BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RONALD CARR, Claimant, vs. KIRKWOOD COMMUNITY COLLEGE, Employer, and THE PHOENIX INSURANCE CO., Insurance Carrier, and SECOND INJURY FUND OF IOWA, Defendants.	File No. 5054595.01 REVIEW-REOPENING DECISION Head Note Nos.: 1402.40, 1701, 1801, 2501, 2502, 2701, 2907

STATEMENT OF THE CASE

Ronald Carr, claimant, filed a petition for arbitration against Kirkwood Community College, as the employer and The Phoenix Insurance Company, as the insurance carrier. Mr. Carr also filed a claim against the Second Injury Fund of Iowa. Those original claims came before the undersigned for an arbitration hearing on March 1, 2017.

The undersigned filed an arbitration decision on October 26, 2017. In that decision, the undersigned found that claimant proved a work injury occurred on November 3, 2013. However, the undersigned found that claimant failed to prove any permanent disability resulting from that work injury other than limited to the left foot and ankle. The arbitration decision awarded claimant 92.4 weeks of permanent partial disability benefits against the employer.

However, the undersigned also found that claimant proved his claim against the Second Injury Fund. In that same October 26, 2017 arbitration decision, the undersigned awarded claimant a 50 percent industrial disability against the Second Injury Fund of Iowa. After the Second Injury Fund's applicable credit, the arbitration decision awarded claimant 151 weeks of benefits from the Second Injury Fund of Iowa.

Mr. Carr filed a timely petition for review-reopening on July 28, 2020. He filed the petition for review-reopening against both the employer and the Second Injury Fund of Iowa. The review-reopening case came before the undersigned for hearing on September 7, 2021.

As a result of the ongoing pandemic in the state of Iowa and pursuant to an order from the Iowa Workers' Compensation Commissioner, this case was heard via videoconference using CourtCall. All participants appeared remotely.

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

The evidentiary record includes Joint Exhibits 1 through 6, Claimant's Exhibits 1 through 10, Defendants' Exhibits A through D, and Second Injury Fund Exhibit AA. All exhibits were received without objection except Defendants' Exhibit D. Claimant filed a written objection to Exhibit D and a ruling on that objection was filed before the commencement of trial. Claimant renewed the objection to Defendants' Exhibit D and made an offer of proof on the issue at the commencement of trial. The objection was again overruled, and Defendants' Exhibit D was received, along with all other offered exhibits.

Claimant testified on his own behalf and called his wife, Ann Carr, to testify. No other witnesses testified live at the hearing. The evidentiary record closed at the conclusion of the review-reopening hearing.

However, counsel for the parties requested an opportunity to file post-hearing briefs. This request was granted and both parties filed briefs simultaneously on November 8, 2021. The case was considered fully submitted to the undersigned on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant proved a substantial change in condition related to the work injury that justifies an increase in his prior award.

2. Whether the initial left foot and ankle injury has caused a subsequent deterioration or injury to claimant's hips and/or low back such that this case is converted from a scheduled member injury to an industrial disability claim.

3. If the initial left foot and ankle injury has substantially changed or caused injury to unscheduled body parts, the extent of claimant's entitlement to permanent disability benefits from the employer and insurance carrier.

4. Whether the Second Injury Fund of Iowa is entitled to reimbursement from the employer for prior benefits paid, if this claim is determined to now involve unscheduled injuries and industrial disability against the employer.

5. Whether claimant has proven a substantial change in condition such that his award against the Second Injury Fund of Iowa should be increased even if the injury is determined to still be a scheduled member injury.

6. The proper commencement date for permanent disability benefits, if any, awarded against the Second Injury Fund of Iowa.

7. Whether claimant is entitled to an order directing the employer and insurance carrier to pay, reimburse third-party payors, and to hold claimant harmless for past medical expenses contained at Claimant's Exhibit 6.

8. Whether claimant is entitled to reimbursement of his independent medical evaluation pursuant to Iowa Code section 85.39.

