

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DALE HAYES,

Claimant,

vs.

EAGLE WINDOW & DOOR
MANUFACTURING, INC.,

Employer,

and

OLD REPUBLIC INS. CO.,

Insurance Carrier,
Defendants.

File No. 5038676.02

REVIEW-REOPENING
DECISIONHead Notes: 1803; 2502; 2601.10;
2701; 2905

Dale Hayes, claimant, filed a review-reopening petition seeking additional workers' compensation benefits from Eagle Window & Door Manufacturing, Inc., employer, and Old Republic Insurance Co., insurance carrier, defendants. The hearing was held on June 9, 2022. Pursuant to an order from the Iowa Workers' Compensation Commissioner, this case was heard via videoconference using Zoom with all parties and the court reporter appearing remotely.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered various stipulations. Those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

Dale Hayes was the only witness to testify live at the trial. The evidentiary record also includes joint exhibits 1-10, claimant's exhibits 1-9, and defendants' exhibits A-O. All exhibits were received into the record without objection.

At the hearing, defendants raised the issue of apportionment. However, they asserted that the issue could not be appropriately addressed in the case until a decision was issued in a subsequent review-reopening claim Mr. Hayes filed, Dale Hayes v. Georgia Pacific Corp., File No. 5067990.02, 2022 WL 1682617 (Arb. Decision, July 15, 2022).

After the hearing, on June 15, 2022, defendants filed a motion to stay the arbitration decision in this matter until after a final agency decision was issued in Mr. Hayes' subsequent claim. On June 17, 2022, Mr. Hayes filed a resistance. On July 5, 2022, the undersigned issued an order granting defendants' motion to stay until a final agency decision was issued in claimant's subsequent claim.

On July 15, 2022, Deputy Andrew Phillips issued a decision in Mr. Hayes' subsequent claim against Georgia Pacific, File No. 5067990.02. In that decision, Deputy Phillips determined that under the odd lot doctrine, Mr. Hayes was permanently and totally disabled as a result of his subsequent injury at Georgia Pacific. On July 29, 2022, Georgia Pacific filed a Notice of Appeal of Deputy Phillips' decision.¹ On December 29, 2022, the Commissioner issued his appeal decision, affirming the arbitration decision in its entirety. Georgia Pacific did not request further review.

The parties submitted post-hearing briefs on March 3, 2023, at which time the case was fully submitted to the undersigned.

ISSUES

The parties identified the following disputed issues on the hearing report:

1. Whether claimant proved a substantial change in condition from the date of the prior arbitration hearing.
2. If claimant proved a substantial change in condition, the extent of claimant's additional entitlement to permanent disability benefits, including a claim for permanent total disability, or odd-lot status.
3. The commencement date for permanent partial disability benefits, if any additional are awarded.
4. Whether defendants are entitled to apportionment for claimant's subsequent claim against Georgia Pacific.
5. Whether claimant is entitled to reimbursement for medical expenses.
6. Whether claimant is entitled to alternate medical care.
7. Whether claimant is entitled to reimbursement for an independent medical examination pursuant to Iowa Code section 85.39.
8. Assessment of costs.

¹ On August 15, 2022, the parties requested an extension to file post-hearing briefs in this matter. This request was granted.

FINDINGS OF FACT

In November 2011, the claimant, Dale Hayes (hereinafter “Hayes”), filed a petition alleging an electrocution injury to his bilateral arms and body as a whole, while working for employer Eagle Window and Door Manufacturing (hereinafter “Eagle”) on July 20, 2010. That case, File No. 5038676, went to hearing on May 6, 2013, before Deputy Workers’ Compensation Commissioner Stan McElderry. Deputy McElderry issued a decision on July 23, 2013. That decision found Mr. Hayes suffered injuries to his bilateral arms, entitling him to 15 weeks of permanent partial disability. Neither party appealed the arbitration decision. It became the final agency action 20 days after the decision was issued.

In January 2015, Hayes filed a review-reopening petition in File No. 5038676, alleging entitlement to additional disability benefits due to the July 20, 2010, work injury. On September 19, 2016, a hearing was held for his review-reopening claim before Deputy Workers’ Compensation Commissioner Toby Gordon. Deputy Gordon issued his decision on May 17, 2017, finding Hayes’ 2010 injury now extended into his body as a whole, specifically his cervical spine. Eagle was ordered to pay Hayes an additional 300 weeks of permanent partial disability benefits, which equated to a finding of 60 percent industrial loss. Eagle appealed the arbitration decision. On December 14, 2018, the Commissioner affirmed Deputy Gordon’s decision.

In March 2019, Hayes filed a new petition alleging he suffered a subsequent injury to his back on March 15, 2018, while working full time as a forklift driver for a new employer, Georgia Pacific Corporation. That claim, File No. 5067990, went to hearing on August 6, 2020, before Deputy Workers’ Compensation Commissioner Andrew Phillips. Deputy Phillips issued his decision on September 29, 2020. It awarded Hayes 10 percent industrial disability or 50 weeks of permanent partial disability benefits as a result of the March 15, 2018 date of injury. Hayes appealed the arbitration decision. On March 10, 2021, the Commissioner issued his appeal decision, increasing the award to 15 percent industrial disability or 125 weeks of benefits.

In July 2021, Hayes filed this second review-reopening action in File No. 5038676, against Eagle, alleging an increase in his disability as a result of the injuries to his bilateral arms and cervical spine on July 20, 2010.

