BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOHNNY VIRDEN,	:	
Claimant,	:	File Nos. 5057949.01 5053647.01
vs.	:	
	:	REVIEW-REOPENING DECISION
CITY OF DES MOINES,	:	
Employer, Self-Insured, Defendant.	: : :	Head Notes: 1400; 2905

STATEMENT OF THE CASE

The claimant, Johnny Virden, filed two petitions for review-reopening seeking workers' compensation benefits from self-insured employer, City of Des Moines ("Des Moines"). Richard R. Schmidt appeared on behalf of the claimant. Luke DeSmet appeared on behalf of the defendant.

The matter came for hearing on January 25, 2022, before Deputy Workers' Compensation Commissioner Andrew M. Phillips. Pursuant to an order of the Iowa Workers' Compensation Commissioner related to the COVID-19 pandemic, the hearing occurred via CourtCall. The hearing proceeded without significant difficulty.

The record in this case consists of Joint Exhibits 1-5, Claimant's Exhibits 1-2, and Defendant's Exhibits A-D.[1] The claimant testified on his own behalf. Also present was employee representative Tony Chiodo. Edie Daniels was appointed the official reporter and custodian of the notes of the proceeding. The evidentiary record closed at the end of the hearing, and the matter was fully submitted.

STIPULATIONS

Generally, hearing reports are separated between case numbers and incidents. In this matter, the parties proceeded with one hearing report. I will proceed by denoting the dates of injury below, rather than the file numbers. Through the hearing report, as reviewed at the commencement of the hearing, the parties stipulated and/or established the following:

1. There was an employer-employee relationship at the time of the alleged injuries.

[1] Despite Defendant's Exhibits List stating A through D, the Exhibits were labeled B through D.

2. The claimant sustained an injury arising out of, and in the course of employment, on December 5, 2013, and January 30, 2015.

3. The alleged injury is a cause of permanent disability.

4. The December 5, 2013, injury caused a permanent scheduled member disability to the claimant's hand.

5. The January 30, 2015, injury caused the claimant to suffer an industrial disability.

6. With regard to the December 5, 2013, date of injury, the claimant's gross earnings were one thousand one hundred twenty-three and 00/100 dollars ($1,123.00) per week. At the time of the alleged injury, the claimant was married and entitled to four exemptions. The result is a weekly compensation rate of seven hundred nineteen and 70/100 dollars ($719.70).

7. With regard to the January 30, 2015, date of injury, the claimant's gross earnings were one thousand one hundred seventy-six and 00/100 dollars ($1,176.00) per week. At the time of the alleged injury, the claimant was married and entitled to four exemptions. The result is a weekly compensation rate of seven hundred fifty-nine and 66/100 dollars ($759.66).

8. Prior to the hearing, the claimant was paid 28.863336 weeks of compensation at the rate of seven hundred nineteen and 71/100 dollars ($719.71) per week for the December 5, 2013, date of injury.

9. Prior to the hearing, the claimant was paid 110.155135 weeks of compensation at the rate of seven hundred fifty-nine and 66/100 dollars ($759.66) per week for the January 30, 2015, date of injury.

Entitlement to temporary disability and/or healing period benefits is no longer in dispute. The defendant waived their affirmative defenses. The claimant is not seeking any medical benefits or costs.

The parties are now bound by their stipulations.

ISSUES

The parties submitted the following issues for determination:

1. Whether the claimant has proven the prerequisites to demonstrate he is entitled to review-reopening benefits under Iowa Code section 86.14.

2. The extent of permanent disability benefits, if any are awarded.

3. The commencement date for permanent disability benefits, if any are awarded.

FINDINGS OF FACT

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

Johnny Virden, the claimant, was 58 years old at the time of the hearing. (Testimony). He resides in Des Moines, Iowa. (Testimony). He is married, and has four children. (Testimony).

Mr. Virden works for the City of Des Moines. (Testimony). He has worked there for 25 years. (Testimony). He currently works in the street department, where he is a medium equipment operator. (Testimony). He generally operates an asphalt paver on a day-to-day basis. (Testimony). He plans on retiring from the City of Des Moines in the near future. (Testimony).

As a medium equipment operator, Mr. Virden is expected to "operate complex motorized construction and repair equipment." (Defendant's Exhibit B:2). Some examples of the motorized construction equipment from Mr. Virden's job description include: two-yard loaders, motor graders, wheeled tractors with backhoe attachments, rotary snow plows, planers, bulldozers, and self-propelled bituminous mixers and pavers. (DE B:2). The position also requires the ability to maintain and make minor repairs to medium equipment, lead a small crew, and understand and follow written and oral instructions. (DE B:2).

