assessed as having spinal stenosis of the lumbar

region. An epidural steroid injection (ESI) was discussed and chosen as a treatment option. (JE 5, pp. 82-85)

On February 28, 2020, claimant left his employment with MidAmerican. (Tr., p. 14) Claimant testified he has not worked since leaving MidAmerican.

Claimant said limitations in his shoulder, his loss of grip strength, and increased hearing loss factored into his retirement. (Tr., pp. 24-26)

On July 7, 2020, claimant underwent audiometric testing with Mark Zlab, M.D. Claimant was assessed as having sensorineural hearing loss in both ears. Dr. Zlab also reviewed audiometric testing of claimant done on a yearly basis throughout his employment with MidAmerican. Dr. Zlab indicated that the 2003 testing already showed sensorineural hearing loss. Given the configuration and progressive nature of the hearing loss, as well as recommended use of hearing protection, Dr. Zlab did not believe the hearing loss was a result of noise exposure with claimant's employment with MidAmerican. (Ex. B, pp. 9-11)

On December 2, 2020, claimant was evaluated by Dr. Crites for knee pain. Claimant was recommended to have an MRI. (JE 3, pp. 60-63)

Claimant returned to Dr. Crites on December 9, 2020. An MRI showed a large medial meniscus tear. Surgery was chosen as a treatment option. (JE 3, pp. 64-69)

In a March 28, 2021 report, Richard Tyler, Ph.D., gave his opinions of claimant's hearing following a phone interview. Dr. Tyler reviewed hearing evaluations from MidAmerican, Dr. Zlab's July of 2020 letter and a 2020 Iowa Clinic audiogram. Dr. Tyler also interviewed claimant by phone. Dr. Tyler believed that claimant was exposed to a high level of damaging noise with MidAmerican and his post-employment audiograms were consistent with noise-induced loss. Dr. Tyler opined that claimant required hearing aids and sound therapy for the tinnitus. Using his own guides, Dr. Tyler found that claimant had a 23 percent permanent impairment to the body as a whole. He also opined, using the AMA Guides to the Evaluation of Permanent Impairment (Fifth Edition), claimant had a 39 percent permanent impairment to the body as a whole for tinnitus. (Ex. 4, pp. 29-53)

In a letter written by defendant's counsel, Dr. Zlab indicated he read Dr. Tyler's report. He opined claimant's hearing loss and tinnitus were not caused by high levels of noise at MidAmerican. He also opined that claimant's age-related binaural hearing loss was 2.48 percent. He opined that under the Guides, claimant had no permanent impairment. He also indicated that claimant did not have any permanent restrictions regarding hearing loss. (Ex. B, pp. 16-18)

Claimant said that in the 17 years he worked at MidAmerican he was exposed to loud noises including vehicles, chainsaws and exploding fuses. (Tr., pp. 36-40) Claimant said he began noticing hearing loss 4-5 years ago. He said he began experiencing tinnitus around the same time. (Tr., pp. 53-55)

Records indicate that prior to his employment with MidAmerican, claimant sustained a ruptured eardrum due to gunfire. (JE 2, p. 10; Ex. B, p. 9) Claimant worked

as a lineman for approximately 25 years before his employment with MidAmerican. (Ex. D, p. 43; depo pp. 14-15) Claimant said there was no hearing protection when he worked for ISU/Alliant as a lineman for the first 10-15 years on the job. (Tr., pp. 76-77) He said he was exposed to the noise of blowing fuses hundreds of times before his work with MidAmerican. (Ex. D, p. 43, depo p. 18)

Claimant testified that during his employment with MidAmerican, he participated in hearing conservation programs. These programs involved annual audiometric testing and training regarding hearing protection devices. (Ex. D, p. 41, depo pp. 20-23; Ex. D, p. 43, depo p. 31; Tr., p. 79) Claimant said hearing protection devices were provided by MidAmerican and he understood how to use those protective devices. He said use of hearing protection devices was enforced by MidAmerican. (Ex. B, p. 9; Ex. D, p. 41, depo pp. 23-24; Ex. D, p. 43, depo p. 21; JE 2, pp. 11, 15, 17, 19, 21, 24, 28, 32, 37, 41, 42, 54; Tr., p. 80)

