BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JEFFREY WALL, Claimant, vs. CITY OF DES MOINES, Employer, Self-Insured, Defendant.	:	File No. 21701301.01 ARBITRATION DECISION Head Note Nos: 1108, 1402.30, 1403.30, 2206, 2209, 2401, 2402

STATEMENT OF THE CASE

Claimant, Jeffrey Wall, has filed a petition for arbitration seeking workers' compensation benefits against the City of Des Moines ("City"), a self-insured employer, as defendant.

In accordance with agency scheduling procedures and pursuant to the Order of the Commissioner, the hearing was held on January 12, 2023, via Zoom. The case was considered fully submitted on January 27, 2023, upon the simultaneous filing of briefs.

The record consists of Joint Exhibits 1-5, Claimant's Exhibits 1-7, Defendant's Exhibits A-F, along with the testimony of claimant, Kevin Buttrey and Caleb Adams-Brown.

ISSUES

1. The appropriate date of injury;

2. Whether claimant gave proper notice under Iowa Code Section 85.23;

3. Whether claimant is entitled to penalty benefits due to defendant's denial of the claim;

4. Whether claimant is entitled to future medical care.

STIPULATIONS

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration

decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The parties stipulate claimant sustained an injury arising out of and in the course of his employment, that the injury was the cause of some temporary disability, and permanent disability resulting in a 37 percent functional loss.

At the time of the injury, claimant's gross earnings were $1,203.21 per week. He was married and entitled to two exemptions. Based on the foregoing the weekly benefit rate is $773.68.

FINDINGS OF FACT

Claimant, Jeffrey Wall, was a 63-year-old employee at the time of the hearing. At all relevant times hereto, claimant was married with three children. He attended high school and obtained a GED. Following high school, claimant obtained a water distribution grade 2 license.

Claimant was an employee of the public works department of defendant employer. He began working for defendant in September 1999 in the forestry department. The undisputed consensus of the individuals who testified was that work for the forestry department was physically taxing. Claimant testified that he had developed knee pain over time as a result of the work he performed for the City, but he did not share this with defendant employer initially.

Claimant's past medical history includes a work injury to his eye in or around 2000. He reported the injury, filled out paperwork, and was off work for a few days to recuperate. (See Defendant's Exhibit D:10)

At the time of his left knee injury, he was working the street cleaning position. Per the job description and claimant's own testimony he hauled materials, cut trees, lifted logs, dragged brush, cleaned culverts, collected and hauled refuse, spread gravel, salt, sand and other materials for road safety. (See e.g. A:1) He climbed in and out of his truck several times during his eight to twelve hour shifts. Some days he would plow for 12 hours and others he would be lifting materials weighing 50-100 pounds.

Caleb Adams-Brown testified on behalf of the defendant. He has known claimant for approximately 13 years and was his immediate supervisor since 2014. Mr. Adams-Brown testified that claimant was a great worker and an honest man, but that he was not aware of claimant sustaining an injury at work. However, he did see claimant limping in the summer of 2021, prior to claimant's retirement. Mr. Adams-Brown did not connect claimant's limping to his work duties since an injury could have occurred at claimant's home.

Mr. Adams-Brown testified that his first knowledge of claimant's work-related injury was when the petition was filed. Shortly after, he made contact with a representative of the City's workers' compensation claims administrator on December 17, 2021.

Mr. Adams-Brown further testified that the forestry department work was more

physically demanding than the street cleaning work and recommended claimant move to street cleaning as it would be easier for claimant physically.

Around April 2021, the left knee began to hurt, and the pain did not abate. He testified that the pain became more noticeable after he moved from forestry to street cleaning, and he had to climb up and down into and out of his truck frequently. This time claimant testified that he did share this with Mr. Adams-Brown. Mr. Adams-Brown does not remember this, nor does he recall referring claimant to a clinic.

Co-worker Kevin Buttrey was called to testify by claimant. Mr. Buttrey testified without rebuttal that he served as a fill-in supervisor from August 2021 to December 2021 and directed injured employees to the City Clinic. He testified that he observed claimant struggle at work due to the limp. He advised claimant to seek care at the City Clinic.

Claimant testified that in late August or early September he reached out to the City Clinic for care but that the City Clinic told him that they would not x-ray his knee. As a result, claimant sought out care with his own family physician.

