BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

AARON LINN, Claimant, vs. ANDERSON ERICKSON DAIRY, Employer, and TRAVELERS INDEMNITY CO. OF CT., Insurance Carrier, Defendants.	File No. 5064948 A R B I T R A T I O N D E C I S I O N Head Note Nos.: 1803, 2501, 2502

STATEMENT OF THE CASE

Claimant, Aaron Linn, filed a petition in arbitration seeking workers' compensation benefits from Anderson Erickson Dairy (AE), employer and Travelers Indemnity Company of Connecticut, insurer, both as defendants. This matter was heard in Des Moines, Iowa on August 27, 2019 with a final submission date of September 17, 2019.

The record in this case consists of Joint Exhibits 1-4, Claimant's Exhibits 1-5, Defendants' Exhibits A through F, and the testimony of claimant.

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

1. Whether the need for claimant's right total knee replacement arose out of and in the course of employment.

2. The extent of claimant's entitlement to permanent partial disability benefits.

3. Whether there is a causal connection between the injury and the claimed medical expenses.

4. Whether claimant is entitled to reimbursement for an independent medical evaluation (IME).

FINDINGS OF FACT

The claimant was 51 years old at the time of hearing. Claimant graduated from high school. Claimant has two associate degrees from DMACC.

Prior to working for AE, claimant worked as a machine operator for Superior Container. Claimant began working for AE in 1993 as a maintenance mechanic. In 2006 claimant left AE to work for a biodiesel company called Technochem. Claimant testified this was mostly a desk job. Technochem closed after about a year due to lack of funding. Claimant then worked at Marzetti's Foods as a maintenance mechanic. Claimant returned to his job at AE about a year after beginning at Marzetti's. (Exhibit 2, page 3) Claimant testified at the time of hearing he was working as a maintenance supervisor. (Transcript p. 16)

Exhibit E is a job description for claimant's position as a maintenance supervisor. Claimant testified he agreed with the job description generally. Claimant testified on occasions he was required to lift up to 150 pounds at work. (Tr. p. 16)

In 2013 claimant was evaluated for knee pain once. Claimant had no permanent restrictions or permanent impairment from that 2013 exam. Claimant did not miss any work from that one visit. (Tr. pp. 21, 65-66) Claimant also had hip surgery in 1986. (Tr. p. 22)

On May 27, 2015 claimant was climbing out of a molding machine when he slipped on a rug on the floor, used to cover a spill. Claimant said he felt a pop in his knee and had immediate pain.

On May 28, 2015 claimant was evaluated by Richard Bratkiewicz, M.D. for a right knee injury. Claimant was assessed as having a right medial knee strain. Claimant was given a knee sleeve and told to ice his knee. (Jt. Ex. 3, p. 1)

Claimant returned to Dr. Bratkiewicz on June 4, 2015. An MRI was recommended. (Jt. Ex. 3, p. 3)

An MRI taken on June 17, 2015 showed a medial meniscus tear. Claimant was referred to an orthopedic specialist. The MRI notes there was cartilage thinning that potentially was due to degenerative processes or was posttraumatic given the history of claimant's twisting injury. (Jt. Ex. 1, p. 1; Jt. Ex. 3, p. 5)

Claimant was evaluated by Christopher Nelson, D.O., on June 7, 2015. Surgery was discussed and chosen as a treatment option. (Jt. Ex. 4, pp. 1-4)

Claimant had right knee surgery on June 20, 2015. Surgery consisted of a partial medial and lateral meniscectomy. Surgery was performed by Dr. Nelson. (Jt. Ex. 2, pp. 9-10)

Claimant returned to Dr. Nelson on August 12, 2018. Claimant had some knee pain, but improvement in symptoms. Claimant was returned to work without restrictions on August 16, 2015. (Jt. Ex. 4, pp. 5-6)

In a September 14, 2015 note, Dr. Nelson found claimant had a 10 percent permanent impairment to the lower extremity. (Ex. B)