9. Whether claimant is entitled to an order authorizing alternate medical care into the future and specifically an order authorizing Dr. Morrissey for further care.

10. Whether costs should be assessed against either party and, if so, in what amount.

At the commencement of hearing, the undersigned discussed the issues of past medical expenses and the claim for alternate medical care with counsel. Defendants stipulated that Dr. Morrissey is the authorized medical provider and that any recommendations he made should be authorized. Accordingly, a verbal order was entered that the care recommended by Dr. Morrissey should be authorized and proceed.

Additionally, defendants conceded that the medical expenses contained in Claimant's Exhibit 6 were authorized medical care and should be paid. Accordingly, defendants will be ordered to pay, reimburse claimant or any third-party payor, and hold claimant harmless for the medical expenses contained at Claimant's Exhibit 6. No further findings or conclusions will be entered on these issues.

FINDINGS OF FACT

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

Ronald Carr, claimant, is a 51-year-old man, who lives in Cedar Rapids, Iowa. He sustained a very significant left foot and ankle injury on November 3, 2013 while working as a truck driving instructor for Kirkwood Community College. The details of

the injury are contained in the October 26, 2017 arbitration decision and will not be reiterated.

In the 2017 arbitration decision, I entered findings of fact that included a finding that claimant reported increased back pain, hip pain and right knee pain to his then treating physician, Douglas T. Sedlacek, M.D. (Claimant's Exhibit 5, p. 35) However, I also found that "neither Dr. Sedlacek nor any other physician opined that the increased back pain, hip pain, and right knee pain were causally related to or caused by the left foot and ankle injury within a reasonable degree of medical certainty." (Claimant's Ex. 5, p. 35) I specifically found, "claimant failed to prove a permanent injury or permanent aggravation to his low back, hips, or right knee as a result of the November 3, 2013 work injury." (Claimant's Ex. 5, p. 35) I found, "claimant has restricted range of motion in his left ankle that causes an altered gait." (Claimant's Ex. 5, p. 36) Nevertheless, I found "that the only permanent injuries sustained as a result of the November 3, 2013 work accident are limited to and confined to the left foot and ankle." (Claimant's Ex. 5, p. 36)

The above findings and the arbitration decision they are contained in were not appealed and became final agency action. Claimant now seeks review-reopening and an increase in his award of benefits. Specifically, claimant asserts that the previously determined left foot and ankle injury has now caused hip and low back injuries such that the employer should be ordered to pay additional permanent disability benefits.

Claimant testified that he experiences increased pain in his left foot since the arbitration hearing. (Transcript, p. 24) Mr. Carr testified that he also believes he has had a steadily decreasing range of motion in his left foot and ankle since the arbitration hearing and that the decreased range of motion affects how he walks. (Tr., pp. 24-25) He testified that he walks with more of a limp now than he did at the time of the arbitration hearing. (Tr., p. 25) Mr. Carr further testified that he sleeps worse now than he did at the time of the arbitration hearing.

Ann Carr, claimant's wife, confirmed his testimony in many respects. She testified that claimant's gait has gotten worse since the arbitration hearing and that he experiences balance issues as well now. She also testified that claimant limps more. (Tr., p. 72) Mrs. Carr also testified that claimant has much greater difficulties with traversing stairs now than at the time of the arbitration hearing and that walking on uneven surfaces is much more difficult now. (Tr., p. 73) Mrs. Carr also testified that claimant's sleep patterns are worse now than at the time of the arbitration hearing and she attributes his arousal from sleep at night to pain in his left foot. (Tr., p. 74)

Claimant also testified that he experiences worse symptoms in his low back and hips since the 2017 arbitration hearing. (Tr., pp. 28-29) He describes decreased range of motion and stiffness in his back and testified that his back pain has moved in location down into the tailbone area. (Tr., p. 28) He described pain radiating down both legs at times. (Tr., p. 29)

