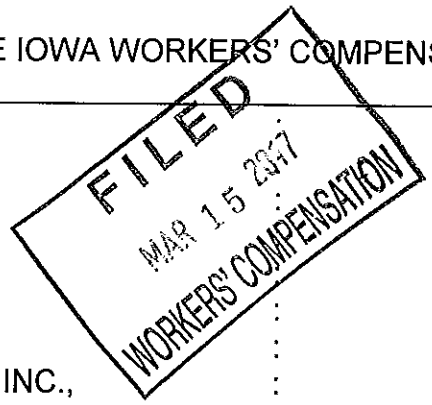
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



LACY ALLEN, Claimant, vs. ANNETT HOLDINGS, INC., Employer, Self-Insured, Defendant.	:	File No. 5024900 REVIEW - REOPENING DECISION Head Note: 2905

STATEMENT OF THE CASE

Claimant Lacy Allen filed a petition in arbitration seeking workers' compensation benefits from the defendant, Annett Holdings, Inc. ("Annett Holdings"). An arbitration hearing was held on March 17, 2010. Exhibits 1 through 18 and A through L were admitted into the record. Allen, Kent Jayne, and Martha Grice testified during the hearing. On June 15, 2010, the deputy workers' compensation commissioner issued an arbitration decision, finding the temporary, light duty work offered to Allen in Des Moines, Iowa was not suitable, awarding Allen 42.714 weeks of healing period benefits, finding Allen had sustained a fifty percent industrial disability, and awarding Allen 250 weeks of permanent partial disability benefits from July 28, 2007.

Annett Holdings filed an appeal and Allen filed a cross-appeal. The decision was affirmed by the agency.

Annett Holdings filed a petition for judicial review and Allen filed a cross-petition for judicial review. The district court reversed the agency's determination the work offered to Allen was not suitable, reversed the award of healing period benefits, and affirmed the finding Allen had sustained a fifty percent industrial disability and the award of 250 weeks of permanent partial disability benefits. The Iowa Supreme Court reversed the district court, in part, and affirmed the agency's finding the work offered to Allen was not suitable, and award of healing period and permanent partial disability benefits.[1]

On September 30, 2015, Allen filed a review-reopening petition, alleging he sustained injuries to his neck, shoulder, back, and body as a whole arising out of his

[1] The original file sent from the agency to the district court and supreme court cannot be located. The file was recreated prior to the most recent proceeding with assistance from the parties.

employment with Annett Holdings, and seeking additional workers' compensation benefits. Annett Holdings filed an answer on October 23, 2015.

A hearing was held at the Division of Workers' Compensation in Des Moines, Iowa on November 22, 2016. Attorney Ben Long represented Allen, who appeared and testified. Attorney Sasha Monthei represented Annett Holdings. Grice appeared on behalf of Annett Holdings, but did not testify. Exhibits 1 through 11, A through C, E, G, and O, and a Joint Exhibit ("JE") were admitted into the record. The record was left open through January 13, 2017, for the receipt of post-hearing briefs. At that time the record was closed.

At the start of the hearing, the parties completed a Hearing Report listing stipulations and issues to be decided. Annett Holdings withdrew all affirmative defenses.

STIPULATIONS

1. Annett Holdings paid Allen temporary benefits from July 27, 2007, pursuant to the June 15, 2010 decision.

2. Temporary benefits are no longer in dispute.

3. Allen's disability is an industrial disability.

4. According to the June 15, 2010 decision, at the time of the alleged injury, Allen's gross earnings were $785.00 per week, he was single and entitled to one exemption, and his weekly benefit rate is $468.07.

5. Allen was paid 250 weeks of permanent partial disability benefits at the rate of $468.07, pursuant to the June 15, 2010 decision.

6. Annett Holdings is not seeking an additional credit for benefits paid.

ISSUES

1. Has Allen sustained a change of condition warranting an award of additional industrial disability benefits?

2. If Allen has sustained a change of condition warranting an award of additional industrial benefits, what is the extent of his disability?