Claimant returned to Dr. Nelson on April 19, 2016. Claimant had good relief for two to three months and then began having knee pain at work. Dr. Nelson believed claimant had a flare up of a preexisting osteoarthritis. Claimant was given a right knee injection. (Jt. Ex. 4, p. 7)

Claimant had an MRI of the right knee on July 1, 2016. It showed mild to moderate medial compartment degenerative joint disease and a medial meniscus tear. (Jt. Ex. 4, p. 9)

Claimant returned to Dr. Nelson on July 12, 2016. Claimant had minimal pain relief from the injection. A second arthroscopic surgery was discussed and chosen as a treatment option. (Jt. Ex. 4, pp. 11-12)

Claimant underwent a second arthroscopic surgery to the right knee on August 8, 2016. Surgery consisted of removal of a loose body, a partial medial meniscectomy, and a right femoral trochlear chondroplasty. (Ex. 1, pp. 3-4; Jt. Ex. 4, p. 16)

On October 4, 2016 Dr. Nelson returned claimant to work without restrictions. (Jt. Ex. 4, p. 16)

Claimant returned to Dr. Nelson on December 14, 2016. Claimant had increased pain and was limping. Dr. Nelson believed claimant's problems were due to increasing arthritic symptoms. Claimant was given a knee brace and another right knee injection. (Jt. Ex. 4, p. 17)

In a March 13, 2017 letter Dr. Nelson indicated claimant's cartilage loss is what was causing his problems and his need for a knee replacement. Dr. Nelson suspected claimant's cartilage loss predated his work injury. (Ex. F)

Claimant returned to Dr. Nelson on May 22, 2017 for a recheck of the right knee. Claimant had knee pain and popping of the right knee. Claimant was given an injection in the right knee. (Jt. Ex. 4, p. 20)

On August 17, 2017 claimant underwent a total knee replacement on the right. Surgery was performed by Dr. Nelson. (Jt. Ex. 2, p. 21)

Claimant returned to Dr. Nelson in follow up on August 21, 2018. Claimant was told to avoid repetitious high-impact activities. (Jt. Ex. 4, p. 24)

In a December 12, 2018 report, John Kuhnlein, D.O., gave his opinions of claimant's condition following an IME. Claimant had constant right knee pain. Claimant had a decrease in right knee strength. Claimant testified his change in gait caused his intermittent lower back pain. Claimant indicated his hip symptoms had worsened for the past few months. (Ex. 1, pp. 1-8)

Dr. Kuhnlein opined when he reviewed claimant's x-rays and MRI scans, claimant's degenerative changes in the right medial knee progressed significantly between 2015 and 2016, leading to the right total knee replacement. As there were no other reasonable explanations for the acceleration of the right knee osteoarthritis, claimant's injury at work accelerated the development of claimant's right knee osteoarthritis, leading to the need for a right total knee replacement. (Ex. 1, p. 10)

Claimant had a preexisting left iliac crest fracture. Claimant indicated he had never had pain in the left hip and thigh until after the injury and surgery. Dr. Kuhnlein opined claimant's lower back and left thigh pain developed as a sequela to the May 2015 injury. (Ex. 1, p. 11)

Dr. Kuhnlein found claimant was at MMI for the right knee, lower back and left thigh pain on August 17, 2018. He found claimant had a 50 percent permanent impairment to the right lower extremity for the total knee replacement. (Ex. 1, p. 12)

Dr. Kuhnlein also found claimant had an additional one percent impairment to the body as a whole for lower back pain and one percent permanent impairment to the body as a whole for the left thigh pain. The combined values converted to a 22 percent permanent impairment to the body as a whole. (Ex. 1, pp. 10-11)

Dr. Kuhnlein limited claimant to lifting 40 pounds occasionally from floor to waist and 50 pounds occasionally from waist to shoulder. (Ex. 1, p. 12)

