

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JASON WENNING,

Claimant,

vs.

ERJ DINING d/b/a CHILI'S GRILL AND
BAR,

Employer,

and

ZURICH AMERICAN INS. CO.,

Insurance Carrier,
Defendants.File Nos. 20012604.01
20700923.01

ARBITRATION DECISION

Head Note Nos.: 1803, 2500

STATEMENT OF THE CASE

On October 12, 2020, the claimant, Jason Wenning, filed two petitions for arbitration and seeks workers' compensation benefits from ERJ Dining (d/b/a "Chili's Grill and Bar"), employer, and Zurich American Insurance Company, insurance carrier. The claimant was represented by Gregory Taylor. The defendants were represented by Timothy Wegman.

The matter came on for hearing on January 10, 2022, before Deputy Workers' Compensation Commissioner Joe Walsh in Des Moines, Iowa via Court Call videoconferencing system. The record in the case consists of Joint Exhibits 1 through 7; Claimant's Exhibits 1 through 7; and Defense Exhibits A through I. The claimant testified at hearing, in addition to Huge Jimenez. Stephanie Cousins was appointed and served as the court reporter for the proceeding. The matter was fully submitted on February 14, 2022, after helpful briefing by the parties.

Through the hearing report, the parties submitted the following issues and stipulations with regard to File No. 20012604.01.

ISSUES

The parties submitted the following issues for determination with regard to File No. 20012604.01:

1. Whether the claimant has sustained any temporary or permanent disability as a result of his stipulated workplace injury.
2. Whether the claimant is entitled to a running award of healing period as a result of his stipulated workplace injury.

3. Whether the claimant has reached maximum medical improvement.
4. Whether the claimant is entitled to any permanency benefits.
5. Whether the claimant is entitled to the medical expenses set forth in Claimant's Exhibit 6.
6. Whether the claimant is entitled to alternate medical care.
7. Whether the claimant is entitled to an independent medical examination (IME) under Section 85.39.
8. Whether claimant is entitled to costs.

STIPULATIONS

Through the hearing report, the parties stipulated to the following with regard to File No. 20012604.01:

1. The parties had an employer-employee relationship at the time of the injury.
2. Claimant sustained an injury which arose out of and in the course of employment on March 4, 2019.
3. The elements comprising the rate of compensation are stipulated and the parties contend the weekly rate of compensation is \$1,020.46.
4. Credit is not in dispute.
5. Affirmative defenses have been waived.

Through the hearing report, the parties submitted the following issues and stipulations with regard to File No. 20700932.01.

ISSUES

The parties submitted the following issues for determination with regard to File No. 20700923.01:

1. Whether the claimant sustained an injury which arose out of and in the course of his employment on March 9, 2019. The parties did stipulate on the record that, if claimant sustained an injury on this date, it was to his right leg.
2. Whether the alleged injury is a cause of any temporary or permanent disability.
3. Whether the claimant is entitled to a running award of healing period benefits.
4. Whether the claimant has reached maximum medical improvement.

5. Whether the claimant is entitled to any permanency benefits, and, if so, the nature and extent.
6. Whether the claimant provided timely notice of his alleged work injury.
7. Whether the claimant is entitled to the medical expenses set forth in Claimant's Exhibit 6.
8. Whether the claimant is entitled to alternate medical care.
9. Whether the claimant is entitled to an independent medical examination (IME) under Section 85.39.
10. Whether claimant is entitled to costs.

STIPULATIONS

Through the hearing report, the parties stipulated to the following with regard to File No. 20700923.01:

1. Affirmative defenses have been waived other than timely notice.
2. The parties had an employer-employee relationship at the time of the injury.
3. The elements comprising the rate of compensation are stipulated and the parties contend the weekly rate of compensation is \$1,020.46.
4. Credit is not in dispute.

FINDINGS OF FACT

Claimant Jason Wenning was 49 years old as of the date of hearing. He testified live and under oath at hearing. I do not find him to be entirely credible. He was not a great historian. Many of his answers were vague and general. Some of his testimony is inconsistent with other evidence in the record. Specific inconsistencies shall be discussed further below.

Mr. Wenning is a high school graduate. He had been the general manager of Chili's in Cedar Rapids since approximately 2007. His duties included all aspects of running a restaurant and training other managers. It appears that he was quite good at this. He worked long hours and some of the work was fairly heavy. His job description is in evidence. (Claimant's Exhibit 5, page 44) His working background involved restaurant management and training.