On August 10, 2021, claimant was seen by William F. Maher, D.O., for left knee pain. (Joint Exhibit 1:2) Claimant reported instability, and that the pain was fairly diffuse, but more prominent in the medial compartment. Id. He relayed that there was no significant injury, nor had he had significant knee problems in the past. Id. On examination there appeared to be an effusion in the left knee along with medial joint line tenderness. The x-ray showed some degenerative changes in the medial compartment and the patellofemoral compartment. (JE 1:3) Dr. Maher recommended that claimant stop taking ibuprofen and try a course of prednisone and Naprosyn. Id.

On October 2, 2021, claimant voluntarily resigned. (DE B:2) This was a planned retirement that he had been thinking about for some time; however, at the time he left employment of defendant, he was in unbearable pain due to his left knee problems. Prior to this, claimant had not missed work due to his knee pain.

After a series of failed conservative treatments, claimant was referred to Barron Bremner, D.O., at Des Moines Orthopaedic Surgeons. (JE 2:6) In reviewing the MRI, which showed severe arthritis in the medial compartment, severe bone-on-bone arthritis in the patellofemoral compartment, a large effusion, a Baker's cyst and complex tear of the medial meniscus, Dr. Bremner recommended a left total knee arthroplasty. (JE 2:6)

Claimant consented to this, and surgery took place on December 6, 2021. (JE 3:16)

He returned to DMOS for follow up on December 21, 2021. (JE 2:10) He was weaning himself from pain medication, and less reliant on assistive walking devices. (JE 2:10) On January 18, 2022, claimant was six weeks status post his surgery. (JE 2:12) At his follow-up visit, he reported pain which Dr. Bremner said was normal. Claimant would take a full year to recover. Id.

Claimant was seen on December 8, 2022 by Dr. Bremner for the one-year follow up. He was doing well but reported some clicking in the left knee, some occasional

numbness and was unable to do squats as deep as he would like to. (JE 2:14) Claimant was released and instructed to return in five years. Id.

On March 29, 2022, Dr. Bremner opined that the work claimant performed was a material aggravating factor in the symptoms that claimant developed which led to his left total knee arthroplasty that Dr. Bremner performed on December 6, 2021. (Claimant's Exhibit 1:1-2)

Todd Peterson, D.O., performed an independent medical examination on or about November 22, 2022. (JE 4) In the report he agreed with the opinion of Dr. Bremner.

Dr. Peterson's examination of claimant revealed near full extension and flexion, mild laxity to anterior drawer, mild clicking, mild distress getting up onto the exam table, difficulty fully squatting and kneeling. (JE 4:21) Dr. Peterson concluded that to a reasonable degree of medical certainty claimant's job had a significant effect on his degenerative changes in the knee. Degenerative changes were multifactorial, as there is a genetic component, as well as nutrition, mechanics, and activity or trauma. Id. Dr. Peterson did not believe that claimant's job was the only cause for arthritis and need for total knee replacement. Id. He did agree that the job partially caused claimant's degeneration and arthritis in the knee, leading to the left knee replacement. (JE 4:21)

Dr. Peterson further opined claimant reached MMI around six months postop and assigned a 37 percent lower extremity impairment with no work restrictions. (JE 4:22) Currently claimant still has pain when he twists or bends. He does no heavy lifting. He does not take any prescription medication but does take a simple aspirin once in a while. He uses an exercise bike at home.

On September 6, 2022, claimant's counsel wrote to defendant's counsel wondering why the defendant continued to deny the claim despite the opinion from claimant's authorized treating physician, Dr. Bremner. (CE 2:4)

Claimant's counsel wrote again on December 1, 2022, noting that the IME of Dr. Peterson agreed that the claimant's 22 years of employment with the defendant employer represented a material aggravating factor in his knee symptoms leading to total knee arthroplasty. (CE 2:5)

Claimant seeks reimbursement of $769.80 for filing fees, the impairment rating from Dr. Bremner, and $250.00 for the conference with Dr. Bremner, as well as the court reporter fee. (CE 3:6)

CONCLUSIONS OF LAW

Claimant alleges he has sustained a compensable workers' compensation injury to his left knee which resulted in a total knee arthroplasty. Defendant argues that while claimant did sustain a work injury, claimant failed to give timely notice of his injury and thus is not entitled to benefits.

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. 6.904(3)

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.

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).

Claimant testified that his left knee began hurting him years prior to the late summer and fall of 2021 due to the work he performed while in the forestry department. He testified that knee pain would cause him to limp from time to time. His supervisor, Mr. Adams-Brown, testified that he recommended claimant spend the last years of working for the City in the street cleaning position as it was less physically taxing than the forestry department.