On December 5, 2013, Mr. Virden was entering a loader when the wind blew the loader door shut. (Testimony). The door shut on Mr. Virden's hand and broke his hand. (Testimony).

Mr. Virden visited Methodist Occupational Health and Wellness on December 26, 2013, complaining of pain in his left hand after the above work incident. (Joint Exhibit 5:36). Richard Bratkiewicz, M.D., examined the claimant at that time, and provided him with a Velcro splint for his hand. (JE 5:36). Dr. Bratkiewicz recommended that the claimant see an orthopedic doctor to determine if he needed more secure splinting and/or casting. (JE 5:36). He continued to work full duty. (JE 5:36). Dr. Bratkiewicz diagnosed Mr. Virden with a nondisplaced "boxer's fracture" in the left hand. (JE 5:36).

On January 3, 2014, Mr. Virden returned to Dr. Bratkiewicz's office for a follow-up visit. (JE 5:38). Mr. Virden was casted and working limited duty. (JE 5:38).

Dr. Bratkiewicz examined Mr. Virden again on January 21, 2014, for a left 5th metacarpal head fracture. (JE 5:40). Another provider advanced Mr. Virden's restrictions, and provided him with a fiberglass custom-fitted Velcro brace. (JE 5:40). He could remove the brace to bathe and for physical therapy. (JE 5:40). He continued to work modified duty. (JE 5:40).

Mr. Virden visited Dr. Bratkiewicz again on February 25, 2014. (JE 5:42). Dr. Bratkiewicz concurred with Dr. Szalay's advancement of Mr. Virden's duties, and that

Mr. Virden should continue with physical therapy as ordered. (JE 5:42). Dr. Bratkiewicz observed that Mr. Virden had a full grip with no discomfort. (JE 5:42).

On April 1, 2014, the claimant met with Melissa D. Young Szalay, M.D., at Des Moines Orthopaedic Surgeons, P.C. ("DMOS") (JE 2:66-67). Dr. Szalay examined Mr. Virden for left hand issues. (JE 2:66). Mr. Virden indicated he no longer had pain in his left hand, but that certain therapy exercises caused him pain in his left shoulder. (JE 2:66). X-rays of the left hand showed a healed fifth metacarpal neck fracture. (JE 2:66). Dr. Szalay recommended that Mr. Virden continue his home exercise program, and released Mr. Virden to full duty. (JE 2:67).

Dr. Bratkiewicz also examined Mr. Virden on April 1, 2014. (JE 5:43-44). Dr. Bratkiewicz provided the claimant with a full duty release. (JE 5:44).

On January 30, 2015, Mr. Virden tripped and fell at work. (Testimony). He described his fall as turning around and losing his balance. (Testimony). He injured his left shoulder in that incident. (Testimony).

Mr. Virden reported to Methodist Occupational Medicine on February 3, 2015, for complaints of left shoulder pain after tripping on rocks. (JE 5:45-46). The provider placed him on modified duty with limitations on use to his left arm. (JE 5:46).

Mr. Virden returned to Methodist Occupational Health and Wellness on February 10, 2015. (JE 5:47). He continued to have complaints of left arm and shoulder pain. (JE 5:47). He told the provider that he did not want to take medication for his left shoulder. (JE 5:47). Upon physical examination, the provider observed some giving way with testing of his rotator cuff musculature. (JE 5:47). The provider recommended a left shoulder MRI. (JE 5:47).

Mr. Virden had an MRI of the left shoulder at Ramic Medical Imaging on February 16, 2015. (JE 4:35). The MRI showed left supraspinatus tendinosis with mild partial-thickness articular-sided tearing/fraying. (JE 4:35). The MRI also showed mild degenerative changes to the acromioclavicular joint. (JE 4:35). The radiologist opined that the claimant did not have a full thickness rotator cuff tear. (JE 4:35).

Dr. Bratkiewicz examined Mr. Virden after the MRI on February 17, 2015. (JE 5:48-49). Mr. Virden reported that he was working within restrictions on the job including minimal to no movement of the left shoulder. (JE 5:48). Dr. Bratkiewicz reviewed the MRI and noted the partial supraspinatus tear seen therein. (JE 5:48). Dr. Bratkiewicz recommended a referral to orthopedics for consultation and further treatment. (JE 5:48). Dr. Bratkiewicz continued Mr. Virden's work restrictions. (JE 5:49).