In a May 19, 2021 report, Steven Aviles, M.D., gave his opinions of claimant's condition following an IME. Claimant indicated the function in his shoulders had declined and he was limited in what he could do. (Ex. A, p. 5) Dr. Aviles opined, based on claimant's exam and history, he saw nothing to suggest a change in permanent impairment to claimant's right or left shoulders. (Ex. A, p. 5)

In a May 20, 2021 report, Dr. Bansal gave his opinions of claimant's condition following an IME. Claimant indicated his shoulder condition worsened. Claimant said he had loss of strength in the right wrist. He also indicated intermittent numbness and tingling in the wrist. (Ex. 3, pp. 20-23)

Dr. Bansal indicated in his May of 2021 report, that using the 2018 IME as a baseline, claimant's condition in both shoulders worsened. (Ex. 3, p. 24) He found claimant had a 9 percent permanent impairment to the body as a whole for the right shoulder, and a 10 percent permanent impairment to the body as a whole for the left shoulder. He also opined claimant had a 3 percent permanent impairment to the right upper extremity for the combined permanent impairment for the right wrist. (Ex. 3, pp. 25-26)

Claimant testified he considers himself retired. Claimant testified he was not going to return to work. (Ex. D, p. 41, depo p. 26; Ex. D, p. 43, depo p. 30)

CONCLUSION OF LAW

The first issue to be determined is whether claimant sustained a hearing loss or tinnitus that arose out of and in the course of employment with MidAmerican.

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 claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

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).

Occupational hearing loss means that a portion of permanent sensorineural loss of hearing in one or both ears is in excess of 25 decibels, arises out of and in the course of employment and results from prolonged exposure to sound capable of producing hearing loss. Hearing loss attributable to age or any other exposure or conditions not arising out of and in the course of employment, is not considered an occupational hearing loss. Iowa Code section 85b.4.

Claimant contends he sustained an occupational hearing loss and tinnitus caused by his employment with MidAmerican.

Claimant testified that in the approximately 17 years he was employed with MidAmerican, he was exposed to a lot of noises including vehicles, chainsaws and exploding fuses. (Tr., pp. 36-40) Claimant said he began noticing hearing loss and tinnitus 4-5 years prior to hearing. (Tr., pp. 53-55)

The records indicate that prior to his employment with MidAmerican, claimant had a ruptured eardrum due to gunfire. (JE 2, p. 10; Ex. B, p. 9) Claimant also worked as a lineman for approximately 25 years before his employment with MidAmerican. (Ex. D, p. 43, depo pp. 14-15) Claimant said he wore no protection devices when he worked for a prior power company the first 10-15 years on the job. (Tr., pp. 76-77) He testified he was exposed to the noise of blowing fuses hundreds of times before he began work with MidAmerican. (Ex. D, p. 43, depo p. 18)

Claimant testified that during his employment with MidAmerican he participated in hearing conservation programs. These programs included annual testing and training regarding hearing protection devices. Claimant said hearing protection devices were provided by MidAmerican. He said the use of hearing protection devices was enforced by MidAmerican. (Ex. B, p. 9; Ex. D, p. 41, depo pp. 23-24; Ex. D, p. 43, depo p. 21; Tr., pp. 79-80)

Two experts have opined regarding claimant's hearing loss and tinnitus. Dr. Zlab evaluated claimant on one occasion. Dr. Zlab found claimant had hearing loss in both ears. He reviewed audiometric testing of claimant. Dr. Zlab noted that in the 2003 test given to claimant in his first year of employment at MidAmerican, claimant was already showing signs of sensorineural hearing loss. Given the configuration and progressive nature of the hearing loss, and the recommended use of hearing protection, Dr. Zlab opined that claimant's hearing loss was not a result of the noise exposure at MidAmerican. (Ex. B, pp. 9-11) He also opined that under the Guides, claimant had no permanent impairment for hearing loss. (Ex. B, pp. 16-18)

Dr. Tyler reviewed claimant's medical records. He also spoke with claimant once by phone. Based on claimant's history, Dr. Tyler believed claimant had been exposed to high levels of damaging noise. Using the Guides, and his own evaluation system, Dr. Tyler found that claimant had a permanent impairment from hearing loss and tinnitus.