"[W]hen a disability develops over a period of time, the compensable injury is held to occur when the employee, 'because of pain or physical inability,' can no longer work." Herrera v. IBP, Inc., 633 N.W.2d 284, 287 (Iowa 2001) (quoting McKeever

Custom Cabinets v. Smith, 379 N.W.2d 368, 374 (Iowa 1985)). The court went on to refine the test, now called the "manifestation test." Herrera, 633 N.W.2d at 287. The court held an injury manifests when "both 'the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person.'" Id. (quoting Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824, 829 (Iowa 1992)). Thus, a cumulative injury manifests when the employee knows they are injured and that the injury is related to their employment.

Defendant argues that claimant knew his left knee pain was the result of his work in the forestry department and opted not to share this with defendant as he did not want to be put on light duty. Defendants point to claimant's consumption of over-the-counter pain medication as he continued to work without any periods of unemployment. Further, claimant had sustained a work injury in the past and knew the process of reporting and receiving care authorized by defendant employer as a result of that work injury. Thus, defendant argues claimant was familiar with the workers' compensation procedures with his employer.

On the other hand, claimant asserts that he did not realize the nature and seriousness of his work-related knee injury until consulting with Dr. Bremner on October 5, 2021. At that visit, claimant was diagnosed with severe arthritis and a left total knee replacement was recommended.

The manifestation date is thus sometime prior to 2014 when claimant was moved from forestry to street cleaning because it was less physically taxing. Claimant testified that he had left knee pain from the work performed on the job.

The analysis does not end here, however.

Although the date of injury is relevant to notice and statute-of-limitations issues, the cumulative injury rule is not to be applied in lieu of the discovery rule." Herrera, 633 N.W.2d at 287. The two rules, "while related, are distinct." Id. at 288. It is the discovery rule, not the cumulative injury rule, which dictates statute-of-limitations questions. Id. An employee is held to have discovered their injury for statute-of-limitations purposes when, "acting as a reasonable person," the employee recognizes the injury "is serious enough to have a permanent adverse impact" on their employment. Id. at 287-88. An employee is deemed to have knowledge of the permanent adverse impact of an injury when they recognize "its nature, seriousness and probable compensable character.'" Id. at 288 (quoting Orr v. Lewis Cent. Sch. Dist., 298 N.W.2d 256, 257 (Iowa 1980)).

To summarize, a cumulative injury is manifested when the claimant, as a reasonable person, would be plainly aware (1) that he or she suffers from a condition or injury, and (2) that this condition or injury was caused by the claimant's employment. Upon the occurrence of these two circumstances, the injury is deemed to have occurred. Nonetheless, by virtue of the discovery rule, the statute-of-limitations will not begin to run until the employee also knows that the physical condition is serious enough to have a permanent adverse impact on the claimant's employment or employability, i.e., the claimant knows or should know the "nature, seriousness, and probable compensable character" of his injury or condition. Herrera, 633 N.W.2d at 288 (citation omitted). Tilton v. H.J. Heinz Co., No. 21-1777, 2022 WL 2824290, at *3 (Iowa Ct. App.

July 20, 2022)

In Tilton, the appellate court determined that because the doctor had not given the injured worker permanent work restrictions, the claimant did not know or should not have known that the work injury had permanent adverse impact on her employment. In Myers v. R.R. Donnelly & Sons Co., 2017 WL 4050335, (Iowa Ct. App. Sept. 13, 2017), the injured worker's injury date was deemed to be at the appointment where claimant was placed on restrictions for six months as a result of the injury. Id. at *3. Claimant was further noted to have increasing pain and found work to be intolerable. Id.

In Baker v. Bridgestone/Firestone, the Supreme Court of Iowa stated:

> Just as not every ache, pain, or symptom is immediately known to be compensable, not every ache, pain, or symptom will satisfy the seriousness component of the discovery rule. See id. at 650. Consistent with our more recent decision in Herrera, not every ache, pain, or symptom will be understood as possibly suggesting a *683 permanent adverse impact on a claimant's health or physical capacity for employment. Herrera, 633 N.W.2d at 288.

Baker v. Bridgestone/Firestone, 872 N.W.2d 672, 682–83 (Iowa 2015)

Claimant did have knee pain in the years leading up to October 2021, but the pain was not constant, and it did not lead to him missing any work. The pain became intolerable somewhere around October 2, 2021, when claimant retired. It was at that time when claimant recognized that his work injury had a permanent adverse impact on his employability.

Defendant argues even if October 2, 2021, was the date of injury, claimant did not provide notice to defendant either actual or implied. Mr. Adams-Brown testified that he was not aware of claimant's injury, that had he known of the injury, he would have helped claimant obtain care. He testified that while he did see claimant limping, he thought it might have been an injury claimant sustained at home.

