BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DALE A. HAYES, Claimant, vs. EAGLE WINDOW & DOOR, MANUFACTURING, INC. Employer, and OLD REPUBLIC INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5038676 REVIEW-REOPENING DECISION Head Note No.: 1803, 2500, 2700

STATEMENT OF THE CASE

Dale Hayes, claimant, filed a petition for review-reopening of an Arbitration Decision that was filed on July 23, 2013. The hearing on the review-reopening petition was held on September 19, 2016.

The evidentiary record includes Claimant's Exhibits 1 through 13, and Defendants' exhibits I through R. At the hearing, claimant and Robin Sassman, M.D., provided testimony.

Counsel for the parties submitted post-hearing briefs on November 14, 2016, and the case was considered fully submitted at that time.

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.

ISSUES

The parties submitted the following disputed issues for resolution:

1) Whether claimant sustained a change in condition, causally related to the original work injury such that the extent of his disability previously established in the arbitration award filed July 23, 2013, should be reassessed.

2) If such a change in condition has occurred, whether claimant is entitled to an assessment of permanent partial disability based on bilateral arms or the body as a whole.

3) The extent of permanent partial disability.

4) The appropriate commencement date for any additional permanent partial disability benefits.

5) Whether claimant is entitled to medical expenses attached to the hearing report.

6) Whether claimant is entitled to alternate medical care.

7) Costs.

FINDINGS OF FACT

Having considered the evidence presented, I find as follows:

This matter arises following an arbitration hearing that occurred on May 6, 2013, and an Arbitration Decision filed July 23, 2013.

The underlying injury is described in the Arbitration Decision and occurred on July 20, 2010. Claimant sustained a shock/electrocution injury while working on a machine at his place of employment, Eagle Window and Door Manufacturing, Inc. (Arbitration Decision, page 2)

At the time of the review-reopening hearing on September 19, 2016, claimant, Dale Hayes was 50 years of age. (Transcript p. 40) He graduated from high school in 1983 and described his grades as C's and D's. (Id.) He did not attend any further formal education, but had on-the-job training in electrical and pneumatics. (Id.)

The presiding Deputy at the arbitration hearing determined that claimant was entitled to permanent partial disability based on bilateral arms and not the body as a whole. This decision was based substantially on the fact that the permanency related to the work injury was limited to the bilateral arms. (Arb. Dec., p. 2) The Deputy awarded 15 weeks of permanent partial disability benefits, based Dr. Sassman's assessment of three (3) percent functional impairment to the bilateral arms. In addition, the Deputy determined that April 21, 2011, was the appropriate commencement date for those benefits. (Arb. Dec., p. 3)

Prior to the May 6, 2013, Arbitration Hearing

Claimant's work history includes working for FDL Foods in a meatpacking plant, where he pulled ribs. He testified that this was not a physically demanding job. (Tr. p. 41) He later began working for Eagle Window and Door in about 1987. (Id.) At Eagle Window and Door, claimant worked assembling windows and doors and then moved to the maintenance department. (Tr. pp. 41-43) His job in maintenance involved welding, putting in air lines, doing electrical work and machine repair. (Tr. p. 43) He described this job as physically demanding. (Tr. p. 44)

After the injury on July 20, 2010, claimant was off work for about a week. (Tr. p. 78) When he returned to work, he continued to work in the maintenance department until his termination. (Id.) Claimant testified that his supervisor allowed him to do what he could, and to get help from other people. (Tr. p. 79) Upon his return to work, claimant worked full-time, from 40 to 60 hours per week, until his termination. (Tr. p. 92) Claimant testified that the work he was performing after the injury was no longer heavy work although he agreed that he continued to do some maintenance work including fixing broken airlines. (Tr. p. 93) Joseph Chen, M.D., reported in October 2013 that claimant was still welding as part of his maintenance job. (Exhibit 2, p. 1)

In December 2011, claimant described the effect of his injury in his answers to interrogatories as follows:

> I have a lack of strength and endurance in my arms. I lost significant strength in my arms after using them on difference [sic] jobs. I have loss of grip strength as well. At night I wake up due to stiffness and pain. I cannot get comfortable while sleeping. I am up every 1-2 hours due to pain and stiffness in my arms.

(Ex. J, p. 3)

Claimant saw Dr. Chen at the University of Iowa Hospitals and Clinics (UIHC) on March 16, 2011, and described bilateral arm pain with a lot of tingling in his arms. There was no discussion of neck pain at that time. Reference is made to normal results of EMG/NCV studies, and evaluation with a neurologist. (Ex. 2, p. A-1) Claimant is described by Dr. Chen as having "predominantly upper extremity neuropathic pain." (Ex. 2, p. A-3) On April 20, 2011, Dr. Chen assigned no permanent restrictions and a two percent whole person impairment for the bilateral arms because of the "ongoing subjective complaints of pain and fatigue with both arms." (Ex. 2, p. A-4) On October 22, 2012, Dr. Chen confirmed that he found no "objective evidence of any permanent functional impairment according to the AMA Guides to the Evaluation of Permanent Impairment, 5th edition," and his assignment of the two percent rating was based on subjective complaints. (Ex. 2, p. A-7)

Robin Sassman, M.D., conducted an independent medical evaluation (IME) of claimant on January 9, 2013. (Ex. 12, p. G-1) Dr. Sassman concluded that claimant had neuropathic pain and left lateral epicondylitis that were caused by the electrocution and found that he sustained a three percent whole person impairment due to his reported pain based on chapter 18 of the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides). She also assigned restrictions of limiting lifting, pushing, pulling and carrying to 50 pounds occasionally and limit vibratory and power tools to an occasional basis. (Ex. 12, p. G-8)

During Dr. Sassman's IME evaluation of claimant, he specifically denied any neck pain. (Ex. 12, p. G-5)

After the May 6, 2013, Arbitration Hearing

Since the arbitration hearing on May 6, 2013, claimant was terminated from his employment at Eagle Window and Doors on September 14, 2014, for an alleged safety violation, relating to lock out tag out (LOTO) procedure. (Tr. p. 80-81) Claimant testified that he believed he was following his supervisor's directive and was terminated as a result. (Id.) The Termination Recommendation document from the employer indicates that claimant knowingly violated the LOTO procedure. (Ex. R, p. 20)

Claimant worked for Eagle Window and Doors for 28 years, and was earning about $21.00 per hour at the time of his termination. (Tr. p. 82; Ex. 13, p. 5) He testified that given his current physical condition, he did not believe that he could currently perform any of the jobs that he had done at Eagle Window and Doors. (Tr. p. 89)

Following his termination, claimant received unemployment benefits before going to work for J & J Pool, full-time earning $10.00 per hour, where he worked winterizing swimming pools and hot tubs. (Tr. pp. 82-83) He testified that this job required a lot of heavy lifting of anti-freeze, and that he was only able to do this job for two weeks when he just "couldn't do it no more." (Tr. p. 83)

