BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RAMON GARCIA SAMUDIO, Claimant, vs. MTT, CO., d/b/a MIDWEST TRACK & TENNIS CO., Employer, and ACUITY, Insurance Carrier, Defendants.	File No. 20005827.01 ARBITRATION DECISION Headnotes: 1402.30, 3003, 2502

STATEMENT OF THE CASE

Claimant, Ramon Garcia Samudio, filed a petition in arbitration seeking workers' compensation benefits from MTT, Co. d/b/a Midwest Track and Tennis Company (MTT), employer, and Acuity, insurer, both as defendants. This case was heard on February 17, 2022, with a final submission date of March 17, 2022.

The record in this case consists of Joint Exhibits 1 through 8, Claimant's Exhibits 1 through 3, Defendants' Exhibits A through H, and the testimony of claimant and Corey Curnyn. Serving as interpreter was Karen Deters.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

ISSUES

1. Whether claimant sustained a right shoulder injury that arose out of and in the course of employment.

2. Whether the injury resulted in a permanent disability; and if so,

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

4. Rate.

5. Whether claimant is entitled to reimbursement for an independent medical evaluation (IME) under Iowa Code section 85.39.

FINDINGS OF FACT

Claimant was 53 years old at the time of hearing. Claimant took ESL classes at a community college for 1.5 years. (Tr., pp. 6, 30-31) Claimant worked for Tyson's for three years on the production line and also worked as an assistant supervisor. (Tr., pp. 29-30)

Claimant testified he worked for MTT for two seasons at the time of injury. MTT installs synthetic turf and running track surfaces. (Tr., p. 46)

Claimant worked as a laborer for MTT, which required him to install turf, mark fields, and add sand and rubber to fields. (Tr., p. 46) A typical season for work at MTT ran from April or May until approximately September or October. (Tr., p. 47)

Claimant's prior medical condition is relevant. On January 23, 2020, claimant was treated for left knee and right shoulder pain, ongoing for three months. Claimant was given steroid injections in both the knee and shoulder. (Joint Exhibit 1, p. 1)

Claimant testified that on April 15, 2020, he was injured while taking up used turf for MTT. He said a roll of turf was lifted with a bobcat. Claimant said the bobcat "kind of fell" and the roll of turf fell on him. Claimant said the prong of the bobcat bucket hit his shoulder. Claimant said he felt pain. He said he continued to work. Claimant said a little while after the injury he told his supervisor he was feeling more pain from the accident. (Tr., pp. 9-10)

Corey Curnyn testified he is the vice president of sales and operations for MTT. In that capacity, he is familiar with claimant, claimant's job duties and his work injury. Mr. Curnyn testified that Dimitrius Elisalde was claimant's supervisor. Mr. Curnyn said Mr. Elisalde said claimant did not report a work injury to Mr. Elisalde until a week after the injury occurred. Mr. Curnyn said Mr. Elisalde reported the injury to him the week after April 15, 2020. At that time Mr. Elisalde said claimant injured his leg when a roll of turf fell on it and injured his knee. Claimant did not report the prong of the skid loader hitting him at that time. (Tr., pp. 45-49) Mr. Curnyn said claimant did not report a right shoulder injury at that time. (Tr., p. 50)

On April 24, 2020, claimant was treated at the Denison Chiropractic Clinic. On a diagram, claimant indicated pain from his knee to his calf. Claimant indicated his injury occurred when turf fell on his leg at work. There is no mention of a shoulder injury in this record. (JE 2, pp. 1, 3-4; Tr., pp. 32-33)

On May 4, 2020, claimant was evaluated at Crawford Memorial Hospital by John Ingram, M.D. Claimant indicated a work injury to his left knee when turf fell on him. X-rays showed moderate osteoarthritis with a joint effusion in the left knee. On May 11, 2020, claimant had an MRI of the left knee. It showed osteoarthritis and a medial meniscal tear. The MRI also showed a potential lateral meniscus tear. (JE 4, p. 4) There is no indication in the records of a right shoulder injury.

Claimant testified he told Dr. Ingram that both his knee and shoulder hurt. (Tr., p. 13)

On May 13, 2020, claimant gave a statement to defendant-insurer. Claimant indicated he was moving turf at the University of Dubuque when a roll of turf came off a skid loader and rolled backwards on his feet, causing claimant to fall. (Defendants' Exhibit G, pp. 27-30) Claimant indicated he injured his left knee. He denied any other injury. (Ex. G, p. 38) Claimant said he continued to work after the accident and did not request medical treatment until one week after the incident. (Ex. G, pp. 36-37) Claimant denied having prior treatment for his left knee. (Ex. G, p. 42)

On May 26, 2020, claimant was evaluated by Steven Stokesbary, M.D., an orthopedic specialist. Claimant indicated he was working with artificial turf when a roll of turf fell back and hit his left leg resulting in knee pain. Surgery was discussed and chosen as a treatment option. (JE 5, pp. 1-4)

