BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KENNETH SMALL,	:	
Claimant,	:	File No. 20010306.01
vs.	:	
LENNOX INDUSTRIES, INC.,	:	ARBITRATION DECISION
Employer,	:	
and	:	
INDEMNITY INS. CO. OF N. AMERICA,	:	Head Note Nos.: 1402.40, 1803, 1806, 2907, 3001
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Kenneth Small, claimant, filed a petition in arbitration seeking workers' compensation benefits from Lennox Industries, Inc., employer and Indemnity Insurance Company of North America, insurance carrier as defendants. The hearing occurred before the undersigned on November 30, 2021, via CourtCall video conferencing.

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

The evidentiary record also includes Joint Exhibits 1 through 13, Claimant's Exhibits 1 through 7, and Defendants' Exhibits A through G. Claimant testified on his own behalf. Rebecca Jean Small also provided live testimony. The evidentiary record closed at the conclusion of the November 20, 2021, hearing.

The parties submitted post-hearing briefs on January 3, 2022, at which time the case was considered fully submitted to the undersigned.

ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant sustained permanent disability as a result of the stipulated August 10, 2020, work injury and, if so, the extent of permanent disability claimant sustained;
2. Claimant's gross earnings at the time of the alleged injury;
3. Whether claimant is entitled to reimbursement of an independent medical examination (IME) under Iowa Code section 85.39;
4. Apportionment; and
5. Assessment of costs.

FINDINGS OF FACT

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

Claimant, Kenneth Small, was 60 years old at the time of hearing. (Hearing Transcript, page 14) His education is limited to a high school degree. (Hr. Tr., p. 16) He did not attend any post-secondary education and he holds no specialized licenses or certificates. (Id.) His past employment largely consists of manual labor positions. (See Hr. Tr., pp. 17-28)

Small has worked for Lennox Industries in Marshalltown, Iowa since September 1994. (See Hr. Tr., pp. 29-30) He has held several different positions over the course of his twenty-seven years, including assembler, machine operator, welder, and forklift driver. (Hr. Tr., p. 31) At the time of the stipulated work injury, Small was working as an Assembler and Crater. (See Exhibit 2) In this role, he assembles and packages furnaces, cooling and blower units, and other components on a conveyor belt. (Ex. 2, p. 17)

Throughout his 27 years working for the defendant employer, Small has sustained a number of injuries to his low back. As a result of these injuries, claimant has undergone two lumbar spine surgeries. (Ex. D, p. 36; see Ex. 1, p. 8) Prior to the injury giving rise to this case, claimant had a 40-pound permanent lifting restriction in place as a result of one such low back injury. (Ex. D, p. 37; Hr. Tr., p. 71)

The date of injury in this case, August 10, 2020, was a particularly difficult day for many across the state of Iowa. Over the course of several hours, a powerful line of severe thunderstorms known as a "Derecho" tracked across the entire state causing widespread damage. The Lennox Industries plant in Marshalltown was one of several buildings throughout the state to sustain damage from the storm.

Around 11:00 a.m., Small was working towards the end of the assembly line when the building he was in lost power and the roof started to leak. (Exhibit C, Deposition Transcript, page 21) Small made the decision to gather his belongings and make his way to the storm shelter. As he was walking to grab his lunch pail, a section of a temporary wall opened and clipped Small's left shoulder, knocking him to the ground. (Hr. Tr., p. 37) Small asserts his head, right shoulder, and hip came into contact with the concrete floor. (Ex. C, Depo. p. 19) Dazed and bloodied from the fall,

Small made his way to the storm shelter where he reported his injury to his supervisor. (See Hr. Tr., pp. 39-40) Small briefly met with the on-site nurse before all employees were sent home for the day.

When his symptoms did not subside after one week, Small requested medical treatment. Lennox authorized Small to present to Sherman Jew, D.O., for an initial evaluation on August 17, 2020. (See JE5, p. 21)

At the August 17, 2020, appointment, Small reported pain in his head, neck, bilateral shoulders, and hip after being struck by a temporary wall. (JE5, p. 22) He also described nausea, light-headedness, photophobia, and issues in his ear. (Id.) Dr. Jew assessed Small with post-concussion syndrome, cervicalgia, and pain in the right hip and shoulder. (JE5, p. 23) He placed claimant on restricted duty, noting Small could only work a desk job. He further recommended no driving, no lifting, pushing, or pulling greater than 10 pounds, no prolonged standing or walking, no climbing ladders and avoid stairs, no overhead work, and wear dark shades in bright areas. (Id.)