Claimant then worked for Express Temporary Service and was placed at the Hormel/Progressive Processing plant, where he earned $10.00 per hour folding boxes and putting canned meat into boxes and lifting them onto a conveyor. (Tr. p. 84) The boxes weighed about 5 pounds. (Id.) Claimant quit after two days because of his "problems." (Tr. p. 84) He was then offered additional work through the temporary agency, at Varied plastics, but declined because of the requirement that he lift 50 to 60 pounds, believing that this would violate the restrictions assigned by Dr. Miller. (Tr. p. 85)

Claimant then began working at Kwik Shop somewhere between January and March, 2016, doing light cleaning, and was eventually moved to cashier. (Tr. pp. 85-86; Ex. K, p. 2) Claimant reported working only a few days as a cashier, stating that after

working a few hours, "my fingers would lock up." (Tr. p. 86) However, he advised Dr. Sassman, during his IME on May 16, 2016, that the cashier job was 20 hours per week and was "going okay." (Ex. 12, p. 10) Claimant quit his job at Kwik Shop shortly thereafter. (Tr. p. 87) He worked at Kwik Shop for about two and one half months. (Ex. K, p. 2)

Claimant began working at Casey's, in the kitchen, on May 20, 2016. (Tr. p. 87; Ex. K. p. 2) He agreed that the work is "pretty easy." (Tr. p. 87) He earns $9.25 per hour with no benefits and remained employed at Casey's at the time of the hearing working five hour shifts. (Tr. pp. 87-88) Barbara Laughlin reported in her Employability Assessment prepared on August 18, 2016, that claimant was working 30 hours per week. (Ex. 13, p. 6) Claimant testified that prior to being hired at Casey's he spoke to the supervisor about his limitations and said he receives an accommodation of taking breaks as needed. (Tr. pp. 87-88)

Following the arbitration hearing claimant returned to Dr. Chen on October 16, 2013, reporting that his bilateral arm pain was worse than before and he was concerned about whether he would still be able to do his job in a few years. (Ex. 2, p. 1) Dr. Chen noted that claimant has "continued upper extremity pain following a work-related electrocution type injury to his arms in July 2010," but stated that he had no further medical recommendations for him and that he should follow-up with his primary care physician for trouble with sleeping and pain. (Ex. 2, p. 5) Dr. Chen also stated that although his chronic pain may be frustrating, he has "no underlying medical disease process that is guaranteed to make him worse or render him incapable of working two years from now." (Id.)

It is curious that Dr. Chen acknowledged an apparent causal connection concerning claimant's work injury and his pain, referring to is as "continued upper extremity pain following a work-related electrocution type injury to his arms in July 2010," yet referred claimant to his primary care physician for treatment of that pain. (Ex. 2, p. 5)

It appears that it was after this appointment that the workers' compensation carrier stopped paying for all or nearly all medical treatment according to the medical bills sought by claimant in the summary attached to the hearing report. In addition, claimant testified that after his last visit with Dr. Chen, the nurse case manager advised him that the matter was closed and "we're done." (Tr. p. 91) Claimant stated that he has made attempts to obtain additional authorized visits to no avail. (Id.)

Claimant sought care at Unity Point Health/Finely Pain Clinic (Finely Clinic) with Timothy Miller, M.D., on February 12, 2014, who noted that his pain was "localized in the forearm." (Ex. 3, p. 2) It is noted that his "[n]eck range of motion is full and does not cause increased symptoms with flexion or extension." (Id.) A cervical MRI and EMG were recommended. (Ex. 3, pp. 2-3)

The MRI obtained February 14, 2014, revealed "[m]ultilevel degenerative changes of the cervical spine resulting in mild thecal sac effacement and moderate to severe neuroforaminal narrowing at multiple levels." (Ex. 3, p. 5)

On April 21, 2014, claimant was seen by Joseph D. Smucker, M.D., at the University of Iowa Hospitals and Clinics (UIHC). It was noted that claimant had a 2 to 3 year history of "worsening upper back pain, neck pain and upper extremity weakness. His problem started over an accident where he was electrocuted." (Ex. 2, p. 8) This appears to be the first report specifically of neck pain. Claimant reported that since the electrical injury "he has had worsening stiffness, pain of [sic] his neck, radiating into his bilateral upper extremities in a glove-like distribution." (Id.) However, it is also noted that diagnostic testing was "reportedly negative for any major radiculopathy." (Id.) Claimant reported that he was still working maintenance and able to use his hands, but that they are numb and weak at the end of the day. (Id.) Dr. Smucker stated that claimant had "chronic neck pain, upper back pain and arm pain." (Ex. 2, p. 12) EMG testing was recommended. (Id.)

The EMG was conducted on June 18, 2014 and Mark Fortson, M.D., recorded his impression as: "(1) no evidence of polyneuropathy; (2) there is EMG evidence of multi-level cervical radiculopathy; and, (3) no evidence of median or ulnar entrapment." (Ex. 6, p. 2)

On September 23, 2014, claimant was seen by Foad Elahi, M.D., at the UIHC. (Ex. 2, p. 16) Claimant advised that he had pain, heaviness, tingling and weakness in his bilateral forearms and rated his pain at 10/10. He also reported weakness in his hands. Claimant advised that the Hydrocodone gave him no particular relief. (Id.) However, claimant also indicated when he was asked that his neck "does not bother him much and it does not go above 2/10." (Ex. 2, p. 17) It is noted by Dr. Elahi that Dr. Smucker evaluated claimant "on 04/21/2014 for upper back pain and bilateral upper extremity pain and no surgical intervention was recommended." (Ex. 2, p. 16) Dr. Elahi recommended, among other things, a trial spinal cord stimulator. (Ex. 2, pp. 19-20)

Dr. Miller wrote a letter to claimant's attorney, Mark Sullivan on October 23, 2014. Dr. Miller noted that according to Dr. Fortson, the MRI and EMG were negative. (Ex. 3, p. 7) However, he also stated that "[t]here was some subtle findings of radiculopathy that could be related to the electrical injury, and do not appear compressive based on the MRI." (Id.) Dr. Miller stated that it is rare but not unheard of to have ongoing pain after an electrical injury. He referred to a medical journal report of a similar situation, noting that claimant "would be more susceptible to this type of injury given his history of poorly controlled diabetes which can cause injury to nerves over time as well as sympathetic dysfunction." (Ex. 3, p. 8) He then stated his opinion that the claimant had "moderate to severe ongoing pain requiring medication management that appears temporally related to electrical injury in July 2010, with persistent complaint in the same area of his body since that time." (Ex. 3, p. 8) Dr. Miller does not indicate that this is a permanent condition, nor does he assess any permanent impairment.

On October 31, 2014, claimant was seen at Hillcrest Family Services for a psychological assessment. Claimant reported feelings of anxiety and depression type symptoms that he related to being recently fired from his job of 28 years and use of medication to manage his physical health and concerns of nerve damage, diabetes and back problems in addition to concerns of potential addiction. He was diagnosed with adjustment disorder with mixed anxiety and depression. (Ex. 5, p. 7) There is no clear statement of causation concerning the diagnosis. Claimant continued with therapy services through February 2015 and again from November 2015 through January 2016. (Ex. 5) There is no statement of permanency concerning his mental health condition.