In October 2021, Hayes also filed a review-reopening action in File No. 5067990, against Georgia Pacific, alleging an increase in his disability from the 2018 back injury. In this petition, Hayes also alleged he was an odd lot employee as a result of the 2018 injury. The hearing for this claim took place on March 23, 2022, and the parties’ post-hearing briefs were due on June 3, 2022.

The hearing in Hayes’ second review-reopening action for the July 20, 2010 injury dated was held on June 9, 2022. On June 15, 2022, defendants filed a motion to stay the decision in this matter until after a final agency decision was issued in Hayes’ review-reopening action for the March 15, 2018 date of injury. On July 5, 2022, the

undersigned issued a ruling granting defendants' motion to stay this case until after a decision was issued in File No. 5067990.

On July 15, 2022, Deputy Phillips issued a review-reopening decision in Hayes' subsequent claim. In this decision, Deputy Phillips determined Hayes was permanently and totally disabled under the odd-lot doctrine as a result of the March 15, 2018 injury to his lower back. Hayes v. Georgia Pacific Corp., File No. 5067990.02, 2022 WL 1682617 (Arb. Decision, July 15, 2022). In support of his decision, the deputy cited to a functional capacity evaluation (FCE) Hayes underwent on March 7, 2022, for his lower back, which found Hayes was no longer capable of performing work in the sedentary demand category. Id. at *19. Deputy Phillips also cited to an independent medical evaluation (IME) performed by Mark Taylor, M.D., on April 6, 2022, finding Hayes needed a 5-to-15-pound lifting restriction, and the ability to alternate sitting, standing, and walking for comfort. Id. Finally, the Deputy cited to an employability assessment performed by Barbara Laughlin, M.A., on April 29, 2022, finding Hayes had a 100 percent occupational loss for closest matched occupations under the FCE restrictions and a 93.4 percent occupational loss in jobs that were a good match for his skills under Dr. Taylor's IME restrictions. Id. at *20. Deputy Phillips determined that under these restrictions, Hayes was no longer employable in the competitive labor market. Id. Under the decision, his permanent total disability benefits commenced on October 1, 2021, the date he filed his review-reopening petition for the March 15, 2018 date of injury.

Georgia Pacific appealed Deputy Phillips' arbitration decision. On December 29, 2022, the Commissioner issued an appeal decision affirming Deputy Phillips' arbitration decision in its entirety. Hayes v. Georgia Pacific Corp., File No. 5067990.02, 2002 WL 18161884 (Arb. Decision, Dec. 29, 2022). Georgia Pacific did not seek further review of the Commissioner's decision.

At the time of Hayes' first review-reopening proceeding against Eagle, Hayes was 50 years old. Hayes v. Eagle Window, File No. 5038676, 2017 WL 2269452 (Review-Reopening Decision, May 17, 2017). He graduated from high school in 1983. After high school, Hayes had on-the-job training in electrical and pneumatics. He began working for Eagle in approximately 1987. In 2010, he was working in the maintenance department, which involved welding, putting in air lines, doing electrical work, and machine repair. Following the injury on July 20, 2010, Hayes returned to work in the maintenance department full-time, working 40 to 60 hours a week until his termination from Eagle on September 14, 2014, for an alleged safety violation. Following that, he worked briefly for J & J Pool, winterizing pools and hot tubs, a temporary job at the Hormel Processing Plant, and Kwik Stop. At the time of the hearing, Hayes was working at Casey's in the kitchen. He was working five-hour shifts, 30 hours per week, earning \$9.25 an hour without benefits. Prior to the hearing, Hayes had applied for social security disability benefits. He was denied in January 2015. He re-applied in February 2015.

In the review-reopening action, Hayes submitted an IME report from Robin Sassman, M.D., dated July 27, 2016. Hayes, File No. 5038676 at *10-11. The IME report noted that his current symptoms included spasms and pain, with a pins and

needles sensation in his bilateral hands and numbness after he used his hands. The report also described a burning and aching sensation in his shoulders and neck, and anxiety attacks. Dr. Sassman diagnosed Hayes with cervical stenosis and radiculopathy and opined that the electrical shock was a substantial aggravating factor in his bilateral upper extremity paresthesias, neck pain, and radicular symptoms. She assigned 15 percent whole person impairment and restrictions of no lifting, pushing, pulling or carrying more than 20 pounds rarely from floor to waist, no lifting, pushing, pulling or carrying above waist height, limited gripping and grasping only to waist height occasionally, and limited vibratory and power tools to rarely, which placed him in the light-duty work category. Deputy Gordon adopted Dr. Sassman's report, her impairment rating, and restrictions. Hayes also submitted an employability assessment performed by Ms. Laughlin on August 18, 2016. Utilizing the restrictions provided by Dr. Sassman, Ms. Laughlin opined that Hayes had a 100 percent loss of transferable occupations and a 98.8 percent loss of unskilled occupations. Deputy Gordon did not adopt Ms. Laughlin's findings because it did not adequately consider Hayes' continued employment with Eagle for a year following the injury, nor did it consider his ability to find and maintain employment after his termination by Eagle.

According to the decision, at the time of the review-reopening hearing Hayes had received treatment for his neck complaints from Timothy Miller, M.D., at Unity Point Health/Finley Pain Clinic. Dr. Miller ordered a cervical MRI and an EMG. Dr. Miller also provided cervical steroid injections, and referred Hayes to Maruti Kari, M.D., at Unity Point Health Quad Cities for a trial of a spinal cord stimulator which seemed to help with his symptoms, but he never had the stimulator permanently implanted. He also attended physical therapy and took pain medications including hydrocodone and oxycodone.