Mr. Carr also testified that he experiences increased right knee pain since the March 2017 arbitration hearing. He testified that he now has a burning sensation in the knee, as well as some grinding and popping below the kneecap. (Tr., pp. 30-31)

Three physicians have weighed in on his condition as well. As noted in the arbitration decision, Douglas T. Sedlacek, M.D. was claimant's treating pain specialist prior to the March 2017 arbitration hearing. Prior to that hearing, Dr. Sedlacek indicated that claimant was reporting increased back pain and hip pain, as well as right knee pain. (Claimant's Ex. 5, p. 35) Dr. Sedlacek indicated, "I suspect [these are] secondary to his gait." (Claimant's Ex. 5, p. 35) However, he did not opine that the work injury in November 2013 caused that gait issue or back, hip, or right knee problems. I found that claimant failed to prove that issue. (Claimant's Ex. 5, p. 35)

Since the arbitration hearing, Dr. Sedlacek retired. Pain management treatment transferred to Kyle E. Morrissey, D.O. In an office note dated June 5, 2020, Dr. Morrissey indicated that claimant reported "increased pain in his left ankle with reduced range of motion[,] stiffness[,] and wakefulness at night. This is also caused [*sic*] him to have more hip and low back pain as he is [*sic*] altered his walking pattern." (Joint Ex. 4, p. 79) Then in a supplemental report dated August 4, 2021, Dr. Morrissey opined, "Mr. Carr has also reported an altered gait that has contributed to his increased bilateral hip and low back pain." (Claimant's Ex. 3, p. 31) Dr. Morrissey continued, "it is more likely than not that Mr. Carr's work injury permanently aggravated his hip and low back condition. Mr. Carr's gait is altered from his work injury, which has aggravated and hastened the likely arthritic process and degeneration in his low back and hips." (Claimant's Ex. 3, p. 31)

Mr. Carr also obtained an independent medical evaluation performed by Mark Taylor, M.D. on May 24, 2021. Dr. Taylor opines, "I agree with Dr. Sedlacek and Dr. Morrissey that it is more likely than not that Mr. Carr's significantly altered gait pattern, including the use of a cane, represents a substantial contributing factor to the worsened back, buttock and hip pain." (Claimant's Ex. 1, p. 25) Dr. Taylor further explains, "With time, and especially with the slow worsening of his left foot and ankle pain, the back and hip pain has also worsened (despite an overall decrease in activity). The pain is more intense and his average pain levels are now elevated compared to previously. The location of the pain is a bit more diffuse and has slowly increased in intensity." (Claimant's Ex. 1, p. 24)

Finally, defendants introduced a report from the treating orthopaedic surgeon, Scott Ekroth, M.D. Dr. Ekroth treated claimant both before and after the 2017 arbitration hearing. Dr. Ekroth re-evaluated claimant on August 17, 2021 and authored a supplemental report. He opines, "His ankle and foot range of motion has not changed in comparison to my report in 2016. Specifically, his ankle dorsiflexion appears to be stable. Therefore, I do not believe that his reported change in gate [*sic*] could be attributed to a progression of dysfunction in his ankle and foot from his work-related injury." (Defendants' Ex. D, p. 11)

Pondering these opinions, I note that Dr. Ekroth is the treating orthopaedic surgeon. He evaluated claimant numerous times, performed surgery, and treated claimant before and after the 2017 arbitration hearing. Dr. Ekroth is in a unique position to have seen claimant's condition and to assess whether there has been a worsening of the left foot and ankle condition since the 2017 arbitration hearing. He has first-hand knowledge of the condition of the foot and ankle prior to and after that hearing. In fact, claimant admits that he has confidence in the treatment Dr. Ekroth has provided and admits that Dr. Ekroth has "much more knowledge, intimate knowledge of [his] condition" than would Dr. Taylor. (Tr., p. 63) For all these reasons, Dr. Ekroth's opinions must be given significant consideration and weight.