The claimant returned to DMOS on February 25, 2015, where Patrick Sullivan, M.D., examined him. (JE 2:68-69; JE 2:610-612). Mr. Virden reported suffering a left shoulder injury while working. (JE 2:68). He worked light duty at the time, and still had pain and discomfort in the shoulder. (JE 2:68). Dr. Sullivan observed full active and passive range of motion in both shoulders. (JE 2:69). Dr. Sullivan also observed that the claimant had a positive impingement sign to the left shoulder with mild rotator cuff

weakness and tenderness over the AC joint. (JE 2:69). X-rays of the left shoulder showed a type 2 acromion and AC degenerative joint disease. (JE 2:69). Dr. Sullivan indicated that this was consistent with the results of a prior MRI, which also showed a partial thickness tear of the supraspinatus. (JE 2:69). Dr. Sullivan recommended an injection. (JE 2:69). The claimant declined the injection, so Dr. Sullivan prescribed physical therapy. (JE 2:69). Dr. Sullivan returned Mr. Virden to work light duty. (JE 2:611).

Mr. Virden continued his care at Methodist Occupational Health and Wellness on March 4, 2015. (JE 5:50). The provider recommended that Mr. Virden continue following up with Dr. Sullivan. (JE 5:50). Mr. Virden told the provider that his left shoulder was "about the same," as his previous visits. (JE 5:50).

On March 25, 2015, Dr. Szalay examined Mr. Virden again for his left hand complaints. (JE 2:613-615). Mr. Virden complained of a persistent loss of strength in his left hand. (JE 2:613). He told Dr. Szalay that his left hand would "give out" whenever he tried to pick up a heavy item. (JE 2:613). He described minor pain, which he rated 2 out of 10. (JE 2:613). Upon physical examination, Dr. Szalay observed full and symmetric range of motion of the digits. (JE 2:614). Dr. Szalay diagnosed Mr. Virden with left hand pain after a crush injury, which she related to "intrinsic muscle imbalance and/or scarring in the intrinsic muscles," and a healed fifth metacarpal neck fracture. (JE 2:614). Dr. Szalay recommended that the claimant work on stretching, and also recommended a corticosteroid injection into the fourth web space. (JE 2:615). Dr. Szalay provided the injection as recommended. (JE 2:615).

On the same day, Dr. Sullivan also examined Mr. Virden for his left shoulder complaints. (JE 2:616). Mr. Virden agreed to a left shoulder injection due to his pain in his shoulder. (JE 2:616). Dr. Sullivan provided Mr. Virden with an injection to the left shoulder. (JE 2:616).

Mr. Virden returned to Methodist Occupational Health and Wellness on March 26, 2015, to follow up on his visit with Dr. Sullivan. (JE 5:51). The provider deferred most recommendations to Dr. Sullivan, but kept Mr. Virden on modified duty. (JE 5:51-52).

Mr. Virden treated at Athletico Physical Therapy, and was discharged on April 11, 2015. (JE 1:1-2). He attended 11 therapy appointments, and missed none. (JE 1:1). At the time of his discharge, he was on restricted duty. (JE 1:1). He could only lift 5 to 10 pounds and was to avoid overhead lifting with the left arm. (JE 1:1). Mr. Virden described his pain as a dull ache. (JE 1:1). Mr. Virden was discharged due to Dr. Sullivan declaring him "no longer a candidate for therapy." (JE 1:1).

On May 6, 2015, Mr. Virden followed-up with Dr. Szalay for his continued left hand issues. (JE 2:620-623). The claimant did not feel as though the injection or intrinsic stretching of the fourth web space helped. (JE 2:620). He continued to complain of weakness and pain in the same area, especially during heavier lifting and pulling activities. (JE 2:620). Dr. Szalay indicated that Mr. Virden achieved maximum medical improvement ("MMI") as of May 6, 2015. (JE 2:622). Based upon the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Dr. Szalay assessed

Mr. Virden with a 10 percent impairment to the left upper extremity. (JE 2:622). Dr. Szalay used various ratings regarding strength, motion, and pain impairments to arrive at the 10 percent impairment rating. (JE 2:622). Dr. Szalay returned Mr. Virden to full duty work. (JE 2:623). Dr. Szalay provided Mr. Virden with no work restrictions for his left hand. (JE 2:624).

Dr. Sullivan performed a debridement of the left rotator cuff tear, a subacromial decompression, and a distal clavicle excision at Orthopaedic Outpatient Surgery Center, L.C., on May 7, 2015. (JE 3:33-34).

Dr. Sullivan examined Mr. Virden again on May 11, 2015. (JE 2:625-626). Dr. Sullivan noted that Mr. Virden was status post arthroscopic debridement of the left rotator cuff, subacromial decompression, and distal clavicle excision. (JE 2:625). Dr. Sullivan recommended that Mr. Virden begin physical therapy, and allowed him to return to light duty work. (JE 2:625). Finally, Dr. Sullivan indicated that Mr. Virden could return to work without restrictions in two weeks. (JE 2:626).