At the time of Hayes' second review-reopening proceeding against Eagle, Hayes was 56 years old. He was unemployed. (See Tr., p. 69). He re-applied for social security disability in May 2021. (Id. at 64). Social security denied his application in September 2021. (Id.). The denial indicated Hayes could still work as a gas station clerk. (Id. at 65; Ex. J). Hayes appealed and a hearing was pending at the time of review-reopening proceeding. (Id.).

Hayes continued to work at Casey's after the first review-reopening proceeding in September 2016. (Tr., p. 25). His tax returns show that he earned \$9,514.61 at Casey's in 2016. (Ex. K, p. 4). Hayes also worked briefly for Rainbo Oil Company, Dubuque Janitorial Service, and Mid Atlantic Trust Company in 2016. (Id. at 2-5). There is no information in the record about the physical demands of these jobs. In 2017, Hayes worked at Farm and Fleet, unloading trucks, and sorting goods. (Tr., p. 26). He earned \$11,762.59 at Farm and Fleet in 2017.² (Ex. L, p. 2).

Hayes started working for Georgia Pacific on August 21, 2017, driving a forklift. (Tr., p. 26). He started out working 40 hours per week, but later increased to 50-60 hours per week. (Id. at 27). Hayes testified he injured his low back while working at

² According to his tax documents, Hayes also worked briefly at Farm and Fleet in 2019. (Ex. N, p. 6).

Georgia Pacific on March 15, 2018. (Id.). He testified he injured his back driving over uneven seams, potholes, and chuckholes in the plant floor. (Id. at 28). Hayes continued to work at Georgia Pacific until March 2019. (Id.). He testified that he left his employment at Georgia Pacific because he had a 40-hour-work-week restriction for his low back injury and Georgia Pacific insisted he work 50 to 60 hours a week. (Id.). He made \$17.60 an hour at Georgia Pacific. (Ex. H, p. 65).

Hayes was unemployed for one month before getting a job through Sedona Temporary Service at Hodge Warehouse. (Tr., pp. 29-30). When he started, Hayes worked 28-30 hours a week for \$13.50 an hour. (Id. at 30). He worked through Sedona for approximately six months before being hired directly by Hodge as a receiving technician or warehouse person. (Id. at 31). As a receiving technician, Hayes was responsible for cleaning and inspecting inbound containers and racks. (Ex. I, pp. 4-5). According to the job description provided, he was required to stand, walk, and reach with his hands and arms, as well as lift up to fifty pounds. (Id. at 5). However, at the hearing, Hayes testified that he was only asked to lift 5-10 pounds. (Tr., p. 31). He used a fork truck to move any container that weighed more than 50 pounds. (Id. at 32). Hayes worked at Hodge until April 2021. (Ex. A, p. 5). He made \$15.44 per hour at Hodge. (Ex. G, pp. 4-6; Ex. I, pp. 3, 13). Hayes has not applied for work since he left Hodge.

According to his tax documents, Hayes made \$40,744.08 at Georgia Pacific in 2018 and \$6,628.83 in 2019. (Ex. M, p. 4; Ex. N, p. 5). It is not clear how much Hayes made from Sedona Temporary Service or Hodge in 2019 through 2021.

According to the medical records, Hayes continued to treat with Dr. Miller at Unity Point Health. (See JE 1, pp. 1-85). He also began treating with Angel Keller, ARNP at Unity Point Health. (Id.). His first treatment note after the first review-reopening hearing in September 2016 is dated October 10, 2016. (Id. at 6). On that date he saw Nurse Keller for chronic bilateral upper extremity pain, cervical disc degeneration post electrocution injury, as well as low back pain, degenerative lumbar disc disease, and degenerative shoulder pain. (Id.). The treatment note indicates Hayes was taking morphine for his bilateral arm pain. (Id.). Nurse Keller refilled his morphine and referred him for a surgical consult for his neck complaints. (Id.).

Hayes' next appointment was on November 7, 2016, with Dr. Miller. (JE 1, p. 7). Hayes complained of radiating arm, back, and leg pain. (Id. at 8). Dr. Miller noted Hayes was still waiting on his spinal cord stimulator. (Id.). He also noted Hayes had developed back, buttock and leg pain. (Id.). His next appointment was on December 12, 2016, with Nurse Keller. (Id. at 10). He complained of persistent low back pain that radiated down into his legs and neck pain that radiated down into his arms. (Id.). His pain medication was changed back to hydrocodone due to bowel issues. (Id. at 10). Hayes requested Nurse Keller provide him with a work restriction of only working 6 hours at a time up to 20 hours per week. (Id.). Keller provided the restrictions as requested. (Id.).

Hayes next appointment was on January 11, 2017, with Nurse Keller. (JE 1, p. 10). He was still complaining of low back pain that radiated into his lower extremities and neck pain that radiated into his arms. (Id. at 11). He requested a referral to Dr. Miller for an epidural or SI joint injection. (Id.). She also recommended a consult with a neurosurgeon. (Id.).