Mr. Wenning testified that prior to his work injuries, he was in a state of good health. (Transcript, pages 28-29) The record reflects, he was active and athletic prior to March 2019. He was diagnosed with psoriatic arthritis in approximately 2014. He testified that his primary symptoms from this condition were pain and tingling in his hands and feet. (Tr., pp. 25-26) He testified that this condition never interfered with his

ability to work. His psoriatic arthritis was treated with a medication called Enbrel which controlled his condition well. (Joint Exhibit 5, page 85) By 2017, his doctor declared his psoriatic arthritis was in remission and stopped prescribing Enbrel. (Tr., p. 27)

Mr. Wenning testified that he sustained an injury while working for Chili's on March 4, 2019. This injury itself is stipulated. Mr. Wenning testified that on that date, he traveled through winter weather to another Chili's location in Coralville, Iowa, to retrieve product for his store in Cedar Rapids. He placed a number of heavy boxes on a 3-tier cart and wheeled it to his vehicle. He slipped on the ice and fell forward. The cart toppled and the boxes fell on top of him. (Tr., pp. 31-32) Mr. Wenning's account of the injury is not disputed.

Mr. Wenning testified that he had immediate and severe pain in his right arm. He thought it was broken. (Tr., p. 33) He also testified that he had pain in his back, left arm and right knee but was mostly concerned about his right arm due to the severity of the pain. (Tr., p. 33) He immediately reported this incident and sought treatment from his family practitioner within hours. His family clinic documented a right wrist injury, in addition to right elbow and knee pain, as well as a knot on his head. There is no mention of back pain. (Jt. Ex. 1, pp. 8-9) X-rays of the right arm initially revealed no fractures. (Jt. Ex. 1, p. 9)

Following the injury, Mr. Wenning returned to work at Chili's. He testified that he assigned his employees to perform the heavier work of unloading boxes and so forth. (Tr., p. 67) On March 9, 2019, he was performing a line check in the kitchen at Chili's. As he was walking in the kitchen with a clipboard, he stepped in an open drain hole and hyperextended his right leg. (Tr., p. 35) Mr. Wenning immediately contacted his superior, Dan Debert, and reported the incident. (Tr., p. 36) While I have found Mr. Wenning's testimony overall to be only marginally credible, I believe him that this incident happened and that he reported it to his supervisor. The incident itself corroborated generally by one of his staff members, Hugo Jimenez, who testified live and under oath. (Tr., pp. 15-16) The defendants denied liability for this alleged injury.

Mr. Wenning's first medical appointment, other than his primary physician, was with Brian Wills, M.D., on March 21, 2019. Mr. Wenning testified that Dr. Wills told him he could only treat the right arm. (Tr., p. 34) Mr. Wenning testified that he told Dr. Wills about pain in his left arm, right knee, and low back (on the right side). (Tr., pp. 37-38) He also testified that he had bilateral locking in his ring finger, as well as pain in both elbows and shoulders. (Tr., pp. 34-35) Dr. Wills documented the following:

He was up at Cedar Rapids at the restaurant they are getting additional supplies that are placed into palm size cans [sic]. He was loading these into the truck when he lost his balance due to the fact he was standing on ice in the parking lot and fell forwards landing on outstretched hands and also on his knees. The cart that the cans were on then flipped and ended up hitting him on the forehead. He was able to stand back up and finished loading the cans into his truck and able to drive back to Iowa City. He had persistent pain and sought medical care later that day. He was evaluated and x-rays were obtained of the right elbow and right wrist. There was a fracture but there was concern for

some possible widening at the scapholunate interval. He was placed in a wrist splint. He notes he has been wearing the splint somewhat, but has been taking off as he is needed to in order to be able to perform his duties as the general manager at Chilis restaurant. He is not having any numbness or tingling. In addition to the pain in the right wrist, he is also noted some bruising and pain in the knees. All of the symptoms seem to be getting better. No numbness or tingling.

(Jt. Ex. 3, p. 25) While it is true that Dr. Wills focused mostly on his right arm at this visit, Dr. Wills clearly documented his knee pain and various symptoms in other body parts. There is, however, no mention of back pain, finger or hand pain or any numbness or locking of the fingers. Dr. Wills diagnosed right wrist contusion. He recommended conservative management and use of a wrist splint.