3. Has Allen established he is permanently and totally disabled?

4. Is Allen entitled to recover the cost of an independent medical examination?

5. Should costs be assessed against either party?

FINDINGS OF FACT

Allen attended school through the tenth grade and later received a GED certificate. (Exhibit A, page 2) Allen obtained a welder's certificate and a commercial driver's license. (Ex. A, p. 2) Allen has worked as a construction worker, a welder, a chicken farm/processor production worker, a logger, and a truck driver. (Ex. A, p. 2) Allen commenced work for Annett Holdings shortly before his March 31, 2006 work injury. (Ex. A, p. 2)

On March 31, 2006, Allen developed a burning sensation in his neck and left shoulder while tightening a chain to secure a load. (Ex. A, p. 2) Allen reported the work injury and received medical care. After conservative therapy failed to alleviate Allen's symptoms, Edward Cullom III, M.D., a neurosurgeon, performed a two-level cervical fusion at C3-4 and C4-5 on July 27, 2006. (Ex. A, p. 2)

On February 3, 2009, Amy Wenger, a physical therapist, performed a functional capacity evaluation of Allen, placing Allen in the light category of work. (Ex. A, p. 3) Wenger did not find the evaluation was invalid, but the deputy commissioner noted Wenger pointed out a number of questionable findings, including "only 'moderate' effort, partial self limited performance, increased distracted cervical motion, and a score of 38 on a pain questionnaire where 30 or above tends to indicate exaggeration of pain reports." (Ex. A, p. 3)

Dr. Cullom responded to a form letter from Annett Holdings's counsel agreeing Allen could work at a medium work level and imposing restrictions of lifting fifty pounds, lifting and/or carrying objects weighing up to twenty-five pounds frequently, standing and walking six to eight hours, sitting five to eight hours, and driving three to seven hours. (Ex. A, p. 3) Dr. Cullom agreed Allen's surgery and treatment were typical and ordinary, Allen should be able to return to full-duty without restrictions, and he is capable of returning to over-the-road trucking. (Ex. A, p. 3)

John Kuhnlein, D.O., performed an independent medical examination for Allen on September 4, 2009. In a subsequent report dated January 14, 2010, Dr. Kuhnlein noted,

> Mr. Allen says that he has ongoing significant pain, but there are multiple nonphysiologic findings on examination. This makes it difficult to determine whether his current neck problems are related back to the original injury now some years ago, and I cannot say that his current complaints are related to the March 31, 2006 injury within a reasonable degree of medical certainty.
>
> * * * *
>
> I would suggest that Mr. Allen see a pain specialist. It is hard to sort through all the nonphysiologic findings on examination, but he did have

> the cervical fusion . . . . Mr. Allen needs to go back to work, and to do so, he needs to exercise and lose weight. Motivation has been mentioned before as an issue, and Mr. Allen has not applied for jobs in quite some time. At this point, it would be in Mr. Allen's best interest to be more active and return to the workforce.

(Ex. A, p. 4)

Dr. Kuhnlein opined Allen reached maximum medical improvement on July 27, 2007, and found he had sustained a twenty-five percent impairment of the whole person. (Ex. A, p. 4) Dr. Kuhnlein imposed restrictions of lifting forty pounds occasionally from floor to waist, twenty pounds occasionally over the shoulder, occasionally work at or above shoulder height, occasionally use vibratory or power tools at or above shoulder height, and use caution when wearing a hardhat. (Ex. A, p. 4)

On September 3, 2009, Michael Jackson, M.D., performed an independent medical examination for Annett Holdings and opined Allen had sustained a sixteen percent whole person impairment, and initially placed Allen in the light category of work with a thirty-pound lifting restriction with occasional forward reaching and elevated work. (Ex. A, pp. 4-5) Dr. Jackson believed Allen could return to over-the-road truck driving within his restrictions, but after reviewing Dr. Kuhnlein's report and the functional capacity evaluation he opined:

> [b]ased upon the findings of Dr. Kuhnlein, and upon further review of the FCE report, I would be in agreement that Mr. Allen could safely lift in the 40-50 pound range. This would place him in the medium level of employment.
>
> I previously stated that Mr. Allen could return successfully and safely to over the road truck driving. To the extent that flat bed operation would not pose any difficulty for Mr. Allen, he certainly could perform most other types of driving as they do not require the same level of exertion that is involved with tarping a flat bed load.

(Ex. A, p. 5)

Ashraf Ragab, M.D., evaluated Allen on November 10, 2008, and agreed with Dr. Cullom's impairment rating, and the date of maximum medical improvement, but he did not recommend any permanent restrictions pending a functional capacity evaluation. (Ex. A, p. 5)

The deputy commissioner noted that during the hearing "Allen was evasive and offered shifting explanations and excuses for his actions. Some of his testimony was flatly unbelievable: for example, that he essentially had no idea that Dr. Cullom was repeatedly surprised that he never returned to work." The deputy commissioner

determined based on the record as a whole, including witness demeanor, Allen could not be viewed as a credible witness. (Ex. A, p. 6)

