

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOSEPH MULVEHILL,

Claimant,

vs.

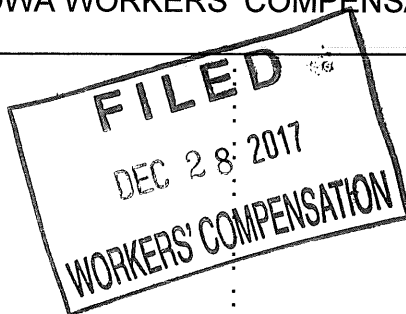
KRAFT HEINZ COMPANY,

Employer,

and

INDEMNITY INSURANCE CO. N.A.,

Insurance Carrier,
Defendants.



File No. 5056658

ARBITRATION

DECISION

Head Note No.: 1402.40

Claimant Joseph Mulvehill filed a petition in arbitration on May 13, 2016, alleging he sustained injuries to his hip and back while working for the defendant, Kraft Heinz Company ("Kraft"), on July 11, 2014. Kraft and its insurer, the defendant, Indemnity Insurance Company of North America ("Indemnity"), filed an answer admitting Mulvehill had sustained a work injury.

An arbitration hearing was held on August 22, 2017, at the Division of Workers' Compensation, in Des Moines, Iowa. Attorney William Bribresco represented Mulvehill. Mulvehill appeared and testified. Attorney Peter Thill represented Kraft and Indemnity. Aurelio Trevino appeared and testified on behalf of Kraft and Indemnity. Joint Exhibits ("JE") 1, 4 and 5, Exhibits 1 through 15, and Exhibits A through H were admitted into the record. The record was held open through October 30, 2017, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

Before the hearing the parties prepared a hearing report listing stipulations and issues to be decided. Kraft and Indemnity waived all affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed between Kraft and Mulvehill at the time of the alleged injury.
2. Mulvehill sustained an injury on July 11, 2014, which arose out of and in the course of his employment with Kraft.

3. Although entitlement to temporary benefits cannot be stipulated to, Mulvehill was off work from August 10, 2016 through October 10, 2016.

4. If the injury is found to be a cause of permanent disability, the disability is an industrial disability.

5. At the time of the alleged injury Mulvehill's gross earnings were \$1,055.50 per week, he was married and entitled to five exemptions, and the parties believe the weekly rate to be \$691.30.

6. Kraft and Indemnity are entitled to a credit under Iowa Code section 85.38(2) for payment of short-term disability income in the amount of \$1,883.99.

7. Costs have been paid.

ISSUES

1. Is the alleged injury a cause of temporary disability during a period of recovery?

2. Is Mulvehill entitled to temporary disability benefits from August 10, 2016 through October 10, 2016?

3. Is the alleged injury a cause of permanent disability?

4. If the alleged injury is a cause of permanent disability, what is the extent of the disability?

5. If the alleged injury is a cause of permanent disability, what is the commencement date for permanent partial disability benefits?

6. Is Mulvehill entitled to reimbursement for the cost of an independent medical examination?

7. Should costs be awarded to either party?

FINDINGS OF FACT

Mulvehill graduated from high school in 1980, and completed a welding course through Western Dakota Voc. Tech in 1984. (Exs. G, p. 3, 13, p. 19; Tr., p. 17) Mulvehill is married and lives in Bettendorf, Iowa, with his wife and three children. (Exs. G, pp. 2-3, 13, p. 2; Tr., p. 17) At the time of the hearing he was fifty-six. (Tr., p. 16)

From 1979 through 1987, Mulvehill worked for Pepsi Cola and for a number of railroad companies laying ties and installing rails. (Ex. G, p. 3; Tr., p. 18) In 1989, Kraft hired Mulvehill. (Ex. G, p. 3; Tr., p. 17) At the time of the hearing Mulvehill had worked

for Kraft for twenty-nine years. (Tr., p. 17) For the past ten years he has primarily worked as a packer or a rack washer. (Tr., p. 47)

On July 11, 2014, Mulvehill punched out of work and rode the elevator to the men's locker room to change his clothes. (Tr., p. 19) Mulvehill testified,

I was coming out of the elevator, and there's a doorway. You go around the doorway. I put my – there's seven steps that go down. I put my hand on the handrail, I put my right foot down, and I was airborne. And I landed on the landing – on the step before the landing.