On November 4, 2014, claimant underwent a psychological evaluation with Thomas Anderegg, Ph.D., psychologist. It was determined that he would be an appropriate candidate for a spinal cord stimulator. (Ex. 7, pp. 1-3)

On November 24, 2014, claimant is seen by Dr. Miller at the Finely Clinic with instructions to be weaned off hydrocodone in anticipation of placement of the spinal cord stimulator. Claimant was to wean off hydrocodone over the next month. (Ex. 3, p. 11)

On December 8, 2014, claimant returned for follow-up to Dr. Elahi. At that time he rated his pain at 8/10. Dr. Elahi recommended a trial of different medications before considering neuromodulation. (Ex. 2, p. 24) But, he did discuss the potential benefit from a spinal cord stimulator if conservative treatment fails. (Id.)

On December 10, 2014, claimant was seen by Carroll Roland, Ph.D., psychologist, at the Center for Behavioral Health for a psychological evaluation for purposes of a disability exam. (Ex. 9, p. 1) No records were provided to the evaluator. (Id.) Claimant reported that he was unable to secure employment because he had no strength in his arms, which he related to the electrocution injury in July, 2010. (Ex. 9, p. 1) Claimant was diagnosed with mild depressive disorder, wherein the stressors were identified as his lack of employment, leading to economic stressors. (Ex. 9, p. 5) Dr. Roland determined that claimant's barrier to employment was physical limitations, and found that claimant had memory and intellect sufficient for employment, and was "not impaired in his ability to relate to others," or in his ability "to exhibit appropriate judgment in a work setting." (Ex. 9, p. 5)

Based on the findings of Dr. Roland and the lack of any finding of permanency from claimant's treatment at Hillcrest described above, I find that claimant has not shown any permanent impairment related to any mental injury.

On January 22, 2015, claimant was seen by Angel Keller, ARNP, in association with Dr. Miller for a history and physical at which time, claimant expressed his desire to proceed with a spinal cord stimulator trial "as every medication regimen he has tried has failed." (Ex. 3, p. 15) Claimant's hydrocodone prescription was refilled again for

another month. (Ex. 3, p. 15) Claimant was given a prescription for physical therapy. (Id.)

On February 12, 2015, claimant was seen at Dubuque Physical Therapy with weakness in his bilateral arms below the elbow, and difficulty with gripping and carrying, and that the pain interrupts his sleep. He reported that he lost his job "due to being unable to perform the work," and that he has "been unable to keep a job due to weakness." (Ex, 8, p. 1)

In January, 2015, claimant was denied Social Security disability benefits. (Ex. L, p. 4) He re-applied in approximately February, 2015. (Ex. K. p. 5)

On February 13, 2015, claimant was seen by Rahul Rastogi, M.D., at the UIHC for follow-up after the completion of the psychological evaluation and medication trials before considering neuromodulation. Claimant stated that his pain level was 10/10. Claimant also complained of "left neck pain over the past few months," which is "typically radiating into the left shoulder with no paresthesias." (Ex. 2, p. 28) The cervical MRI reports were reviewed, but the actual images were not available to review at that time and claimant was told to provide them for review. (Ex. 2, pp. 31-32)

On February 17, 2015, Dr. Rastogi reviewed the MRI images and opined that due to stenosis, there was "no place to put any cervical stimulator lead, thus no option for spinal cord stimulator." (Ex. 2, p. 33)

On February 19, 2015, claimant returned to Dr. Miller, and stated his pain level was 8/10 at its worst and 4-5/10 at best. Claimant reported trying several occupations recently including helping a pool company and shoveling snow and "has not been able to stay active with any of them," due to his report that "the pain gets too severe," and his upper extremities "become very weak." (Ex. 3, p. 19) Claimant reported that physical therapy is of little benefit. He requested a detailed list of functional limitations/restrictions, which Dr. Miller declined to provide, stating that it "is not our area to specify specific structural limitations." (Id.) Dr. Miller also indicated that "we will try to research and get him set up with referral to a neurologist that specializes in electrocution injury/proceed with cervical stimulator as we really have been at a stand-still with his plan of care." Claimant would like a second opinion on the viability of the spinal cord stimulator. (Ex. 3, p. 20)

A referral for additional consideration of the spinal cord stimulator was made by Dr. Miller to Maruti Kari, M.D. at Unity Point Health, Quad Cities. (Ex. 10, pp. 10, 16)

On March 9, 2015, claimant was seen by Dr. Kari, for the purpose of a second opinion concerning the cervical stimulator. After evaluation, Dr. Kari suggested an orthopedic surgical consultation for his neck. (Ex. 10, p. 15) Claimant was to return in one week for cervical epidural steroid injection. (Id.)

On March 19, 2015, claimant was seen by Dr. Miller with right greater than left arm pain and some increased back pain. (Ex. 3, p. 26) Dr. Miller states in regard to the bilateral arm pain, "I think it is from electrocution . . ." (Id.) He goes on to state that "we are looking at a trial of cervical epidural steroid injections to see if he will respond and reduce his symptoms." (Id.) The cervical epidural steroid injection was administered. (Ex. 3, p. 27)

On April 3, 2015, claimant returned to seen Dr. Kari for follow up of "chronic neck and arm pain," which he reported at the level of 8/10 (Ex. 10, p. 18) It is noted that claimant reported no relief from the cervical epidural steroid injection on March 19, 2015, administered by Dr. Miller. (Id.) Claimant then received a cervical epidural steroid injection with a catheter. (Ex. 10, p. 22) Dr. Kari reviewed the MRI images of the cervical spine and stated that the central stenosis was "not prominent but there is moderate foraminal stenosis at multiple levels." (Ex. 10, p. 23) His assessment of claimant included: cervical radiculopathy; cervical facet arthropathy; and , spinal stenosis – cervical. (Ex. 10, p. 22) He stated that he would discuss possible surgical intervention with Dr. Purighalla (or Dr. Dolphin), an orthopedic doctor, and if that was not an option, then discuss the spinal cord stimulator trial at the next appointment. (Ex. 10, p. 22; Tr. p. 63)

On April 16, 2015, claimant was seen by Dr. Miller and was primarily concerned with new and worsening low back pain and bilateral lower extremity pain. (Ex. 3, p. 33) There is no indication that this low back and bilateral leg issue is related to the work injury.

