

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOSEPH PHIPPS,

Claimant,

vs.

MIDAMERICAN ENERGY CO.,

Employer,
Self-Insured,
Defendant.File Nos. 5066050.01
20005453.01
20700369.01

A P P E A L

D E C I S I O N

: Head Notes: 1402.20; 1402.40; 1803; 1806;
: 2208; 2403; 2502; 2905; 2907

Claimant Joseph Phipps appeals from a combined review-reopening and arbitration decision filed on December 2, 2021. Defendant MidAmerican Energy Company, self-insured employer, cross-appeals. The cases were heard on June 24, 2021 and were considered fully submitted in front of the deputy workers' compensation commissioner on August 5, 2021.

In the review-reopening decision for File Number 5066050.01, the deputy commissioner found claimant did not meet his burden of proof to establish he sustained a change of physical or economic condition. The deputy commissioner declined to assess claimant's costs to defendant.

In the arbitration decision for File Number 20005453.01, the deputy commissioner found claimant did not meet his burden of proof to establish he sustained occupational hearing loss or tinnitus caused by his employment with defendant. The deputy commissioner found claimant was not entitled to recover the cost of Richard Tyler, Ph.D.'s examination under Iowa Code section 85.39 or the cost of Dr. Tyler's report under 876 IAC 4.33. The deputy commissioner ordered the parties to pay their own costs.

In the arbitration decision for File Number 20700369.01, the deputy commissioner found claimant met his burden of proof to establish he sustained permanent impairment of his right wrist on November 3, 2019, which arose out of and in the course of his employment with defendant. The deputy commissioner found claimant sustained three percent functional loss of the right wrist entitling claimant to receive 7.5 weeks of permanent partial disability benefits at the stipulated weekly rate of \$1,251.79, commencing on November 25, 2019. The deputy commissioner found apportionment does not apply because there was no evidence the rating for claimant's November 2019

injury to his right wrist was related, in any way, to the 2012 injury to his right elbow. The deputy commissioner found defendant should be assessed claimant's costs. The deputy commissioner found claimant is entitled to recover the cost of Sunil Bansal, M.D.'s independent medical examination (IME) for File Numbers 5066050.01 and 20700369.01

In the appeal in File Number 5066050.01, claimant asserts the deputy commissioner erred in finding claimant did not prove he sustained a change of physical or economic condition and claimant asserts he is entitled to additional industrial disability benefits. Claimant asserts the deputy commissioner erred in failing to assess defendant with claimant's costs.

In the appeal in File Number 20005433.01, claimant asserts the deputy commissioner erred in finding claimant did not prove he sustained occupational hearing loss and tinnitus caused by his employment with defendant and claimant asserts he is entitled to additional industrial disability benefits. Claimant asserts the deputy commissioner erred in failing to assess defendant with the cost of Dr. Tyler's examination and report and with claimant's other costs.

Claimant asserts the remainder of the decision should be affirmed.

In the cross-appeal in File Number 20700369.01, defendant asserts the deputy commissioner erred in finding claimant proved he sustained permanent impairment of his right wrist caused by the November 3, 2019, work injury. Defendant asserts the deputy commissioner erred in finding apportionment does not apply.

In the cross-appeal in Files 20700369.01 and 5066050.01, defendant asserts the deputy commissioner erred in finding claimant is entitled to reimbursement from defendant for the cost of Dr. Bansal's IME.

Defendant asserts the remainder of the decision should be affirmed.

Those portions of the proposed combined review-reopening and arbitration decision pertaining to issues not raised on appeal are adopted as part of this appeal decision.

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 17A.15 and 86.24, the combined review-reopening and arbitration decision filed on December 2, 2021, is affirmed in part, and is reversed in part, with the following additional and substituted analysis.

In File Number 5066050.01, I affirm the deputy commissioner's finding that claimant failed to prove he sustained a change of economic condition for his bilateral shoulder injury. With the following additional and substituted analysis I reverse the deputy commissioner's finding that claimant failed to prove he sustained a change of physical condition for his bilateral shoulder injury and I find claimant is entitled to

additional industrial disability benefits. I reverse the deputy commissioner's finding that defendant should not be assessed claimant's costs in File No. 5066060.01.

In File Number 20005433.01, I affirm the deputy commissioner's finding that claimant failed to prove he sustained occupational hearing loss or tinnitus caused by his employment with defendant. I affirm the deputy commissioner's finding that defendant should not be assessed the cost of Dr. Tyler's exam or report and claimant's other costs.