Allen sought an award of permanent total disability under the "odd-lot" doctrine at hearing. The deputy commissioner disagreed, finding:

> [a]nalysis of Allen's industrial disability is complicated by his lack of motivation and credibility. Allen is now 38 years old with GED certification and welding certification as well as a commercial driver's license. His employment history includes construction, welding, logging, meat production and driving. According to Dr. Cullom, he is capable of working within the "medium" exertional category and can specifically work as an over-the-road driver, although Dr. Cullom does not explain how he can do so when he can only drive a maximum of seven hours at a stretch. Dr. Kuhnlein, Allen's choice of evaluating physician, offers lifting restrictions generally in the "medium" category and does not limit standing.
>
> Based on this evidence and the likelihood that Allen has transferable skills in the trucking industry, this is not an "odd-lot" claim. Nonetheless, Allen has a multi-level cervical fusion, likely with residual discomfort, and is limited to employment in the medium exertional class. Considering all the factors of industrial disability as set forth above, it is found that, as a result of the work injury sustained March 31, 2006, Lacy Allen has experienced loss of earning capacity on the order of fifty percent of the body as a whole, or the equivalent of 250 weeks of permanent partial disability.

(Ex. A, p. 10)

Allen asserts he has experienced a change of condition since 2010 and he is now permanently and totally disabled. At the time of the review-reopening hearing Allen was forty-four. (Tr., p. 9) Allen continues to smoke, he is single, and he lives with his brother. (Exs. 1, p. 3; 4, p. 29; 7, p. 48)

Allen has not worked since the 2010 hearing. From March 2010 through April 2015 Allen did not apply for any jobs. (Tr., pp. 54-56) In May 2015 Allen applied for three driver positions, a dock worker position, two dockworker/driver positions, a warehouse worker position, and a warehouse/driver position. (Ex. 10, p. 105) In August 2015 he applied for manager, manager trainee, and associate manager positions for three fast-food restaurants, and a salesperson position for an auto parts store. Allen testified he did not receive an interview for any of the positions. (Tr., pp. 37-38, 58-59) Allen reported he applied for driving and warehouse positions, but he did not believe he could perform the work. (Tr., pp. 57-58) Allen applied for a manager position, but he has no experience as a manager. (Tr., p. 58)

Allen complains that since the hearing he has developed numbness in his bilateral upper extremities into his fingers, a cracking sensation in his neck, a pinprick/burning sensation in his neck, difficulty swallowing, and the pain in his neck and shoulders has increased. Allen testified,

> The sticking, the burning getting worse. The numbness going down my right side, it go [sic] around my left side, you know. I probably just consistently getting [sic] worse. The – like when I'm laying down, if I roll over, like you – when you pop your knuckles, in my neck, it does that and it's getting even louder, you know, when I, you know, roll from one side to the other. You know, I have to just be cautious about how I move my neck.

(Tr., p. 13) Allen contends his voice has changed and he has to hold his throat while drinking because he feels a lump in his throat and it feels like the plate is shifting and moving in his neck. (Tr., p. 16)

Allen acknowledges he had pain in his knees, hips, back, shoulder, and neck prior to the 2010 hearing, but contends the pain is more intense now, it is harder for him to do things, he has numbness from his neck in "both fingers" of his bilateral arms, he has to lean his head toward the left, and the clicking in his neck is louder. (Tr., pp. 16-17) Allen testified, "where the tear was in the rear of my neck, it's sticking more. And like I said before, it be like just a sharp point, like a pin." (Tr., pp. 17-18)

On cross-examination, Allen admitted he reported he had constant pain in his right shoulder in 2010 and felt like his arm was going to fall off. (Tr., p. 44) Allen acknowledged he had some numbness and tingling in his left fingers in 2010, but he contends the numbness and tingling is worse now. (Tr., pp. 46-47)

Allen testified he has to be cautious about movements and what he picks up, "it takes a toll on me getting dressed," and he has to be cautious when he turns or looks right because of the pain in his neck. (Tr., pp. 39-40) Allen admitted that in 2010 he described difficulty drying off from a shower, brushing his teeth, and getting dressed. (Tr., p. 45) During his deposition in 2009 Allen reported he could not drink a can of soda because of the limited movement in his neck and difficulty looking up. (Tr., pp. 49-50)

During the review-reopening hearing Allen reported he cannot sleep due to the pain, but admitted in 2010 he would only sleep one to four hours per night. (Tr., pp. 40-44) Allen admitted he told his physicians he could be up two days straight due to the pain in 2010. (Tr., p. 44) Allen testified his hip and leg issues interfere with his ability to sleep, bend and twist, lift weight, and walk. (Tr., pp. 65-66) Allen does not believe he can work due to his increased symptoms. (Tr., pp. 33-36) As with the previous deputy workers' compensation commissioner, I did not find Allen to be a credible witness at hearing. He did not maintain appropriate eye contact, he engaged in furtive movements while testifying, and he was evasive when answering questions.