Hayes did not seek treatment again until June 5, 2017, when he saw Nurse Keller. (JE 1, p. 13). He complained of pain in his right lower back, bilateral lower extremities, neck, and bilateral upper extremities. (Id.). He noted that he had received a trigger point injection with Dr. Miller. (Id.). It did not provide him with any relief. (Id.). The treatment note also states that Hayes' spinal cord stimulator trial was unsuccessful because it became infected and had to be removed. (Id.). Hayes again requested a consult to a neurosurgeon for his neck. (Id.). His next appointment took place on August 1, 2017. (Id. at 17). According to the treatment notes, in the interim, Hayes had evaluations with Dr. Fortson and Dr. Parvin, and Dr. Parvin ordered an MRI of his cervical spine. (Id.). Records from Hayes' visits with Dr. Fortson and Dr. Parvin are not in the hearing record, nor is there a cervical MRI from 2017. However, according to Nurse Keller's note, the MRI showed multilevel degenerative changes with spinal stenosis. (Id.). Nurse Keller refilled his hydrocodone. (Id.).

Hayes returned to Nurse Keller on October 2, 2017. (JE 1, p. 20). By that time, he was working as a forklift driver at Georgia Pacific. (Id.). He indicated his symptoms had decreased because he was not standing as much at work. (Id.). Hayes returned to see Nurse Keller on November 29, 2017. (Id. at 21). He complained of persistent low back pain that radiated down both his legs, and neck pain with radiation down his arms. (Id.). She refilled his hydrocodone and restarted him on morphine. (Id. at 22). Hayes continued to seek medication management from Nurse Keller. He saw her on January 2, 2018; February 27, 2018; June 27, 2018; and August 16, 2019. (Id. at 25-33). On October 17, 2019, Nurse Keller ordered another course of physical therapy. (Id. at 34). This was performed at Dubuque Physical Therapy from January 3, 2020, through February 21, 2020. (JE 3, pp. 91-102).

Hayes saw Dr. Miller on January 28, 2020. (JE 1, p. 35). He was concerned about his extended use of opiates and the risk for addiction. (Id.). He wanted to stop taking opiate medication, and instead requested a referral for a medical marijuana card. (Id.). Dr. Miller made the referral. (Id.).

Hayes returned to Nurse Keller on June 30, 2020. (JE 1, p. 36). He indicated he was unable to get a medical marijuana card because the dispensaries were closed due to the COVID-19 pandemic. (Id.). He requested a prescription for hydrocodone, which was provided. (Id. at 36-37). Hayes had follow-up appointments with Nurse Keller on August 12, 2020, and December 21, 2020. (Id. at 39-44). At the December appointment, Nurse Keller recommended a referral to a neurologist and a cervical epidural steroid injection. (Id. at 44). He continued to take hydrocodone. (Id.). Dr. Miller performed the injection on January 20, 2021. (Id. at 47-48).

On January 26, 2021, Ronald Sims, M.D., at Dubuque Neurology and Sleep Medicine evaluated Hayes. (JE 5, pp. 107-109). Dr. Sims thought it “unlikely that the injury to the nervous system by electrocution in 2010 progressed in recent months.” (Id. at 109). He felt the pain might be from diabetic polyneuropathy or degenerative cervical disc disease. (Id.). He requested more of Hayes’ prior treatment records to review. (Id.).

On February 8, 2021, Dr. Miller performed a trigger point injection to the right paralumbar muscles. (JE 1, pp. 51-52). Hayes had a follow-up appointment with Nurse Keller on February 23, 2021. (JE 1, p. 53). He stated the injections decreased his pain complaints, but he was still experiencing arm weakness, worse on the right side. (Id. at 55).

Hayes had a second appointment with Dr. Sims on February 25, 2021. (JE 5, p. 110). Dr. Sims’ treatment note indicates Hayes had been suffering from severely uncontrolled diabetes for the past year. (Id.). However, only one page of Dr. Sims’ treatment note is included in the record, and it does not contain his diagnosis. (Id.). Dr. Sims ordered an MRI of Hayes’ cervical spine. (Id.). This was performed on March 8, 2021. (JE 2, p. 90). It showed disk osteophyte complexes at the C5-C6 and C6-C7 levels. (Id.).

In April 2021, defendants asked Dr. Sims if Hayes’ work as a forklift driver for Hodge could have caused his increased neck and arm symptoms. (JE 5, p. 111). Dr. Sims replied in June 2021. (Id. at 115). His response indicates Hayes was diagnosed with pain in the upper limb and cervical spondylosis with radiculopathy. (Id.). Dr. Sims did not have any additional treatment recommendations for pain management. (Id.). He referred Hayes to the University of Iowa Hospitals and Clinics (UIHC) Neurosurgery for further evaluation. (Id.). Dr. Sims indicated Hayes’ job at Hodge could have caused increased symptoms in his upper extremities and neck, but it was unlikely that his work movements aggravated his 2010 nervous system injury. (Id. at 116).

On April 21, 2021, another MRI was taken of Hayes’ cervical spine. (JE 7, p. 131). It showed multilevel degenerative changes most predominant at C5-C6 and C6-C7, causing mild thecal sac effacement and neural foraminal narrowing at those levels. (Id.). Hayes also had an MRI of his lumbar spine on that date. (Id. at 132-133). It revealed mild degenerative changes at L3-L4 and L4-L5. (Id. at 133).

On May 4, 2021, Matthew Howard, M.D. at UIHC evaluated Hayes. (JE 7, p. 134). Hayes complained of stiffness in his neck and arms, as well as back and right leg pain. (Id.). He indicated he had been off work since April 19, 2021, because of his symptoms. (Id.). Dr. Howard diagnosed him with neck pain and bilateral low back pain with sciatica. (Id. at 137). He did not recommend surgery. (Id.). Dr. Howard recommended he continue with conservative symptom management and referred him to the UIHC Pain Clinic for a consultation. (Id.).