(Tr., p. 19) Mulvehill relayed he injured his left forearm, cut his finger, and injured his left buttocks or glute and left hip. (Tr., p. 19)

Mulvehill denied he had ever injured his left hip or had pain in his left hip before the July 11, 2014 incident. (Tr., pp. 24-25) Mulvehill was involved in a car accident in December 1989, and underwent back surgery. (Exs. G, p. 4, 13, p. 2) In 2001 Mulvehill fell down some steps at work injuring his right hip and upper back. (Ex. 13, p. 2) In 2002 Mulvehill fell on some ice in the parking lot of Kraft and hit his back and head and received treatment at the plant. (Tr., p. 45) In 2010 he fell again in the winter at Kraft. (Ex. 13, p. 2) Mulvehill also received treatment for right knee arthritis in 2006 and in 2013. (Tr., pp. 29, 50-51)

Mulvehill continued to work at Kraft following his July 2014 work injury. (Tr., p. 26) Mulvehill sought medical treatment from the company nurse. (Tr., p. 20) Mulvehill testified the nurse told him five other people almost fell before he did. (Tr., p. 20) Mulvehill relayed the nurse reported "there was Quat, a liquid detergent they put in a footbath because of the flooding that was coming through our locker room. And people were walking through the water and then they were walking on the steps. That made it slippery." (Tr., p. 20)

After his initial treatment Mulvehill returned to the nurse's station for heat and ice treatments twice per day for twenty minutes at a time. (Tr., p. 21) Mulvehill testified his left buttock and hip area was tight, it felt like he had a big muscle strain, and it hurt. (Tr., p. 22) Mulvehill reported he continued to receive treatment at the plant from the nurses. (Tr., p. 22) He was not referred to Rick Garrels, M.D., an occupational medicine physician, until September 2014. (Tr., p. 22)

Dr. Garrels examined Mulvehill at the plant. (Tr., pp. 22-23) Dr. Garrels ordered an x-ray of Mulvehill's pelvis. (Ex. 9, p. 13) The reviewing radiologist listed an impression of "[m]oderate to severe degenerative changes of the left hip with cyst formation with no acute fracture." (Ex. 9, p. 13)

Dr. Garrels examined Mulvehill on September 23, 2014. (Ex. A, p. 1) Mulvehill complained of deep pain in his left hip. (Ex. A, p. 1) Dr. Garrels documented an x-ray shows moderate to severe degenerative joint disease with joint space narrowing and a

femur cyst. (Ex. A, p. 1) Dr. Garrels assessed Mulvehill with left hip degenerative joint disease, a left hip contusion, and opined his acute symptoms had resolved and the current systems were related to "non work-related osteoarthritis." (Ex. A, p. 1) Mulvehill testified Dr. Garrels told him that arthritis in his hip was causing his pain and he released him to attend treatment with his own physician. (Tr., p. 23)

Mulvehill testified Dr. Garrels told him his arthritis was caused "from riding motorcycles your whole life." (Tr., p. 24) Dr. Garrels denied making the statement and relayed Mulvehill had not listed any hobbies on his intake form and he did not document any in his report, and noted "[i]f he had informed me that a hobby included motorcycle riding, I am 100% confident it would have made it into my report. I would always include outside activities that could impact the condition." (Ex. A, p. 6) Dr. Garrels responded he thought Mulvehill must have been confused about a comment regarding motorcycle riding because if he had made a statement regarding motorcycle riding causing his hip osteoarthritis, "it would have also been in my report." (Ex. A, p. 6)

Mulvehill attended an appointment with his family practitioner, Robert Knudson, M.D., on December 22, 2014, complaining of left hip pain in his groin and buttocks after he slipped on chemicals and fell at work on July 11, 2014. (JE 4, p. 1) Dr. Knudson assessed Mulvehill with hip pain and arthritis. (JE 4, p. 2)