After the original hearing Allen returned to Dr. Cullom, his treating physician, on October 3, 2011, complaining of right shoulder and neck pain. (Ex. JA, p. 18) Dr. Cullom noted,

> [o]n exam his cervical range of motion is slightly diminished as expected now. I could not elicit a Lhermitte or Spurling sign. His incision is well healed. Shoulder range of motion is minimal on either side. I get the feeling that he is actively working against me when I passively try to move his shoulders. Individual muscle testing seems to be equal. Tone seemed to be normal. Effort is suboptimal. Reflexes are 2+. I could not elicit any Hoffman's. Sensory wise he appears to be intact. Muscle bulk and tone seem to be normal. Skin color and temperature seems to be normal. Both hands are fairly rough probably equal debris on both hands. I really do not have anything further to offer him. As far as I am concerned he should have been back to work years ago. This is now going on 5 years since his surgery. I do not see any objective evidence or problems. He seems to be adequately well healed. I do not quite understand why this issue has not been settled years ago. As before I have nothing further to offer him.

(Ex. JA, p. 18)

Allen attended an appointment with Larry Field, M.D., his treating orthopedic surgeon, on November 23, 2011, complaining of bilateral shoulder pain. (Ex. JA, p. 41) Dr. Field noted he had examined Allen five years before and he had referred him to a neck surgeon. (Ex. JA, p. 41) Dr. Field took x-rays, which "show some concern related to degenerative arthritis versus avascular necrosis." (Ex. JA, p. 41) Dr. Field listed an impression of bilateral shoulder pain possibly related to avascular necrosis with no known etiology. (Ex. JA, p. 41)

Annett Holdings's attorney sent Dr. Cullom a form opinion letter, which he signed in February 2012. (Ex. JA, p. 43) Dr. Cullom did not provide any written comments, and agreed if Allen has degenerative arthritis in one or both of his shoulders the condition would not be related to his March 31, 2006 work injury, if Allen has avascular necrosis in one or both shoulders the condition would not be related to his March 31, 2006 work injury, and he did not recommend additional magnetic resonance imaging for Allen's work injury. (Ex. JA, p. 43)

Dr. Field ordered magnetic resonance imaging of Allen's right shoulder, which was completed on January 2, 2013. (Ex. JA, p. 45) The reviewing radiologist listed an impression of avascular necrosis of the humeral head with collapse of the superior articular surface and no evidence of a rotator cuff or labral tear. (Ex. JA, p. 45) Dr. Field has not opined Allen's avascular necrosis is related to his 2006 work injury.

During a follow-up appointment on January 9, 2013, Dr. Field noted Allen's examination was "basically unchanged." (Ex. JA, p. 46) Dr. Field documented Allen

informed him he was being treated for hip problems and Dr. Field suspected the condition might be related to avascular necrosis. (Ex. JA, p. 46) Dr. Field provided Allen with anti-inflammatory medication, and discussed treatment options for his shoulder pain. (Ex. JA, p. 46)

Allen attended an appointment with Andrea Speed, ARNP, complaining of body pain on November 13, 2013. (Ex. JA, p. 47) Speed assessed Allen with chronic back and hip pain. (Ex. JA, p. 47) Speed documented Allen's back pain had occurred for years while lifting, bending, and engaging in activities. (Ex. JA, p. 47) Speed prescribed Meloxicam and Cyclobenzaprine HCl. (Ex. JA, p. 47) Allen received follow-up care with Speed on December 11, 2013, and March 3, 2014. (Ex. JA, pp. 49-52)

On November 20, 2014, Allen attended an appointment with David Collipp, M.D., a physiatrist, complaining of neck, left hip, and bilateral shoulder pain. (Ex. JA, p. 53) Dr. Collipp assessed Allen with bilateral shoulder arthritis, a history of a two-level fusion with range of motion reduced beyond expected, and bilateral upper limb paresthesias. (Ex. JA, pp. 53-54)