At this juncture, it is worth noting that throughout Dr. Jew's medical records, he consistently notes a primary problem of head trauma and neck pain, a secondary problem of right hip pain, and a tertiary problem of bilateral shoulder pain. (See JE5)

It is also worth noting that this is not the first time in which claimant has been diagnosed with post-traumatic headaches. According to the medical records, claimant was struck in the head by a piece of lumber in May 1986. (JE13, p. 138) Following the injurious event, claimant complained of temporal headaches for at least six months. (Id.) In 1997, claimant also reported pain in the back of his head for several months with no known trauma. (JE13, p. 140) He eventually underwent an MRI of the head, which returned unremarkable. (JE13, p. 141) In 1999, he reported some intermittent dizziness and vertigo-like symptoms following a motor vehicle accident. (JE13, p. 147) He continued to report headaches and/or dizziness in August 2002, April 2004, September 2007, October 2007, and May 2008. (JE13, pp. 148, 149, 154, 157) His physicians routinely related the symptoms to sinusitis. (See id.) However, at least one medical record provides claimant was not experiencing photophobia or phonophobia as of May 2008. (JE13, p. 158)

Following his examination, Dr. Jew ordered an x-ray of the neck and a CT scan of the head. (JE5, p. 23) He also referred Small to physical therapy for each of the impacted body parts. (Id.) The cervical spine x-rays showed an anterior C6-C7 fusion with degenerative endplate spurring and bony degenerative changes.[1] (See JE9, p. 113; Ex. 1, p. 4) The CT of Small's head revealed a right-sided subdural hematoma for which he was referred for a neurosurgical evaluation. (JE5, p. 23)

Small presented to MercyOne Neurosurgery on August 21, 2020. (JE6, p. 87) Haley Galligan, PA-C noted that Small's symptoms were consistent with a diagnosis of concussion and should subside over time with cognitive rest. (JE6, p. 88) She further

[1] Small underwent a cervical spine fusion in July 2016 to address neck and radiating left arm pain he experienced following an October 22, 2015, injury. (See JE2, pp. 2-15; Ex. B, p. 25)

opined no further imaging was necessary as the area of bleeding was very small and unlikely to increase in size as the CT scan of Small's head was completed greater than one-week post-injury. (Id.)

Small had several telehealth consultations with Dr. Jew throughout the month of September 2020. (JE5, pp. 27-35) During this time, Small saw steady improvement in his right hip, bilateral shoulder, and back conditions, while his neck and head conditions remained stable or worsened. (Id.)

On September 18, 2020, Small reported to Dr. Jew that the left side of his head felt like it was on fire. (JE5, p. 31) He further described a throbbing pain at the base of his skull, photophobia, intolerance to noise, increased confusion, and difficulties with memory. (Id.) On September 30, 2020, Small told Dr. Jew that he woke up disoriented earlier and had a hard time finding his way around his home. (JE5, p. 34)

Small participated in physical therapy between September 8, 2020, and September 24, 2020. He reported to Dr. Jew that physical therapy had been helpful for his neck pain and dizziness. (JE5, p. 34) Indeed, at his physical therapy appointment on the same date, Small reported 50 percent improvement in dizziness. (JE8, p. 98)

A repeat CT scan of Small's head, dated September 28, 2020, showed resolution of the subdural hematoma and no new hemorrhaging was noted. (JE7, pp. 91-92)

Dr. Jew returned Small to light duty work on October 5, 2020. (JE5, p. 35) Dr. Jew instructed that Small was to work in a quiet area with dark shades to reduce bright lights, no prolonged walking greater than five minutes at a time, no lifting over 15 pounds, and only work 4 to 6 hours per day. (Id.) Initially, Small returned to work on the production floor; however, due to the noise levels, he was moved to an office setting. (See Hr. Tr., pp. 44-45; JE5, p. 46)

After Small returned to work, his physical therapy was transferred from McFarland Clinic to Kinetic Edge Physical Therapy inside the Lennox plant. (See Ex. 1, p. 4)

Between October 30, 2020, and December 3, 2020, Small reported ongoing pain in his bilateral shoulders, with shooting pain down both arms. (See JE5, p. 53) Seeing little improvement in his bilateral shoulder pain, Dr. Jew referred Small for an orthopedic evaluation on December 3, 2020. (JE5, p. 54)

Small first presented to Timothy Vinyard, M.D., on December 9, 2020, reporting bilateral shoulder pain, left worse than right. (JE9, p. 101) Small further reported clicking, popping, catching, and instability in his shoulders. (Id.) Given Small's ongoing symptoms, Dr. Vinyard felt it appropriate to order bilateral shoulder MRIs. (JE9, p. 103)

