BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOHN WEBBER, Claimant, vs. THE WEITZ GROUP, LLC, Employer, and SENTINEL INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 5068414 ARBITRATION DECISION Head Notes: 1402.40; 1803; 2206; 2502; 2907; 3800

STATEMENT OF THE CASE

Claimant John Webber filed a petition in arbitration seeking worker's compensation benefits against The Weitz Group, LLC, employer, and Sentinel Insurance Company, insurer, for an accepted work injury date of June 8, 2017. The case came before the undersigned for an arbitration hearing on July 1, 2020. This case was scheduled to be an in-person hearing occurring in Des Moines. However, due to the outbreak of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via video means, using CourtCall. Accordingly, this case proceeded to a live video hearing via CourtCall with all parties and the court reporter appearing remotely. The hearing proceeded without significant difficulties.

The parties filed a hearing report prior to the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 9, Claimant's Exhibits 1 through 4, and Defendants' Exhibits A through C.

Claimant testified on his own behalf. Debora Keiser also testified on behalf of the claimant. The evidentiary record closed at the conclusion of the evidentiary hearing on July 1, 2020. The parties submitted post-hearing briefs on August 3, 2020, and the case was considered fully submitted on that date.

ISSUES

1. Whether claimant is entitled to permanent partial disability benefits as a result of the accepted work injury that occurred on June 8, 2017;
2. If so, the extent of permanent disability;
3. Payment of certain medical expenses, medical mileage, and claimant's Independent Medical Evaluation; and
4. Taxation of costs.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Claimant's testimony was consistent as compared to the evidentiary record, and his demeanor at the time of hearing gave the undersigned no reason to doubt his veracity. Claimant is found credible.

At the time of hearing, claimant was 63 years old. (Hearing Transcript, p. 10) Claimant lives in Urbandale, Iowa, with his companion, Debby Keiser. Claimant graduated from high school in 1975. For the past 32 years, claimant has worked as a cement finisher and plasterer, receiving job assignments through Local Union 21. (Tr., pp. 10-11)

At the time of hearing, claimant was working as a cement mason for DML Construction Services, which is a general construction company. (Tr., p. 11) Claimant described his work as concrete flatwork, meaning he works on commercial and industrial floors, parking ramps, and whatever else the flatwork entails.

In addition to his concrete work through the Union, claimant operates two small businesses from his home. One is called Blue Note Gardens, and claimant grows perennials, flowers, and heirloom vegetables. (Tr., p. 12) Claimant testified that he makes approximately $4,000 to $5,000 per year from that business. The other business is called Re-Con Ornamental. Claimant testified that he acquired that business about 9 years ago, and he manufactures concrete lawn ornaments. (Tr., pp. 12-13) Through that business claimant makes about $5,000 per year. (Tr., p. 13)

On June 8, 2017, claimant was working for The Weitz Group. He was working on a parking ramp in downtown Des Moines, and toward the end of the workday, claimant was walking down a stairwell in the garage. As he neared the bottom of the stairs, he stepped on a small rock on the edge of the step, which caused his foot to slip over the edge of the step and down the next step. (Tr., p. 14; Joint Exhibit 2, p. 1) Claimant landed on a cement landing on the outside edge of his right foot, which caused his right knee to twist inward. He had immediate pain in his right knee, and swelling developed shortly thereafter. (Jt. Ex. 2, p. 1) Claimant testified that he reported the injury right away, as is company policy, but initially declined medical treatment as he preferred to

wait to see if it would improve. Claimant testified that he did not want to just "sit around" on light duty, so he was hopeful his knee would improve on its own. (Tr., pp. 14-15)