On June 23, 2021, Hayes was evaluated by Justin Wikle, M.D., at the UIHC Pain Clinic. (JE 7, pp. 138-139). Hayes complained of back and right leg pain, as well as

neck and arm stiffness. (Id. at 139). Dr. Wikle's diagnosis and treatment recommendations, however, are not included in the hearing records. (Id.).

Hayes returned to Dr. Miller for a right sacroiliac steroid injection on July 29, 2021. (JE 1, p. 64). On August 23, 2021, he had an appointment with Nurse Keller. (JE 1, pp. 66-67). He complained of neck pain radiating into his arms. (Id. at 68). Nurse Keller refilled his hydrocodone and provided trazodone for sleep. (Id. at 69). His next appointment with Nurse Keller was on October 18, 2021. (JE 1, p. 70). The work note indicates she was seeing him for two separate workers' compensation injuries—the electrocution injury in 2010 to his neck and shoulders, and an injury to his low back with radiating pain to his right leg that occurred 1.5 years ago driving a forklift. (Id. at 72). She notes hydrocodone “manages his neck and arm pain quite well.” (Id.). She continued his pain medications. (Id. at 73).

On November 11, 2021, Dr. Wikle gave Hayes a right cluneal nerve block injection for right hip pain. (JE 7, pp. 142-152). Hayes returned to Nurse Keller on December 20, 2021. (JE 1, p. 76). He indicated the nerve block did not provide any pain relief. (Id. at 77). He also indicated trazodone was no longer helping him sleep. (Id. at 78). Nurse Keller discontinued trazodone and prescribed gabapentin. (Id.). She also refilled his hydrocodone. (Id.). Hayes returned to see Nurse Keller on February 14, 2022. (Id. at 82). He had discontinued using the gabapentin because of side effects. (Id.). She refilled his hydrocodone and suggested he make an appointment with his primary care doctor to discuss his sleep issues. (Id. at 83).

On March 7, 2022, Hayes underwent a functional capacity exam (FCE) at the request of his attorney. (JE 9, p. 190). The FCE was conducted by Daryl Short at Work Well. (Id.). On the FCE report, low back pain is listed as Hayes' primary diagnosis. (Id.). The FCE report indicated Hayes was unable to crouch and had limitations with forward bent standing, kneeling, stairs, crawling, lifting more than 10-15 lbs., and front carrying more than 15 pounds. (Id. at 191). Mr. Short opined that Hayes could not meet the physical capabilities of the sedentary demand category. (Id.). Mr. Short stated he was “essentially in an unemployable condition” due to his low back condition. (Id.). Mr. Short recommended restrictions of limited standing/walking to up to 30 percent of his day and being able to change positions as needed. (Id. at 191-192). He also suggested Hayes limit lifting to 15 pounds floor to waist, 10 pounds waist to crown, front carry 15 pounds, and not perform frequent lifting. (Id. at 193).

On April 6, 2022, Hayes attended an IME with Mark Taylor, M.D., at the behest of his attorney. (JE 10, p. 205). This was the IME relied upon by Deputy Phillips in the July 15, 2022, arbitration decision. Dr. Taylor diagnosed Hayes with chronic right-sided lumbago with pain and paresthesias extending into the right buttock and leg, and spondylosis and moderate facet arthrosis. (Id. at 210). He increased Hayes' permanent impairment to 9 percent whole person impairment and recommended restrictions of limiting lifting to 5 to 15 pounds, and alternate sitting, standing, and walking for comfort. (Id. at 211).

Hayes attended a psychological pain assessment with Beth Dinoff, PhD, at UIHC on April 12, 2022. (JE 7, p. 153). The evaluation states Hayes was having pain in his right-sided low back and down his left leg. (Id.). It does not mention his neck or arm issues. (Id.). Dr. Dinoff diagnosed Hayes with depression and chronic pain. (Id. at 158). Hayes indicated he was not interested in receiving pain psychology treatment. (Id.).

On April 22, 2022, Hayes underwent another IME at the request of his attorney. (CI Ex. 2). This IME was with David Segal, M.D. (Id. at 6). Dr. Segal diagnosed electrocution injury of the shoulders, chronic bursitis, rotator cuff injury, impingement syndrome, biceps tendonitis, bilateral multilevel cervical radiculopathy, disc osteophyte complex at C5-C6 and C6-C7, cervical facet arthropathy, cervicogenic headache, reactive depression, and diabetes. (CI Ex. 3, pp. 22-23). Dr. Segal stated the condition of Hayes' bilateral arms, shoulders, and neck had substantially changed and worsened since the 2016 arbitration hearing. (Id. at 32). Dr. Segal opined Hayes' permanent impairment had increased to 48 percent whole person as a result of the 2010 date of injury. (Id. at 39). This rating incorporated 20 percent whole person impairment for his shoulders, 28 percent whole person impairment for his cervical spine, 5 percent whole person impairment for reactive depression, and 5 percent whole person impairment for sleep disturbance. (Id.).