The providers at Methodist Occupational Health and Wellness examined Mr. Virden again on May 12, 2015. (JE 5:53). The doctor noted the claimant's recent surgery, and that Mr. Virden should have minimal use of his left arm. (JE 5:53). Mr. Virden expressed concern about Dr. Sullivan's recommendation of a return to work without restrictions in two weeks. (JE 5:53). The provider recommended that Mr. Virden continue "essentially one-arm duty," avoid safety-sensitive functions while on hydrocodone, and attend physical therapy. (JE 5:53).

On June 8, 2015, Dr. Sullivan noted that Mr. Virden was 80 percent to 90 percent improved after his surgery. (JE 2:627). Dr. Sullivan recommended that Mr. Virden continue to work on strengthening and range of motion. (JE 2:627). Dr. Sullivan allowed Mr. Virden to return to working full duty. (JE 2:627-628).

The providers from Methodist Occupational Health and Wellness also examined Mr. Virden on June 8, 2015. (JE 5:57-58). Mr. Virden indicated that his left shoulder was still achy and stiff. (JE 5:57). Upon physical examination, Mr. Virden displayed "[m]ild pain behavior with palpation and active range of motion testing about the left glenohumeral joint." (JE 5:57). The provider deferred to the recommendation of Dr. Sullivan, and provided a full duty release. (JE 5:57-58)

Dr. Sullivan saw Mr. Virden again on July 13, 2015, for a post-surgical follow up. (JE 2:630-631). Mr. Virden had a full range of motion in the left shoulder, with grade 4 strength in abduction and grade 4 strength in forward flexion of the shoulder. (JE 2:630). Dr. Sullivan placed Mr. Virden at MMI on that date, and allowed Mr. Virden to work full duty. (JE 2:630-631).

Mr. Virden also visited Methodist Occupational Health and Wellness on July 13, 2015. (JE 5:59-60). Mr. Virden indicated that his left shoulder continued to improve, although he had mild residual tenderness. (JE 5:59). Mr. Virden noted that he had one or two more sessions of physical therapy and that he was no longer taking pain medication for his left shoulder. (JE 5:59). Upon examination, the claimant displayed near-normal active range of motion without overt pain behavior. (JE 5:59). The

provider felt that Dr. Sullivan's recommendations were reasonable. (JE 5:59). He also indicated that Mr. Virden was to promptly notify Dr. Sullivan and the City if there were any additional difficulties. (JE 5:59).

On July 17, 2015, Mr. Virden was again discharged from therapy with Athletico Physical Therapy. (JE 1:3-5). Dr. Sullivan and Dr. McCoy returned Mr. Virden to therapy for a week, and then recommended discharging him. (JE 1:3). Mr. Virden indicated that he no longer had a stretching feeling in his left shoulder; however, he continued to have a sharp pain in the back of his left shoulder. (JE 1:3). The therapist noted that Mr. Virden could return to full work duties pursuant to Dr. Sullivan's release. (JE 1:5). However, the therapist noted that Mr. Virden had continued difficulty with overhead lifting. (JE 1:5).

Based upon his examination and treatment of the claimant, Dr. Sullivan opined that Mr. Virden rated a zero percent impairment to the left upper extremity. (JE 2:632).

On January 27, 2016, John Kuhnlein, D.O., M.P.H., C.I.M.E., F.A.C.P.M., F.A.C.O.E.M., examined Mr. Virden for the purpose of conducting an independent medical examination ("IME"). (DE C:9-15). On March 8, 2016, Dr. Kuhnlein issued a report based upon his findings. (DE C:9-15). Dr. Kuhnlein reviewed Mr. Virden's treatment related to the 2013 and 2015 injuries. (DE C:9-10). Mr. Virden reported that he was doing stretching for his left shoulder, but was not doing anything for his hand. (DE C:11). Mr. Virden described numbness and tingling along the ulnar border of his left hand. (DE C:11). He also described decreased grip and grasp strength in his hand due to pain. (DE C:11). Mr. Virden told Dr. Kuhnlein that he had constant waxing and waning aching pain in his left shoulder. (DE C:11). Mr. Virden indicated that he has adapted his duties at work, and that his coworkers helped him. (DE C:11).