On May 21, 2015, claimant returned to Dr. Kari again stating that the pain was "continuous sharp and throbbing pain in the neck that radiates into the bilateral arms with weakness." (Ex. 10, p. 30) Claimant reported losing "all feeling in his arms when he uses them." (Id.) He advised that the cervical ESI with catheter done on April 3, 2015, did not provide any relief. (Id.) Dr. Kari stated, presumably following a discussion with Dr. Purighalla or Dr. Dolphin that claimant was not a candidate for spine surgery, he had failed medication management and the next best option would be a trial of a spinal cord stimulator, which may not resolve the neck pain. (Ex. 10, p. 35)

On August 7, 2015, claimant underwent placement of a trial of a spinal cord stimulator by Dr. Kari. (Ex. 10, p. 47)

On August 11, 2015, claimant returned to Dr. Kari to check the leads for the spinal cord stimulator. He reported feeling nauseated, vomiting and diarrhea. He reported his pain level was 10/10. (Ex. 10, p. 63) However, it is reported that following a reprograming of the stimulator with the manufacturer representative, that "he is getting significantly good coverage on the left side . . . which he states is at least 50% better or more compared to the right side where he has no stimulation." (Ex. 10, p. 68) It is noted that this "would be considered a significantly positive result as far as a trial of spinal cord stimulation is concerned in managing his pain. Therefore, the next best step

would be to proceed with the permanent placement of the spinal cord stimulator." (Id.) The trial lead was then removed due to "possible infection." (Id.)

On August 12, 2015, claimant was seen at the pain clinic by Angel Keller, ARNP. Claimant felt that prior to the removal of the trial lead, he had noticed "a difference and improvement in the pain at that time." (Ex. 3, p. 41)

Claimant testified that the cost of the trial stimulator has not yet been paid and is now in collections. (Tr. p. 66) Claimant testified that he could not afford to pay out of pocket for a permanent spinal cord stimulator, which therefore did not proceed. (Tr. p. 67)

On August 19, 2015, Natalie Krug Wierda, DPT, issued a report entitled "Mini FCE Report." (Ex. 8, p. 11) Ms. Wierda reported that claimant had been going to the pain clinic for three years, that he had injections and physical therapy that has provided only short term relief. He rated his pain as 8-10/10. (Ex. 8, p. 11) Ms. Wierda stated that claimant could tolerate sitting for about 5 to 10 minutes and walking 30 minutes. She described his bilateral lifting capabilities as limited to a 1 rep maximum, limited by pain, of 10 pounds to waist level, 21.01 pounds waist to chest, and 14.68 pounds chest to above shoulder. She identified claimant's 25 foot carrying capacity of 13 pounds. She stated that: "[d]ue to high levels of pain (10/10) produced with 1 rep max testing frequent twisting, bending, lifting would not be recommended for this patient. Hands became shaky/unsafe for gripping with only the small amounts of weights lifted during the lifting assessment portion of this exam." (Ex. 8, p. 14)

The above evaluation appears to take into consideration non-work related lower extremity issues. Therefore, the results and recommendations in this report are given little weight when considering any potential disability for the pending work-related claim.

Between May 8, 2015, and October 12, 2015, claimant was surveilled by R & D Agency, Inc. The company issued reports on May 12, September 28, October 9, and October 20, 2015. The reports indicated that claimant carried such items as packs of cigarettes, a magazine and two bottles of pop. Claimant was also observed starting a lawn mower and push mowing his small lawn in a trailer park as well as his neighbor's small lawn. He also was observed unhitching a boat on a trailer from his vehicle and spending about five minutes sweeping out the boat with a small handheld dust broom and pan. (Ex. P, pp. 1-19)

I find that the surveillance information obtained on a few short occasions over a five month period provides very little insight into claimant's physical capabilities or the extent of his injuries and is therefore given little weight.

On December 10, 2015, claimant returned to the pain clinic where it is noted that this "has been a long drawn out process for him." (Ex. 3, p. 49)

On January 20, 2016, Dr. Miller wrote a letter to defense counsel. (Ex. 3, p. 52) Dr. Miller stated that: (1) claimant's lumbar spine complaints "have no relation to previous shock injury;" (2) based on an extensive, but not exhaustive, review of medical literature, Dr. Miller stated the "incidence of worsening pain or severe pain after electrical shock injury is extremely rare," and although it may be possible, it would not cause progressive damage and that "the symptoms Mr. Hayes has now should not have progressed beyond the initial presentation that he had" following the injury; (3) claimant's permanent impairment from this injury would not have changed and the "new back complaints" would be specifically excluded from consideration as unrelated; and, (4) no additional medical treatment is needed regarding the original work injury and "any change in management would be related to new conditions, specifically the lumbar spine." (Ex. 3, pp. 52-53)

Interestingly, Dr. Miller does not offer any clear opinion on whether the neck complaints are related to the original work injury or whether any additional medical treatment would be appropriate for the neck complaints. It could be reasonably understood based on Dr. Miller's referral for additional consideration of the spinal cord stimulator to Dr. Kari described above, that he would conclude, if asked, that additional treatment for the neck would be appropriate, or that he may at least defer to Dr. Kari on the matter. Nevertheless, Dr. Miller does not specifically address the matter. (Ex. 3, pp. 52-53; Ex. 10, pp. 10, 16)

Also, Dr. Miller's opinion was given with a specific caveat that concerning the question of an electrical shock injury resulting in a progressive degenerating condition, he would defer to a neurologist with specific training in electric-type injuries. (Ex. 3, p. 52) It does not appear to the undersigned that Dr. Kari expressed an opinion on the matter, although he references progressively worsening symptoms without negative comment. (Ex. 10, p. 10)

On February 22, 2016, claimant returned to Dr. Miller at the pain clinic and was switched from hydrocodone to oxycodone. (Ex. 3, p. 54) He was switched back to hydrocodone on March 23, 2016, due to unpleasant side effects. (Ex. 3, p. 55)

On March 24, 2016, claimant underwent a functional capacity evaluation (FCE), at the request of claimant's counsel, with Charles Goodhue of Advantage Physical Therapy and Rehab. (Ex. 11, pp. 3-7) Mr. Goodhue indicated that claimant was cooperative and willing to work to his maximal abilities and demonstrated consistent performance and considered the testing to be valid, having passed all validity criteria. (Ex. 11, p. 4) The therapist concluded that claimant's functional ability "places him within the U.S. Department of Labor's light work category." (Ex. 11, p. 6) The therapist specifically recommended restrictions which are generally described as rare lifting up to 20 pounds and 15 pounds overhead, and limit pushing and pulling and carrying to 15 to 20 pounds. In addition there are restrictions limiting bending, squatting, kneeling, crawling, crouching, sitting, standing and walking. The specific restrictions are set out in Exhibit 11, page 8.