By way of contrast, Dr. Morrissey did not begin evaluating and treating claimant until after the arbitration hearing. His opinions appear to accept the subjective complaints offered by Mr. Carr without question. For instance, he reports "Mr. Carr has also reported an altered gait that has contributed to his increased bilateral hip and low back pain." (Claimant's Ex. 3, p. 31) Of course, claimant had low back and hip pain at the time of the 2017 arbitration hearing. He also had an altered gait at the time of the arbitration hearing. Dr. Morrissey does not specifically acknowledge these existed previously or offer specific opinions about what has changed since the arbitration hearing. Arguably, the ongoing gait alteration could be the cause, though it was found that claimant had the altered gait and that none of the physicians at the time of the 2017 arbitration hearing causally connected the low back or hip issues to the 2013 work injury. If it is the same gait issue as existed in 2017, claimant cannot "backfill" on the causation issue that has already been tried and determined. Realistically, Dr. Morrissey is not in a position to know or to determine the changes that may or may not have occurred since 2017 and relies on the subjective history reported by claimant.

Finally, claimant relies upon the medical opinions of Dr. Taylor. Of course, Dr. Taylor is not a treating physician and does not have the advantage of having treated claimant throughout this process to evaluate his condition both before and after the 2017 arbitration hearing. Dr. Taylor was able to evaluate claimant both before and after the 2017 arbitration hearing and has some of the advantages to which Dr. Ekroth has in determining whether there has been a worsening of claimant's condition since the arbitration hearing.

What is troubling about Dr. Taylor's assessment is that he asserts he agrees with Dr. Sedlacek "that it is more likely than not that Mr. Carr's significantly altered gait pattern, including the use of a cane, represents a substantial contributing factor to the worsened back, buttock and hip pain." (Claimant's Ex. 1, p. 25) Dr. Sedlacek did not offer the opinion to which he is attributed by Dr. Taylor prior to the 2017 arbitration hearing. In fact, in the arbitration decision, I specifically found that no physician offered that opinion prior to the 2017 arbitration hearing. If Dr. Taylor is relying upon a causation opinion by Dr. Sedlacek offered prior to the 2017 arbitration hearing, he is either reviewing something that was not offered into the prior evidentiary record, or he is drawing conclusions about Dr. Sedlacek's opinions that were specifically rejected in the

arbitration decision. Either way, his reliance upon Dr. Sedlacek's opinion is troubling and damaging to his credibility.

Moreover, if Dr. Taylor agrees with an opinion offered by Dr. Sedlacek prior to the 2017 arbitration hearing, there is no substantial change in condition since that hearing. If his opinion is read in this manner, Dr. Taylor is essentially saying the low back and hip pain is and always has been related to or materially aggravated by the 2013 work injury. Yet, he did not offer this opinion prior to the 2017 arbitration hearing and offers no explanation why he did not offer that opinion in 2017 but now relies upon evidence prior to 2017 for his causation opinion.

To the extent that Dr. Taylor now opines claimant's low back and hip pain has always been causally related to or materially aggravated by the 2013 work injury, his opinion is contrary to the findings of this agency in the arbitration decision. Claimant cannot seek to overturn those findings of fact at this juncture. To the extent that Dr. Taylor simply disagrees with the prior agency findings, his opinion carries little or no weight.

I also note that the question posed to Dr. Taylor for him to address is "whether or [not] Mr. Carr's additional injuries (back, hips) are consistent with his 11/13/2013 injury." (Claimant's Ex. 1, p. 24) While claimant must prove that a change in condition remains causally related to the initial injury, the question, as posed, is really the question that was not proven by claimant in the initial arbitration proceeding. Claimant did not pose a question to Dr. Taylor in this proceeding about whether the activities or changes in claimant's condition since the arbitration hearing caused a material aggravation of the condition as it existed at the time of the arbitration hearing. Ultimately, I conclude that Dr. Taylor was pondering and answering a question that should have been posed and argued in the initial arbitration proceeding, rather than a question specific to a review-reopening proceeding.