In a May 3, 2019 letter, Dr. Nelson indicated he had reviewed outpatient records from Scott Honsey, M.D., from 2013. Dr. Nelson did not believe claimant's May 27, 2015 injury was a substantial contributing factor to claimant's need for a right total knee replacement. (Ex. C)

Dr. Kuhnlein indicated he had reviewed Dr. Nelson's May 3, 2019 letter and did not change his views expressed in his IME report. (Ex. 1, p. 16)

In a February 3, 2019 note, Dr. Nelson indicated claimant had a 37 percent permanent impairment to the right lower extremity relating to the right total knee replacement. This was based upon a finding that claimant's total knee replacement had a good result. (Ex. D)

Claimant testified that prior to his 2015 knee injury, no one ever told him he needed a total knee replacement. (Tr. pp. 32-33)

Claimant testified he has constant pain in his knee, hips and back. Claimant testified he has gone to massage therapy for his hip and back pain. (Tr. p. 39)

Claimant said he can no longer return to work as a regular maintenance worker at AE due to his current restrictions and limitations. Claimant said he could not return to work to any of his prior jobs. (Tr. pp. 43-45)

CONCLUSIONS OF LAW

The first issue to be determined is whether claimant's total knee replacement arose out of and in the course of employment. Defendants stipulate claimant sustained an injury to his right knee. Defendants dispute claimant's need for a total knee arthroplasty arose out of and in the course of his employment.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability.

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

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

Regarding claimant's total knee replacement, two experts have opined regarding a causal link between the need for the knee replacement and the May of 2015 injury.

Dr. Nelson performed all three of claimant's knee surgeries. Dr. Nelson treated claimant for approximately three years. Dr. Nelson opined claimant's cartilage loss within the knee was the reason for the total knee replacement. He opined, "based on his initial mechanism of injury, I suspect his cartilage loss predated his work-related injury." (Ex. F)

In a subsequent note Dr. Nelson indicated he did not believe claimant's May of 2015 injury was a substantial factor in claimant's need for a right total knee replacement. (Ex. C)

Dr. Kuhnlein evaluated claimant once for an IME. Dr. Kuhnlein opined the degenerative changes in claimant's right medial knee progressed significantly between 2015 to 2016, upon review of x-rays and MRIs. Based on this, he believed claimant's injury accelerated the right knee osteoarthritis, leading to the need for a right total knee replacement. (Ex. 1, p. 10)

I have a great deal of respect for the opinions of Dr. Nelson. However, I find the opinions of Dr. Kuhnlein regarding causation between the 2015 injury and the ultimate need for a total knee replacement, more convincing. This is for several reasons. First, before the 2015 injury, there is no evidence in the record claimant was diagnosed with cartilage loss or required the need for a total knee replacement.

Second, the record does indicate claimant was treated once in 2013 for a right knee injury. There is no evidence in the record claimant had any symptoms to the right

knee condition, from 2013 until the 2015 injury. There is no evidence in the record claimant was told in 2013 he would need a total knee replacement. Claimant returned to work after the 2013 visit for his knee injury with no permanent restrictions and no permanent impairment.

Third, the initial MRI, taken in 2015 suggests claimant's cartilage problems could be due to the 2015 injury. (Jt. Ex. 1, p. 1)

Finally, claimant's condition for his right knee went from asymptomatic to before the injury, to the need for a right total knee replacement in 2017. As indicated, there is no evidence claimant had any degenerative cartilage problems in his left knee or in any other joint.

Based on this record, it is found the opinions of Dr. Kuhnlein regarding the cause of the need for claimant's right total knee replacement is found to be more convincing than the opinions of Dr. Nelson. Given this record, claimant has carried his burden of proof the need for a right total knee replacement was caused or accelerated by the 2015 injury.