I do not find Dr. Segal's IME convincing, and I decline to adopt it. It contains numerous diagnoses, as well as several causation opinions, which lack medical support. For example, Dr. Segal diagnosed Hayes with chronic bursitis, a rotator cuff injury, impingement syndrome, and biceps tendonitis. (CI Ex. 3, p. 23). He causally relates these diagnoses to the 2010 injury date. (Id. at 22). According to the record before me, no other medical provider has diagnosed Hayes with these conditions, nor has he received treatment for them. There is also no objective testing to confirm the presence of a rotator cuff injury. I do not find support for these shoulder diagnoses. Dr. Segal also diagnosed Hayes with cervicogenic headaches. (Id. at 23). The medical records contain no mention of headache complaints or treatment since 2016. Similarly, Dr. Segal diagnosed Hayes with reactive depression as a result of the 2010 work injury. The only treatment note in the hearing record addressing Hayes' mental health is Dr. Dinoff's psychological pain assessment in April 2022. Following that evaluation, Dr. Dinoff diagnosed Hayes with moderate depression and chronic pain. (JE 7, p. 158). However, Dr. Dinoff's note clearly causally relates Hayes' depression to his 2018 low back injury, not the 2010 injury date. I cannot find evidentiary support for numerous diagnoses contained in Dr. Segal's report, and therefore, cannot adopt his proposed impairment ratings or suggested restrictions for these conditions. Dr. Segal's opinion lacks evidentiary support in the record; it is not adopted.

CONCLUSIONS OF LAW

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

This is a review-reopening proceeding. A review-reopening proceeding is appropriate whenever there has been a substantial change in condition since a prior arbitration award or settlement. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 391 (Iowa 2009). Under Iowa Code section 86.14(2), this agency is authorized to reopen a prior award or settlement to inquire about whether the condition of the employee warrants an end to, diminishment of, or increase of compensation. Id.

Upon filing a review-reopening, the claimant has the burden to show a change in condition related to the original injury since the original award or settlement was made.

The Iowa Supreme Court has held that a party does not need to prove that the change in the condition was not contemplated at the time of the original decision(s). Kohlhaas, 777 N.W.2d at 392. However, the party bringing the review-reopening proceeding has the burden of showing that the employee's condition has changed since the original award or settlement was made and that that change in condition relates back to the original injury. The change may be either economic or physical. Blacksmith v. All-American Inc., 290 N.W.2d 348, 350 (Iowa 1980); Henderson v. Iles, 250 Iowa 787, 794, 96 N.W.2d 321, 324 (1959). A mere difference of opinion of experts as to the percentage of disability is not sufficient to justify a different determination on a petition for review-reopening. Rather, claimant's condition must have worsened or deteriorated since the time of the initial award or settlement. Bousfield v. Sisters of Mercy, 249 Iowa 64, 70, 86 N.W.2d 109, 113 (1957).

In a review-reopening proceeding the claimant has the burden of proof to demonstrate whether he or she has suffered an impairment of earning capacity proximately caused by the original injury. E.N.T. Associates v. Collentine, 525 N.W.2d 827, 829 (1994). A loss of earning capacity due to voluntary choice or lack of motivation to return to work is not compensable. Malget v. John Deere Waterloo Works, File No. 5048441 (Remand Dec. May 23, 2018); Rus v. Bradley Puhmann, File No. 5037928 (App. December 16, 2014); Gaffney v. Nordstrom, File No. 5026533 (App. September 1, 2011); Snow v. Chevron Phillips Chemical Co., File No. 5016619 (App. October 25, 2007). Copeland v. Boone's Book and Bible Store, File No. 1059319 (App. November 6, 1997). See also, Brown v. Nissen Corp., 89-90 IAWC 56, 62 (App. 1989) (no prima facie showing that claimant is unemployable when claimant did not make an attempt for vocational rehabilitation).

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. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283, 285 (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, 652 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410, 420 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845, 853 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 421 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910, 911 (Iowa App. 1994).

In a review-reopening action, the principles of res judicata apply and the agency should not reevaluate facts and circumstances that were known or knowable at the time of the original action. Kohlhaas, 777 N.W.2d at 392. In this instance, the principles of res judicata would apply to all of Hayes' prior proceedings, including his original award for the 2010 date of injury, his first review-reopening award for the 2010 date of injury, as well as his original award for the new date of injury in 2018 and his review-reopening awards for the 2018 date of injury.

In his post-hearing brief, Hayes presents several arguments for why his industrial disability award should be increased in this action. First, Hayes states that he is now unemployed and in the process of re-applying for social security disability benefits. At the time of the last review-reopening action for the 2010 injury date, Hayes was also in the process of applying for social security disability benefits; however, he was working for Casey's 30 hours per week, making \$9.25 per hour. Since that time, Hayes has performed many different jobs, the most recent being a forklift driver for Georgia Pacific making \$17.60 per hour and for Hodge making \$15.44 per hour. (Ex. H, p. 65; Ex. G, pp. 4-6; Ex. I, pp. 3, 13). In his deposition testimony, Hayes indicated that his employment at Georgia Pacific and Hodge ended because of his low back injury, not because of his neck or arm conditions. (Ex. A, pp. 5-8). Under the law, the claimant's change in condition must relate back to the original injury. Blacksmith, 290 N.W.2d at 350. Given this, I do not find Hayes' change of economic circumstances argument compelling, as it does not relate back to the original injury in this case.

Hayes also argues that he should be awarded additional impairment because Dr. Segal opined his permanent impairment increased to 48 percent whole person as a result of the 2010 date of injury. In 2016, Dr. Taylor found Hayes had a 15 percent whole person impairment as a result of the 2010 injury date. As stated above, Dr. Segal's rating is not supported by the medical evidence, and it is not adopted. Additionally, a mere difference of expert opinion on percentage of disability is not sufficient to justify a different determination on a petition for review-reopening. Bousfield, 249 Iowa at 70, 86 N.W.2d at 113.