In File Number 20700369.01, I affirm the deputy commissioner's finding that claimant proved he sustained permanent impairment of his right wrist caused by the November 3, 2019, work injury. I affirm the deputy commissioner's finding that claimant sustained three percent functional loss of his right wrist. With the following additional and substituted analysis I reverse the deputy commissioner's finding that apportionment does not apply and I reverse the deputy commissioner's award of permanent partial disability benefits. I affirm the deputy commissioner's finding that defendant should be assessed claimant's costs.

I affirm the deputy commissioner's finding that claimant is entitled to recover the cost of Dr. Bansal's IME in Files 5066050.01 and 20005433.01.

I. Apportionment

The deputy commissioner found apportionment does not apply because there was no evidence the rating for claimant's November 2019 injury to the right wrist was related, in any way, to the 2012 injury to his right elbow. Defendant asserts the deputy commissioner erred in finding apportionment does not apply to claimant's right arm claim.

Iowa Code section 85.34(7), provides as follows:

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.

Claimant proved he sustained three percent permanent impairment of his right upper extremity caused by the November 3, 2019, work injury. As noted by the deputy

commissioner, claimant sustained an injury to his right elbow on April 20, 2012, while working for defendant. Claimant underwent ulnar nerve surgery for his right elbow injury. The parties entered into an agreement for settlement, agreeing claimant sustained 12.5 percent permanent impairment of his right upper extremity as a result of the April 20, 2012, work injury.

The statute does not contain any language stating apportionment does not apply when there is a successive injury to the same scheduled member. The 2012 and 2019 injuries are both to the right upper extremity or arm. Under the express wording of the statute, apportionment applies. Because the functional loss from the November 3, 2019, injury does not exceed the prior functional loss from the April 20, 2012, work injury, claimant is not entitled to receive any additional permanent partial disability benefits for the November 3, 2019, injury to his right wrist.

II. Change of Physical Condition and Extent of Disability

Iowa Code section 86.14 governs review-reopening proceedings. When considering a review-reopening petition, the inquiry “shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded.” Iowa Code § 86.14(2). The deputy workers’ compensation commissioner does not re-determine the condition of the employee adjudicated by the former award. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 391 (Iowa 2009). The deputy workers’ compensation commissioner must determine “the condition of the employee, which is found to exist subsequent to the date of the award being reviewed.” Id. (quoting Stice v. Consol. Ind. Coal Co., 228 Iowa 1031, 1038, 291 N.W. 452, 456 (1940)). In a review-reopening proceeding, the deputy workers’ compensation commissioner should not reevaluate the claimant’s level of physical impairment or earning capacity “if all of the facts and circumstances were known or knowable at the time of the original action.” Id. at 393.

The claimant bears the burden of proving, by a preponderance of the evidence that, “subsequent to the date of the award under review, he or she has suffered an *impairment or lessening of earning capacity proximately caused by the original injury.*” Simonson v. Snap-On Tools Corp., 588 N.W.2d 430, 434 (Iowa 1999) (emphasis in original).

When considering expert testimony, the trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997). When considering the weight of an expert opinion, the factfinder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert’s education, experience, training, and practice, and “all other factors which bear upon the weight and value” of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

Claimant contends the deputy commissioner erred in finding he failed to establish a change of physical condition because Dr. Bansal's 2018 and 2021 independent medical examinations show a worsening of his range of motion in his bilateral shoulders. Defendant alleges the deputy commissioner correctly rejected Dr. Bansal's report, finding Steven Aviles, M.D.'s opinion more persuasive.

Claimant underwent an IME with Dr. Bansal in 2018, as part of the original arbitration proceeding involving claimant's April 2017 injury to his bilateral shoulders. The report was not produced at hearing and the parties relied on the reports prepared by the treating orthopedic surgeon, Brian Crites, M.D., and Dr. Aviles, who performed an IME for defendant. The deputy commissioner found Dr. Crites's opinion more persuasive than Dr. Aviles's opinion and found claimant sustained ten percent industrial disability.