The January 7, 2021, MRIs revealed left shoulder tendinosis with partial rotator cuff tear, moderate AC joint osteoarthritis, right shoulder tendinosis without rotator cuff tear, and right advanced AC joint osteoarthritis. (JE11, p. 128; See JE9, p. 106)

After reviewing the imaging, Dr. Vinyard told claimant he did not perceive any significant tearing or major structural damage on imaging. (JE9, p. 106) Dr. Vinyard recommended and performed bilateral corticosteroid injections. (JE9, p. 106) Small reportedly experienced good relief from his symptoms following the bilateral injections. (JE9, p. 109) After demonstrating full range of motion and excellent strength on examination, Dr. Vinyard placed Small at maximum medical improvement (MMI) and returned him to work without any formal restrictions relating to his shoulders on February 22, 2021. (JE9, p. 110) Dr. Vinyard did not anticipate Small requiring any further care with respect to the bilateral shoulder injury. (Id.)

Dr. Jew's medical records for the next several months note waxing and waning symptoms. During this time, Dr. Jew continued to treat claimant with medication management, physical therapy, and light duty restrictions. (JE5, pp. 52-76)

In January 2021, Small received special rearview mirrors for his vehicle. Dr. Jew recommended Small attempt to practice driving with the same and then they would reassess his ability to drive at his follow-up appointment on February 10, 2021. (JE5, pp. 63, 65)

On February 10, 2021, Small estimated that his head and neck complaints were "constantly at about 70% of what he was[.]" (JE5, p. 66) With respect to his hip, Small reported that he experienced right hip pain with excessive walking. He considered his left hip pain to be resolved. (Id.) Lastly, Small felt as though his right shoulder was improving faster than his left. He noted a pain rating of 4 in the left shoulder and 1 in the right shoulder. (Id.)

Small similarly reported 75 percent improvement to his physical therapist on February 18, 2021. (JE10, p. 120) In the same medical record, Tim VanderWilt, P.T. noted that Small's symptoms were inconsistent and he was not able to verbalize specific activities that aggravate his symptoms. (JE10, p. 121) On February 23, 2021, Mr. VanderWilt opined that Small had demonstrated minimal progress over the last several weeks. He felt that Small had plateaued with therapy. (JE10, p. 125) He further noted Small's pain was very inconsistent and he was unable to reproduce Small's symptoms through testing. (Id.) Mr. VanderWilt subsequently recommended discontinuing physical therapy. (Id.)

On February 24, 2021, Dr. Jew reduced the severity of Small's restrictions, noting he could begin driving and return to working 8 hours per workday as of March 1, 2021. (JE5, p. 70) Unfortunately, Small reported that an increase of work by 1 hour made his headaches and neck pain much worse. (JE5, p. 72) Small reported that he missed 4.5 days of work due to pain between March 1, 2021, and March 10, 2021. (Id.) Dr. Jew subsequently reduced claimant's hours at work back to 6 per workday. (JE5, p. 73)

In February and March, 2021, Small's only lingering concerns involved his headaches and neck pain. (See JE5, pp. 72, 75, 77) On March 30, 2021, Dr. Jew referred Small to an orthopedic specialist for further evaluation of his neck complaints. (JE5, p. 77)

Small first saw Trevor Schmitz, M.D., on April 13, 2021. (JE9, p. 111) He reported pain on the left side of his head, neck, and chest, with radiating pain in the left arm. (Id.) On examination, Dr. Schmitz noted normal alignment and functional range of motion in the neck, and pain with left shoulder range of motion. (JE9, p. 112) Notably, Small could not recall the year in which he sustained his injury and estimated that the injury occurred in 2000. (Id.) Dr. Schmitz concluded his examination by noting Small's x-rays revealed multilevel degenerative changes above the level of his previous fusion. As such, Dr. Schmitz ordered an MRI of the cervical spine. (JE9, p. 113)

Around the same time, defendants had Small evaluated by neurologist Steven Adelman, D.O. (See JE12, p. 129)

Dr. Adelman first examined Small on April 14, 2021. (JE12, p. 129) Small's chief complaints included headache, dizziness, and light sensitivity. (Id.) Small also reported issues with his short-term memory. (JE12, p. 129) He denied having a prior history with the reported issues. (Id.) After reviewing the occupational health records and examining Small, Dr. Adelman opined that Small's symptoms were consistent with posttraumatic vertigo and headache. (JE12, p. 131) However, Dr. Adelman expressed his belief that Small's cognitive complaints may also be related to an inability to focus due to his pain complaints. Dr. Adelman doubted that Small suffered a traumatic brain injury severe enough to cause his memory disturbance and did not believe further treatment would provide any benefit. He did, however, find it reasonable for Small to continue utilizing the restrictions assigned by Dr. Jew; however, he opined Small did not require any restrictions on the number of hours he worked. (Id.) Lastly, Dr. Adelman estimated that Small would reach MMI for the traumatic brain injury one year after the date of injury. (Id.)