Hayes' final argument is that the physical condition of his neck and bilateral arms has deteriorated since the 2016 hearing. As evidence of this decline, he points to his increased symptoms and extensive treatment since 2016. According to Deputy Gordon's decision, at the time of the first review-reopening he experienced spasms and pain, as well as a pins and needles sensation and numbness after using his hands. He also reported a burning, aching sensation in his shoulders and neck. At the hearing in

2022, Hayes indicated he had trouble lifting anything with his arms due to weakness and sleeping issues because of increased pain in his neck and arms. (Tr., pp. 66-68). He also testified he suffered from more neck spasms and now had trouble turning his head. (Id. at 68).

At the time of the 2016 hearing, Hayes was treating with Dr. Miller at Unity Point Health for his neck complaints. Prior to that hearing Dr. Miller had already ordered a cervical MRI, an EMG, and provided cervical steroid injections. He had also ordered a trial of a spinal cord stimulator, physical therapy, and prescribed pain medications including hydrocodone and oxycodone. According to the records submitted during the second review-reopening hearing in 2022, after 2016 Hayes continued to regularly treat with Dr. Miller and his colleague Nurse Keller for neck and arm pain. He also had several more cervical MRIs, trigger point injections, epidural steroid injections, nerve blocks, attended another round of physical therapy, underwent a failed spinal cord stimulator trial due to infection, and took pain medication including hydrocodone, trazodone, and gabapentin, and tried medical marijuana. Given this extensive treatment, Hayes has carried his burden of proof that his compensable physical conditions have worsened since the 2016 review-reopening hearing. However, under the law, Hayes also needs to carry the burden of proof to show that his compensable worsening physical condition resulted in a reduced earning capacity. Kohlhaas, 777 N.W.2d at 391. He has not done that. Dr. Segal's opinion regarding increased impairment has been disregarded for lack of verifying evidence. Hayes submitted a 2022 FCE placing him in the less than sedentary physical demand category. (JE 9, p.191). However, that exam was obtained for his 2018 low back injury; it does not address what restrictions are necessary solely due to the 2010 work injury. (Id.). Finally, Hayes clearly testified that he can no longer work at Georgia Pacific and Hodge because of his low back injury, not because of conditions stemming from the 2010 injury. (Ex. A, pp. 5-8). At the hearing, Hayes also stated he was having trouble working at Casey's in 2016 because of his hands and arms. (Tr., p. 37). He opined he could no longer physically perform his jobs at Casey's or Kwik Stop but did not expound upon why or explain what physical condition would prevent him from working there. (Id. at 65). Hayes' statement, however, is directly contradicted by his social security denial, which found he could still work as a gas station clerk. Given this evidence, I find Hayes failed to show that his worsening arm and neck conditions caused any further reduction in his earning capacity beyond that documented in his last review-reopening proceeding.

As detailed above, there is no evidence that Hayes has had an additional increase in loss of earning capacity proximately caused by the 2010 injury. Instead, the evidence shows that Hayes' loss of earning capacity is the result of his subsequent injury while working at Georgia Pacific in 2018. Hayes has failed to carry his burden of proof that he is entitled to additional permanent partial disability benefits under this review-reopening proceeding. Given this finding, the issues of permanent total

disability,³ odd lot status, commencement date and apportionment are moot; the undersigned will make no findings with respect to them.

At the hearing, Hayes sought payment of the medical expenses listed in claimant's exhibit 1.⁴ However, in his post-hearing brief, Hayes only seeks payment for one medical bill—the charge for a cervical MRI ordered by Dr. Howard at UIHC on April 21, 2021. (Claimant's Post-Hearing Brief, p. 19). According to the medical records, Dr. Sims referred Hayes to Dr. Howard at UIHC Neurosurgery for further evaluation of his neck and upper extremity conditions. (See JE 5, p. 115).

For all compensable injuries under Iowa Code chapter 85 or 85A, the employer must “furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies therefor and shall allow reasonably necessary transportation expenses incurred for such services.” Iowa Code § 85.27(1). The agency has already found Hayes' neck and bilateral arm conditions compensable. Even though Dr. Howard also evaluated Hayes' low back injury at his appointments, the cervical MRI remains compensable under this claim. Hayes is entitled to payment for the April 21, 2021, cervical MRI in the amount of \$448.00. (CI Ex. 1, p. 5).

Hayes also asserts a claim for alternate medical care. Specifically, he seeks a second opinion from a neurosurgeon for his worsening neck symptoms. (Claimant's Post-Hearing Brief, p. 19). Iowa Code section 85.27(4) provides, in relevant part:

For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

Id.; see also, Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433, 436-37 (Iowa 1997).

³ In his post-hearing brief, Hayes states the primary question in this case is whether a worker that is already receiving permanent total disability benefits for one injury, can receive additional permanent disability benefits for another injury. (Claimant's Post-Hearing Brief, p. 7). Because Hayes failed to prove his worsening neck and arm conditions caused him a further reduction in earning capacity, I do not reach the issue of whether the language in Iowa Code section 85.34(2)(y) prevents him from receiving additional permanency benefits.

⁴ He also sought reimbursement for the mileage listed in claimant's exhibit 6. (See Hearing Report). This request and the accompanying exhibit were later withdrawn.