Dr. Kuhnlein measured Mr. Virden's range of motion during his IME. (DE C:11-12). Dr. Kuhnlein noted that Mr. Virden had flexion of 165 degrees in the right shoulder and 145 degrees to the left shoulder. (DE C:11). He had extension of 55 degrees on the right and 30 degrees on the left. (DE C:11). He displayed 170 degrees of abduction on the right and 145 degrees on the left. (DE C:11). He had 50 degrees of adduction on the right and 35 degrees on the left. (DE C:11). He showed 80 degrees of internal rotation with both the right and left shoulder, and 90 degrees of external rotation with both the right and left shoulder. (DE C:11). Mr. Virden complained of pain with left shoulder flexion, abduction, and internal rotation. (DE C:11). Dr. Kuhnlein also measured Mr. Virden's range of motion in his wrists. (DE C:12). He had 70 degrees of flexion in both wrists, 55 degrees of extension in both wrists, 30 degrees of radial deviation in the right wrist and 20 degrees of radial deviation in the left wrist, 30 degrees of ulnar deviation in the right wrist, and 40 degrees of ulnar deviation in the left wrist. (DE C:11). Dr. Kuhnlein found that Mr. Virden had grade 5 grip strength bilaterally, and grade 5 opponens strength. (DE C:12). He also had grade 4 left shoulder flexion and abduction strength along with grade 5 minus left shoulder external rotation strength. (DE C:12). Dr. Kuhnlein observed that Mr. Virden had left trapezius tenderness and muscle spasm with palpation, along with tenderness in the left acromioclavicular joint and pain in the left posterior deltoid area. (DE C:12).

Dr. Kuhnlein opined that Mr. Virden achieved MMI for his left hand fracture on May 6, 2015, and for his left shoulder on November 7, 2015. (DE C:13). Dr. Kuhnlein then embarked on an explanation of Mr. Virden's permanent impairment rating. (DE C:13-14). Dr. Kuhnlein assigned a 12 percent left digital impairment for decreased range of motion in the left hand. (DE C:13). This converts to a 1 percent hand impairment. (DE C:13). Due to sensory deficits in the left ulnar nerve, Dr. Kuhnlein assigned a 7 percent impairment. (DE C:13). He used a 25 percent modifier to arrive at a 2 percent left upper extremity impairment, which converted to a 2 percent hand impairment. (DE C:13-14). Due to pain at the fracture site, Dr. Kuhnlein added a 2 percent hand impairment. (DE C:14). Dr. Kuhnlein took all of the impairment ratings, and used the Combined Values Chart on page 604 to arrive at a 5 percent upper extremity impairment and a 5 percent hand impairment. (DE C:14). Turning to the left shoulder, Dr. Kuhnlein opined that Mr. Virden had a 6 percent impairment to the left upper extremity for deficits in his range of motion. (DE C:14). He then opined that Mr. Virden had a 10 percent impairment due to the distal clavicle excision. (DE C:14). This is reduced due to a 25 percent multiplier to a 3 percent upper extremity impairment. (DE C:14). Dr. Kuhnlein also attributed a 7 percent impairment rating to the left upper extremity for weakness. (DE C:14). Using the combined values chart, Dr. Kuhnlein assigned a total 16 percent left upper extremity impairment. (DE C:14). This converted to a 10 percent whole person impairment. (DE C:14).

Dr. Kuhnlein opined that Mr. Virden should grip or grasp on an occasional to frequent basis. (DE C:15). He allowed Mr. Virden to use tools, but advised that he should wear an antivibration glove if he used vibratory or power tools. (DE C:15). Wearing "knobby" gloves could decrease grip strength requirements. (DE C:15). Mr. Virden should also only crawl occasionally and work at or above shoulder height occasionally. (DE C:15).

On September 11, 2017, Mr. Virden testified in an evidentiary deposition. (DE D:24-82). He indicated that, before working for the City of Des Moines, he worked at Montgomery Ward unloading products from semi-trucks. (DE D:32-33). He then worked for Swift Packing, wherein he unloaded cattle from trucks. (DE D: 33-34). After leaving Swift, he took a job with Carroll Auto Wrecking, where he ran a loader to move junked vehicles. (DE D:34-35). Mr. Virden then drove a Redi-Mix concrete truck for Economy Concrete for several years. (DE D:36). He then began his employment with the City of Des Moines as a refuse collector in 1997. (DE D:36). As noted above, he eventually transitioned to a street maintenance worker and then a medium equipment operator. (DE D:37-38).

Mr. Virden claimed that he could not lift as much weight in buckets at his cattle operation. (DE D:42-43). His wife and kids had to lift the buckets. (DE D:42). He testified that he had pain with gripping and hanging onto items. (DE D:45). This prevented him from carrying different items, and altered how he climbed onto things. (DE D:45-46). He required more assistance from coworkers to carry certain pieces of paver equipment. (DE D:46). He also noted that grasping, changing tires, and lifting his kids was difficult. (DE D:47).