Consistent with Dr. Adelman's opinion, Dr. Jew removed all limitations on the number of hours Small could work on April 16, 2021. (JE5, p. 81)

By May 6, 2021, Small was tolerating all lifting exercises at physical therapy with minimal complaints of pain. (JE10, p. 127) At the time, Small reported localized pain to the right forehead and left chest wall. (Id.)

Small returned to Iowa Ortho to go over the results of his MRI with Dr. Schmitz on May 11, 2021. (JE9, p. 114) Dr. Schmitz interpreted the imaging as confirming multilevel degenerative changes. (JE9, p. 115) Dr. Schmitz diagnosed osteoarthritis and cervical stenosis. (Id.) However, he opined the degenerative changes in Small's cervical spine were stable and released him from care. (Id.)

Small had his last telehealth visit with Dr. Jew on May 12, 2021. (JE5, p. 82) At the appointment, Small reported that his main complaints were ongoing headaches and dizziness. (JE5, p. 83) He also complained of right hip pain after performing yard work. (Id.) The last restrictions provided by Dr. Jew included a 20-minute restriction on driving, working in a relatively quiet area with dark shades and earmuffs, ground-level only work, no climbing of ladders, and avoid stairs. (Id.) At the conclusion of the appointment, Dr. Jew submitted a referral and a transfer of care to neurology for Small's ongoing complaints of headaches and dizziness. (JE5, p. 84)

The transfer of care was short-lived, as Dr. Adelman released Small from his care following the May 25, 2021, appointment. (JE12, p. 134) Dr. Adelman again estimated that claimant would reach MMI one year after the initial date of injury. Despite not placing claimant at MMI, Dr. Adelman opined he did not believe Small sustained any permanent neurological impairment as a result of his work injury. (Id.) With respect to claimant's need for any additional medical treatment, Dr. Adelman opined that further testing and/or treatment would not change his diagnosis or management; however, he also noted that if claimant's cognitive complaints remained an issue, he would recommend claimant present for a formal neuropsychological evaluation. (Id.)

At hearing, Small testified that he continues to experience pain in his shoulders, and he recently returned to see Dr. Vinyard for the same. (Hr. Tr., p. 48) He further testified that he continues to experience headaches, dizziness, and pain when turning his neck. (Hr. Tr., pp. 50-52, 58) He has also testified that he is much more forgetful since the August 10, 2020, injury. (See Ex. C, Depo. p. 29) He does not take any prescription medications at this time. (Ex. 1, p. 8)

Small's wife, Becky, testified at the evidentiary hearing. (Hr. Tr., p. 83) Mrs. Small's testimony largely corroborated claimant's assertions with respect to how the August 10, 2020, work injury has impacted his life, both physically and mentally. (See Hr. Tr., pp. 83-91)

Small continues to work at Lennox Industries in a light duty position. (See Hr. Tr., p. 54) He works approximately 40 hours per week in Quality Assurance where he checks parts, places stickers, and handles circuit boards. He maintains the same hourly rate he received prior to the stipulated work injury; however, he is not eligible for overtime in his current position. (See Ex. C, Depo. p. 14; Hr. Tr., p. 57) In the 13 weeks immediately prior to the evidentiary hearing, claimant's average weekly earnings were over $200.00 less per week than those earned at the time of his work injury. (Ex. 6, p. 35) Small does not believe he could return to work as an assembler given his current condition. (Ex. C, Depo. p. 14)

All of the treating physicians evaluated Small for permanent impairment.

In a letter, dated June 8, 2021, Dr. Schmitz placed Small in DRE Category I and assigned zero percent whole person impairment to the cervical spine. (JE9, p. 116)

Dr. Vinyard produced a similar letter to defendants on July 1, 2021. (See JE9, p. 117) Based on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Dr. Vinyard opined that Small would not qualify for an impairment rating to either shoulder. (JE9, p. 117)

Defense counsel next penned a letter to Dr. Adelman on August 27, 2021, and requested he answer several questions pertaining to Small's traumatic brain injury. (JE12, p. 135) Dr. Adelman responded to defendants' letter on September 10, 2021. (Id.) Dr. Adelman provided he could not confirm that claimant reached MMI for the head injury on August 10, 2021, because he last saw claimant on May 25, 2021. (Id.) Dr. Adelman confirmed that his May 25, 2021, opinion regarding permanent impairment was made pursuant to the AMA Guides, Fifth Edition, and he was not recommending any further treatment. (Id.) Lastly, Dr. Adelman provided claimant did not require permanent restrictions at the time of the May 25, 2021, appointment. (Id.)