On July 27, 2016, Dr. Sassman issued a report following an IME that was conducted on May 16, 2016. (Ex. 12, p. 1) Dr. Sassman noted that claimant's current symptoms included spasms and pain, with a pins and needles sensation in his bilateral hands along with numbness after he uses his hands. Claimant also described a burning and aching sensation in both shoulders and anxiety attacks since the injury. Dr. Sassman confirmed that claimant denied any neck or arm symptoms prior to the electrocution injury on July 20, 2010. (Ex. 12, p. 13) After a review of records and physical exam, Dr. Sassman diagnosed claimant with: "1. cervical radiculopathy after an electrical shock of 480 volts," and "2. Atrial fibrillation after an electrical shock, resolved." (Ex. 12, p. 12) Dr. Sassman opined that "[b]ecause he had no symptoms prior to the injury . . . that the electrocution injury was a substantial aggravating factor of the cervical stenosis and subsequently the development of his bilateral upper extremity paresthesias and radicular symptoms that are present at this time." (Ex. 12, p. 13) She then assigned a 15 percent whole person impairment based on pages 379-380, and 392 of the AMA Guides, utilizing the DRE method for the cervical spine, "due to signs of radiculopathy on examination." (Ex. 12, p. 14) She also assigned restrictions of no lifting, pushing, pulling and carrying more than 20 pounds rarely from floor to waist and "[h]e should not lift, push, pull or carry above waist height." (Id.) In addition, "gripping and grasping should be limited to waist height on an occasional basis," and limit vibratory and power tools to a rare basis. (Id.)

Dr. Sassman noted different symptoms in her more recent IME than she found in her initial IME, prior to the May 2013 arbitration hearing. In her 2016 IME, Dr. Sassman found that claimant had new symptoms of spasms, numbness in both hands after using them and claimant's complaint that the symptoms were worse than before. (Ex. 12, p. 10; Tr. p. 15) Dr. Sassman also noticed decreased sensation in the left upper extremity in the C7 dermatome. (Tr. p. 16) She concluded that the electrocution injury aggravated the pre-existing cervical stenosis, which was the cause of claimant's current symptoms. (Tr. p. 18)

I find that Dr. Sassman is the only physician that has provided a clear opinion on the causal connection of the neck complaints to the work injury and as to the permanency of claimant's current condition, including both his arm and neck complaints. I accept Dr. Sassman's causation opinion and her opinion of impairment of 15 percent of the whole person.

I find that the restrictions determined by the FCE on March 24, 2016, provide for restrictions that appear to include the non-work related lower extremities as well as the upper extremities and that no physician has related anything other than the bilateral arms and cervical spine to this work injury. Also, Dr. Miller has specifically stated that the lower extremities are not related to the work injury. (Ex. 3, p. 52) I therefore find that the restrictions assigned by Dr. Sassman are more appropriate considering the bilateral arms and cervical spine injuries upon which this claim is based.

On August 18, 2016, Barbara Laughlin of Laughlin Management issued an Employability Assessment report at the request of claimant's counsel in which she considered the March 24, 2016, FCE. Ms. Laughlin opined that claimant sustained an average of an 83 percent loss of transferable occupations. (Ex. 13, p. 8) Utilizing the restrictions assigned by Dr. Sassman from her 2013 IME report, claimant sustained a 26.1 percent loss of transferable occupations, however, using the restrictions from Dr. Sassman's more recent IME, produces a 100 percent loss of transferable occupations and a 98.8 percent loss of unskilled occupations. (Ex. 13, pp. 9-10) This seems curious as it would appear that the March 24, 2016, restrictions are more restrictive than those assigned by Dr. Sassman in July 2016.

Ms. Laughlin, then using the restrictions from the FCE identifies a number of jobs that "are part of his post injury occupational access." (Ex. 13, pp. 10-13) Ms. Laughlin concludes that claimant "is quite limited in his ability to obtain and maintain employment" and he remains employed only "because of the kindness and accommodation of his employer." (Ex. 13, p. 13)

On September 6, 2016, Holly Mathieu of Ohara, LLC, issued a vocational report at defendant's request. (Ex. I, p. 1) Ms. Mathieu notes that after the work injury, claimant "returned to work without any work restrictions," and "continued to work for over four years before his termination for a safety violation." (Ex. I, p. 9) She also noted that claimant had little or no accommodation on his maintenance job post-injury. (Id.) Ms. Mathieu opines that but for the termination from Eagle Window and Doors, for reasons unrelated to his work injury, claimant would still be employed there and therefore, "he has not sustained a [l]oss of [a]ccess to [e]mployment as a result of the electric shock on July 20, 2010." (Ex. I, p. 10) Ms. Mathieu is critical of the restrictions assigned by Mr. Goodhue's FCE, questioning why an upper extremity injury would result in positional restrictions regarding lower extremity functioning, such as standing, walking and sitting. (Id.) She also notes that claimant has successfully obtained a number of jobs after his termination from Eagle Window and Door. (Id.)

Considering the competing vocational reports, I find that Ms. Laughlin's report does not adequately consider claimant's continued employment with the defendant employer for well over a year after the May 2013 arbitration hearing, nor his demonstrated ability to find and maintain employment after his termination. Ms. Laughlin asserts that claimant is only employed now because of the kindness of his current employer. However, his current employer is not an employer with whom claimant had a previous relationship, and by the evidence presented he was hired in an ordinary arms-length offer of employment. Therefore, claimant has demonstrated his willingness and ability to work, even though it may be in a light category of work and at a reduced wage compared to his job at Eagle Window and Doors.

On the other hand, Ms. Mathieu's report appears to undervalue the change in claimant's duties and accommodations that he testified occurred after his work injury at Eagle Window and Doors and the fact that claimant did not believe he could presently

return to the heavy work that he had done before. Ms. Mathieu then generally disregards the physical restrictions assigned by Dr. Sassman.

I do not find either vocational report compelling.

Claimant testified at hearing that he continued to have a burning sensation in his neck and pain in his arms, including his shoulders. (Tr. pp. 70-71) He described his usual arm and shoulder pain as 8-10/10 and that the pain is aggravated with activity. (Tr. pp. 71-72) He also describes numbness and tingling in his arms from his elbows to his wrists and reduced strength in his hands and arms. (Tr. p. 73) Claimant stated that he has modified his work around the house, including using a self-propelled lawn mower and avoiding shoveling and getting help with household projects involving painting and moving furniture. (Tr. pp. 75-76)

Claimant testified in his deposition that he was apparently seen by Vaassen Chiropractic for treatment including acupuncture for his back and arms that claimant does not relate to this work injury. (Ex.Q, p. 3) It is not clear when this treatment occurred, and is difficult therefore, to put into context concerning this claim.

It was previously determined in the July 2013 arbitration decision that as of that date, claimant had continuing pain in his bilateral arms, which is supported by the deputy's acceptance of Dr. Sassman's 3 percent permanent impairment based on the pain chapter of the AMA Guides.

Dr. Sassman testified that cervical stenosis occurs over time and may be present and asymptomatic. (Tr. p. 19) She also stated that in her opinion, claimant had cervical stenosis at the time of the original electrocution injury and agreed that the electrocution aggravated the underlying stenosis and that the electrocution was the cause of claimant's current symptoms. (Tr. pp. 18-19)

I now find from claimant's testimony, the medical records and the testimony of Dr. Sasman, that at the time of the present review-reopening hearing, claimant has worsening bilateral arm pain as well as neck pain that he did not have before the 2013 arbitration hearing.