Annett Holdings's attorney contacted Dr. Collipp on November 24, 2014, and inquired whether Allen's avascular necrosis in his bilateral shoulders is related to his March 31, 2006 work injury. (Ex. JA, p. 55) Dr. Collipp documented Allen's avascular necrosis in his bilateral shoulders is not related to his 2006 work injury. (Ex. JA, p. 55) Dr. Collipp requested approval of electromyography and magnetic resonance imaging of Allen's neck, and noted Allen currently has a light to medium work capacity. (Ex. JA, p. 55)

Allen received magnetic resonance imaging of his cervical spine on December 8, 2014. (Ex. JA, p. 56) The reviewing radiologist listed an impression of "C5/C6 degenerative disc bulge and osteophyte formation causing moderate canal stenosis." (Ex. JA, p. 56)

On February 6, 2015 and August 11, 2015, Allen returned to Speed complaining of chronic back pain and left hip pain. (Ex. JA, p. 58-61) Speed prescribed Meloxicam, and Toradol and Dexamethasone injections. (Ex. JA, pp. 58-61)

Allen retained Howard Katz, M.D., a physiatrist, to conduct an independent medical examination. (Exs. 1; 2) In October 2015, Dr. Katz examined Allen and reviewed his medical records. (Ex. 1, p. 1) Allen reported having difficulty opening jars, washing walls or floors, carrying shopping bags, cutting his food with a knife, washing his back, and participating in recreational activities that require force or impact with his arms. (Ex. 1, p. 4) Allen complained of severe pain and tingling in his hands that prevents him from sleeping. (Ex. 1, p. 4)

Dr. Katz assessed Allen with a status post right paracentral disc protrusion at C3-4 and C4-5, status post anterior cervical discectomy and fusion C3 to C5 with decreased sensation in his arms and chronic neck pain, bilateral avascular necrosis of

the humerus, and a disc bulge at C5-6. (Ex. 1, p. 15) Dr. Katz found since the June 15, 2010 ruling, Allen's condition has changed because he "has been complaining of increasing shoulder pain and hip pain." (Ex. 1, p. 15) Dr. Katz opined Allen's current symptoms, limitations and restrictions are consistent with his 2006 work injury, finding:

> Mr. Allen has had a 2-level fusion. This frequently is accompanied by problems swallowing. Mr. Allen has had further degeneration of his cervical spine one level below his current fusion. Based to a reasonable degree of medical certainty that further deterioration is caused by his injury and the treatment with a 2-level fusion. It is well known that there is increased risk of having further deterioration and requiring surgery, especially one level above and one level below a fusion. His further cervical degeneration has resulted in increased neck pain. The numbness in his fingertips may or may not be related directly to the injury. EMG and nerve conduction study will reveal whether this is cervical radiculopathy, carpal tunnel syndrome, other peripheral nerve entrapment or injury, or a combination of the above. If his problems relate to cervical radiculopathy they would be related to the cervical spine injury of March 31, 2006.
>
> Certainly Mr. Allen's complaints of neck pain are likely related to his cervical spine injury and 2-level fusion. His 2-level fusion is from C3 to C5 which is likely to cause bilateral shoulder pain. Based to a reasonable degree of medical certainty Lacy Allen's complaints of problems swallowing, neck pain, neck pain causing headaches, and bilateral shoulder pain is as a direct result of the March 31, 2006 injury and his 2-level cervical fusion. Based to a reasonable degree of medical certainty his disc pathology at C5-6 is a direct result of his C3-4 and C4-5 fusion. Based to a reasonable degree of medical certainty some of the problems of numbness, if not all of the problems with numbness, are caused by the March 31, 2006 injury and the C3 to C5 fusions. EMG and nerve conduction velocity can help differentiate any other causes of numbness in his arms and hands.

(Ex. 1, pp. 15-16)

Using Chapter 15, page 392, section 15.6 of the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Katz found Allen falls under DRE cervical category IV and assigned Allen a twenty-five percent impairment to the body as a whole. (Ex. 1, p. 16) Dr. Katz imposed restrictions of sedentary and light work, no "work where he has to look up except rarely" and no "work with his arms overhead except rarely" and work above shoulder height with his arms occasionally. (Ex. 1, p. 16) Dr. Katz further opined that given Allen's restrictions and age he doubts anyone will hire Allen, and he believes Allen is vocationally disabled. (Ex. 1, p. 17)

On December 8, 2015, Allen attended a follow-up appointment with Speed complaining of pain. (Ex. JA, p. 62) Speed prescribed Meloxicam, and administered injections into Allen's right and left hips. (Ex. JA, p. 62) Speed administered additional injections on May 4, 2016, and refilled Allen's Meloxicam prescription. (Ex. JA, p. 65)