Defense counsel subsequently requested clarification of Dr. Adelman's answers on September 28, 2021. (JE12, p. 136) On the issue of MMI, Dr. Adelman confirmed his prior opinion anticipating Small would reach MMI on August 10, 2021. (Id.) On the issue of permanent restrictions, Dr. Adelman opined that he would not address restrictions as they relate to claimant's arms; however, he would recommend tinted glasses if claimant was comfortable with the same. (Id.)

On September 29, 2021, Dr. Jew responded to a letter from defense counsel inquiring about claimant's permanent impairment. After reviewing the permanency evaluations of Dr. Vinyard, Dr. Schmitz, and Dr. Adelman, Dr. Jew opined that Small sustained no impairment as a result of his injuries. Dr. Jew did, however, recommend Small be restricted from working in loud, noisy environments. (JE5, p. 85)

In response to the opinions of his authorized treating physicians, Small scheduled an independent medical evaluation (IME) with John Kuhnlein, D.O. (Ex. 1) The evaluation occurred on August 25, 2021. (Ex. 1, p. 1) During the interview portion of the IME, Small relayed that his current symptoms include right, frontal and temporal headaches that last for approximately one hour, photophobia, phonophobia, and memory issues. He also reported intermittent central neck pain that radiated into the right side of his head, but not into his arms. (Ex. 1, pp. 6-7) On examination, claimant scored 29/30 on a Mini-Mental Status examination, which is a normal value. (Ex. 1, p. 9) There was no evidence of any weakness in either upper extremity. (Ex. 1, p. 10)

While Dr. Kuhnlein noted that Small's issues with short and long-term memory were not immediately apparent during his evaluation, Dr. Kuhnlein recommended Small receive formal neuropsychological testing for the same. He further suggested Small present to a neuro-ophthalmologist to ensure that there is no neurologic visual pathway pathology or ocular pathology that would objectively account for reported visual blurring.

Lastly, Dr. Kuhnlein noted that if Small's vertigo was troublesome, he could present to an ENT specialist. (Ex. 1, p. 13)

Dr. Kuhnlein assigned 5 percent whole person impairment for post-concussive syndrome, 1 percent whole person impairment for headaches, and no impairment for vertigo. (Ex. 1, p. 13) Notably, the 5 percent impairment rating for post-concussive syndrome falls under Class 1, and is characterized as "Paroxysmal disorder with preimpairment exists, but is able to perform activities of daily living." Dr. Kuhnlein assigned no impairment to the bilateral shoulders. (Ex. 1, p. 14) He assigned 20 percent whole person impairment for the range of motion deficits in the cervical spine. (Ex. 1, pp. 13-14) Dr. Kuhnlein noted apportionment may be indicated in this case, and, as a result, he attributed 10 of his 20 percent impairment rating to the cervical fusion Small had in 2015. (Ex. 1, p. 14) When combined, these ratings produce 25 percent whole person impairment. (Id.)

Dr. Kuhnlein utilized the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, when assessing claimant's permanent impairment. (Ex. 1, p. 13)

On the issue of apportionment, I note Small's past medical history includes a head injury in 1986, a left shoulder injury in 1991, a back injury in 1997, and a neck injury in 2016. Small has undergone bilateral carpal tunnel releases, a cervical fusion, and two lumbar spine surgeries. (See Ex. 1, p. 8)

Defendants submitted an Agreement for Settlement Small entered into following a January 23, 2010, work injury at Lennox Industries. (Ex. D) The parties agreed Small was entitled to 115 weeks of industrial disability benefits, or a 23 percent loss of earnings. (Ex. D, p. 27) In reaching Small's industrial disability, the parties relied, in part, on the medical opinions of Charles Mooney, M.D., and Robert Jones, M.D. Both physicians assigned 13 percent whole person impairment for Small's degenerative disc disease. (Ex. D, pp. 32, 36) Dr. Mooney assigned a universal 40-pound lifting restriction, while Dr. Jones opined Small should be limited to occasional lifting and carrying of objects weighing 40 pounds. (Ex. D, p. 37)

Dr. Kuhnlein recommended a slight adjustment to Small's permanent lifting restriction. He recommended Small only lift up to 35 pounds, occasionally, at all levels. (Ex. 1, p. 14) No other physician recommended a change to Small's permanent lifting restriction.

Dr. Jew, Dr. Adelman, and Dr. Kuhnlein all weighed in on Small's need for any additional permanent restrictions related to his traumatic brain injury.