Dr. Wills reexamined Mr. Wenning on April 24, 2019, documenting the following at this time:

He is now about 7 or half [sic] weeks out from his injury. He notes that his symptoms tend to be very 'hit or miss'. He does feel better when he is resting. His symptoms were much improved while he was on vacation for a week. He knows if he overdoes things, the pain gets worse. He can have an episode where his will seem to flare up his symptoms and then they will last for several hours. He is not able to do a pushup due to placing the wrist in an uncomfortable position. No significant numbness or tingling. No nocturnal symptoms. He has been taking anti-inflammatory medication on and off. Aspirin has been some benefit. He is wondering about switching to ibuprofen.

He is noting some aching and pain that seems to go from the wrist up into both proximal forearms. It seems to be more on the back of the wrist on each side. He is also noting some discomfort around the outside of the left elbow.

(Jt. Ex. 3, p. 29) There is no documentation of any other symptoms at this visit, including locking in his fingers or back pain. Mr. Wenning testified that he was confident he told Dr. Wills about these other symptoms. (Tr., p. 38) Mr. Wenning testified that Dr. Wills told him that his symptoms would improve with time. (Tr., p. 31) Dr. Wills though, actually recommended occupational therapy. "As pain decreases and motion and strength improve, he can begin a work hardening program." (Jt. Ex. 3, p. 31) He prescribed two times per week for six weeks and asked him to return upon completion of the treatment. It appears that his only restriction at this time was to wear the wrist splint.

Mr. Wenning testified that the therapy was initially denied, however, other than his own testimony, there is no evidence of this in the record. (Tr., pp. 79-80) Mr. Wenning also testified that his work schedule made it difficult to attend appointments. (Tr., p. 41) He testified he only went one time after Dr. Wills prescribed therapy. "I

worked a lot. And it was pretty much just squeezing a ball, but I figured I could do that anywhere." (Tr., p. 41) This was Mr. Wenning's last medical treatment until November 2019.

In June 2019, Mr. Wenning was terminated from Chili's. There are no employment records or other evidence in the record documenting the basis for his termination. Mr. Wenning testified that he was told he was terminated for painting bathroom stalls without authorization, unauthorized use of cameras and using a manager training comp card. (Tr., p. 65) He was eventually awarded unemployment compensation. His unemployment payment records are in evidence. (Def. Ex. H)

The record is somewhat unclear as to why Mr. Wenning did not receive any treatment between June and November 2019. He testified that he did not seek treatment because the physicians told him he would improve with time. He did not apply for unemployment until November or December 2019. He was not getting any treatment. He testified that he did not try to get any treatment during this period of time because Dr. Wills told him his condition would improve with time. (Tr., p. 41) He also did not have any insurance following his termination.

He first returned to his primary clinic in November 2019. Sarah von Harz, M.D., documented the following: "He reports he is still suffering from bilateral hand and wrist pain, as well as neck and back pain which he believes are a result of the fall he had." (Jt. Ex. 1, p. 11) Dr. von Harz noted that psoriatic arthritis symptoms had returned. She documented severe hand pain, triggering in his fingers that is painful, and pain in his shoulders neck and back. (Jt. Ex. 1, p. 11) Upon examination she noted swelling in his bilateral hands and locking in his ring fingers. (Jt. Ex. 1, p. 12) Dr. von Harz reexamined him in December 2019, and documented many of the same issues.

[H]e continues to have bilateral hand pain and trigger digits. He reports that these have been a problem since a fall at work. I had seen him for this one month ago. I advised that he pursue splinting for the time being, and ice but recommended that he stop ibuprofen and nsoids as well as apap for now because I was concerned about liver and kidney function, he has a history of psoriatic arthritis. The only active psoriasis now is a spot on the left forearm, he hasn't been on immunosuppressives for many months now and states that his sx's have not returned the same as they were. He reports that the hand pain and foot pain has been present since he fell on ice at work. He did see ortho. When he went there, he was told that they expected his sx's would get better, but they have not. He is now still struggling with left foot pain, which is plantar aspect; in one area specifically, he has tried inserts, changed shoes, massage and ice but the pain is pinpoint and severe. He feels it is getting worse, and now he feels a small bump in the most painful area, the lower leg swelling continues although he reports it is somewhat better.

(Jt. Ex. 1, p. 14) She referred him back for orthopedic consultation and recommended a hand and foot specialist. (Jt. Ex. 1, p. 16)

For the orthopedic consultation he returned to Dr. Wills on January 16, 2020. (Jt. Ex. 3, p. 35) Mr. Wenning's clinical presentation in January 2020, was significantly different from what Dr. Wills had documented in April 2019.