The next issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

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

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

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The extent of scheduled member disability benefits to which an injured worker is entitled is

determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

Regarding the back and hip problems, only Dr. Kuhnlein assessed claimant as having permanent impairment for the alleged back and hip condition. Other than Dr. Kuhnlein's report, there is no other record in evidence that refers to claimant having problems with his lower back and hip. Dr. Kuhnlein found claimant had a two percent permanent impairment for both the hip and back condition. However, Dr. Kuhnlein also notes, "At this point, both the lower back and left iliac crest/left thigh pain appear to be a tissue response to the gait changes without permanent injury, as they resolve with rest, but they are related to increased activity." (Ex. 1, p. 11)

Only Dr. Kuhnlein opines claimant has hip and back injuries from the 2015 knee injury. Dr. Kuhnlein finds claimant has a permanent impairment for the back and hip, but also states the conditions are not permanent injuries. Given this record, claimant has failed to carry his burden of proof his back or hip injuries resulted in permanent impairment.

Regarding the total knee replacement, Dr. Nelson found claimant had a 37 percent permanent impairment to the right lower extremity for the knee replacement. This is based upon a finding claimant had a good result from the arthroplasty. (Ex. D)

Dr. Kuhnlein found claimant had a 50 percent permanent impairment to the right lower extremity. (Ex. 1, p. 12)

Dr. Nelson's opinions regarding permanency to the right lower extremity are based on claimant having a good result from his total knee replacement. Claimant's unrebutted testimony is he has continued aching and pain in the right knee. Claimant has credibly testified he is limited in his activities at work and at home due to limitations due to his right knee. Based on this, it is found the opinions of Dr. Kuhnlein regarding permanent impairment are more convincing than those of Dr. Nelson. It is found claimant has a 50 percent permanent impairment to the right lower extremity. This entitles claimant to 110 weeks of permanent partial disability benefits (220 x 50%).

The next issue to be determined is if there is a causal connection between claimant's injury and the claimed medical expenses.

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 1975).

As noted above, it is found claimant's 2015 injury caused or accelerated the need for claimant's right total knee replacement. The parties have stipulated the charges at issue are fair and reasonable. They have also stipulated the treatment was reasonable and necessary for claimant's condition. Given this record, defendants are liable for the claimed medical expenses as they relate to claimant's knee surgeries, including the right total knee replacement.

The final issue to be determined is whether claimant is entitled to reimbursement for an IME.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

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Regarding the IME, the Iowa Supreme Court provided a literal interpretation of the plain-language of Iowa Code section 85.39, stating that section 85.39 only allows the employee to obtain an independent medical evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 847 (Iowa 2015).

Under the Young decision, an employee can only obtain an IME at the employer's expense if an evaluation of permanent disability has been made by an employer-retained physician.

Iowa Code section 85.39 limits an injured worker to one IME. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842 (Iowa 2009).

The Supreme Court, in Young noted that in cases where Iowa Code section 85.39 is not triggered to allow for reimbursement of an independent medical examination (IME), a claimant can still be reimbursed at hearing the costs associated with the preparation of the written report as a cost under rule 876 IAC 4.33. Young at 846-847.

Dr. Nelson, the employer-retained physician, initially issued a rating to claimant's knee on September 14, 2015. (Ex. B) Dr. Kuhnlein, the employee-retained physician, issued a report regarding claimant permanent impairment on December 12, 2018. Given the chronology of the report, claimant is due reimbursement, including mileage, for costs associated with Dr. Kuhnlein's IME.

ORDER

Therefore, it is ordered:

That defendants shall pay claimant one hundred ten (110) weeks of permanent partial disability benefits at the rate of eight hundred thirty-four and 19/100 dollars ($834.19) per week commencing on August 16, 2015.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

That defendants shall receive a credit for benefits previously paid.

That defendants shall pay claimant's medical expenses as they relate to the right total knee replacement.

That defendants shall reimburse claimant for costs associated with the IME, including mileage.

That defendants shall pay costs.

That defendants shall file subsequent reports of injury as required by this agency under rule 876 IAC 3.1(2).

Signed and filed this 6th day of November, 2019.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Nick Platt (via WCES)
James Bryan (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be 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.