Dr. Knudson ordered magnetic resonance imaging of Mulvehill's left hip. (Ex. 10, p. 15) The reviewing radiologist listed an impression of severe degenerative changes of the left hip, and moderate degenerative changes of the right hip. (Ex. 10, p. 16)

On July 21, 2015, Mulvehill attended an appointment with Peter Rink, D.O., an orthopedic surgeon with Ora Orthopedics, complaining of pain in his groin and left hip since an injury on July 11, 2014. (JE 1, p. 1) Mulvehill relayed there was a flood at work and he slipped on steps where chemicals had been applied, and went flying and landed on his left hip. (JE 1, p. 1) Dr. Rink noted Mulvehill had undergone magnetic resonance imaging and the report was consistent with severe degenerative changes of the left hip and moderate degenerative changes of the right hip. (JE 1, p. 1) Mulvehill complained of pain while walking, and stiffness and pain with twisting. (JE 1, p. 1) Dr. Rink examined Mulvehill and listed an impression of severe left hip degenerative arthritis. (JE 1, p. 2) Dr. Rink noted,

I do feel the arthritis that he has is not secondary to the injury. I do think the arthritis that he has was going to happen anyway and was going to require treatment with or without the fall. On the other hand, I do think the fall did cause symptoms and it was reasonable to be under Workers' Compensation at that time.

(JE 1, p. 2)

Mulvehill received physical therapy from January 6, 2015 through January 29, 2015. (JE 5) Mulvehill testified that after his July 2014 work injury his coworkers would

say, "[h]e weebles and wobbles but he don't fall down," "[h]ere comes the penguin," and "[h]ere comes gimpy." (Tr., p. 31)

Mulvehill continued to perform his normal work duties packing meat. (Tr., p. 31) Mulvehill relayed that he used the elevator for one month until the restriction was removed. (Tr., p. 37)

As a packer, Mulvehill works with thirty pound Subway sticks and Lunchable sticks weighing three to four pounds that have been processed. (Tr., p. 33) Mulvehill grabs meat off six foot tall racks and puts it into bins, straightens the meat, and puts a plastic liner in the bin, and weighs the meat when he reaches the top of a bin. (Tr., p. 35) Mulvehill's job is repetitive and he works on six racks with ten shelves each at a time before taking the racks to the waiting cooler to be sliced. (Tr., pp. 35-36) The highest level Mulvehill reaches is six feet, and he has to bend below his knees to reach the bottom shelf of each rack. (Tr., pp. 36-37) Mulvehill testified after a day of work he would hurt from the twisting and bending. (Tr., p. 37)

On January 8, 2016, Mulvehill attended a follow-up appointment with Dr. Knudson, complaining of left hip pain. (JE 4, p. 3) Dr. Knudson examined Mulvehill, and diagnosed him with left hip osteoarthritis, left hip pain, and right hip osteoarthritis, ordered Mulvehill to perform stretching exercises, and referred him to an orthopedic surgeon. (JE 4, p. 5)

Richard Kreiter, M.D., an orthopedic surgeon, conducted an independent medical examination for Mulvehill on March 2, 2016. (Exs. 4, 5, 8, p. 1) Dr. Kreiter examined Mulvehill and reviewed his medical records. (Exs. 4, 5) Dr. Kreiter listed an impression of significant, progressive, left hip degenerative arthritis. (Ex. 4, p. 6) Dr. Kreiter testified Mulvehill was walking with an antalgic gait or limp. (Ex. 8, p. 2) Dr. Kreiter opined:

[t]he fall on the stairs, landing directly on the buttock, and a photo revealing a large ecchymotic hematoma in that area, indicates to me a significant injury. It is my opinion, the event permanently aggravated and accelerated changes in Joseph's left hip which now will require total hip replacement for pain relief.