I find from the evidence presented that claimant's neck pain became known, developed and worsened after the May 2013 arbitration hearing, and that the electrocution injury of July 10, 2010, aggravated the underlying condition of claimant's cervical stenosis. Claimant has undergone a successful trial of a cervical spinal cord stimulator supporting the conclusion that his arm pain that developed after the electrocution injury and has been persistently present since then, is radicular pain from the aggravated cervical spine.

In support of the finding that the cervical condition is causally related to the original work injury, I now review the medical evidence.

Claimant returned to Dr. Chen on October 16, 2013, reporting that his bilateral arm pain was worse than before, but Dr. Chen offered no further medical treatment. Despite acknowledging a causal connection between the work injury and the continued pain, Dr. Chen referred claimant to his primary care physician for treatment of the pain. (Ex. 2, p. 5) Therefore, Dr. Chen seems to support the conclusion that claimant's ongoing arm pain is related to the work injury, but offers no opinion concerning the neck.

Claimant saw Dr. Miller at Unity Point Health who requested the cervical MRI. (Ex. 3, pp. 2-3) On October 23, 2014, Dr. Miller wrote a letter to claimant's counsel indicating that it is possible to have persistent pain after an electrocution and that claimant would have been more susceptible to this due to his poorly controlled diabetes. Dr. Miller also stated that despite relatively normal MRI and EMG findings, "[t]here was [sic] some subtle findings or radiculopathy that could be related to the electrical injury, and do not appear compressive based on the MRI." (Ex. 3, p. 7)

On March 19, 2015, Dr. Miller stated concerning the ongoing bilateral arm pain:

> I think it is from electrocution, and we have gone through that at length before, and I had written an opinion letter previously on that. At this point we are looking at a trial of cervical epidural steroid injections to see if he will respond and reduce his symptoms.

(Ex. 3, p. 26)

In this statement, Dr. Miller acknowledges the ongoing bilateral arm pain as being related to the July 2010 electrocution work injury and makes a recommendation of a cervical spine injection, hoping to reduce the arm pain. Therefore, impliedly, indicating a connection between a neck condition and the arm pain and therefore, the work injury.

Dr. Miller wrote a letter to defense counsel on January 20, 2016, concerning causation and clearly states his opinion that the lumbar spine complaints are not related to the work injury, but very curiously does not plainly address the neck pain or neck condition and its potential relationship to the work injury.

Dr. Sassman issued her IME report on July 27, 2016, and opined that the electrocution injury was a substantial aggravating factor of the cervical stenosis and residual bilateral arm pain and radicular symptoms. (Ex. 12, p. 13)

Considering the implantation and results of the trial cervical spinal cord stimulator, I note that on August 11, 2015, Dr. Kari stated that claimant reported the stimulated left side as 50 percent better than the non-stimulated right side. (Ex. 10, p. 68) Dr. Kari also stated that this "would be considered *a significantly positive result as far as a trial of spinal cord stimulation is concerned in managing his pain.* Therefore, the next best step would be to proceed with the permanent placement of the spinal cord

stimulator." (Id.)(emphasis added) In addition, claimant reported to Ms. Keller, at the pain clinic, that the trial stimulator produced "a difference and improvement in the pain." (Ex. 3, p. 41)

No physician has specifically concluded that the continued bilateral arm pain is not related to the work injury and the cervical stimulator improved that pain. Also, the trial spinal cord stimulator involved leads placed near the cervical spine and therefore invaded the body as a whole.

I find based on Dr. Sassman's opinion and the additional supporting facts that claimant's preexisting neck condition was causally and materially aggravated by the July 10, 2010, work injury.

The neck is not a scheduled member and is a part of the body as a whole.

Regarding permanent partial disability, and in consideration of claimant's age, education, the severity of the injury, his intellect, his earnings before and after the injury, his willingness to remain employed and all other appropriate factors concerning industrial disability, I find that claimant has sustained 60 percent industrial disability.

Claimant has asserted a claim for medical reimbursement. I have found that following claimant's appointment with Dr. Chen on October 16, 2013, defendants ceased providing medical benefits. Claimant has provided a statement of medical expenses incurred, which is attached to the Hearing Report, and relate to the medical history described above after the final appointment with Dr. Chen. I find that the treatment referenced therein was reasonable and appropriate to treat claimant's condition and was beneficial to the claimant. This is evidenced by the fact that claimant followed through with recommended medical treatment as he was able, and he received benefit from the trial spinal cord stimulator. I further find that the medical treatment in question provided a more favorable outcome than the lack of care provided by defendants.

I further find that continued treatment for pain management is reasonable and the failure to provide medical care for the work related injury is unreasonable.

CONCLUSIONS OF LAW

The first issue is whether claimant is entitled to a review-reopening of the arbitration decision entered July 23, 2013.

Iowa Code section 86.14(2) provides: "[i]n a proceeding to reopen an award for payments or agreement for settlement as provided by section 86.13, inquiry shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded or agreed upon."

In a review-reopening, "[t]o justify an increase in compensation benefits, the claimant carries the burden of establishing by a preponderance of the evidence that, subsequent to the date of the award under review, he or she has suffered an *impairment or lessening of earning capacity proximately caused by the original injury.*" Simonson v. Snap-On Tools Corp., 588 N.W.2d 430, 434 (Iowa 1999).

The Supreme Court stated in Kohlhaas v. Hog Slat, Inc., "The review-reopening claimant need not prove, as an element of his claim, that the current extent of disability was not contemplated by the commissioner (in the arbitration award) or the parties (in their agreement for settlement)." Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009)

The Supreme Court also stated in the case of Kohlhaas v. Hog Slat, Inc, that:

> A compensable review-reopening claim filed by an employee requires proof by a preponderance of the evidence that the claimant's current condition is "proximately caused by the original injury." *See Simonson,* 588 N.W.2d at 434 (original emphasis omitted) (quoting *Collentine,*525 N.W.2d at 829). While worsening of the claimant's physical condition is one way to satisfy the review-reopening requirement, it is not the only way for a claimant to demonstrate his or her current condition warrants an increase of compensation under section 86.14(2). *See Blacksmith v. All–Am., Inc.,* 290 N.W.2d 348, 354 (Iowa 1980) (holding a compensable diminution of earning capacity in an industrial disability claim may occur without a deterioration of the claimants physical capacity).

Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009)

The Supreme Court has held in Gosek v. Garmer & Stiles that:

> cause for allowance of additional compensation exists on proper showing that facts relative to an employment connected injury existed but were unknown and could not have been discovered by the exercise of reasonable diligence, sometimes referred to as a substantive omission due to mistake, at time of any prior settlement or award.