With regard to his shoulder, he indicated that it was more difficult to climb onto machinery. (DE D:48-49). Mr. Virden further testified that he had not slept in his bed since the injury occurred. (DE D:49). He testified that he maintained his yard with a riding lawnmower and push lawnmower. (DE D:71-72). He also shoveled snow and used a snowblower to remove snow from his driveway. (DE D:71-72).

Mr. Virden was asked if he could perform the tasks he previously performed at Montgomery Ward. (DE D:59). He indicated that he could not. (DE D:59). However, he could continue to perform work such as those at Swift, Carroll Auto Wrecking, and Economy Concrete. (DE D:59). The only issues that he may have had with those would have been climbing into trucks. (DE D:59). With regard to his work with the city, he testified that he would have issues with throwing garbage. (DE D:59).

In October of 2017, Mr. Virden reached a settlement with the City of Des Moines for his 2013 and 2015 injury claims. (Testimony; DE C:3-16). The parties filed an agreement for settlement covering both dates of injury. (DE C:3-16). The parties agreed that the claimant sustained an 11.54533 percent loss of function to the left hand. (DE C:3). The parties further agreed that the claimant suffered a 22.03103 percent loss of earning capacity. (DE C:4). The parties also agreed upon certain other compensation for medical benefits and stipulated to previous payments. (DE C:4). The parties also agreed that the claimant was eligible for continued care related to the left shoulder. The Commissioner approved this settlement agreement on October 31, 2017. (DE C:6).

Dr. Kuhnlein examined Mr. Virden again on June 30, 2021. (Claimant's Exhibit 1:1-7). Dr. Kuhnlein noted that he reviewed no new medical records, as Mr. Virden had not received any medical care related to either the December 5, 2013, hand injury, or the January 30, 2015, left shoulder injury. (CE 1:1-2). With regard to his left hand, Mr. Virden told Dr. Kuhnlein that he had no major change in pain, but insisted that he had decreased grip strength. (CE 1:1). He further described "persistent numbness and tingling along the ulnar border of the left hand." (CE 1:1). With regard to his left shoulder, Mr. Virden noted that he had a "constant, slowly progressive decrease in strength and range of motion" of the joint. (CE 1:1-2). He also experienced fatigue with less activity when compared to 2016. (CE 1:2). He also claims that he experiences more pain in the same locations than he had in 2016. (CE 1:2). Finally, he described a "new catching sensation" within the previous year. (CE 1:2).

Upon physical examination, Dr. Kuhnlein observed that Mr. Virden complained of trapezius and left shoulder pain with left side bending and left cervical rotation. (CE 1:2). Dr. Kuhnlein measured Mr. Virden's range of motion in his right and left shoulders. Mr. Virden displayed 150 degrees of flexion in the right shoulder and 125 degrees of flexion in the left shoulder. (CE 1:2). He displayed 70 degrees of extension in the right shoulder and 45 degrees in the left shoulder. (CE 1:2). Dr. Kuhnlein observed 145 degrees of abduction in the right shoulder and 115 degrees in the left shoulder. (CE 1:2). He also observed 30 degrees of abduction in both shoulders. (CE 1:2). He noted 75 degrees of internal rotation with the right shoulder and 70 degrees of internal rotation with the left shoulder. (CE 1:2). Finally, Dr. Kuhnlein observed 85 degrees of external rotation in the right shoulder and 80 degrees of external rotation in the left shoulder.

(CE 1:2). Furthermore, Mr. Virden complained of pain in the left trapezius and deltoid upon various tests performed by Dr. Kuhnlein. (CE 1:3).

Strength testing in the left hand showed grade 5 grip bilaterally, and grade 5 opponens strength bilaterally. (CE 1:3). Dr. Kuhnlein observed "cogwheeling." (CE 1:3). In testing the left shoulder strength, Dr. Kuhnlein noted grade 4 strength in left shoulder flexion and grade 5 strength in left shoulder abduction. (CE 1:3). Dr. Kuhnlein also listed grip strength measurements for each hand. (CE 1:4).