Dr. Bansal's 2018 and 2021 reports were admitted into evidence during the review-reopening hearing. (Ex. 3) During his 2018 and 2021 examinations, Dr. Bansal recorded range of motion findings and corresponding impairments using Figures 16-40 through 16-46 of the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"). In 2018, Dr. Bansal recorded the following findings:

	Right Shoulder	Left Shoulder
Flexion:	176, 178, 176 degrees	180, 178, 178 degrees
Abduction:	175, 180, 177 degrees	174, 172, 174 degrees
Adduction:	49, 47, 46 degrees	48, 48, 49 degrees
External Rotation:	84, 88, 85 degrees	52, 53, 53 degrees
Extension:	49, 50, 52 degrees	47, 46, 46 degrees
Internal Rotation:	72, 73, 72 degrees	62, 62, 63 degrees

For the right shoulder Dr. Bansal assigned a one percent upper extremity impairment for loss of internal rotation and a 10 percent upper extremity impairment for his distal clavicle resection, for a combined 11 percent upper extremity impairment, which equals a seven percent impairment of the body as a whole. (Ex. 3, p. 16) For the left shoulder Dr. Bansal assigned a one percent upper extremity impairment for loss of external rotation, a two percent upper extremity impairment for loss of internal rotation, and a 10 percent upper extremity impairment for his distal clavicle resection, for a combined 13 percent upper extremity impairment, which equals an eight percent impairment of the body as a whole. (Ex. 3, p. 16)

In his May 20, 2021, Dr. Bansal recorded the following findings:

	Right Shoulder	Left Shoulder
Flexion:	172, 171, 168 degrees	166, 167, 167 degrees

Abduction:	163, 160, 162 degrees	161, 161, 160 degrees
Adduction:	46, 45, 45 degrees	45, 43, 42 degrees
External Rotation:	73, 76, 74 degrees	46, 48, 45 degrees
Extension:	42, 42, 40 degrees	39, 37, 36 degrees
Internal Rotation:	61, 59, 60 degrees	44, 43, 41 degrees

(Ex. 3, pp. 24-25) For the right shoulder Dr. Bansal assigned a one percent upper extremity impairment for loss of flexion, a one percent upper extremity impairment for loss of abduction, a one percent upper extremity impairment for loss of extension, a two percent upper extremity impairment for loss of internal rotation and a 10 percent upper extremity impairment for his distal clavicle resection, for a combined 15 percent upper extremity impairment, which equals a nine percent impairment of the body as a whole. (Ex. 3, p. 24) For the left shoulder Dr. Bansal assigned a one percent upper extremity impairment for loss of flexion, a one percent upper extremity impairment for loss of abduction, a one percent upper extremity impairment for loss of external rotation, a one percent upper extremity impairment for loss of extension, a three percent upper extremity impairment for loss of internal rotation, and a 10 percent upper extremity impairment for his distal clavicle resection, for a combined 16 percent upper extremity impairment, which equals a 10 percent impairment of the body as a whole. (Ex. 3, p. 25)

In his May 19, 2021, report, Dr. Aviles recorded the following range of motion findings:

Shoulder ROM L	Active ROM – Flexion: 180 degrees, Factors: normal, Description: active pain free range of motion. Passive ROM – Ext Rot 90 Abd: 90 degrees, Int Rot 90 Abd: 70 degrees, Factors: normal, Description: passive pain free range of motion.
Shoulder ROM R	Active ROM – Factors: pain, Description: active painful range of motion. Passive ROM – Ext Rot 90 Int Rot 90 Abd: 90 degrees, Flexion: 180 degrees, Factors: pain, Description: passive painful range of motion.

(Ex. A, p. 4)

Range of motion findings provide objective evidence of function. The AMA Guides direct the examiner to record findings for flexion, extension, abduction, adduction, internal rotation, and external rotation when evaluating shoulder injuries. AMA Guides at 474-79. Dr. Aviles's 2021 report does not provide findings for extension or adduction for both shoulders, nor does he respond to any of Dr. Bansal's findings. I do not find Dr. Aviles' report persuasive. Dr. Bansal's reports document objective proof

claimant's range of motion has worsened since the November 21, 2018, arbitration decision. Based on Dr. Bansal's objective range of motion findings, I find claimant has established he sustained a change of physical condition.

Claimant's injury to his bilateral shoulders occurred before the changes to the statute occurred in 2017 and is compensated as an unscheduled injury. Compensation for an unscheduled injury through the industrial method is determined by evaluating the employee's earning capacity. Westling v. Hormel Foods, 810 N.W.2d 247, 251 (Iowa 2012). In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-138 (Iowa 2010). The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138.

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u). When considering the extent of disability, the deputy commissioner considers all evidence, both medical and nonmedical. Evenson v. Winnebago Indus., Inc., 881 N.W.2d 360, 370 (Iowa 2016).

The Iowa Supreme Court has held, "it is a fundamental requirement that the commissioner consider all evidence, both medical and nonmedical. Lay witness testimony is both relevant and material upon the cause and extent of injury." Evenson, 881 N.W.2d 360, 369 (Iowa 2016) (quoting Gits Mfg. Co. v. Frank, 855 N.W.2d 195, 199 (Iowa 2014)).