Gosek v. Garmer & Stiles, 158 N.W.2d 731, 735 (Iowa 1968)

The Supreme Court confirmed the validity of the above rational for review-reopening stated in Kohlhaas v. Hog Slat, Inc., II, stating that awards may be reviewed and modified by the commissioner pursuant to section 86.14(2) when facts that existed at the time of the prior hearing or settlement were not known to the parties, despite their reasonable diligence. See Gosek v. Garmer & Stiles Co., 158 N.W.2d 731, 735 (Iowa 1968). Kohlhaas v. Hog Slat, Inc., 815 N.W.2d 410 (Table Iowa 2012)

In Gosek claimant asserted a mental health claim on review-reopening. The Court stated that claimant had a back injury resulting in an operation on May 2,

1962, and a settlement on October 15, 1963. Post-surgery, but prior to settlement, claimant's "nerves affected his thinking," and "[c]laimant did not know if psychiatric assistance was needed, and if so whether anything could be done about it," although [h]e was willing to see a psychiatrist in order to determine whether he had brain trouble from the disc operation." Gosek, 158 N.W. 2d at 735. The Court also noted that "[p]rior to the injury these difficulties had not been noticed . . ." Id. The Court concluded that the "testimony presented during hearing on the second review-reopening is sufficient to reveal a probable unknown injury connected neurosis at [the] time of the first hearing; a new fact neither recognized, appreciated nor considered by the commissioner in adjudicating claimant's first review petition for additional compensation." Id., at 737.

In Kohlhaas II, the Court rejected claimant's assertion for additional benefits. In this case, claimant had previously settled his claim at 50 percent permanent partial disability to his right leg. On review-reopening, claimant asserted, in part, that his knee, hip and back complaints represented an "injury to the body as a whole at the time of settlement, but that the evidence was not known at that time because Dr. Crane informed him there was no connection between his work injury and 'his whole sbody conditions.'" Kohlhaas v. Hog Slat, Inc., 815 N.W.2d 410 (Table Iowa 2012). The Supreme Court affirmed the district court determination that claimant was well aware of the injuries that he alleged supported an increase in permanent disability when the settlement was completed, and stated that these facts do not fit the scenario described in Gosek. (Id.)

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).

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).

I have found above that claimant has sustained an aggravation of an underlying cervical condition at the time of the work injury and that since the May 2013 arbitration hearing, claimant's arm condition has worsened and his cervical spine injury has become known.

I have accepted the 15 percent whole person impairment assigned by Dr. Sassman and the restrictions she assigned, both of which are more significant than that which existed at the time of the May 2013 arbitration hearing.

Claimant has therefore demonstrated a change in condition warranting a review of the compensation previously awarded. Iowa Code section 86.14(2)

Next, having found a causal connection between the neck condition and the July 10, 2010, work injury, I must consider whether the facts supporting said connection existed at the time of the original arbitration hearing, but were "unknown and could not have been discovered by the exercise of reasonable diligence." Gosek v. Garmer & Stiles, 158 N.W.2d 731, 735 (Iowa 1968)

The principles of res judicata apply in a review-reopening situation. "The agency, in a review-reopening petition, should not reevaluate an employee'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." Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 393 (Iowa 2009)

"[S]ection 86.14(2) does not provide an opportunity to re-litigate causation issues that were determined in the initial award or settlement agreement." Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 393 (Iowa 2009)

Claimant does not argue that the bilateral arms have led to or developed into a cervical spine issue, but that there was a "misunderstanding" of claimant's true injuries at the time of the 2013 arbitration hearing. (Cl. Brief, p. 17) Claimant argues, based on the opinion of Dr. Sassman, that the July 10, 2010, electrocution injury was a substantial aggravation of an underlying cervical stenosis condition that was not known to the parties at the time of the prior arbitration hearing, despite their reasonable diligence.

The 2013 arbitration hearing found that claimant's bilateral arm pain was caused by the electrocution injury. No medical opinion appears to contradict this conclusion.

The record supports that claimant's bilateral arm complaints have persisted since before the 2013 arbitration hearing.

The facts support the finding that treatment with a cervical spinal cord stimulator improved those symptoms.

Claimant did not experience significant neck pain prior to the 2013 hearing, nor did he have a cervical MRI or other diagnostic testing that could have alerted claimant to a potential connection between his work injury and his neck condition.

Significantly, the treating and evaluation physicians simply did not address whether the cervical spine was related to the bilateral arm condition.

Therefore, despite treatment from qualified professionals, and unlike the facts in Kohlhaas, no physician provided an opinion on the potential relationship between the work injury and the neck condition. As in Gosek claimant had no medical evidence to consider prior to the 2013 arbitration hearing indicating that his neck may play a role in the injury and in addition thereto he was experiencing no specific neck pain to alert him to the aggravated condition. I cannot hold claimant, as a layman, to a standard that would require him to have understood a condition existed that the treating and evaluating physicians did not discover.

I conclude that the cervical spine condition existed at the time of the 2013 arbitration hearing and was unknown and could not have been discovered by claimant with the exercise of reasonable diligence at the time of the arbitration hearing.

The second issue to consider is the extent of permanent disability and whether the permanent disability is limited to the bilateral arms or is an industrial disability.

An injury to a scheduled member may, because of after effects or compensatory change, result in permanent impairment of the body as a whole. Such impairment may in turn be the basis for a rating of industrial disability. It is the anatomical situs of the permanent injury or impairment which determines whether the schedules in section 85.34(2)(a) - (t) are applied. Lauhoff Grain v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943). Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

Dr. Chen assigned a two percent impairment prior to the May 2013 arbitration hearing and Dr. Miller stated on January 20, 2016, that there would not be any new impairment relating to any change in his upper extremity electrical injury that would go beyond the initial impairment. (Ex. 3, pp. 52-53) However, having not addressed the cervical spine issue and its relationship to the work injury, I give Dr. Miller's opinion concerning permanency little weight.

Dr. Sassman assigned a 15 percent whole person impairment based on pages 379-380, and 392 of the AMA Guides, utilizing the DRE method for the cervical spine, "due to signs of radiculopathy on examination." (Ex. 12, p. 14)

Considering the evidence related to functional impairment, I accepted the rating of 15 percent of the whole person assigned by Dr. Sassman.

Having found the cervical spine condition was aggravated by the July 10, 2010, work injury and that claimant has sustained an increase in functional impairment, I conclude that claimant has carried his burden of proof that he has sustained "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).

Based on the findings that the neck condition is related to the original work injury, I find that the injury is a body as a whole injury and compensated as an industrial disability, not a scheduled member.

The third issue is the extent of industrial disability.

Because claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 593; 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability, which is the reduction of earning capacity. However, consideration must also be given to the injured worker's medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured workers' qualifications intellectually, emotionally and physically; the worker's earning before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted. Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616 (Iowa 1995); 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).

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 654 (App. February 28, 1985).

I have found above that claimant has sustained a 60 percent industrial disability for the reasons there stated.

The fourth issue is determining the appropriate commencement date for any additional permanent partial disability benefits.

Claimant has asserted in the Hearing Report that the commencement date should be August 4, 2011. This position is based on the prior arbitration decision, which identified April 22, 2011, as the commencement date and assessed15 weeks of benefits. April 22, 2011, plus 15 weeks is August 4, 2011. In support of this conclusion, claimant cites to factors to be considered when establishing a cumulative trauma date of injury. These appear misplaced.