Claimant's knee did not improve, and on June 22, 2017, he saw Jon R. Yankey, M.D., at Methodist Occupational Health in Des Moines. (Jt. Ex. 2, pp. 1-2) Dr. Yankey noted that claimant denied a past history of prior right knee injuries or other knee problems. X-rays taken that day showed minimal medial compartment joint space narrowing; chondrocalcinosis within the medial and lateral compartments, and joint effusion. (Jt. Ex., 2, p. 1) Dr. Yankey opined that claimant's evaluation was most consisted with a strain injury of the right knee, and associated joint effusion. He recommended conservative treatment, including over-the-counter medication, intermittent icing of the knee, and use of a sleeve-type knee brace. Claimant was allowed to continue with full work duties, and told to return in 6 to 7 days for a recheck. (Jt. Ex. 2, pp. 1-2)

Claimant returned to Dr. Yankey on June 29, 2017. (Jt. Ex. 2, p. 4) At that visit, claimant reported that his knee was much improved since his appointment one week prior. He reported that most of the time he had no pain in his knee, but occasionally would have brief discomfort with certain motions. He also reported the swelling in his knee had resolved. He had been using the knee sleeve occasionally, especially at work, and was tolerating his usual work duties. (Jt. Ex. 2, p. 4) Dr. Yankey noted his assessment of right knee strain and "flare up of the DJD [degenerative joint disease] of the right knee." Dr. Yankey felt that the strain injury and flare up of the degenerative changes had resolved. He recommended continuing stretching and range of motion exercises, and using ice packs and over-the-counter ibuprofen as needed. Claimant was discharged from care and to continue with full work duties. (Jt. Ex. 2, pp. 4-5)

Approximately 8 weeks later, on August 22, 2017, claimant returned to Dr. Yankey. (Jt. Ex. 2, p. 6) At that time, claimant reported that since his last follow up visit, he had continued pain and swelling in the right knee. He stated that the pain was severe enough at times that it caused him to walk up and down stairs differently. He had continued with his usual work duties, and had been using a knee cushion when kneeling. Dr. Yankey examined claimant and noted mild joint effusion, mild tenderness over the medial aspect of the knee, and fullness and possible cystic structure posteriorly. Dr. Yankey stated that the pain and swelling "may still be related to a flare up of the DJD of his right knee," and recommended an MRI. In the interim, he recommended continued conservative treatment, and allowed claimant to return to full duty work. (Jt. Ex. 2, p. 6)

Claimant had an MRI of the right knee on August 24, 2017. (Jt. Ex. 1, p. 23) He returned to Dr. Yankey on August 28, 2017, who noted the MRI showed a tear of the medial and lateral menisci, a partial tear of the ACL, tear of the lateral femoral articular cartilage, bone contusion of the lateral tibial plateau, and moderate joint effusion with a Baker's cyst. (Jt. Ex. 2, p. 9) Dr. Yankey noted that the MRI findings seemed more significant than the claimant's symptoms and physical findings, and recommended an orthopedic evaluation. (Jt. Ex. 2, p. 9)

Claimant was seen by Matthew DeWall, M.D., at Des Moines Orthopaedic Surgeons (DMOS) on September 7, 2017. (Jt. Ex. 1, p. 25) Dr. DeWall noted that claimant denied any previous problems with his right knee. Dr. DeWall reviewed the MRI and noted evidence of an ACL rupture, medial meniscus and lateral meniscus tears, and osteoarthritis and chondromalacia. (Jt. Ex. 1, p. 26) Dr. DeWall advised claimant that due to the degree of chondral loss in the medial compartment, he would not rush to surgical treatment of the meniscus. (Jt. Ex. 1, p. 27) His recommendation was to try to get the knee to "settle down" with a steroid injection and aspiration. Dr. DeWall noted that it was possible that the ACL rupture and degenerative meniscus may have been there in the past, but it was difficult to tell on the MRI, and claimant reported no significant symptoms prior to the injury. As such, they "certainly could have been new injuries as well." (Jt. Ex. 1, p. 27) Either way, Dr. DeWall advised to proceed conservatively, and gave claimant a steroid injection that day. Claimant was allowed to continue working full duty, as he requested, as long as he can tolerate it.