At his last appointment with Small, Dr. Jew recommended he work in a relatively quiet area wearing dark shades to reduce bright lights and earmuffs to reduce noise, work only on ground level, no climbing ladders, and avoid using stairs. (See JE5, p. 84) In his responses to defendants' September 28, 2021, letter, Dr. Jew broadly recommended that Small avoid loud, noisy work areas. (JE5, p. 85)

In May of 2021, Dr. Adelman noted that Small worked better in a dark environment, and he was on board with continuing such a restriction, if possible. When responding to defendants' August 27, 2021, letter, Dr. Adelman opined Small did not require any permanent restrictions as of May 25, 2021. (JE12, p. 135) When asked to clarify his opinions in September 2021, Dr. Adelman recommended Small wear tinted glasses if it made him more comfortable. (JE12, p. 136)

It would be difficult to adopt any of Dr. Adelman's recommendations given the fact he did not reexamine Small prior to providing his final opinions. Similarly, Dr. Adelman never definitively placed Small at MMI for his head injury. Following the May 25, 2021, appointment, Dr. Adelman opined that Small would likely reach MMI one year after the date of injury, or on August 10, 2021. (JE12, p. 134) When responding to the August 27, 2021, letter, Dr. Adelman could not confirm that Mr. Small reached MMI for his head injury on August 10, 2021, because he had not examined him since May 25, 2021. (JE12, p. 135) When responding to the September 28, 2021, letter, Dr. Adelman again noted that he anticipated Small would reach MMI on August 10, 2021; however, he did not definitively provide that Small reached MMI on August 10, 2021. (JE12, p. 136)

Dr. Kuhnlein agreed with the work restrictions imposed by Dr. Jew on May 12, 2021. (Ex. 1, p. 14) The restrictions included: No driving more than 20 minutes at a time, work in relatively quiet area, wear dark shades (or UV blockers) to reduce bright lights, wear earmuffs to reduce noise, work only on ground level, no climbing ladders, and avoid stairs. (JE5, p. 84)

After reviewing the evidentiary record as a whole and comparing the competing expert opinions, I find the opinions of Dr. Kuhnlein to be most persuasive. I similarly find that Dr. Kuhnlein has produced the most consistent and credible expert medical opinions in this record. His report is thorough and fair. Dr. Kuhnlein succinctly and convincingly discussed each of claimant's alleged injuries and whether they resulted in permanent impairment. Moreover, Dr. Kuhnlein is the only physician in the evidentiary record to have reviewed all of the pertinent medical records in this case. Therefore, I accept Dr. Kuhnlein's opinions and find claimant sustained permanent injuries to, or material aggravations of, his head and neck.

To the extent his opinions regarding claimant's bilateral shoulders are consistent with the opinions of Dr. Kuhnlein, I also accept the expert opinions of Dr. Vinyard.

I find Dr. Jew's opinions to be significantly less persuasive than the opinions of Dr. Kuhnlein. Dr. Jew based his permanency opinion on the opinions of Dr. Vinyard, Dr. Schmitz, and Dr. Adelman. He provided no analysis of his own. Additionally, Dr. Jew opined claimant was likely at MMI because, "it has been over 1 year." Dr. Jew did not explain the significance of claimant being one-year post-injury. Lastly, he reached his conclusion having not examined claimant in over four months.

I similarly do not find Dr. Schmitz's opinions to be particularly convincing in this case. At no point does Dr. Schmitz address whether the August 10, 2020, injury aggravated, accelerated, or lit up claimant's pre-existing cervical spine condition. While Dr. Schmitz provided an impairment rating, he provided no explanation for the same. This is particularly troubling after he documented a nine-month history of symptoms in claimant's neck and degenerative changes on claimant's cervical MRI.

I further find Dr. Kuhnlein's impairment ratings to be most convincing and credible in this evidentiary record. I accept the impairment ratings assigned by Dr. Kuhnlein as accurate and find that claimant carried his burden of proving he sustained permanent injuries to the head and neck as a result of the August 10, 2020, stipulated work injury.

Lastly, I find the permanent restrictions recommended by Dr. Kuhnlein are reasonable, appropriate, and most accurately reflect claimant's functional abilities.

At the time of the evidentiary hearing, claimant was 60 years old. He remains employed with the defendant employer; however, he is now working a light duty position without the ability to work overtime or earn incentive pay. He works approximately 40 hours per week. His permanent lifting restriction has changed from 40 pounds to 35 pounds. But for his sensitivities to light and sound, it is likely claimant could return to his pre-injury job. By all accounts claimant is a hard-working individual and he enjoys working for the defendant employer. He is not taking any prescription medications for his conditions at this time. He continues to treat with Dr. Vinyard; however, the treatment appears to be maintenance related.