Defendants argue that under Verizon Business Network Services, Inc. v. McKenzie, 823 N.W.2d 418 (Table, Iowa 2012) that the commencement date for PPD benefits in a review-reopening is the date that the review-reopening petition is filed.

Neither party discusses the potential impact of Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360 (Iowa 2016) on the issue of commencement of PPD benefits in the review-reopening scenario.

I conclude that Evenson did not specifically address the review-reopening situation and that the standard established in Verizon Business Network Services, Inc. v. McKenzie, was therefore not disturbed.

I agree with defendants that the correct date of commencement of PPD benefits in a review-reopening case is the date that the review-reopening petition was filed. In this case, that date is January 20, 2015.

The fifth issue is whether claimant is entitled to medical expenses attached to the hearing report.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 16, 1975).

Prudent persons customarily rely upon their physician's recommendation for medical care without expressly asking the physician if that care is reasonable. Proof of reasonableness and necessity of the treatment can be based on the injured person's testimony. Sister M. Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963).

It is said that "actions speak louder than words." When a licensed physician prescribes and actually provides a course of treatment, doing so manifests the physician's opinion that the treatment being provided is reasonable. A physician practices medicine under standards of professional competence and ethics. Knowingly providing unreasonable care would likely violate those standards. Actually providing care is a nonverbal manifestation that the physician considers the care actually provided to be reasonable. A verbal expression of that professional opinion is not legally mandated in a workers' compensation proceeding to support a finding that the care provided was reasonable. The success, or lack thereof, of the care provided is evidence that can be considered when deciding the issue of reasonableness of the care. A treating physician's conduct in actually providing care is a manifestation of the physician's opinion that the care provided is reasonable and creates an inference that can support a finding of reasonableness. Jones v. United Gypsum, File No. 1254118 (App. May 2002); Kleinman v. BMS Contract Services, Ltd., File No. 1019099 (App. September 1995); McClellon v. Iowa Southern Utilities, File No. 894090 (App. January 1992). This inference also applies to the reasonableness of the fees actually charged for that treatment.

Claimant is entitled to an order of reimbursement only if he has paid treatment costs; otherwise, to an order directing the responsible defendants to make payments directly to the provider. See, Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Defendants should also pay any lawful late payment fees imposed by providers. Laughlin v. IBP, Inc., File No. 1020226 (App., February 27, 1995)

"We do not believe the statute can be narrowly construed to foreclose all claims by an employee for unauthorized alternative medical care solely because the care was unauthorized. Instead, the duty of the employer to furnish reasonable medical care supports all claims for care by an employee that are reasonable under the totality of the circumstances, even when the employee obtains unauthorized care, upon proof by a preponderance of the evidence that such care was reasonable and beneficial. In this context, unauthorized medical care is beneficial if it provides a more favorable medical outcome than would likely have been achieved by the care authorized by the employer." Bell Bros. Heating v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010)

I have found above that the medical for which claimant seeks reimbursement was reasonable and beneficial and provided a more favorable outcome than the lack of care provided by defendants. Defendants shall reimburse the requested medical expenses attached to the Hearing Report.

The sixth issue is whether claimant is entitled to alternate medical care.

Claimant seeks alternate medical care in the form of pain management.

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See Iowa R. App. P. 14(f)(5); Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

Determining what care is reasonable under the statute is a question of fact. Id. The employer's obligation turns on the question of reasonable necessity, not desirability. Id.; Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983). In Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997), the court approvingly quoted Bowles v. Los Lunas Schools, 109 N.M. 100, 781 P.2d 1178 (App. 1989):

> [T]he words "reasonable" and "adequate" appear to describe the same standard.
>
> [The New Mexico rule] requires the employer to provide a certain standard of care and excuses the employer from any obligation to provide other services only if that standard is met. We construe the terms "reasonable" and "adequate" as describing care that is both appropriate to the injury and sufficient to bring the worker to maximum recovery.

The commissioner is justified in ordering alternate care when employer-authorized care has not been effective and evidence shows that such care is "inferior or less extensive" care than other available care requested by the employee. Long; 528 N.W.2d at 124; Pirelli-Armstrong Tire Co.; 562 N.W.2d at 437.

Defendant ceased to provide medical care for the work related injury, which I have found to be unreasonable. Claimant's request for continued pain management is reasonable and defendants' shall provide the same.

The final issue is costs.

Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. I conclude that claimant was successful in this claim and therefore exercise my discretion and assess costs against the defendants in this matter which shall include: the filing fee of $100.00; the Rose Reporting fee of $70.50, based on defendants' use of the deposition or portions thereof as an exhibit at hearing; and, the reasonable cost of the opinion letter of Dr. Miller dated October 24, 2014, in the amount of $500.00.

Rule 876-4.33 provides for "the reasonable costs of obtaining no more than two doctors' or practitioners' reports." The Iowa Supreme Court in DART v. Young, 867 N.W.2d 839, at 846-847 (Iowa 2015) has made it clear that the examination that may be associated with a report is not properly taxable as a cost. The cost of the March 24, 2016 FCE of $850.00 was not conducted by a doctor and does not provide an itemization separating the report from the examination and is therefore denied.

Claimant seeks reimbursement for a vocational evaluation performed by Ms. Laughlin. This agency has held that vocational reports fall within Rule 4.33. However, under Young the allowable taxable costs are the reports themselves, not the underlying examination of records or interviewing of the claimant. See LaGrange v. Nash Finch

Co., File No. 5043316 (Appeal July 1, 2015). Ms. Laughlin's invoice is itemized and identifies 4.5 hours for the preparation of the report. Ms. Laughlin's hourly billing rate is $110.00 per hour (4.5 hours x $110.00 per hour = $495.00). Thus, I assess costs against the defendant in the amount of $495.00 for Ms. Laughlin's report.

Therefore the total costs taxed to defendants are the filing fee, the reporting fee, Ms. Laughlin's report fee, and for Dr. Miller's October 24, 2014, letter, which together are $1,165.50.

ORDER

IT IS THEREFORE ORDERED:

Defendants shall pay claimant three hundred (300) weeks of permanent partial disability at the stipulated rate of four hundred seventy three and 85/100 dollars ($473.85) beginning with a commencement date of January 20, 2015.

Accrued benefits shall be paid in lump sum together with interest pursuant to Iowa Code section 85.30.

Defendants shall pay interest on any accrued weekly benefits pursuant to Iowa Code section 85.30 and shall be entitled to credit for all weekly benefits paid to date.

Defendants shall reimburse claimant for his out-of-pocket medical expenses set forth in the Medical Treatment Summary attached to the Hearing Report and shall pay, reimburse, and/or otherwise satisfy all remaining medical expenses contained therein.

Defendants shall promptly authorize pain management treatment for claimant at the Finely Pain Clinic as soon as practicable and alert claimant of the date and time of the authorized appointment.

Costs are taxed to the defendants as set forth above in the sum of one thousand one hundred sixty five and 50/100 dollars ($1,165.50).

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 May, 2017.

TOBY J. GORDON
DEPUTY WORKERS' COMPENSATION
COMMISSIONER

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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.