Interestingly, Dr. Taylor also concludes that claimant's permanent impairment rating for his left foot and ankle remains the same as it was in 2017 at the time of the arbitration hearing. I accepted Dr. Taylor's rating in the initial hearing. Dr. Taylor explains that the rating remains the same because he chose a methodology for rating that injury at the time of the prior hearing that does not result in an increase in permanent impairment. (Claimant's Ex. 1, p. 23) The fact that claimant's functional impairment rating has not changed does not necessarily mean he has no additional symptoms, but it does suggest that any functional changes since the 2017 arbitration hearing may not be substantial and tends to support the opinions of Dr. Ekroth more than those of Dr. Taylor.

Having considered all the medical opinions offered in this review-reopening proceeding, I find the opinions of Dr. Ekroth, the long-time treating orthopaedic surgeon, to be the most convincing and credible medical opinions. Therefore, I find that any reported change in claimant's gait is not attributable to the left foot and ankle injury in 2013 because there is no change in claimant's range of motion in the left foot and ankle. I specifically find that claimant failed to prove a substantial change in condition of the left

foot and ankle. I find that claimant failed to prove any increase in low back or hip symptoms is caused by an altered gait since the arbitration hearing or the effects of the 2013 work injury.

While I find Mr. Carr and his wife to be sympathetic witnesses that offered honest testimony as they currently perceive his condition, I note that many of claimant's current complaints were present at the time of the 2017 arbitration hearing. For instance, claimant complains of increased symptoms in his left foot and ankle. However, claimant testified at the initial trial that he never experienced a pain-free day in his left foot and ankle since the date of injury in 2013. (Claimant's Ex. 5, p. 35) Claimant (and his wife corroborates) complains now of sleep difficulties due to his symptoms. Yet, he testified at the arbitration hearing that he had broken sleep and averaged six hours of interrupted sleep per night. (Claimant's Ex. 5, p. 35)

Claimant now asserts he has a significantly altered gait. However, he clearly had an altered gait and Dr. Taylor even rated his injury based on the altered gait at the time of the 2017 arbitration hearing. Claimant used a cane for walking long distances both at the time of the 2017 hearing and now. Claimant's restrictions now are very similar to those found to be applicable at the time of the arbitration hearing. (Claimant's Ex. 1, p. 24; Claimant's Ex. 5, p. 37) While I acknowledge that claimant perceives a worsening of his condition, an increase in his symptoms, alteration of his gait, the more objective medical evidence does not suggest a significant change in condition from that which claimant demonstrated at the 2017 arbitration hearing.

Mr. Carr also asserts that he sustained a substantial change in condition of his right knee, the first qualifying injury for purposes of his Second Injury Fund claim. Only one physician has specifically addressed the right knee and alleged changes. Dr. Taylor opines in his June 16, 2021 report that claimant's right knee impairment rating has increased from three percent of the right lower extremity to four percent of the right lower extremity. The increase in permanent impairment appears to be solely related to the subjective report of increased pain from claimant. (Claimant's Ex. 1, p. 26)

Dr. Taylor reports that claimant reports more consistent burning on the underside of his right kneecap. He also records that the patellofemoral pain is more constant now than it was at the time of the 2017 arbitration hearing. (Claimant's Ex. 1, p. 26) However, claimant has not had any additional evaluation or treatment on his right knee since the 2017 arbitration hearing. (Tr., p. 64; Claimant's Ex. 1, p. 26) Claimant acknowledges that he has no future treatment scheduled for the right knee. (Tr., p. 64) Claimant restrictions have not really changed for the right knee condition since the 2017 arbitration hearing. (Claimant's Ex. 1, p. 26)

Ultimately, Dr. Taylor's opinion regarding permanent impairment for the right knee injury is unrebutted. I accept Dr. Taylor's opinion that claimant's permanent impairment related to the right knee is now 4 percent of the right lower extremity. However, I do not find any ongoing medical care is occurring, or that claimant's permanent restrictions related to the right knee have significantly changed.