Having considered claimant's age, educational background, employment history, residual symptoms, ability to retrain, motivation to continue working, claimant's anticipated retirement age, permanent impairment, permanent restrictions, and all other industrial disability factors set forth by the Iowa Supreme Court, I find that he has sustained a 35 percent loss of future earning capacity as a result of his work injury with the defendant employer.

The parties have a dispute regarding claimant's gross average weekly earnings at the time of his injury. It appears the main dispute between the parties is which weeks should be included in the calculation of Small's gross weekly earnings. Both parties submitted a rate calculation. (Ex. 4; Ex. A) Defendants assert an average weekly wage of $914.58, with a corresponding weekly rate of $602.86. (Ex. A, p. 1) Claimant asserts an average weekly wage of $928.77, with a corresponding weekly rate of $611.24. (Ex. 4, p. 24) Defendants excluded the week ending June 7, 2020, because claimant only worked 17.6 regular hours that week. (Ex. A, p. 11) In its place, defendants included the week ending May 10, 2020. (Id.)

For reasons that will be discussed in the Conclusions of Law section, I accept claimant's rate calculation and find claimant's weekly compensation rate to be $611.24.

Claimant's entitlement to fees associated with Dr. Kuhnlein's IME and costs will be addressed in the Conclusions of Law section.

CONCLUSIONS OF LAW

The initial dispute submitted for resolution is whether the stipulated head, neck, and bilateral shoulder injuries sustained on August 10, 2020, resulted in permanent disability.

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).

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

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

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

In this case, defendants concede that Small sustained temporary injuries to the head, neck, and bilateral shoulder injuries on August 10, 2020. However, defendants dispute whether Small sustained any permanent impairment regarding the same.

I found the opinions of Dr. Kuhnlein to be the most convincing on the issue of permanent disability. With this in mind, I found Small failed to prove by a preponderance of the evidence that he sustained a permanent injury to his bilateral shoulders as a result of the August 10, 2020, work injury. I also found Small carried his burden of proving by a preponderance of the evidence that he sustained permanent injuries to the head and neck.

Claimant's head and neck injuries are unscheduled injuries. Accordingly, his injuries are compensated pursuant to Iowa Code section 85.34(2)(v). Iowa Code section 85.34(2)(v) provides:

> If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity.

In determining whether the above provision of Iowa Code section 85.34(2)(v) applies, there is a comparison between the pre- and post-injury wages and earnings. McCoy v. Menard, Inc., File No. 1651840.01 (App. April 9, 2021).

Neither party disputes that claimant returned to work for the same hourly wage that he was receiving at the time of the stipulated work injury. However, it cannot be said that claimant returned to work for the same or greater earnings. Small established his earnings were less after he returned to work following his injury because he did not receive as many hours. Therefore, he is entitled to a determination of permanent disability based on lost earning capacity. See McCoy v. Menards, File No. 1651840.01 (App. April 9, 2021)

In McCoy v. Menards, File No. 1651840.01 (App. April 9, 2021) the deputy commissioner found that because the claimant's hourly wage did not change post-injury, his disability was limited to his functional impairment. The commissioner reversed the deputy commissioner's decision, finding such an interpretation of Iowa Code section 85.34(2)(v) inaccurate. The commissioner held that a claimant's hourly wage, considered in isolation, is not sufficient to limit a claimant's compensation to functional disability. The claimant's hourly wage must be considered in tandem with the actual hours worked or offered by the employer when comparing pre- and post-injury wages and earnings.

Small returned to work for the defendant employer. He works a light duty position where he works no overtime and receives no incentive pay. (Hr. Tr., p. 57) It is indisputable that claimant's post-injury earnings are less than his earnings on or immediately prior to August 10, 2020. As such, I find Small's recovery is not limited to his functional impairment.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

After considering the industrial disability factors set forth by the Iowa Supreme Court, I concluded that claimant sustained a 35 percent loss of future earning capacity as a result of his August 10, 2020, work injury with the defendant employer.

Defendants seek an apportionment of disability pursuant to Iowa Code section 85.34(7).

Iowa Code section 85.34(7) provides:

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

Defendants assert they are entitled to a credit for the 23 percent industrial disability awarded in the April 18, 2013, agreement for settlement for claimant's prior low back injury.

Iowa Code section 85.34 provides no mechanism for apportioning the loss between the present injury and the prior injury. This is in direct contrast to prior apportionment statutes, which explained how the offset was to be calculated when an employee suffers successive injuries while working for the same employer. Iowa Code section 85.34(7)(b) (2016) (". . . the employer is liable for the combined disability that is caused by the injuries, measured in relation to the employee's condition immediately prior to the first injury. In this instance, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer.")