He notes that it is now difficult for him to feel items in his pocket. He has difficulty pulling change out as he does not feel it. He also notes that driving exacerbates the numbness and tingling in the hands. He is not having nocturnal awakening due to the symptoms. He notes that the symptoms have been going on for about 5 months. He notes that the fingers will be stiff in the morning and it is difficult for him to make a tight fist. He has tried wearing copper gloves that he finds are very beneficial as is using a powerful magnet. He has also noted some clicking and catching involving the ring finger. This has also been going on for several months. He describes a history of the finger getting stuck [sic] in flexion and he will have to use his other hand to pull it out into extension. He has not had any electrodiagnostic testing.

He tells me that he does have similar symptoms that occurred on the left side and that he injured his left upper extremity as well when he fell back in March of 2019. He is currently having the left side be evaluated as part of the workers' compensation claim. He understands that I can only evaluate his right side today as the left side has not been approved as a workers' compensation injury.

(Jt. Ex. 3, p. 35) There is no mention whatsoever of any back pain in this record. Dr. Wills thoroughly examined both upper extremities and hands and he suspected carpal and/or cubital tunnel. He ordered electrodiagnostic studies and placed him on a five-pound lifting restriction. (Jt. Ex. 3, pp. 38-39)

In February 2020, Mr. Wenning gave a recorded statement to the insurance carrier. (Cl. Ex. 3) In his statement, he made no mention of injuring his back in the March 4, 2019, work injury. (Cl. Ex. 3, p. 32) He indicated he hurt his right hand and arm. When asked what other body parts were injured, he answered, "My knees and my, my ankles. Was when I fell on fell on all fours." (Cl. Ex. 3, p. 32) He did mention that the boxes hit him in his back and the back of his legs. (Cl. Ex. 3, p. 33)

For reasons not apparent in this record, Mr. Wenning did not immediately have electrodiagnostic testing or any follow-up with Dr. Wills. In fact, he did not return to any physician until August 2020. At some point prior to July 2020, Mr. Wenning filed for Social Security Disability (SSD). Through that process, Disability Determination Services authorized radiographic evaluation of his low back and knee. The following conditions were listed as needing evaluation: "Hand/Wrist Arm Problem; Knee Problem; High Blood Pressure; Psoriatic Arthritis; Foot Problems; Stomach Problems". (Jt. Ex. 4, p. 65) On August 5, 2020 lumbar x-rays showed mild chronic multi-level disc degeneration. Knee x-rays demonstrated osteoarthritis and moderate-sized tricompartmental osteophytes and mild medial compartment joint space narrowing, and joint effusion. (Jt. Ex. 4, pp. 70-71)

Mr. Wenning returned to his primary physician, Dr. von Harz in August 2020 for a rash on his right upper arm. (Jt. Ex. 1, p. 17) Dr. von Harz documented the following:

History of Present Illness

Patient's here today because he was concerned about a potential allergic reaction centered around a patch on his left arm. This patch has been present for a week now. He states it is there because he had DHS called on him and they placed a patch on his arm in order to see if he is using drugs or not. I have never seen a patch like this before. Is a small patch, 2 cm x 3 cm placed on the left lateral upper arm. It is covered with clear adhesive. The skin surrounding adhesive is very irritated, red and excoriated. Patient also states that he was working fixing his car and spilled break [sic] fluid on this. He thinks that exacerbated skin irritation. He was supposed to drive to Cedar Rapids to have this removed yesterday but he felt too tired and run down to do so. He plans to go today.

He does have a diagnosis of psoriatic arthritis. He is not following with rheumatologist for this. He stopped doing so when medications became too expensive and follow up appointments also became problematic. He was taking Enbrel which he felt helped both his skin and joint pain. Since stopping that medication he has had chronic problems with polyarthralgia mostly centered in the hands. He is currently reporting hand swelling that's worse in the morning, tends to get somewhat better during the day but he continues to have trouble using his hands, decreased grip strength, chronic problems with redness and swelling. He now has insurance and is willing to seek rheumatological help again. He is not currently taking his blood pressure medicine. His blood pressure today is within normal limits. He has not been taking it for quite some time. He denies current drug and alcohol use.

(Jt. Ex. 1, p. 17) Dr. von Harz did lab testing and referred Mr. Wenning to rheumatology. "I discussed the importance of the patient's having control over his psoriatic arthritis." (Jt. Ex. 1, p. 19)

On September 4, 2020, Mr. Wenning was evaluated at an urgent care clinic in North Liberty complaining of back pain. Other than his visit to Dr. von Harz, this is the first office note I can locate in the record of evidence which documents Mr. Wenning specifically complaining of back pain. "This is a new problem. The current episode started yesterday (yesterday, heavy lifting furniture/tires and 'tweaked' his low back." (Jt. Ex. 4, p. 72) The pain was documented as severe. He was diagnosed with acute right-sided low back pain without sciatica. (Jt. Ex. 4, p. 72) He was prescribed some medications and told to follow up with his primary physician if necessary. (Jt. Ex. 4, p. 74) Claimant filed the petition in this matter on October 12, 2020.