Dr. Kuhnlein diagnosed Mr. Virden as follows: [l]eft fifth metacarpal fracture, healed with minimal residual impaction and dorsal angulation," and "[l]eft shoulder rotator cuff tear and impingement syndrome with May 7, 2015, rotator cuff debridement, subacromial decompression and distal clavicle excision." (CE 1:5). Dr. Kuhnlein then used the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, to update his opinions on the extent of permanent impairment sustained by Mr. Virden. (CE 1:5-6). Dr. Kuhnlein indicated that Mr. Virden has a 2 percent small finger impairment for issues with range of motion. (CE 1:5). This translates to a 0 percent permanent impairment to the left hand. (CE 1:5). Dr. Kuhnlein opined that Mr. Virden had a 1 percent left upper extremity impairment due to ulnar deviation, which converts to a 1 percent left hand impairment. (CE 1:5). Due to the sensory deficits at the ulnar nerve in the left hand, Dr. Kuhnlein assigned a 7 percent impairment, which is provided with a 25 percent modifier based upon Table 16-10, page 482. (CE 1:5). This equated to a 2 percent left hand impairment. (CE 1:5). Dr. Kuhnlein added 2 percent to this rating due to pain limiting the claimant's grip ability. (CE 1:5). Based upon the foregoing, Dr. Kuhnlein assigned a 5 percent left hand impairment. (CE 1:5).

Dr. Kuhnlein turns to the left shoulder. (CE 1:5-6). He found a total 4 percent left upper extremity impairment for deficits in range of motion, and a 7 percent left upper extremity impairment for motor deficits. (CE 1:5). Dr. Kuhnlein added a 10 percent left upper extremity impairment due to the excision of the left distal clavicle. (CE 1:5). He then used a multiplier to modify this to a 3 percent left upper extremity impairment rating. (CE 1:5-6). Dr. Kuhnlein then combined these to arrive at a 14 percent left upper extremity impairment rating, which converted to an 8 percent whole person impairment. (CE 1:6).

Dr. Kuhnlein noted that Mr. Virden was accommodated for his injuries in his current job. Dr. Kuhnlein goes on to state that "should Mr. Virden change jobs, permanent restrictions would be in order based on the change in his functional abilities." (CE 1:6). Mr. Virden could occasionally lift 50 pounds from the floor to the waist, occasionally lift 50 pounds from the waist to the shoulder, and occasionally lift 40 pounds over the shoulder. (CE 1:6). He also could occasionally crawl, work on ladders if he could maintain a three-point safety stance, work at or above shoulder height, and grip or grasp. (CE 1:6). He also could occasionally use power tools, provided he wears antivibration gloves with vibratory or power tools. (CE 1:6). Dr. Kuhnlein concluded that "[w]ith the decreased endurance he describes from the shoulder and gripping/grasping, this does represent a change in his functional abilities since 2016." (CE 1:6).

Since the time of his 2017 settlement, Mr. Virden testified that he puts more work on other employees. (Testimony). He also does not perform as much lifting as he used to due to issues with his shoulder and hand. (Testimony). He also does not perform activities like raking and shoveling, which he did at the time of the settlement. (Testimony). His supervisor allows him to pass some work onto other employees, which has allowed him to reduce his workload. (Testimony). This is due to his level of seniority, and his supervisor's knowledge of his condition. (Testimony). His supervisor has never expressed an issue with the quality of the claimant's work. (Testimony). He has had no change in job title, nor has he had any decreased income since 2017. (Testimony).

Mr. Virden worked for Waste Management as a residential garbage collector from 1995 to 1997. (Testimony). He does not think that he could return to that job, as his shoulder would not be able to hold up to the demands of the position. (Testimony).

Mr. Virden feels more numbness and tingling in his left hand since 2017. (Testimony). He also feels as though his grip is not as strong. (Testimony). He finds that his left hand fatigues rapidly. (Testimony). He has to carry things shorter distances due to these issues. (Testimony). He also testified that his wife and kids have to carry more burden around his home, and that he had issues sleeping due to pain. (Testimony). Mr. Virden owns a farm and has livestock. (Testimony). He relies more on his wife and children to assist in operation of the farm and caring for the livestock. (Testimony). He limits himself to performing tasks with a machine rather than his hands. (Testimony).

Of note, Mr. Virden has had no medical care since the settlement of his claims in 2017, nor does he have any recommendations for further care. (Testimony). He testified that he is "just not a big one [*sic*] on doctors or pain medicines, or anything like that…" (Testimony). He also has not missed significant time from work due to his left hand or left shoulder since 2017. (Testimony). He operates under no permanent restrictions due to the left hand or left shoulder. (Testimony).

CONCLUSIONS OF LAW

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

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 section 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).

What is to first be determined is whether Mr. Virden has established a change in condition following the 2017 settlement agreement. Mr. Virden presents his own testimony, and an IME report from Dr. Kuhnlein as evidence of a change in condition. 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 fact-finder 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, 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).

Mr. Virden testified in an evidentiary deposition in 2017 that he could not lift as much weight in a bucket on his cattle operation. He also testified that he had pain with gripping items. He further noted that he required more assistance from his coworkers while lifting items for the asphalt paver. He claimed difficulty climbing into machinery. He testified that he had not slept in a bed since the shoulder injury due to ongoing pain.