Cassim Igram, M.D., an orthopedic surgeon at the University of Iowa Hospitals and Clinics, performed an independent medical examination of Allen on October 12, 2016. (Ex. E, p. 1) Dr. Igram documented Allen complained of neck pain, frequent headaches, difficulty swallowing, a raspy voice, numbness in his fingers, and that sneezing causes radiation of pin-prick sensations down his right arm. (Ex. E, pp. 1-2) Allen described his pain as "aching, burning, radiating, pins and needles, and shooting, at the neck and upper back, shoulder blades, down the right arm to the hand, at the right hip and radiating down the right buttock into the leg" and that his pain is worse when he shakes his arm too hard or drives. (Ex. E, p. 1)

Dr. Igram opined,

> Neck and back pain is likely myofascial, with a degenerative component. Over time his condition has deteriorated but this is not related to the initial injury of his neck. There are no further impairment recommendations for this patient with regard to his neck or back injury. We would not recommend any additional treatment for his neck or back. After examination, in our opinion Mr. Allen's main complaint seems to be predominantly about the neck and shoulders, which is likely secondary to the [avascular necrosis] of his shoulders. [Avascular necrosis] is not a work-related injury and would have nothing to do with the injury of his neck from 2006.

(Ex. E, p. 3)

Allen has applied for benefits through the Social Security Administration in 2010 and 2014. (Tr., p. 52) His applications have been denied. (Tr., p. 36) Allen has appealed the most recent denial.

During his November 15, 2016 deposition, Dr. Collipp testified the disc bulge identified on the December 8, 2014 magnetic resonance imaging is not causally related to Allen's 2006 neck injury. (Ex. 8, p. 83) Dr. Collipp explained,

> [t]here is a possibility, approximately 25 percent of times, when a person has fusion at one level, they can have an advanced degenerative change at the level above or the level below, and it usually progresses fairly rapidly, within two years, even going on to require surgical change on the – in other words, surgical correction. On the other hand, this is a disc bulge, which is, of course, a degenerative change, as well as osteophyte, which is bony growth. Degenerative change, that means more consistent with just a gradual degenerative change that people get, and C5-C6 is a

> common level for having such degenerative change. So while it is possible that it could be related to that, within a reasonable degree of medical probability it is not related to that. It is more reasonable that it is not.

(Ex. 8, pp. 83-84)

When questioned about Allen's avascular necrosis, Dr. Collipp opined the condition is not related to the 2006 work injury, as follows:

> Q. Dr. Collipp, with respect to the avascular necrosis condition found in Mr. Allen's shoulders, do you have an opinion whether that condition was somehow caused by, whether materially aggravated, lit up, or otherwise somehow related to his neck injury in 2006, within a reasonable degree of medical certainty?
>
> A. Yes, ma'am, I have an opinion, and the opinion is that the avascular necrosis in both of the shoulders is unrelated to the injury, it's unrelated to the treatment for the injury, it's unrelated to the neck surgery.
>
> Q. And can you explain why that is your opinion?
>
> A. In terms of mechanisms of injury or causation for avascular necrosis, we think of things like sickle-cell disease, alcoholism, steroid abuse, decompression, that's like scuba divers, and some people just happen to develop that. We don't see it as causally related to pulling one's arms together even forcefully, nor do we see it as related to having had neck surgery. Those are not recognized causes. It's much more likely that it is related to just the idiopathic development of avascular necrosis.
>
> Coupled with that, he has avascular necrosis of his left hip, suggesting that he actually is prone to such changes, whether because of, again, one of the causes that I've mentioned before or some other cause, perhaps something genetic that I don't know about. But it is much more logical, therefore, and certainly within a reasonable degree of medical probability it is more probable that it is unrelated to a trauma, which is not a recognized cause of avascular necrosis, anyway.

(Ex. 8, p. 84)

On cross-examination, Dr. Collipp reported that when avascular necrosis comes on acutely, it "is extremely painful and that would receive the focus of attention." (Ex. 8, p. 88) Dr. Collipp did not see an event from 2006 that would have caused the condition because it would have been "excruciatingly painful." (Ex. 8, p. 94) Dr. Collipp testified he did not recall seeing that as being the focus of the attention, but rather the focus was

on Allen's neck, and Dr. Field did not find avascular necrosis when he examined Allen and his x-rays when he provided Allen's initial treatment. (Ex. 8, p. 88)

With respect to Allen's complaints of posterior neck pain and pain across his shoulders, Dr. Collipp opined,

> it's related to what's going on with his avascular necrosis in his shoulders. The disc bulge itself that's there at C5-C6, we wouldn't consider that to be likely a cause of neck pain. It's a possible thing, but that's not typical, particularly because it does not appear to be causing any kind of nerve damage, consistent with my examination, as a matter of fact.
>
> And the muscles that attach to the neck are also the same muscles that attach to the shoulders, and so the shoulder muscles, like levator scapulae, the rhomboids, trapezius and such, these are muscles that are holding the shoulder blades in place, and when a person has avascular necrosis of the humeral head or avascular necrosis of their shoulder joint, we would expect those muscles to actually be involved, and indeed that's typical.