In March 2021, claimant's counsel requested further treatment for claimant's back and arms. (Cl. Ex. 4, p. 40) On March 26, 2021, defense counsel wrote to claimant's counsel denying liability for any condition other than claimant's right arm injury. (Cl. Ex. 4, p. 41)

On March 23, 2021, Mr. Wenning was evaluated by a rheumatologist at the University of Iowa for his psoriatic arthritis. His history of psoriatic arthritis was documented as follows:

HISTORY OF PRESENT ILLNESS

History comes from the patient:

- has been seeing Dr. Bagheri for 1-2 years.
- he put him on Enbrel – got the arthritis in remission (was on it for 1.5 or 2 years), stopped it in 2015/2016 methotrexate – unable to tolerate (pills)
- sulfasalazine – did not help.
- the pain came back within two to three months after stopping the Enbrel
- joint pain:

Hands: ring finger on both hands and middle finger on the right.

Swollen in the same areas. Morning stiffness for couple of hours. The worst time for his hands in morning.

Right shoulder: The pain started about 9 months and has gotten much worse in the last two months. The shoulder hurts any time. It feels like it is out of place.

Right knee: started hurting since the accident in 2019. This was when he already stopped the Enbrel. Denies swelling. Does hear clicking.

Walking upstairs is difficult. The pain is present all the time. He denies morning stiffness.

Low back: started in the last 6-8 months. It was there before but not as bad as before the fall in 2019. It hurts with driving and has to stop and get out of the car. The pain comes down on the back of the left leg.

When he coughs, it hurts on the right leg in the front. Sitting makes it worse. Lying down is fine.

Toes: always numb. The pain came back after stopping the Enbrel.

Denies sausage toes. This does hurt more in the mornings.

- takes aspirin, Advil and that does help
- does feel tired "all the time" for almost a year
- skin mainly involves the scalp and some on his arms. Enbrel helped the skin too.
- drinks water at night, and sleeps with mouth open
- right arm feels weak
- numbness and tingling in hands and feet since 2015. It got better while on Enbrel.
- shower does help a lot

(Jt. Ex. 7, p. 109) The rheumatologist did a full arthritis workup and diagnosed psoriatic arthritis. (Jt. Ex. 7, pp. 114-115) Enbrel was prescribed. (Jt. Ex. 7, p. 115)

In June 2021, Mr. Wenning returned to Physicians' Clinic of Iowa and began seeing physicians for his left arm, back and right knee. (Jt. Ex. 5, p. 88) This is the same clinic which had previously treated his psoriatic arthritis (Dr. Bagheri). James Huber, D.O., evaluated his low back and hip in June 2021. Peter Chimenti, M.D., examined his left ring finger in September 2021. (Jt. Ex. 5, p. 102) Dr. Chimenti noted that the finger issue may "be possibly contributed by the psoriatic arthritis." (Jt. Ex. 5, p. 102) This record reflects the difficulty in sorting out the precise causal relationship between any work injury and his ongoing condition.

Mr. Wenning finally obtained electrodiagnostic testing in July 2021. (Jt. Ex. 3, pp. 44-47) This is presumably the testing Dr. Wills recommended in January 2020. He followed up with Dr. Wills a few days later. Dr. Wills documented the following:

History of Present Illness

Mr. Wenning is a 49 year old gentleman seen today for the the [sic] above. He returns today independently having been last seen on January 17, 2020. He has been seen for the above. He has recently had electrodiagnostic testing that was recommended when he last saw me on January 17. He does note that overall he is doing "better". He does note still some numbness and tingling just in the tips of the fingers, but the symptoms of numbness and tingling seem to have improved overall. His main concern today is the left ring finger and the fact that he is not able to fully extend at the DIP joint and he has difficulty fully flexing the finger as well. This finger has been evaluated by several other care providers it seems though I do not have access to the records. He tells me he was recently at PCI for what sounds to have been a possible IME. He told me x-rays were obtained of the finger at that appointment and that he was told there was no evidence of fracture. The right ring trigger finger that he had at his last appointment has not resolved. He is related to me that he has not returned to work since I saw him last.