There are a number of problems with Dr. Tyler's opinions. As noted in the Findings of Fact, claimant worked for a prior employer for 10-15 years as a lineman with no hearing protection. Claimant ruptured his eardrum before working with MidAmerican. Claimant testified that prior to working at MidAmerican, he was exposed to the noise of blowing fuses hundreds of times. Claimant's tests showed hearing loss before he began with MidAmerican. MidAmerican enforced the use of hearing protection on the job. None of this information appears to be factored into Dr. Tyler's opinions regarding causation. Dr. Tyler's incorrect use of the Guides to find that claimant has a 39 percent permanent impairment to the body as a whole also leaves his opinions regarding causation questionable.

Dr. Tyler does not appear to know claimant's noise exposure history before his employment with MidAmerican. He does not appear to know about MidAmerican's hearing loss protection program or that use of hearing protection was enforced at MidAmerican. Given the record as detailed above, Dr. Tyler's opinions regarding causation of claimant's hearing loss and tinnitus are found not convincing.

Claimant had hearing loss prior to his employment with MidAmerican. Claimant was exposed to high level noise with a prior employer for 10-15 years before his work with MidAmerican. Dr. Zlab found that claimant's hearing loss was not caused by his work with MidAmerican. Dr. Tyler's opinions of causation regarding hearing loss and tinnitus are found not convincing. Given this record, claimant has failed to carry his burden of proof he sustained a work-related hearing loss or tinnitus caused by his employment with MidAmerican.

As claimant failed to carry his burden of proof his hearing loss or his tinnitus was caused by his employment with MidAmerican, all other issues, except for reimbursement of Dr. Tyler's IME expenses, are found to be moot.

The next issue to be determined is whether claimant sustained a permanent disability regarding file number 20700369.01 (DOI 11/3/2019).

The law regarding burden of proof and proximate cause detailed above, applies to these issues, but will not be repeated.

Claimant developed a bump on his right wrist after removing insulation with a knife on November 3, 2019. Over 20 days after the date of injury, claimant was allowed to see Nurse Practitioner Harbert. Claimant was assessed as having a ganglion cyst. At the same visit, claimant was found to have no permanent impairment and returned to regular duty. (JE 4, pp, 74-76)

Claimant testified he asked to see a doctor after seeing Nurse Practitioner Harbert, but no visit was authorized. (Tr., p. 31)

Claimant testified he continues to have a lump on his right wrist. He testified he has loss of strength in his right wrist. Dr. Bansal opined that claimant had permanent impairment to the right upper extremity based on loss of range of motion. (Ex. 3, pp. 25-26)

The record does not indicate Nurse Practitioner Harbert did any testing on claimant's right hand range of motion or strength in November 2019. Claimant credibly testified that 1-1/2 years after the injury he still has a lump in his wrist and loss of strength in his right hand. Dr. Bansal found that claimant had a permanent impairment based on loss of range of motion. Given this record, claimant has carried his burden of proof he has permanent impairment from the November 2019 injury to his right wrist.

The only rating in the record regarding claimant's right wrist is the 3 percent rating given by Dr. Bansal. Based on this, claimant is entitled to 7.5 weeks of permanent partial disability benefits for the right wrist (3 percent x 250 weeks).

The next issue to be determined is whether apportionment under Iowa Code section 85.34(7) is appropriate. Iowa Code section 85.34(7) states in relevant part:

7. Successive disabilities.

> An employer is liable for compensating only that portion of an employee's disability that arises out of and in the course of the employee's employment with the employer and that relates to the injury that serves as the basis for the employee's claim for compensation under this chapter, or chapter 85A, 85B, or 86. An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment from a prior injury with the employer, to the extent that the employee's preexisting disability has already been compensated under this chapter, or chapter 85A, 85B, or 86. 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.