(Ex. 8, p. 84)

CONCLUSIONS OF LAW

I. Change of Condition

Iowa Code section 86.14 governs review-reopening proceedings. When considering a review-reopening petition, the inquiry "shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded." Iowa Code § 86.14(2). The deputy commissioner does not re-determine the condition of the employee adjudicated by the former award. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 391 (Iowa 2009). The deputy commissioner must determine "the condition of the employee, which is found to exist subsequent to the date of the award being reviewed." Id. (quoting Stice v. Consol. Ind. Coal Co., 228 Iowa 1031, 1038, 291 N.W. 452, 456 (1940)). In a review-reopening proceeding, the deputy commissioner should not reevaluate the claimant's level of physical impairment or earning capacity "if all of the facts and circumstances were known or knowable at the time of the original action." Id. at 393. The claimant bears the burden of proving, by a preponderance of the evidence that, "subsequent to the date of the award under review, he or she suffered an *impairment or lessening of earning capacity proximately caused by the original injury*." Simonson v. Snap-On Tools Corp., 588 N.W.2d 430, 434 (Iowa 1999) (Emphasis in original.)

Allen complains that since the hearing he has developed numbness in his bilateral upper extremities into his fingers, a cracking sensation in his neck, a pinprick/burning sensation in his neck, difficulty swallowing, and the pain in his neck and

shoulders has increased. Allen has experienced a change in condition since the original arbitration decision. He has developed avascular necrosis in his hips and shoulders and a disc bulge at C5-6. Therefore, it is necessary to determine whether the conditions were caused by the original work injury, and whether Allen has sustained an impairment or a lessening of earning capacity caused by the original injury.

The claimant bears the burden of proving the claimant's work-related injury is a proximate cause of the claimant's disability and need for medical care. Ayers v. D & N Fence Co., Inc., 731 N.W.2d 11, 17 (Iowa 2007); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 153 (Iowa 1997). "In order for a cause to be proximate, it must be a 'substantial factor.'" Ayers, 731 N.W.2d at 17. A probability of causation must exist, a mere possibility of causation is insufficient. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997). The cause does not need to be the only cause, [i]t only needs to be one cause." Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60, 64 (Iowa 1981).

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The deputy commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

It is well-established in workers' compensation that "if a claimant has a preexisting condition or disability, aggravated, accelerated, worsened, or 'lighted up' by an injury which arose out of and in the course of employment resulting in a disability found to exist," the claimant is entitled to compensation. Iowa Dep't of Transp. v. Van Cannon, 459 N.W.2d 900, 904 (Iowa 1990). The Iowa Supreme Court has held,

> [A] disease which under any rational work is likely to progress so as to finally disable an employee does not become a "personal injury" under our Workmen's Compensation Act merely because it reaches a point of disablement while work for an employer is being pursued. It is only when there is a direct causal connection between exertion of the employment and the injury that a compensation award can be made. The question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause.

Musselman v. Cent. Tel. Co., 261 Iowa 352, 359-60, 154 N.W.2d 128, 132 (1967).

Since the original arbitration hearing Allen has been examined by Drs. Cullom, Collipp, Field, Igram, and Katz. Only Dr. Katz has determined Allen's neck pain, shoulder pain, and C5-6 disk bulge are related to his March 2006 work injury. Dr. Katz examined Allen on one occasion for purposes of conducting an independent medical examination. Dr. Katz found since the June 15, 2010 ruling, Allen's condition has changed because he "has been complaining of increasing shoulder pain and hip pain." (Ex. 1, p. 15) No expert has opined that Allen's hip pain is related to the 2006 work injury.