At the time of the review-reopening hearing, claimant was 67 years old. Claimant graduated from high school and he worked as an electrical lineman for most of his working career.

As noted by the deputy commissioner, claimant returned to his normal duties following the 2017 work injury without any restrictions. Claimant worked approximately 650 hours of overtime between July 2018 and January 2020, before retiring in February 2020. Claimant did not request any accommodations from defendant when he returned to work, nor did he report he had any physical problems performing his job. Claimant did not request medical treatment from defendant due to any worsening problems. Claimant did not elect to move to a less physically demanding position through the collective bargaining agreement before he retired.

When claimant returned to work in 2018, he underwent testing ordered by defendant to determine if he could return to work. (Ex. 2) The results of the testing confirmed claimant could perform the essential job demands of lifting floor to waist and

horizontally occasionally up to 65 pounds, and front carry occasionally up to 60 pounds. (Ex. 2)

In his 2021 report, Dr. Bansal assigned claimant permanent restrictions of no lifting above 40 pounds with both arms, no lifting greater than 10 pounds overhead with both arms, no frequent overhead lifting with either arm, and no frequent reaching with either arm. (Ex. 3, p. 25) Using Dr. Bansal's restrictions, claimant is no longer able to perform the essential job demands of his former position with defendant. (Ex. 2)

Claimant has not looked for work and he does not intend to return to work. Claimant testified at hearing he considers himself retired. Considering all of the factors of industrial disability, including claimant's retirement and his lack of motivation to return to work, I find claimant has sustained an additional five percent industrial disability. Claimant is entitled to receive an additional 25 weeks of permanent partial disability benefits at the stipulated weekly rate of \$1,097.84, commencing on the stipulated commencement date of December 12, 2018.

III. Costs

Claimant asserts the deputy commissioner erred in declining to assess defendant the \$103.00 cost of the filing fee, and the \$90.20 cost of claimant's deposition in File Number 5066050.01. Defendant asserts claimant is not entitled to recover the \$105.00 cost of medical records.

Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Rule 876 Iowa Administrative Code 4.33, provides costs may be taxed by the deputy workers' compensation commissioner for: (1) the attendance of a certificated shorthand reporter for hearings and depositions; (2) transcription costs; (3) the cost of service of the original notice and subpoenas; (4) witness fees and expenses; (5) the cost of doctors' and practitioner's deposition testimony; (6) the reasonable cost of obtaining no more than two doctors' or practitioners' reports; (7) filing fees; and (8) the cost of persons reviewing health service disputes. The rule expressly allows for the recovery of the filing fees and the deposition transcript. The rule does not allow claimant to recover the cost of medical records. I find claimant is entitled to recover the cost of the filing fees in Files 5066050.01 and 20700369.01 and the cost of the deposition transcript in File 5066050.01.

ORDER

IT IS THEREFORE ORDERED that the combined review-reopening and arbitration decision filed on December 2, 2021, is affirmed in part, and reversed in part, with the above-stated additional and substituted analysis.

For File Number 5066050.01 – Date of Injury 04/24/2017:

Defendant shall pay claimant an additional 25 weeks of permanent partial disability benefits at the stipulated weekly rate of one thousand ninety-seven and 84/100 dollars (\$1,097.84), commencing on the stipulated commencement date of December 12, 2018.

Defendant shall receive credit for all benefits paid to date.

Defendant shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent, See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Pursuant to rule 876 IAC 4.33, defendant shall pay claimant's costs of the arbitration proceeding in the amount of one hundred ninety-three and 20/100 dollars (\$193.20).

For File Number 20005453.01 – Date of Injury 02/28/2020:

Claimant shall take nothing from these proceedings.

For File Number 20700369.01 - Date of Injury 11/03/2019:

Claimant shall take nothing from these proceedings in the way of weekly benefits.

Pursuant to rule 876 IAC 4.33, defendant shall pay claimant's costs of the arbitration proceeding in the amount of one hundred three and 00/100 (\$103.00).

For File Numbers 5066050.01 and 20700369.01:

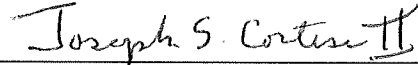
Defendant shall reimburse claimant one thousand nine hundred and fifty-six dollars (\$1,956.00) for the cost of Dr. Bansal's IME.

For All Files:

Pursuant to rule 876 IAC 4.33, the parties shall split the costs of the appeal, including the cost of the hearing transcript.

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

Signed and filed on this 11th day of July, 2022.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Thomas Palmer (via WCES)

Lori Brandau (via WCES)