“Iowa Code section 85.27(4) affords an employer who does not contest the compensability of a workplace injury a qualified statutory right to control the medical care provided to an injured employee.” Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 769 (Iowa 2016) (citing R.R. Donnelly & Sons v. Barnett, 670 N.W.2d 190, 195-97 (Iowa 2003)). “In enacting the right-to-choose provision in section 85.27(4), our legislature sought to balance the interests of injured employees against the competing interests of their employers.” Ramirez, 878 N.W.2d at 770-71 (citing Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 202, 207 (Iowa 2010); IBP v. Harker, 633 N.W.2d 322, 326-27 (Iowa 2001)).

The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Iowa Code § 85.27; Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening, October 16, 1975). An employer’s right to select the provider of medical treatment to an injured worker does not include the right to determine how an injured worker should be diagnosed, evaluated, treated, or other matters of professional medical judgment. Assmann v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 19, 1988). Reasonable care includes care necessary to diagnose the condition, and defendants are not entitled to interfere with the medical judgment of its own treating physician. Pote v. Mickow Corp., File No. 694639 (Review-Reopening Decision, June 17, 1986).

The employer must furnish “reasonable medical services and supplies *and* reasonable and necessary appliances to treat an injured employee.” Stone Container Corp. v. Castle, 657 N.W.2d 485, 490 (Iowa 2003) (emphasis in original). Such employer-provided care “must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee.” Iowa Code § 85.27(4).

By challenging the employer’s choice of treatment - and seeking alternate care - claimant assumes the burden of proving the authorized care is unreasonable. See e.g., Iowa R. App. P. 14(f)(5); Gwinn, 779 N.W.2d at 209; Long v. Roberts Dairy Co., 528 N.W.2d 122, 124 (Iowa 1995). An injured employee dissatisfied with the employer-furnished care (or lack thereof) may share the employee’s discontent with the employer and if the parties cannot reach an agreement on alternate care, “the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order the care.” Id. “Determining what care is reasonable under the statute is a question of fact.” Long, 528 N.W.2d at 123; Reynolds, 562 N.W.2d at 436. As the party seeking relief in the form of alternate care, the employee bears the burden of proving that the authorized care is unreasonable. Long, 528 N.W.2d at 124; Gwinn, 779 N.W.2d at 209; Reynolds, 562 N.W.2d at 436. Because “the employer’s obligation under the statute turns on the question of reasonable necessity, not desirability,” an injured employee’s dissatisfaction with employer-provided care, standing alone, is not enough to find such care unreasonable. Long, 528 N.W.2d at 124.

Hayes argues that he is entitled to alternate medical care because his prior neurosurgery evaluation “did not result in any further treatment recommendations.”

(Claimant's Post-Hearing Brief, p. 19). He alleges that given the severity of his symptoms; he should be provided a new surgical opinion. (*Id.*). Defendants have authorized ongoing care with Dr. Miller, Nurse Keller, Dr. Sims, and Dr. Wickle, as well as a surgical evaluation with Dr. Howard. Dr. Howard appears to be a qualified surgeon. He did not recommend surgery. He recommended conservative treatment. Defendants have provided a great deal of conservative treatment including physical therapy, a spinal cord stimulator, an EMG, trigger point injections, epidural steroid injections, nerve blocks, pain medications, and numerous MRIs, none of which apparently revealed anything surgical. Additionally, Dr. Segal, Hayes' IME physician, did not recommend surgery in his report. Based upon the information in the record, I find Hayes has not proven that the care offered is unreasonable. No doctor has recommended another surgical opinion. The request for alternate medical care is denied.

Hayes seeks reimbursement for his IME with Dr. Segal. A claimant's right to reimbursement for an IME exam is controlled by Iowa Code section 85.39. This code section states,

If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination.

Regarding the IME, the Iowa Supreme Court provided a literal interpretation of the plain language of Iowa Code section 85.39, stating that section 85.39 only allows the employee to obtain an independent medical evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 847 (Iowa 2015). Under the Young decision, an employee can only obtain an IME at the employer's expense if an evaluation of permanent disability has been made by an employer-retained physician. Under Iowa Code section 85.39, an injured worker is limited to one IME. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842, 861 (Iowa 2009). Defendants did not obtain a rating in this review-reopening and thus, the trigger for Iowa Code section 85.39 reimbursement was not engaged. Kohlhaas, 777 N.W.2d at 394-95. Hayes has not proven entitlement to reimbursement of Dr. Segal's IME under Iowa Code section 85.39.

Hayes also seeks an award of costs as outlined in claimant's exhibits 5 and 7. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. See 876 Iowa Administrative Code 4.33; Iowa Code § 86.40. 876 Iowa Administrative Code 4.33(6) provides:

[c]osts taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2)

transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, including convenience fees incurred by using the WCES payment gateway, and (8) costs of persons reviewing health service disputes.

Hayes incurred costs for the filing fee for his petition. (CI Ex. 5, pp. 85-86). He is also requesting reimbursement for the charges attributable to Dr. Segal's report. (CI Ex., 7, pp. 91-92). Hayes failed to prove that he is entitled to additional benefits in this review-reopening proceeding; therefore, I conclude his costs should not be assessed against defendants. Each party shall bear its own costs.

ORDER

THEREFORE, IT IS ORDERED:

Claimant shall take no further benefits from these proceedings.

Defendants shall pay Claimant four hundred forty-eight and 00/100 dollars (\$448.00) in medical expenses.

Each party shall bear their own costs.

Signed and filed this 2nd day of August, 2023.



AMANDA R. RUTHERFORD
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Mark Sullivan (via WCES)

Timothy Wegman (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.