(Ex. 5, p. 7) Dr. Kreiter recommended Mulvehill use a cane for any distance walking. (Ex. 5, p. 7)

Dr. Kreiter found Mulvehill had sustained an impairment to his right hip, and provided a "provisional rating" since he is not at maximum medical improvement. (Ex. 5, p. 8) Using Page 529, Table 17-5, of the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Kreiter found "impairment due to gait derangement severity which is mild with a positive Trendelenburg and moderate arthritic changes in the hip joint, is a 10% whole person impairment." (Ex. 5, p. 8)

Mulvehill returned to Ora Orthopedics on May 6, 2016, complaining of left groin, thigh, and lower buttock pain that had worsened and was interfering with his sleep, and he was examined by Joseph Martin, M.D., an orthopedic surgeon. (JE 1, p. 4) Dr. Martin reviewed his x-rays and noted Mulvehill's left hip showed "severe erosive osteoarthritis, loss of femoral head height, loss of acetabulum, and subluxation of the hip." (JE 1, p. 4) Dr. Martin testified Mulvehill walked with an antalgic gait. (Ex. 14, pp. 12-13) Dr. Martin assessed Mulvehill with severe debilitating osteoarthritis of the left hip with erosive changes and loss of bone, and failed nonoperative management. (JE 1, p. 4) Dr. Martin discussed continued nonoperative management with strong medication or injections and hip replacement surgery with Mulvehill. (JE 1, p. 5) Mulvehill elected to proceed with hip replacement surgery. (JE 1, p. 5)

On August 10, 2016, Dr. Martin performed left total uncemented hip replacement surgery on Mulvehill. (JE 1, p. 7) Following surgery Mulvehill used a walker for ambulation, and he received physical therapy. (JE 1, pp. 11-13)

Mulvehill returned to work after his surgery and he returned to his normal duties. (Tr., p. 40) After he returned to work due to a change in production Mulvehill moved to rack washer where he uses a battery operated hand truck that picks up racks to be placed in stalls for washing. (Tr., p. 41) Mulvehill cleans the racks with soap and sprays off the racks with a high-pressured Hotsy. (Tr., pp. 41-42)

Mulvehill attended an appointment with Dr. Garrels on January 10, 2017. (Ex. A, p. 2) Dr. Garrels reviewed Mulvehill's medical records and examined him. (Ex. 3, pp. 2-4) Dr. Garrels assessed Mulvehill with a left hip contusion, and degenerative arthritis of the bilateral hips and right knee. (Ex. A, p. 4) With respect to causation, Dr. Garrels opined:

[t]he patient sustained a left buttock contusion. This contusion resolved within 2 months of the injury. There was a progressive degenerative osteoarthritis involving multiple joints of the lower extremity that was ongoing with the patient's age which was noted incidentally during the evaluation. The patient noted limitation associated with the left hip that preceded the work injury. The advanced nature of the osteoarthritis would have resulted in the need for a total hip replacement within a period of months irrelevant of left buttock contusion at work. The difference in level of osteoarthritis between the right and left hip would be explained by the chronic right knee osteoarthritis resulting in [sic] the increased use of the left leg.

(Ex. A, p. 4) Dr. Garrels recommended no additional care or restrictions, and using the AMA Guides found Mulvehill had sustained a zero percent impairment rating associated with the left buttock contusion, noting "[t]he provision rating completed by Dr. Kreiter is not applicable because the patient was not at Maximum Medical Improvement. The need for a hip replacement is not related to the work injury so no rating is assessed for that treatment." (Ex. A, p. 4)

On March 29, 2017, Dr. Kreiter conducted a second independent medical examination of Mulvehill. (Exs. 6, 7, 8, p. 3) Dr. Kreiter examined Mulvehill and reviewed his medical records. (Exs. 6, 7) Dr. Kreiter testified "his gait was much better. He didn't have the limp, and he had reasonably good range of motion within the hip joint. He no longer had the pain in his groin, and the marked limp that he had had preoperatively was gone." (Ex. 8, p. 3)

Dr. Kreiter listed an impression of status post left total hip replacement with good result, and early degenerative changes of the right hip. (Ex. 6, p. 10) Dr. Kreiter noted Mulvehill had preexisting changes to his hip joints, "but on the left, the condition was aggravated, accelerated, and ended up with a total hip replacement." (Ex. 7, p. 11) Dr. Kreiter agreed with Dr. Garrels that the soft tissue buttock contusion resolved within two months, but opined "the trauma to the bony and cartilaginous hip joint did not. He could have broken the hip with such trauma. The MRI of 06/18/15 noted degenerative changes in both hips, but it was the left side that sustained the ecchymotic contusion and major injury." (Ex. 7, p. 11)