Claimant testified that he shared with Mr. Adams-Brown that he had knee pain because of his work, and he also shared his pain with his co-worker, Kevin Buttrey. Defendant states that claimant is not credible because his testimony varied.

At his deposition, claimant stated his knee pain began around April 2021. When asked when he reported the injury to his supervisor, claimant testified that it was shortly after his pain stated. He then later said he told his supervisor about the pain before calling the City Clinic which claimant believed to be around August or September 2021. Claimant also testified that he sought out care from his personal physician after being told by the City Clinic they would not take x-rays. However, the visit to claimant's personal physician occurred on August 10, 2021.

Claimant's imprecise recollection of when the pain in his left knee began and when he informed his supervisor of his injury is less attributable to credibility issues and more likely due to lack of a good memory. Even Mr. Adams-Brown stated claimant was an honest and good employee. There were no other signs of credibility problems in

claimant's injury presentation to his doctors or in his testimony at hearing.

Mr. Adams-Brown was aware of claimant limping at work in the summer of 2021. Mr. Adams-Brown dismissed this as related to some home activity on the part of the claimant. He did not make a connection between claimant's physically taxing work and his limping despite Mr. Adams-Brown knowing that claimant's physical condition was challenged during his many years of service in the forestry department.

During the time between August 2021 and December 2021, Kevin Buttrey served as a stand-in supervisor who helped direct injured workers to the City Clinic. During this time period, he advised claimant to seek aid from the City Clinic for the knee problem.

Thus, it is found that the employer had actual and imputed knowledge of claimant's potential work injury at least by August 2021. Since the date of injury is deemed to be October 2, 2021, claimant's claim is not barred by lack of notice.

The parties stipulate that the claimant sustained a 37 percent functional loss.

Claimant seeks additional penalty benefits for unreasonable denial of benefits. Defendant denied liability for claimant's left knee injury and have paid no weekly benefits for this injury. Iowa Code section 86.13(4) requires that if a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the workers' compensation commissioner shall award additional weekly benefits in an amount not to exceed 50 percent of the amount of benefits that were unreasonably delayed or denied. Iowa Code section 86.13(4)(b). A reasonable or probable cause or excuse must satisfy the following requirements:

1. The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee;

2. The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits;

3. The employer or insurance carrier contemporaneously conveyed the basis of the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay or termination of benefits.

(Iowa Code section 86.13(4)(c))

Defendant has the burden to show compliance with this statutory provision in order to avoid the mandatory assessment of a penalty. In this case, by the time of hearing, defendant based the denial of their claim on the testimony of Mr. Adams-Brown. Mr. Buttrey was not questioned, although it may have been because Mr. Buttrey was retiring. The record is not clear. Other than the testimony of Mr. Adams-Brown, it appears no other investigation was undertaken before the denial of benefits. Deposition of the claimant was not taken until November 17, 2022. Prior to that, no statement was

taken from the claimant. It does not appear that even after the medical records were obtained wherein claimant reported pain stemming back to April that any additional investigation was undertaken.

The law requires proof of a prompt investigation and that factual basis be provided to the injured worker at the time of the denial, delay, or termination of benefits. Herein, defendant must show a timely investigation of claimant's report of an injury, that the denial of the left knee claim is based on the results of that timely investigation, and that there was a timely communication to claimant of the reasons for the denial. There is no such evidence in the record of defendant taking such action. Therefore, due to the failure of defendant meeting its burden of proof, a penalty of 25 percent of all benefits owed shall be imposed.

Claimant seeks future medical care and reimbursement of costs.

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).

According to IAC rule 876 4.33 the claimant can request that costs be taxed by the deputy to a prevailing party. "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." Rule IAC 876 4.33.

Claimant is entitled to future medical care for his left knee as well as reimbursement for costs paid including but not limited to the report of Dr. Bremner as itemized in Claimant's Exhibit 3:6.

ORDER

THEREFORE, it is ordered:

That defendant is to pay unto claimant 81.4 weeks of permanent partial disability benefits at the rate of one thousand twenty and 82/100 dollars ($1,020.82) per week from June 6, 2022.

That defendant shall pay accrued weekly benefits in a lump sum.

That claimant is entitled to future medical care related to his left knee.

That defendant shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendant shall pay penalty benefits of 25 percent of all unpaid benefits.

That defendant shall pay the costs of this matter pursuant to rule 876 IAC 4.33.

Signed and filed this ___3rd___ day of May, 2023.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Christopher Spaulding (via WCES)

Molly Tracy (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.