Claimant returned to Dr. DeWall for a follow up visit on October 5, 2017. (Jt. Ex. 1, p. 29) He reported his knee feeling better since the injection. He still had some discomfort, and occasionally mild swelling, popping, and grinding. Dr. DeWall opined that claimant had an aggravation of his underlying arthritis, which they had gotten to "settle down." He placed claimant at MMI, with no work restrictions and no permanent impairment. He noted that claimant "may need future treatment down the road, but unless a new work injury occurs I think it would be under his regular insurance and I am happy to take care of him." (Jt. Ex. 1, p. 29)

Claimant testified that after Dr. DeWall released him, he called Sean Graham with the defendant insurance carrier. He asked Mr. Graham to contact his personal health insurance company to let them know the status so he "didn't get called up on fraud." (Tr., p. 19) Claimant stated he was "kind of mystified" by the decision that his personal insurance should pay for any future treatment, because he assumed that "it was work oriented so that would be dealt with with the company insurance." (Tr., p. 18)

Claimant returned to Dr. DeWall, using his personal insurance, on April 9, 2018. (Jt. Ex. 1, p. 31) At that time his injection from September had worn off, and he was given another injection. Around this time, claimant also asked the insurance carrier to send him for a second opinion regarding permanency. Claimant testified that he chose Iowa Ortho, and Iowa Ortho assigned Benjamin R. Beecher, M.D., to perform an independent medical evaluation (IME). (Tr., p. 20) Claimant made this request prior to retaining legal counsel. (Tr., p. 20)

Dr. Beecher's IME took place on April 19, 2018. (Jt. Ex. 4) After reviewing the medical records and examining claimant, Dr. Beecher opined that claimant's work injury lead to a high-grade partial anterior cruciate ligament tear with active instability. (Jt. Ex. 4, p. 4) Claimant also had a symptomatic medial meniscal tear. Dr. Beecher noted mild degenerative changes with respect to osteoarthritis. Dr. Beecher concluded claimant's knee symptoms were related to the work injury, with the biggest symptoms being the

high-grade ACL rupture and medial meniscal tear. (Jt. Ex. 4, p. 5) Dr. Beecher did not make any recommendations regarding additional treatment or restrictions, and did not provide an impairment rating.

The letter the insurance carrier sent to Iowa Ortho does ask for the evaluation "to provide an opinion on his [claimant's] condition and impairment." (Jt. Ex. 4, p. 9) It is unclear whether Dr. Beecher received that letter prior to the IME, or if any other correspondence was provided to him. At some point after receiving Dr. Beecher's report, claimant retained legal counsel, who then requested that the defendants send claimant back to Dr. Beecher for an impairment rating, since that was not included in his first report. (Tr., pp. 20-21; Jt. Ex. 4, pp. 10-12) Claimant was not sent back to Dr. Beecher, and he has not provided an impairment rating to date.

Claimant returned to Dr. DeWall, again using his personal insurance, on October 5, 2018. (Jt. Ex. 1, p. 40) Claimant reported that his knee was continuing to bother him, limiting his activity. He continued to report pain and swelling, worse by the end of the day. Claimant expressed frustration with his symptoms, and had questions as to why Dr. DeWall did not "fix" his ACL. (Jt. Ex. 1, p. 40) Dr. DeWall notes that the reason he did not pursue ACL reconstruction was due to claimant's underlying problem of osteoarthritis, which pre-existed the ACL injury and is why Dr. DeWall did not believe further treatment of the osteoarthritis would be work related. Dr. DeWall also discussed that ACL reconstruction is a long recovery, and is performed to help with instability, as opposed to pain and swelling. As such, Dr. DeWall did not feel that claimant would benefit from ACL reconstruction, given his age and arthritic condition, as claimant may eventually need a total knee arthroplasty. (Jt. Ex. 1, p. 40) Claimant was provided with another steroid injection in the knee, and again released with no work restrictions.