With respect to apportionment statutes, the Iowa Supreme Court has previously stated, "If the legislature wanted to require a credit or offset of disability benefits . . . it logically would have prescribed how [the credit or offset of disability benefits] should be determined." Roberts Dairy v. Billick, 861 N.W.2d 814, 822 (Iowa 2015)

That being said, the plain language meaning of the statute indicates that an employer is only liable for compensation of the disabilities relating to the injury that is being litigated. Based on the plain language meaning of the statute, it does not appear that the intent of Iowa Code section 85.34(7) (2017) has changed to suddenly allow double recoveries.

The current Iowa Code section 85.34(7) provides a straightforward approach to apportionment when compared to prior versions. Regarding the January 23, 2010, date of injury, claimant was paid 115 weeks of permanent partial disability benefits. The current decision found that claimant sustained 35 percent industrial disability regarding the August 10, 2020, date of injury. Based on this, under Iowa Code section 85.34(7), defendants shall pay claimant 60 weeks of permanent partial disability benefits ((35 percent x 500 weeks) - (23 percent x 500 weeks)).

The next issue involves Small's weekly workers' compensation rate. Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded. Section 85.36(6).

The parties have a dispute regarding which weeks should be included in the calculation of Small's gross weekly earnings. Defendants assert an average weekly wage of $914.58, with a corresponding weekly rate of $602.86. (Ex. A, p. 1) Claimant asserts an average weekly wage of $928.77, with a corresponding weekly rate of $611.24. (Ex. 4, p. 24) The only real difference in the parties' calculations is that

defendants excluded the week ending June 7, 2020, as claimant only worked 17.6 regular hours that week. (Ex. A, p. 11) In its place, defendants included the week ending May 10, 2020. (Id.)

While claimant only worked 17.6 regular hours in the week ending on June 7, 2020, he was still paid his customary earnings by using paid sick leave benefits to reach 39.95 hours. A week in which the claimant received vacation or sick leave payments is not automatically excluded from the rate calculation. Mercy Med. Ctr. v. Healy, 801 N.W.2d 865 (Iowa App. June 29, 2011) The test to determine whether a week is representative is whether the claimant's earnings during each particular week was customary for that particular employee given his or her earning history as a whole. In the weeks preceding June 7, 2020, claimant was paid for 32 hours, 39.73 hours, and 39.82 hours. With this in mind, I find that the pay period ending on June 7, 2020, is representative of claimant's customary earnings and should be included in the calculation of claimant's gross weekly earnings.

I accept claimant's gross earnings and rate calculation as the more accurate calculation. I therefore conclude claimant's gross weekly wages are nine hundred twenty-eight and 77/100 dollars ($928.77). The parties have stipulated that claimant is married and entitled to two exemptions. Thus, claimant's weekly workers' compensation rate is six hundred eleven and 24/100 dollars ($611.24).

Claimant seeks reimbursement of his IME with Dr. Kuhnlein. Defendants agree that claimant is entitled to reimbursement for the reasonable cost of an IME, as indicated at hearing. As such, I conclude claimant is entitled to reimbursement of Dr. Kuhnlein's IME in the amount of $4,837.50.

Claimant is seeking an assessment of his costs. Costs are to be assessed at the discretion of the workers' compensation commissioner or the deputy hearing the case. 876 IAC 4.33. I find that claimant was successful in his claim; therefore, an assessment of costs is appropriate. I find that the $103.00 filing fee is an appropriate cost under Rule 4.33(7). I further find that the $6.80 service fee is appropriate under Rule 4.33(3). Defendants are assessed costs totaling one hundred nine and 80/100 dollars ($109.80).

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay sixty (60) weeks of permanent partial disability benefits commencing on the stipulated commencement date of August 10, 2021.

All weekly benefits shall be paid at the rate of six hundred eleven and 24/100 dollars ($611.24).

Defendants shall be entitled to credit for all weekly benefits paid to date.

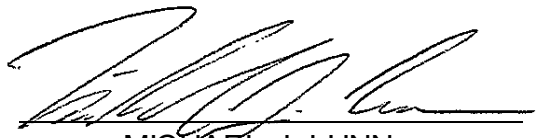
Defendants shall pay accrued weekly benefits, including but not limited to the underpayment of the weekly rate, in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

Defendants shall reimburse claimant in the amount of four thousand eight hundred thirty-seven and 50/100 dollars ($4,837.50) for Dr. Kuhnlein's IME.

Defendants shall reimburse claimant costs totaling one hundred nine and 80/100 dollars ($109.80).

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

Signed and filed this 17th day of June, 2022.



MICHAEL J. LUNN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

James Ballard (via WCES)

Alison Stewart (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.