There is no reference to a shoulder injury in Dr. Stokesbary's records. Claimant testified he told Dr. Stokesbary the skid loader hit his shoulder. (Tr., p. 34)

On June 3, 2020, claimant underwent a partial medial and lateral meniscectomy. Surgery was performed by Dr. Stokesbary. (JE 5, p. 4)

On June 18, 2020, claimant began physical therapy. Claimant indicated he injured his left knee when a roll of turf fell on his knee. (JE 6, p. 1) There is no reference in any physical therapy record regarding a right shoulder injury. Claimant testified he told his physical therapist about his shoulder. (Tr., p. 35)

Defendant-insurer indicated that on September 2, 2020, they received a phone call from claimant that claimant believed he also injured his right upper extremity at the time of injury. (Ex. C, p. 7) Claimant testified he informed his employer at or about the time of injury that he had injured his right shoulder on April 15, 2020. (Tr., pp. 24-25)

On October 29, 2020, Dr. Stokesbary found claimant at maximal medical improvement (MMI) and returned claimant to work with no restrictions. (JE 5, p. 21) On December 10, 2020, Dr. Stokesbary found claimant had a 10 percent permanent impairment to the lower extremity based on Table 17-33 of the AMA Guides to the Evaluation of Permanent Impairment (5^{th} edition). (JE 5, p. 22)

On December 17, 2020, claimant was evaluated by Daniel Larose, M.D. Claimant indicated that when the bobcat dropped the turf, claimant fell to his knees and

hit the tooth of the bobcat with his shoulder. Dr. Larose indicated he reviewed claimant's prior medical records and found no mention of a right shoulder injury. (JE 7, p. 1)

Dr. Larose assessed claimant has having glenohumeral osteoarthritis in the right shoulder. He did not believe claimant's injury was a significant factor to his current condition. (JE 7, p. 1)

In a January 10, 2020 report, Jacqueline Stoken, D.O., gave her opinion of claimant's condition following an IME. Claimant complained of right shoulder and left knee pain. Dr. Stoken opined claimant's April 15, 2020, work injury caused permanent impairment to the left knee. She also opined the April 15, 2020, injury materially aggravated claimant's underlying osteoarthritis in the right shoulder. (Claimant's Exhibit 1, pp. 1-7)

Dr. Stoken found claimant had a 10 percent permanent impairment to the lower extremity for the knee injury. She found claimant had an 18 percent permanent impairment to the shoulder. The combined value for both impairments resulted in a 15 percent permanent impairment to the body as a whole. Dr. Stoken recommended claimant avoid work at or above shoulder level. She also recommended claimant avoid repetitive kneeling, bending or crawling. (Ex. 1, pp. 7-8)

Mr. Curnyn testified claimant did not return to work with MTT after his release from Dr. Stokesbary as the season had ended for MTT. He stated claimant did not ask to return to work after being released by Dr. Stokesbary. He said that claimant did not return to work for MTT in the spring of 2021. (Tr., pp. 53-54)

Claimant testified he has difficulty putting his shirt on due to loss of range of motion in the shoulder. He testified he has loss of strength and range of motion in his right shoulder. (Tr., pp. 15-18) At the time of hearing claimant was employed at the Pella Corporation. (Tr., p. 14)

Claimant was paid $13.00 an hour. He worked the following hours the 16 weeks before his date of injury:

#	Week	Hours	OT
1	04/11/20	40	0
2	04/04/20	40	15.50
3	03/28/20	40	6.5
4	03/21/20	37	0
5	03/14/20	34.50	0
6	09/28/19	2.0	0
7	09/21/19	27.50	0
8	09/14/19	40	22
9	09/07/19	22	0
10	08/31/19	40	38.50

11	08/24/19	40	35.50
12	08/17/19	40	37
13	08/10/19	40	40.50
14	08/03/19	40	36.50
15	07/27/19	40	35.50
16	07/20/19	40	20.50

CONCLUSIONS OF LAW

The first issue to be determined is whether claimant sustained a right shoulder injury that arose out of and in the course of the April 15, 2020, work injury.

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 contends he injured his right shoulder in the April 15, 2020, work injury when the prong of a skid loader hit his right shoulder. (Claimant's Post-Hearing Brief, p. 1) Claimant also testified he told medical care providers he injured his right shoulder in the work accident. (Tr., pp. 13, 34)

The first medical care claimant received after the April of 2020 incident was at the Denison Chiropractic Clinic. The pain diagrams from that visit do not indicate a right shoulder injury. Notes from the provider also do not indicate that claimant reported a shoulder injury. (JE 2, pp. 1, 3-4; Tr., p. 33)

On May 4, 2020, claimant was treated by Dr. Ingram. There is no mention in any of Dr. Ingram's notes regarding a right shoulder injury. (JE 3)