On April 20, 2012, claimant had a right elbow injury. (Tr., p. 33) On August 9, 2012, claimant underwent ulnar nerve surgery for his right elbow. Claimant eventually settled his right elbow injury with MidAmerican in an Agreement for Settlement for 12.5 percent permanent impairment to the right upper extremity. (Ex. C)

As noted, Iowa Code section 85.34(7) indicates, "an employer is not liable for compensating an **employee's pre-existing disability** that arose out of and in the course of employment for a prior injury with the employer, to the extent that the employee's pre-existing disability has already been compensated under this chapter . . ." (Emphasis added)

There is no evidence in the record Dr. Bansal's 3 percent rating of claimant's November 2019 injury to the right wrist is related, in any way, to the 2012 injury to the right elbow. For this reason, apportionment is not appropriate for this file.

The next issue to be determined is whether claimant is entitled to additional permanent partial disability benefits under review-reopening proceeding.

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).

In a review-reopening proceeding, claimant has the burden of proof to show that he sustained impairment in earning capacity proximately caused by the original injury. E.N.T. Associates v. Collentine, 525 N.W.2d 827, 829 (Iowa 1994)

Claimant contends his shoulder condition worsened after his return to work in 2018. He argues his retirement from MidAmerican was due to the physical decline in his shoulders. Claimant contends his retirement from MidAmerican resulted in a substantial economic change. (Claimant's Post-Hearing Brief, pp. 6-7, 9-10)

Dr. Bansal's 2018 IME found that claimant had 11 percent permanent impairment to the right upper extremity and 13 percent permanent impairment to the left upper extremity. (Ex. 3, p. 16) Dr. Bansal's 2021 IME report found that claimant had a 15 percent permanent impairment to the right upper extremity and a 16 percent permanent impairment to the left upper extremity. (Ex. 3, p. 25)

In the 2018 arbitration decision, claimant testified he had reduced range of motion and strength. He also testified he had shoulder pain. (Arbitration Decision, p. 7) When he returned to work in 2018, until the time he retired, claimant had no other shoulder injury. (Ex. D, p. 43, depo p. 27; Tr., p. 61) Claimant did not request or receive additional medical care for his shoulders on his return to work. (Ex. D. p. 43, depo pp. 27-28; Tr., p. 61) Claimant did not take any prescription medication for his shoulders on his return to work. Id. During the period from his return to work in 2018 until his retirement, claimant did not miss any work due to his shoulders. (Ex. D, p. 43, depo p. 28; Tr., p. 61)

When he returned to work, until his retirement, claimant worked full time without restrictions as a lineman/serviceman. (Ex. D, p. 43, depo pp. 18-19; Tr., pp. 62, 96) From July 2018 to January 2020, claimant worked approximately 650 hours of overtime. (Tr., p. 97)

Mr. Crain was claimant's manager. He testified claimant returned to work at full duty. (Tr., p. 96) He said claimant had no difficulty doing his job, and claimant did not request accommodations. (Tr., p. 97) He said claimant worked full duty until his retirement. (Tr., p. 97) Mr. Crain testified that if claimant had physical problems doing his job as a lineman, claimant could have requested and moved to a less physically demanding job with MidAmerican through a collective bargaining agreement. He said claimant did not elect this option, but simply retired. (Tr., pp. 98-100)

Claimant had pain and loss of range of motion and strength in his shoulders at the time of both the arbitration and the review-reopening hearing. Claimant returned to work in 2018 without restrictions to the same job. He had no further injuries to his shoulders while at work at MidAmerican. From the time of his 2018 hearing to the review-reopening hearing, claimant had no medical treatment for his shoulders. During the same time, claimant did not take prescription medication for his shoulders. Claimant did not miss any time from work due to his shoulders while at MidAmerican. Between July 2018 through January 2020, claimant worked approximately 650 hours of overtime. Claimant's manager testified claimant did not have difficulty doing his job. He testified claimant did not request accommodations. Mr. Crain testified claimant could have been moved to a less physically demanding job under a collective bargaining agreement. He said claimant chose not to do that and retired. Given this record, it is found the opinions of Dr. Bansal that claimant had an increased permanent impairment from the time of his arbitration hearing until his retirement in 2020, are found not convincing. Given this

record, it is also found that claimant has failed to carry his burden of proof he sustained an increased loss of earning capacity proximately caused by the original injury and failed to prove he is entitled to additional permanent partial disability benefits under review-reopening proceeding.