Using Table 17-33, page 546 of the AMA Guides, Dr. Kreiter opined, "under the hip region, total hip replacement with a good result, would be a 15% whole person impairment, or a 37% lower extremity impairment." (Ex. 7, p. 11) Dr. Kreiter also recommended the use of a cane for long distance walking. (Ex. 7, p. 11)

William Jacobson, M.D., an orthopedic surgeon, conducted an independent medical examination for Kraft and Indemnity in June 2017. (Ex. B) Dr. Jacobson reviewed Mulvehill's medical records and his deposition, and he examined Mulvehill. (Ex. B) Dr. Jacobson diagnosed Mulvehill with status post left total hip arthroplasty secondary to severe degenerative arthritis of the left hip, and a secondary diagnosis of low back pain secondary to left hip arthritis. (Ex. B, p. 3) Dr. Jacobson noted "[t]he back issue has essentially resolved at this point." (Ex. B, p. 3)

Dr. Jacobson opined he did not believe Mulvehill's diagnosis of left hip severe arthritis is causally related to the July 11, 2014 left hip injury and noted,

I do not doubt that Mr. Mulvehill did not have significant left hip problems prior to this. I also believe he did have a slip and fall injury at work on July 11, 2014, that resulted in a contusion to the left buttock area. He also had a left forearm and right finger injury at that time. It is my opinion that the left hip contusion had resolved approximately two months after the injury. I do not believe it resulted in any permanent impairment.

It is my opinion that the fall on July 11, 2014, did not directly cause, materially aggravate, or substantially accelerate Mr. Mulvehill's underlying left hip degenerative arthritis condition. This is based on the fact that the x-rays obtained approximately two months after the injury show severe degenerative arthritic changes in the left hip joint and moderate arthritic degenerative hip changes of the right hip. There is no evidence of any

fracture that would have led to this. The x-rays show bone on bone arthritis of the left hip. There are subchondral cysts noted on both sides of the joint and osteophytes, which are all consistent with advanced arthritic changes. Mr. Mulvehill states that he was not having any left hip problems prior to the fall. While this may be possible, I do not think the injury itself would have changed the natural history and symptoms that are seen on the x-rays from September 2014. This is clearly a hip that would have developed pain, decreased motion, and resulted in the typical back stiffness that he describes, also.

(Ex. B, pp. 3, 4) Dr. Jacobson opined Mulvehill has not sustained any functional disability to his left hip or back as a result of the July 11, 2014 work injury, and opined he did not require any additional medical care or restrictions. (Ex. B, p. 4)

On July 18, 2017, Gary Culver, signed an affidavit which provides he has worked with Mulvehill for Kraft since July 1989, and before July 11, 2014, he never observed Mulvehill had any problems with his left hip, or heard him complain of his left hip, but after July 11, 2014, he observed Mulvehill had problems with his left hip and complained of pain in his left hip. (Ex. 1, p. 1) On July 22, 2017, Joel Langrehr, signed an affidavit which provides he has worked with Mulvehill for Kraft for over twenty years, and before July 11, 2014, he never observed Mulvehill had any problems with his left hip, or heard him complain of his left hip, but after July 11, 2014, he observed Mulvehill had problems with his left hip and complained of pain in his left hip. (Ex. 2, p. 2)

Aurelio Trevino was Mulvehill's immediate supervisor at the time of his work injury. (Ex. 12, pp. 6-7) Trevino testified in his deposition that prior to July 11, 2014, Mulvehill never complained about left hip pain, and he never observed Mulvehill had any problems walking. (Ex. 12, p. 2) At hearing Trevino relayed that before the July 2014 incident, "I always thought he favored his right leg, like a – just like a little limp, maybe," but relayed it never affected his job. (Tr., p. 67) Trevino testified Mulvehill has always been a good worker and reported, "I wish I had 100 of him." (Tr., p. 68)