Allen has been diagnosed with avascular necrosis in his hip and shoulders. Drs. Cullom, Collipp, and Igram have opined if Allen has avascular necrosis, the condition is not related to his 2006 work injury. (Exs. E, p. 4; JA, pp. 43, 54-55) During his deposition Dr. Collipp noted acute avascular necrosis "is extremely painful and that would receive the focus of attention." (Ex. 8, p. 88) Dr. Katz did not directly opine Allen's avascular necrosis is related to the original work injury, but found Allen's current symptoms, limitations, and restrictions are consistent with his March 31, 2006 injury. (Ex. 1, pp. 15-16) Allen's medical records do not support he was suffering from excruciating shoulder pain from the date of injury through the date of the original arbitration hearing. The record does not support Allen's bilateral shoulder avascular necrosis is related to his 2006 work injury.

Dr. Katz opined Allen's swallowing problems, deterioration and disk bulge at C5/C6, neck pain and neck pain causing headaches, and shoulder pain are a direct result of his work injury and two-level fusion. (Ex. 1, pp. 15-16) Drs. Igram and Collipp disagreed, and opined Allen has experienced degenerative changes unrelated to the 2006 work injury and that his avascular necrosis is a cause of neck and shoulder pain. (Exs. E, pp. 1-4; 8) I find the opinions of Drs. Igram and Collipp more persuasive than Dr. Katz's opinion.

Dr. Collipp opined disc bulges at C5-C6 are commonly the result of gradual degenerative changes, and noted approximately twenty-five percent of the time following a fusion, the patient may develop degenerative changes one level above or below the fusion, "and it usually progresses fairly rapidly, within two years." (Ex. 8, pp. 83-84) No rebuttal opinion was obtained from Dr. Katz.

With respect to Allen's complaints of posterior neck pain and pain across his shoulders, Dr. Collipp opined,

> it's related to what's going on with his avascular necrosis in his shoulders. The disc bulge itself that's there at C5-C6, we wouldn't consider that to be likely a cause of neck pain. It's a possible thing, but that's not typical, particularly because it does not appear to be causing any kind of nerve damage, consistent with my examination, as a matter of fact.
>
> And the muscles that attach to the neck are also the same muscles that attach to the shoulders, and so the shoulder muscles, like levator

> scapulae, the rhomboids, trapezius and such, these are muscles that are holding the shoulder blades in place, and when a person has avascular necrosis of the humeral head or avascular necrosis of their shoulder joint, we would expect those muscles to actually be involved, and indeed that's typical.

(Ex. 8, p. 84) Allen has not met his burden of proof that he has suffered an impairment or a lessening of earning capacity proximately caused by the original injury.

II. Independent Medical Examination

In Exhibit 9, Allen seeks to recover the $2,295.00 cost of Dr. Katz's opinions. An itemized bill of the charges was not included in Allen's exhibits.

After receiving an injury, the employee, if requested by the employer is required to submit to examination at a reasonable time and place, as often as reasonably requested to a physician, without cost to the employee. Iowa Code § 85.39. If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes the evaluation is too low, the employee "shall, upon 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 choosing." Id.

After the original arbitration hearing, Allen returned to his treating physician, Dr. Collum, complaining of increased pain, discomfort, and symptoms following the work injury. (Ex. JA, p. 18) Dr. Collum opined Allen's complaints were not related to his original work injury. (Ex. JA, p. 43) Allen disagreed with Dr. Collum's opinion, and sought an independent medical examination with Dr. Katz. Allen has not produced separate charges for Dr. Katz's examination and the report. Allen is not entitled to recover the cost of Dr. Katz's independent medical examination. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 846-47 (Iowa 2015) ("We conclude section 85.39 is the sole method for reimbursement of an examination by a physician of the employee's choosing and that the expense of the examination is not included in the cost of a report").

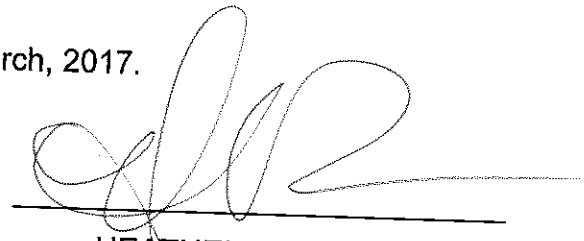
ORDER

IT IS THEREFORE, ORDERED:

Claimant shall take nothing further.

The parties shall pay their own costs.

Signed and filed this 15th day of March, 2017.



HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Pressley Henningsen
Benjamin P. Long
Attorneys at Law
425 - 2nd St. S.E., Ste. 1140
Cedar Rapids, IA 52401
phenningsen@fightingforfairness.com
blong@fightingforfairness.com

Sasha Monthei
Attorney at Law
PO Box 36
Cedar Rapids, IA 52406
smonthei@scheldruplaw.com

HLP/sam

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 in writing and received by the commissioner's office 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 a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.