I appreciate that claimant had a difficult time returning to work as a lineman and that he may have had physical difficulty with his shoulders on his return to work. However, given the record as detailed above, I am unable to find in his favor regarding the review-reopening proceeding.

As claimant failed to carry his burden of proof he is entitled to additional permanent partial disability benefits under review-reopening proceeding, all other issues are moot, except for reimbursement of the IME.

The final issue to be determined is whether claimant is due reimbursement of the IMEs by Dr. Tyler and Dr. Bansal.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Regarding the IME, the Iowa Supreme Court provided a literal interpretation of the plain language of Iowa Code section 85.39, stating that section 85.39 only allows the employee to obtain an independent medical evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 847 (Iowa 2015).

Under the Young decision, an employee can only obtain an IME at the employer's expense if an evaluation of permanent disability has been made by an employer-retained physician.

Iowa Code section 85.39 limits an injured worker to one IME. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842 (Iowa 2009).

The Supreme Court, in Young noted that in cases where Iowa Code section 85.39 is not triggered to allow for reimbursement of an independent medical examination (IME), a claimant can still be reimbursed at hearing the costs associated

with the preparation of the written report as a cost under rule 876 IAC 4.33. Young at 846-847.

Iowa Code section 85.39 allows claimant to be reimbursed for costs associated with an IME by a physician. Dr. Tyler is an audiologist and not a physician. For that reason, his IME is not reimbursable under Iowa Code section 85.39.

As noted above, claimant may receive reimbursement of the preparation of Dr. Tyler's report under Rule 876 IAC 4.33. Costs are awarded at the discretion of this agency. As claimant failed to carry his burden of proof regarding file number 20005453.01 (DOI 02/28/2020), costs are not taxed to the defendant for this file.

Regarding file number 5066050.01, Dr. Bansal gave his opinion regarding the review-reopening in an IME dated May 20, 2021. Dr. Aviles, the employer-retained physician, gave his opinions in a report dated May 19, 2021. Given the chronology of the reports, claimant is entitled to reimbursement for Dr. Bansal's May 20, 2021 report as it relates to the bilateral shoulder injury.

For file number 20700369.01 (DOI 11/03/2019), Nurse Practitioner Harbert opined, in a record dated 11/26/2019, claimant had no permanent impairment for his upper extremity injury. (JE 4) Dr. Bansal gave his opinion regarding claimant's impairment to his upper extremity injury in a report dated May 20, 2021. Given this chronology, claimant is due reimbursement for Dr. Bansal's May 20, 2021 report as it relates to the right upper extremity.

ORDER

THEREFORE IT IS ORDERED:

File Number 5066050.01 (DOI 04/24/2017):

That claimant shall take nothing in the way of additional permanent partial disability benefits regarding the review-reopening proceeding.

That both parties shall pay their own costs, except for reimbursement of the IME.

That defendant shall file subsequent reports of injury as required by this agency under rule 876 IAC 3.1(2).

File Number 20700369.01 (DOI 11/03/2019):

That defendant shall pay claimant seven point five (7.5) weeks of permanent partial disability benefits at the rate of one thousand two hundred fifty-one and 79/100 dollars ($1251.79) per week commencing on November 25, 2019.

Defendant 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.

That defendant shall pay costs.

That defendant shall file subsequent reports of injury as required by this agency under rule 876 IAC 3.1(2).

File Number 20005453.01 (DOI 02/28/2020):

That claimant shall take nothing in the way of any benefits.

That both parties shall pay their own costs.

File Number 5066050.01 (DOI 04/24/2017) and File Number 20700369.01 (DOI 11/03/2019):

That defendant shall reimburse claimant for costs associated with Dr. Bansal's May 20, 2021 IME.

Signed and filed this 2nd day of December, 2021.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Thomas Palmer (via WCES)

Lori Brandau (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.