Based upon my review of his evidentiary deposition and my observations of his testimony during the hearing in the instant case, I found that Mr. Virden testified consistently with his 2017 evidentiary deposition. He testified that he places more work on others, does not perform as much lifting as he used to, and no longer rakes or shovels. He also testified that he had increased numbness and tingling in his left hand, that his grip strength was reduced, and that his left hand rapidly fatigues. His alleged issues with strength are contradicted a bit by Dr. Kuhnlein's IME findings. Mr. Virden also testified to sleep issues due to his pain, but he did not elaborate on this differing from his 2017 issues. Of note, Mr. Virden operates under no doctor provided restrictions, nor did he in 2017.

Dr. Kuhnlein measured the claimant's range of motion during the 2016 IME and the 2021 IME. The left shoulder ranges of motion showed a 20-degree decrease in flexion and a 30-degree reduction in abduction. The left shoulder showed 5 to 10 degree reductions in adduction, internal rotation, and external rotation. Finally, the left shoulder showed an increase in range of motion extension. It is interesting to note that Mr. Virden also had decreased range of motion in his right shoulder from the 2016 to 2021 IMEs. Mr. Virden also displayed reduced range of motion in the left hand from 2016 to 2021. There were also similar reductions in range of motion found in Mr. Virden's uninjured right hand.

Dr. Kuhnlein performed an IME on the claimant in 2016. In evaluating the claimant's permanent impairment to his left hand, Dr. Kuhnlein assessed the claimant with a 1 percent hand impairment due to decreased range of motion, a 2 percent left hand impairment due to left ulnar nerve deficits, and a 2 percent left hand impairment due to pain at the fracture site. These impairment ratings combined to a 5 percent hand impairment. Dr. Kuhnlein also found that the claimant had grade 5 grip strength and grade 5 opponens strength.

In 2021, Dr. Kuhnlein opined that the claimant had no impairment for range of motion issues, a 1 percent impairment due to ulnar deviation, a 2 percent impairment due to ulnar nerve sensory issues, and a 2 percent impairment due to pain limiting the claimant's grip. These impairment ratings again combined to a 5 percent impairment to the left hand. Dr. Kuhnlein again found grade 5 grip strength and grade 5 opponens strength to the left hand.

In reviewing the claimant's left shoulder impairment in 2016, Dr. Kuhnlein found that Mr. Virden sustained a 6 percent impairment due to deficits in the range of motion, a 3 percent upper extremity impairment due to the distal clavicle excision, and a 7 percent impairment due to weakness in the left shoulder. These combined to a 16 percent left upper extremity permanent impairment. Using the Guides, Dr. Kuhnlein equated these to a 10 percent whole person impairment. Dr. Kuhnlein also found that Mr. Virden displayed grade 4 measurements for shoulder flexion and abduction strength.

In 2021, Dr. Kuhnlein opined that the claimant had a 4 percent impairment due to deficits in range of motion in the left shoulder, a 7 percent impairment due to motor deficits, and a 3 percent left upper extremity impairment due to the distal clavicle excision. Dr. Kuhnlein combined these ratings to a 14 percent left upper extremity impairment. Using the Guides, Dr. Kuhnlein equated these to an 8 percent whole person impairment. Dr. Kuhnlein also opined that the claimant displayed grade 4 flexion and grade 5 abduction strength. All other aspects of the left shoulder strength were rated grade 5.

Based upon the objective evidence, Mr. Virden had a slight reduction in range of motion in his left hand and left shoulder. This was accompanied by similar reductions in range of motion in the right (uninjured) side. Mr. Virden's testimony at the hearing was consistent with his testimony in his 2017 evidentiary deposition. In observing Mr. Virden's testimony and comparing it to his evidentiary deposition, I did not find differences sufficient to establish a change in condition. Further, Dr. Kuhnlein's impairment rating related to the left hand did not change. He also found similar strength measurements with regard to Mr. Virden's left hand. Dr. Kuhnlein found a lower impairment rating with regard to Mr. Virden's left shoulder, resulting in a lower whole person impairment. Dr. Kuhnlein also noted increased measurements in strength in the left shoulder. Based upon the foregoing, I conclude that the claimant failed to meet his burden of an impairment or lessening of earning capacity that was proximately caused by the initial injuries in these matters.

ORDER

THEREFORE, IT IS ORDERED:

The claimant shall take nothing further.

That the defendant shall file subsequent reports of injury (SROI) as required by this agency pursuant to 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this ____23rd____ day of February, 2022.

ANDREW M. PHILLIPS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Richard Schmidt (via WCES)

Luke DeSmet (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.