Mulvehill testified at hearing he is "feeling pretty good," but he is not 100 percent and he becomes stiff when he sits for a while and gets up. (Tr., p. 45) Mulvehill worked overtime before his work injury and he is still able to work overtime. (Tr., pp. 47-48) Mulvehill testified he is able to perform all of the job responsibilities of both a rack washer and packer, if needed. (Tr., p. 48) Both positions are in the same pay grade, and Mulvehill has received contract raises since his work injury. (Tr., p. 48) Mulvehill has not received any permanent work restrictions. (Tr., pp. 48, 59) Mulvehill testified he used a cane while ambulating for a period of time "[j]ust after surgery" and not at work. (Tr., p. 59)

CONCLUSIONS OF LAW

I. Causal Connection

The parties stipulated Mulvehill sustained an injury on July 11, 2014, arising out of in the course of his employment. Kraft and Indemnity aver Mulvehill has failed to prove that his left total hip replacement is causally connected to the July 2014 work injury. Mulvehill contends the work injury aggravated, accelerated or “lighted up” his preexisting arthritic condition, which resulted in his left hip replacement.

The claimant bears the burden of proving the claimant’s work-related injury is a proximate cause of the claimant’s disability and need for medical care. Ayers v. D & N Fence Co., Inc., 731 N.W.2d 11, 17 (Iowa 2007); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 153 (Iowa 1997). “In order for a cause to be proximate, it must be a ‘substantial factor.’” Ayers, 731 N.W.2d at 17. A probability of causation must exist, a mere possibility of causation is insufficient. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997).

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

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

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

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

Dr. Martin performed the left hip replacement on Mulvehill. During his deposition, Dr. Martin declined to issue an opinion on causation. (Ex. 13, p. 22)

Three physicians have provided opinions on causation in this case, Dr. Jacobson and Dr. Kreiter, both of whom are orthopedic surgeons retained to provide independent medical examinations only, and Dr. Garrels, a treating occupational medicine physician. Drs. Jacobson and Garrels found Mulvehill sustained a contusion to his left buttock area that resolved, and opined his left hip arthritis was not causally related to his July 11, 2014 work injury. Dr. Kreiter agreed with Dr. Garrels "that the soft tissue buttock contusion resolved within two months," but opined "the trauma to the bony and cartilaginous hip joint did not [resolve]. He could have broken the hip with such trauma" and noted Mulvehill was asymptomatic before the work injury. (Ex. 7, p. 11) Dr. Kreiter opined Mulvehill's "condition was aggravated, accelerated, and [he] ended up with a total hip replacement," as a result of the work injury. (Ex. 7, p. 11) None of the physicians in this case have opined Mulvehill sustained a permanent impairment to his back as a result of the work injury. I find Dr. Jacobson's causation opinion most persuasive.

Mulvehill has not alleged he sustained a cumulative injury to his hip as a result of his many years of employment at Kraft, rather he alleges he sustained an acute injury to his left hip when he fell in July 2014. Drs. Garrels, Jacobson, and Kreiter all agree the acute injury resulted in a soft tissue buttock contusion that resolved in two months.

During his deposition Dr. Kreiter noted Mulvehill noticed a click in his hip, which he testified:

[s]o in my simple mind, I think that fall probably caused sloughing of an articular – a piece of articular cartilage, that was a loose piece within the joint, and it was causing that locking up of the joint. . . . So, you know he had – he had something loose in the joint with the click. And I think that was – you know, it may well have been a piece of cartilage that sloughed off after the fall. But then it either was ground up within the joint or was sequestered off somewhere else.

(Ex. 8, pp. 5, 6) Mulvehill's medical records do not support his need for a left hip replacement was due to the acute injury. Imaging did not reveal any broken bones or other acute injuries. (Exs. 9, p. 13; 10, p. 16) Rather, as noted by Dr. Jacobson, the imaging revealed Mulvehill had severe degenerative arthritic changes in his left hip and subchondral cysts noted on both sides of the joint and osteophytes, which Dr. Jacobson found "are all consistent with advanced arthritic changes." (Ex. B, p. 4) Dr. Jacobson's opinion is also supported by Dr. Rink, a treating orthopedic surgeon, who opined,

I do feel the arthritis that he has is not secondary to the injury. I do think the arthritis that he has was going to happen anyway and was going to require treatment with or without the fall. On the other hand, I do think the

fall did cause symptoms and it was reasonable to be under Workers' Compensation at that time.