Claimant returned to Dr. DeWall for injections on February 7, 2019, May 28, 2019, September 5, 2019, December 13, 2019, and March 17, 2020. (Jt. Ex. 1, pp. 42-47) Claimant also testified that he had another injection on June 18, 2020, just prior to hearing. (Tr., pp. 21-22) At the last appointment prior to hearing, claimant also had his knee aspirated. (Tr., p. 22) Claimant testified that the injections usually help him for close to three months, and when they wear off he starts to get swelling in his knee down his leg to his sock line, and it becomes more difficult to walk. (Tr., p. 22; Jt. Ex. 9) He also experiences more grinding in the knee, and general pain, which causes him to take more ibuprofen. (Tr., p. 24) Claimant's understanding is that Dr. DeWall will continue to provide the injections every three months until they stop working, at which time he will likely need a total knee replacement. (Tr., pp. 24-25)

Claimant had an IME with Sunil Bansal, M.D., M.P.H., on October 16, 2019. (Jt. Ex. 5) Dr. Bansal opined that claimant's work injury on June 8, 2017 caused a right knee anterior cruciate ligament tear, medial and lateral meniscus tears, and an aggravation of his osteoarthritis. (Jt. Ex. 5, p. 9) He agreed that claimant reached MMI on October 5, 2017. For future treatment, Dr. Bansal recommended intermittent steroid and/or viscosupplementation injections. He further noted that the "endpoint" is a knee replacement, which has been accelerated by the June 8, 2017 work injury. (Jt. Ex. 5, p.

10) Dr. Bansal recommended restrictions of no frequent kneeling or squatting, avoiding walking for more than one hour at a time, and avoiding multiple stairs. Finally, Dr. Bansal provided a 10 percent lower extremity impairment rating for claimant's medial and lateral meniscal tears, a 7 percent lower extremity impairment for ACL laxity, and 7 percent lower extremity impairment for the aggravation of claimant's degenerative joint disease. Combined, Dr. Bansal assigned a total of 22 percent lower extremity impairment. (Jt. Ex. 5, pp. 10; 14-15)

Claimant had another IME, at the defendants' request, with Scott B. Neff, D.O., FAAOS. (Jt. Ex. 6) Dr. Neff's exam took place on February 12, 2020. After examining claimant and reviewing the medical records, Dr. Neff opined that claimant, "in all likelihood" tore his ACL in his right knee on June 8, 2017. (Jt. Ex. 6, p. 6) He indicated that claimant also had chondrocalcinosis in his knee, which causes the meniscal cartilage to lose its rubberiness and increases stiffness. He stated that commonly patients with chondrocalcinosis have meniscal tears in the medial and/or lateral meniscus. (Jt. Ex. 6, p. 6) Dr. Neff noted that claimant is motivated to continue working, and as long as he continues to get the injections every three months, he can function. Dr. Neff provided a 7 percent impairment rating for the mild anterior cruciate ligament instability in claimant's right knee. (Jt. Ex. 6, pp. 6-7) He noted that attribution of impairment for claimant's meniscal tears is not appropriate under the AMA Guides to the Evaluation of Permanent Impairment, as claimant had not had surgery.

Dr. Neff recommended that claimant continue with the steroid injections every 3 to 4 months as long as they continue to relieve his symptoms, and suggested that viscosupplementation might also be considered. (Jt. Ex. 6, p. 7) He noted that claimant's arthritis will continue to worsen, and his medial and lateral meniscus tissue will continue to deteriorate "directly as a result of chondrocalcinosis." As a result, at some point in the future, claimant may require a total knee arthroplasty. (Jt. Ex. 6, p. 7)