Mr. Carr has secured employment in the predicted occupation that was foreseen at the time of the 2017 arbitration hearing. He is able to perform that occupation with the right knee in its current condition. Even with a very slight increase in claimant's permanent impairment related to the right knee, I continue to perceive his loss of future earning capacity related to the combined effects of the left foot and ankle, as well as the right knee, to be in the 50 percent range. I find no significant change in claimant's earning capacity as a result of the increase in permanent impairment for the right knee as a result of the subjective report of increased pain without any other objective factors or evidence to demonstrate further loss of earning capacity since the 2017 arbitration hearing. Accordingly, I find that claimant failed to prove a substantial change in condition related to the right knee at least with respect to a determination of whether his industrial disability award against the Second Injury Fund needs to be modified.

CONCLUSIONS OF LAW

Mr. Carr asserts alternative claims against both the employer and the Second Injury Fund of Iowa for review-reopening. Against the employer, claimant contends that his left foot and ankle injuries have resulted in an altered gait that has caused or materially aggravated low back and hip conditions. Accordingly, claimant asserts that the previously determined scheduled member injury should now convert to an unscheduled injury that is compensated by the employer and insurance carrier with industrial disability. In the alternative, claimant contends that he sustained a worsening of his right knee and left foot and ankle conditions and that the industrial disability award against the Second Injury Fund of Iowa should be increased.

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.

Claimant is required to prove that a substantial change in condition has occurred since the arbitration decision. Claimant is not required to prove that the current extent of disability was not contemplated by the commissioner at the time the arbitration decision was entered. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009). However, the principles of res judicata still apply and claimant is not permitted to simply "relitigate causation issues that were determined in the initial award or settlement agreement." Id. at 393.

The failure of a condition to improve to the extent anticipated originally may constitute a change of condition. Meyers v. Holiday Inn of Cedar Falls, Iowa, 272 N.W.2d 24 (Iowa App. 1978). Moreover, an injury to a scheduled member that later causes an industrial disability constitutes a substantial change in condition that justifies review-reopening and an increase in a prior award. Kohlhaas, 777 N.W.2d at 392-393; Mortimer v. Fruehauf Corp., 502 N.W.2d 12 (Iowa 1993).

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).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

In the underlying arbitration decision, I found "that the only permanent injuries sustained as a result of the November 3, 2013 work accident are limited to and confined to the left foot and ankle." (Claimant's Ex. 5, p. 36) That finding of fact was not appealed and is final agency action. That finding of fact is binding in this review-reopening proceeding and may not be relitigated.

Accordingly, claimant must demonstrate that something occurred after the 2017 arbitration hearing that resulted in a material aggravation of the hip and low back conditions that existed at the time of that hearing. As noted in the findings of fact, claimant clearly had an altered gait at the time of the arbitration hearing and had ongoing low back and hip pain at the time of that hearing. Since that low back and hip pain at the time of the arbitration hearing was found not related to the 2013 work injury, claimant must demonstrate some change in condition, worsening, or material aggravation of that hip pain and/or low back pain as a result of the effects of the 2013 work injury since the arbitration hearing.

Having considered the medical opinions in the evidentiary record, along with the testimony of Mr. Carr and his wife, I found the medical opinions of Dr. Ekroth to be the most convincing and credible in this record. Accordingly, I found that claimant failed to prove a substantial change in condition related to his left foot and ankle or that the 2013 left foot and ankle injury caused a material aggravation of claimant's low back and/or hips as they existed at the time of the 2017 arbitration hearing. As a result of these findings, I conclude that claimant failed to prove he sustained a substantial change in condition related to the 2013 work injury that would justify an increase in permanent disability at this time.