(JE 1, p. 2) Mulvehill has not met his burden of proof that the July 11, 2014 work injury aggravated, accelerated, worsened, or "lighted up" his preexisting left hip osteoarthritis causing his need for a total left hip replacement.

II. Independent Medical Examination

Mulvehill seeks to recover the \$1,600.00 total cost of two independent medical examinations performed by Dr. Kreiter on March 2, 2016 and March 29, 2017. After receiving an injury, the employee, if requested by the employer is required to submit to examination at a reasonable time and place, as often as reasonably requested to a physician, without cost to the employee. Iowa Code § 85.39. If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes the evaluation is too low, the employee "shall, upon application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choosing." Id. The statute discusses one examination, not two. Dr. Kreiter's examination occurred after Dr. Garrels made a finding Mulvehill's left hip contusion had resolved and his current symptoms were not work-related. (Ex. A, p. 1; 4, 5, 8, p. 1)

In the case of Des Moines Area Regional Transit Authority v. Young, the Iowa Supreme Court held:

[w]e conclude section 85.39 is the sole method for reimbursement of an examination by a physician of the employee's choosing and that the expense of the examination is not included in the cost of a report. Further, even if the examination and report were considered to be a single, indivisible fee, the commissioner erred in taxing it as a cost under administrative rule 876-4.33 because the section 86.40 discretion to tax costs is expressly limited by Iowa Code section 85.39.

867 N.W.2d 839, 846-47 (Iowa 2015). Mulvehill did not produce a bill from Dr. Kreiter for the two independent medical examinations. There is no itemization of the cost of the independent medical examination and the report. Under Young, Mulvehill is not entitled to recover the cost of Dr. Kreiter's independent medical examination. Id.

III. Costs

Mulvehill seeks to recover the \$100.00 filing fee for the petition, \$13.00 in service costs, \$570.01 for the deposition transcripts for Trevino, Dr. Martin, and Dr. Kreiter, \$150.00 for Dr. Martin's professional fee for the deposition, and \$150.00 for Dr. Kreiter's professional fee for the deposition. Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Rule 876 Iowa Administrative Code 4.33(6), provides:

[c]osts 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.

As analyzed above, under Young, Mulvehill is not entitled to recover the unitemized fees for Dr. Kreiter's examinations and reports. 867 N.W.2d at 846-47. The administrative rule expressly allows for the recovery of the remaining costs Mulvehill seeks to recover. Using my discretion, I find the \$100.00 filing fee, the \$13.00 service costs, the \$570.01 cost for the depositions, and the \$300.00 cost of the professional fees for the depositions of Drs. Kreiter and Martin should be assessed to Kraft and Indemnity.

ORDER

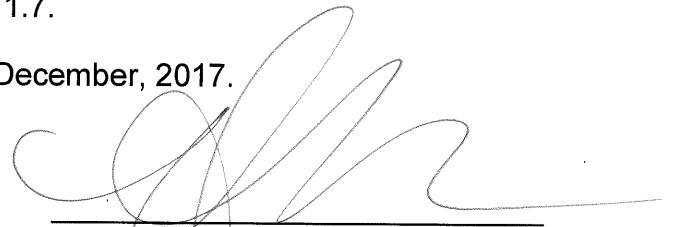
IT IS THEREFORE, ORDERED:

Claimant shall take nothing in this case.

Defendants are assessed one hundred and 00/100 dollars (\$100.00) for the filing fee, thirteen and 00/100 dollars (\$13.00) for service costs, five hundred seventy and 01/100 dollars (\$570.01) for the depositions of Trevino, Dr. Kreiter, and Dr. Martin, and three hundred and 00/100 dollars (\$300.00) for the professional fees for Drs. Kreiter and Martin.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 28th day of December, 2017.



HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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HLP/sam

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.