(Jt. Ex. 3, p. 48) Dr. Wills again recommended a course of occupational therapy. (Jt. Ex. 3, p. 51) He provided work restrictions and asked to follow up in six weeks.

On July 8, 2021, Mr. Wenning was evaluated by Charles Wenzel, D.O., for an independent medical evaluation and prepared a report dated August 18, 2021. (Cl. Ex. 2) Dr. Wenzel reviewed appropriate records and examined Mr. Wenning. (Cl. Ex. 2, pp. 3-11) He diagnosed low back pain and right knee pain. He did not make any diagnosis for either of claimant's arms, wrists or hands. (Cl. Ex. 2, p. 11) Regarding medical causation, he stated the following:

If the incident occurred as Mr. Wenning states (he states that he did not have any low back pain until after the 03/04/2019 work injury when he slipped on ice), the low back pain could be related to his employment with Chili's, assuming the history presented today is accurate.

(Cl. Ex. 2, pp. 11-12) Dr. Wenzel rendered a similar opinion regarding Mr. Wenning's right knee pain. He assigned a 5 percent whole body rating for the low back and recommended orthopedic evaluations for both the low back and the right knee. Dr. Wenzel did fully evaluate the condition in claimant's bilateral hands and arms, but provided no conclusions regarding diagnosis, causation, impairment or disability.

After his IME, Mr. Wenning began therapy in August 2021. (Jt. Ex. 7, p. 106) It appears the therapy focused on his low back and right hip. (Jt. Ex. 7, p. 107) Dr. Wills examined Mr. Wenning on August 24, 2021. At that time, Mr. Wenning reported significant improvement. (Jt. Ex. 3, pp. 55-57) He was given an injection.

Dr. Wills electronically signed a statement prepared by claimant's counsel on firm letterhead in August 2021. (Cl. Ex. 1) Dr. Wills agreed that claimant had complained of pain in his bilateral wrists, forearms, knees, left elbow, right and left ring fingers, but he was only authorized to treat the right arm. (Cl. Ex. 1, p. 1) He went on to opine that the March 2019, work injury was a substantial factor in causing Mr. Wenning's bilateral forearm tendonitis. (Cl. Ex. 1, p. 1) He further opined that Mr. Wenning had not reached maximum medical improvement for this condition and that he had been under restrictions for this condition since January 2020. (Cl. Ex. 1, p. 2)

Dr. Wills examined Mr. Wenning on a final occasion on October 5, 2021. The following is documented:

Mr. Wenning is a 49 year old gentleman seen today for the above. He returns today independently in scheduled follow-up having been last seen on August 24, 2021 at which time he had a right ringer finger A1 sheath injection for trigger digit. He notes his triggering has resolved and he has no further triggering. He does still notes [sic] some pain and stiffness in the mornings that gets better after about an hour. He additionally tells me that he has had an injection into the left ring finger is well by a no other [sic] physician that he is seeing for this and that this has helped his left ring finger.

(Jt. Ex. 3, p. 58) This was the last visit he had with Dr. Wills. On December 7, 2021, Dr. Wills documented the following:

Mr. Wenning has not presented to his last 2 scheduled appointments. At this point, I will not plan to see him back. I am happy to provide a letter as needed. At this point, I will assume that he has responded very well to the injection performed at his last appointment and that he has recovered and does not need any further treatment as he has not presented to his last two appointments.

(Jt. Ex. 3, p. 61)

Defendants had Mr. Wenning evaluated by Peter Matos, D.O., on October 19, 2021. (Def. Ex. A) He reviewed appropriate records and examined Mr. Wenning. (Def. Ex. A, pp. 2-11) Dr. Matos opined that "I do not find any work-related injury to Mr. Wenning occurring on or about March 4, 2019, and/or March 9, 2019. His ongoing

complaints are more personal in nature related to degenerative joint disease and psoriatic arthritis.” (Def. Ex. A, p. 3) He assigned no impairment or restrictions and did not recommend any treatment. (Def. Ex. A, p. 4)

After the evaluation by Dr. Matos, Dr. Wenzel provided a supplemental report addressing the opinions of permanency from Dr. Matos in addition to reviewing records from PCI and Dr. Wills. (Cl. Ex. 2, pp. 14-21) Dr. Wenzel reached largely the same conclusions as his earlier report. He still provided no opinion on diagnosis, causation, impairment or disability for the bilateral upper extremities. He added a diagnosis of right knee pain and opined that this condition would require further medical testing and evaluation. (Cl. Ex. 2, pp. 19-20)

CONCLUSIONS OF LAW

File No. 20012604.01 (Date of Injury, March 4, 2019)

The first question submitted is whether the claimant's stipulated work injury is a cause of any temporary disability during a period of recovery. The claimant contends that he injured his low back and both arms and hands in this accident. The defendants dispute that claimant's injury caused disability in any part of his body other than the right arm. The claimant further contends he has been in a healing period since January 2020, when he was placed on restrictions by Dr. Wills and seeks a running award of benefits through the date of hearing and continuing. The defendants assert that Mr. Wenning is not entitled to a running award of healing period benefits.