Mr. Carr also asserted he sustained a substantial change in condition related to the first qualifying, right knee, injury for purposes of the Second Injury Fund claim. In this respect, claimant introduced an unrebutted medical opinion from Dr. Taylor that awarded claimant an additional one percent permanent impairment of the right lower extremity since the 2017 arbitration hearing. Although I accepted that medical opinion and found that claimant proved a one percent increase in his right knee permanent functional impairment, I also found that claimant requires no significant change in permanent restrictions as a result of the right knee condition. I also found that claimant has not obtained treatment for the right knee since the arbitration hearing and has no treatment scheduled for the right knee into the future.

Considering all of these factual issues, I ultimately found that claimant's loss of future earning capacity has not substantially changed as a result of the right knee injury. I specifically found that claimant was able to secure employment as predicted at the time of the 2017 arbitration hearing and that his loss of future earning capacity related to the combined effects of the left ankle and foot injuries and the right knee injury remains approximately 50 percent. Accordingly, I conclude that claimant failed to prove a substantial change in condition related to the right knee injury for purposes of determining whether the prior industrial disability award against the Second Injury Fund of Iowa should be increased. I conclude claimant failed to prove entitlement to additional Second Injury Fund benefits. All other issues pertaining to permanent disability benefits, commencement date of benefits, and reimbursement of prior payments by the Second Injury Fund are rendered moot by these findings and conclusions.

Mr. Carr also asserts a claim for reimbursement of his independent medical evaluation with Dr. Taylor on May 24, 2021 pursuant to Iowa Code section 85.39. In this review-reopening proceeding, Dr. Taylor is the only physician that offered an opinion about claimant's functional impairment. His impairment rating came before defendants solicited a "no change" opinion from Dr. Ekroth.

The Iowa Supreme Court held, "Iowa Code section 85.39 does not expose the employer to liability for reimbursement of the cost of a medical evaluation unless the employer has obtained a rating in the same proceeding with which the claimant disagrees." Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 394 (Iowa 2009). At most, the opinion letter from Dr. Ekroth authored in August 2021 could be considered the employer's attempt to solicit an impairment or disability rating from a physician of their

choosing. Dr. Taylor's independent medical evaluation clearly occurred prior to August 2021. I conclude that claimant is not entitled to reimbursement for his independent medical evaluation pursuant to Iowa Code section 85.39.

The final disputed issue is whether costs should be assessed against any party. Costs are assessed at the discretion of the agency. Iowa Code section 86.40. In this case, claimant has not proven entitlement to an increase in his prior award of permanent disability benefits. However, hearing was necessary for claimant to secure award of past medical expenses and alternate medical care through Dr. Morrissey. Therefore, exercising the agency's discretion, I conclude that it is appropriate to assess claimant's filing fee ($100.00). 876 IAC 4.33(7). All other requested costs are denied.

ORDER

THEREFORE, IT IS ORDERED:

Claimant takes no additional permanent disability benefits against the employer and insurance carrier.

Claimant takes no additional benefits from the Second Injury Fund.

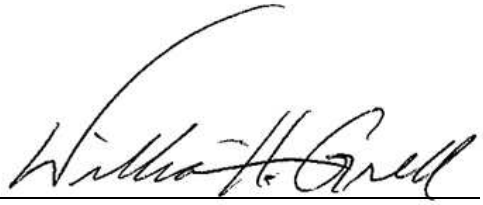
The employer and insurance carrier shall authorize future care through Dr. Morrissey pursuant to their stipulation, or agreement, at the commencement of the review-reopening hearing.

The employer and insurance carrier shall pay, reimburse claimant, reimburse any third-party payor, and hold claimant harmless for all past medical expenses contained in Claimant's Exhibit 6.

The employer and insurance carrier shall reimburse claimant's filing fee of one hundred and 00/100 dollars ($100.00) as a cost pursuant to 876 IAC 4.33(7).

Defendant 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 21st day of February, 2022.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Emily Anderson (via WCES)

James Ballard (via WCES)

Jonathan Bergman (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.