On May 13, 2020, claimant recorded a statement, with an interpreter, to defendant-insurer. In the interview, claimant reported a left knee injury and denied any other injury. (Ex. G, p. 38)

Claimant treated with Dr. Stokesbary for his left knee. Dr. Stokesbary also performed claimant's knee surgery. There is no mention in any of the reports from Dr. Stokesbary of a right shoulder injury. (JE 5)

Claimant underwent physical therapy after his surgery. There is no mention of a right shoulder injury in any of the physical therapy records. (JE 6)

From April 15, 2020, through September 2, 2020, claimant saw approximately four providers for health care. He had a recorded statement taken by the defendant-insurer. There is no reference in any of the records that claimant had a right shoulder injury. In the May of 2020 statement, claimant denied having an injury other than to his left knee. The first evidence in the record that the claimant gave notice of a shoulder injury, concerning the April 15, 2020, work incident, was in early September 2020. Given this record it is found that claimant's testimony regarding reporting a shoulder injury to his employer and his healthcare providers is not convincing. Given the findings in Joint Exhibits 2, 3, 5, 6 and Exhibit G, it is found that claimant failed to carry his burden of proof he sustained a right shoulder injury on April 15, 2020, that arose out of and in the course of his employment.

As claimant failed to carry his burden of proof he sustained a right shoulder injury that arose out of and in the course of employment, the issues regarding claimant's entitlement to permanent partial disability benefits for the right shoulder are moot.

The record indicates defendants have paid claimant permanent partial disability benefits regarding the knee injury based on Dr. Stokesbary's rating. (Hearing Report; Defendants' Post-Hearing Brief, p. 1)

The next issue to be determined is rate.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

Claimant contends he has an average weekly wage of $855.00 per week and has three exemptions. (Ex. 3, p. 1) Defendants contend claimant's average weekly wage is $799.50 per week and he has two exemptions. (Ex. F, p. 18)

Claimant indicated in his recorded statement that he had no dependent children under the age of 18. (Ex. G, p. 22) In the hearing report, claimant contends he had three exemptions at the time of injury. There is no documentation that disputes claimant's recorded statement. Given this record, it is found that claimant has failed to carry his burden of proof that he is entitled to three exemptions.

Regarding the average weekly wage, defendants excluded the weeks of September 28, 2019, September 21, 2019, and September 7, 2019, in their rate calculation. (Ex. F, p. 18) In addition to those weeks, claimant also excludes the weeks of March 21, 2020, and March 14, 2020, as not being representative. Claimant includes the weeks of July 13, 2019, and July 6, 2019. (Ex. 3, p. 1)

The record indicates that claimant's work hours varied each week depending on the work available and the weather. (Tr., pp. 23, 47) Mr. Curnyn testified that it was not customary for claimant to work at least 40 hours per week. (Tr., p. 47) Given this record, it is found that the weeks of March 21, 2020, and March 14, 2020, should be included in the calculation of the 13 weeks used to determine claimant's average weekly wage.

Based on the above findings of fact and conclusions of law, the weeks of July 20, 2019, through August 31, 2019, the week of September 14, 2019, and the weeks of March 14, 2020, through April 11, 2020, are used to calculate the 13 weeks to determine claimant's average weekly wage. Using these weeks, claimant had an average weekly wage of $790.50 per week ($10,393.50 divided by 13). Claimant was married with two exemptions. Claimant's rate is $532.06 per week.

The final issue to be determined is whether claimant is due an additional $300.00 for Dr. Stoken's IME.

Claimant underwent an IME with Dr. Stoken that included exams for both the knee and right shoulder. This arbitration decision finds that claimant failed to carry his burden of proof he sustained a compensable right shoulder injury on April 20, 2020. Defendants contend that as a result, claimant is not entitled to reimbursement for the additional IME expenses related to the right shoulder. (Defendants' Post-Hearing Brief, pp. 15-16)

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

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

As noted in the Dodd decision, claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under Iowa Code section 85.39. Given the case law in Dodd, claimant is due reimbursement for the full amount of the IME with Dr. Stoken. (See also Kern v. Fenchel, Doster & Buck, P.L.C., and Pharmacists Mut. Ins. Co., 20-12-06 (Iowa Court of Appeals, Sept. 1, 2021)) (No causation opinion triggers the injured worker's right to an Iowa Code section 85.39 exam.)

ORDER

THEREFORE IT IS ORDERED:

That defendants shall pay claimant twenty-two (22) weeks of permanent partial disability benefits related only to claimant's knee injury at the rate of five hundred thirty-two and 06/100 dollars ($532.06) per week.

That defendants shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

That defendants shall receive a credit for benefits previously paid.

That defendants shall reimburse claimant for the full amount of Dr. Stoken's charges related to the IME.

That both parties shall pay their own costs.

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

Signed and filed this 12th day of May, 2022.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Jerry Jackson (via WCES)

Stephanie Marett (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.