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).

As an initial matter, I find that the claimant has failed to prove that his low back condition is causally connected to this injury. The claimant testified that he has had low back pain continually since his date of injury. This assertion is simply not supported by the contemporaneous medical records in evidence. While Dr. Wills and other medical providers documented a host of physical complaints following his March 4, 2019, work injury, there is nothing at all documented in the initial records regarding his low back. The first mention of low back pain in any of his medical records is recorded in November 2019, by his family doctor, six months after the work injury. Then, in September 2020, a full year and a half after the injury the following is documented. "This is a new problem. The current episode started yesterday (yesterday, heavy lifting furniture/tires and 'tweaked' his low back." (Jt. Ex. 4, p. 72)

Mr. Wenning explains this by suggesting that Dr. Wills was not allowed to treat any condition other than his right arm. This appears to be true. Nevertheless, Dr. Wills had documented a host of other physical complaints that he was apparently not allowed to treat in his notes, but not the low back. Moreover, none of Mr. Wenning's other physicians documented the condition either. While it is possible that he really did have back pain since that time, the weight of the evidence simply does not support this finding in the record. It is noted that claimant's own expert opined that if his history was accurate, his low back pain "could be" related to the work injury. (Cl. Ex. 2, p. 12) He also did not mention this condition in his recorded statement taken nearly a year after the accident. (Cl. Ex. 3)

It does, however, appear from this record that Mr. Wenning sustained an injury to his bilateral arms and hands on March 4, 2019. This is well-documented in the early medical records. Initially, his most immediate concern was the right arm, which he believed was fractured. Claimant's IME physician, Dr. Wenzel, however, did not render any opinion on diagnosis, disability or causation as it relates to his bilateral upper extremities. (Cl. Ex. 2, p. 11)

Mr. Wenning's authorized treating physician, Dr. Wills provided sporadic treatment for the bilateral upper extremities. He initially provided treatment in March and April 2019. Dr. Wills recommended occupational therapy at that time and asked Mr. Wenning to return. Then there is an insufficiently explained six-month gap in treatment.¹ When he returned to Dr. Wills in January 2020, after having been off work since June 2019, his documented symptoms were significantly different from his March/April 2019 symptoms. Dr. Wills provided treatment again in January 2020, and then there is another significant gap in treatment. Dr. Wills had again recommended treatment but there was no follow-up by Mr. Wenning. When Mr. Wenning returned in July 2021, his symptoms were again, significantly different. From July 2021, through

¹ Mr. Wenning did attempt to explain this treatment gap. He testified that the doctors told him his condition would get better, so he waited. He also testified that he lost his medical insurance after he was terminated. The problem is that this is not supported by the records. Dr. Wills may have told him his condition may improve with time, however, Dr. Wills clearly instructed him to do occupational therapy and return to him. Mr. Wenning chose not to do this. Importantly, Dr. Wills documented that his condition had been improving in the spring of 2019, particularly when he was allowed to rest. (Jt. Ex. 3, p. 29) Yet, after he had been off work for six months, his complaints had become more specific and worse. In short, Mr. Wenning's attempt to explain this treatment gap does not make sense.

September 2021, however, Mr. Wenning's symptoms seemed to come under control. Prior to this, claimant had started taking Enbrel again to control his psoriatic arthritis.

I find that while claimant did sustain injury to his bilateral arms and hands from his work injury, he has failed to meet his burden of proof that this condition caused any temporary or permanent disability. It is impossible to sort out in this record, the precise cause of the symptoms he was experiencing in his upper extremities from January 2020, through the date of hearing. I do not find either the report from Dr. Wills, nor the report of Dr. Matos to be particularly convincing, and Dr. Wenzel did not provide opinions regarding the arms and hands. From this record, however, it does appear that his symptoms are more related to his condition of psoriatic arthritis than to any ongoing effects of his stipulated work injury. Since the claimant has failed to meet his burden of proof, he shall take nothing further for this claim by way of indemnity benefits.

The claimant has also made a claim for past and future medical. The defendants also dispute these claims.

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).

Evidence in administrative proceedings is governed by section 17A.14. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence. The rules of evidence followed in the courts are not controlling. Findings are to be based upon the kind of evidence on which reasonably prudent persons customarily rely in the conduct of serious affairs. Health care is a serious affair.

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 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).

The claimant has presented past medical expenses set forth in Claimant's Exhibit 6. I find that the defendants are responsible for the outstanding medical expenses from Steindler Orthopedic Clinic, Corridor Radiology and North Liberty Family Health. These were authorized treating physicians performing treatment on Mr. Wenning's bilateral upper extremities. The remainder of the expenses appear to conditions which claimant has failed to prove are related to his work injury.

The claimant also seeks alternate medical care for future medical treatment. He seeks an order authorizing Physicians' Clinic of Iowa (PCI) to treat his ongoing conditions in his bilateral upper extremities. I find that claimant has failed to meet his burden of proof that the treatment recommended by PCI is causally connected to his work injury.

File No. 20700923.01 (Date of Injury, March 9, 2019)

The claimant also alleged that he sustained an injury to his right knee on March 9, 2019, just a few days after his first work injury. The defendants dispute this, contending the injury was never reported. The defendants have asserted a notice defense.

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" refer 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 Elec. 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.

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

Mr. Wenning testified that he stepped in a hole at work, hyperextended his right leg and immediately told his supervisor following the injury. In this instance, his testimony is supported by an independent witness, Hugo Jimenez, who observed Mr. Wenning immediately following the alleged injury. Mr. Wenning testified that when he told his superior of this incident, he was told it would look bad if he reported another work injury and suggested that he pursue treatment under his own insurance.

While I have not found Mr. Wenning to be a particularly credible witness, I do find it is more likely than not that he did sustain an injury which arose out of and in the course of his employment on March 9, 2019. I further find that the employer has failed to meet its burden as it relates to the notice defense. The defendants presented no evidence on this topic.

To date, Mr. Wenning has had no real workup at all on the condition in his right knee. It is impossible to award any benefits to the claimant with this record. Since I have found that Mr. Wenning did sustain an injury to his right knee which arose out of and in the course of his employment, I find that he is entitled to medical treatment for

this condition. The defendants shall authorize a physician to evaluate claimant's right knee and provide treatment if requested.

For Both Files

Claimant also seeks assessment of his independent medical evaluation fees from Dr. Wenzel, including his supplemental report dated December 8, 2021. He alternatively seeks these expenses as a cost.

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).

Iowa Code section 86.40 states:

Costs. All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

Costs. Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the

deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010) The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

At the time Dr. Wenzel initially evaluated Mr. Wenning, there had been no evaluation of "permanent disability" on either of claimant's injuries. The employer did not seek an evaluation of permanent disability until October 2021 with Dr. Matos. Dr. Wenzel, however, provided a supplemental report in December 2021, specifically addressing the evaluation of disability by Dr. Matos. I find that claimant is entitled to reimbursement of Dr. Wenzel's December 2021 supplemental IME report in the amount of \$3,162.00. I further find that claimant is entitled to a reimbursement of costs in the amount of \$2,689.15. This amount includes the cost of Dr. Wenzel's initial October 2021 report (not the evaluation), in the amount of \$2,020.90, the report from Dr. Wills in the amount of \$400.00, the filing fee (\$200.00) and the claimant's deposition (\$68.25).

ORDER

THEREFORE IT IS ORDERED

File No. 20012604.01

Claimant shall take nothing further by way of indemnity benefits.

Defendants shall pay the unpaid medical expenses set forth in Claimant's Exhibit 6, from the following providers only: Steindler Orthopedics, Corridor Radiology, North Liberty Family Health Center. These medical expenses shall be paid in a manner consistent with this decision.

File No. 20700923.01

Defendants shall authorize an evaluation and treatment of claimant's right knee if requested.


For both files

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

Defendants shall reimburse claimant's supplemental IME costs in the amount of three thousand one hundred sixty-two and 00/100 dollars (\$3,162.00), set forth in Claimant's Exhibit 7.

Defendants shall pay costs in the amount of two thousand six hundred eighty-nine and 15/100 dollars (\$2,689.15).

Signed and filed this 28th day of June, 2022.



JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Charles Cutler (via WCES)

Gregory Taylor (via WCES)

Timothy Wegman (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.