Dr. Bansal provided a response to Dr. Neff's report on March 26, 2020. (Jt. Ex. 5, pp. 14-15) Dr. Bansal affirmed his prior 10 percent impairment rating to the un-operated meniscal tears, stating that they are perhaps more debilitating as they have not been repaired. He further reiterated that while claimant had preexisting degenerative changes, he was asymptomatic prior to the work injury. As such, Dr. Bansal opined that the work injury caused an aggravation of claimant's preexisting arthritis, and the end-point is a "knee replacement that has been accelerated by the lighting up and aggravation of his right knee degenerative changes." (Jt. Ex. 5, p. 15)

With respect to his current condition, claimant testified that he has to watch what he does, and some activities are more difficult than others. (Tr., p. 27) He stated that he cannot walk very far, especially up and down hills, and that twisting and turning can worsen his symptoms. He also notices worsening with certain weather changes and humidity. (Tr., pp. 27-28) Claimant testified that his right knee had never been completely pain-free since the injury. (Tr., p. 28)

Claimant also testified that prior to the June 8, 2017 injury, he had never suffered any problems with his right knee, including pain, swelling, or stiffness. (Tr., p. 40) This testimony is consistent with all of the medical evidence. There is no evidence that claimant's right knee was ever symptomatic prior to the work injury, and claimant consistently advised every physician he saw that he had never experienced issues with his right knee before the work incident. Additionally, the medical reports are generally in agreement that claimant's work incident more likely than not resulted in the ACL tear. It is less clear whether the meniscal tears were preexisting. Regardless, claimant's knee was completely asymptomatic prior to the June 8, 2017 incident, and became immediately symptomatic after and has remained so since. As such, I find that claimant's work related injury on June 8, 2017 caused a traumatic ACL tear in his right knee, which has resulted in a permanent aggravation of his previously asymptomatic degenerative condition.

Having found that claimant sustained a permanent aggravation of his preexisting degenerative condition, the next issue to be decided is the extent of disability to claimant's right lower extremity. Dr. DeWall opined that claimant has no permanent impairment. As the primary physician who treated claimant's knee, his opinion is entitled to a great deal of weight. However, Dr. DeWall's rating is dated October 5, 2017. (Jt. Ex. 1, p. 29) At that time, claimant's condition was stable as he had recently received his first injection. Once that injection wore off, his symptoms returned. Both Dr. Bansal and Dr. Neff saw claimant in 2020, after claimant had received multiple additional injections. As such, I find their opinions to carry more weight with respect to claimant's ultimate permanent impairment.

Dr. Bansal provided a 10 percent lower extremity rating for claimant's medial and lateral meniscal tears, a 7 percent lower extremity impairment for ACL laxity, and 7 percent lower extremity impairment for the aggravation of claimant's degenerative joint disease. Combined, Dr. Bansal assigned a total of 22 percent lower extremity impairment. (Jt. Ex. 5, pp. 10; 14-15) Dr. Neff provided a 7 percent impairment rating for the mild anterior cruciate ligament instability in claimant's right knee, and noted that attribution of impairment for claimant's meniscal tears is not appropriate as claimant had not had surgery. (Jt. Ex. 6, pp. 6-7) The greater weight of evidence suggests that claimant's work injury resulted in an ACL tear with permanent instability. It is less clear from the evidence whether the incident caused the medial and lateral meniscal tears. However, as Dr. Neff points out, claimant has not had surgery for the meniscal tears, and it is therefore inappropriate to provide an impairment rating under the AMA Guides. Therefore, I find Dr. Neff's 7 percent lower extremity rating to be the most persuasive. Claimant is entitled to 7 percent permanent partial disability of his right lower extremity, which is equal to 15.4 weeks of benefits.

CONCLUSIONS OF LAW

The threshold inquiry is whether claimant sustained a temporary or permanent aggravation of his pre-existing right knee condition.

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 Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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

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

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

I found that that claimant's work-related injury on June 8, 2017 caused a traumatic ACL tear in his right knee, which has resulted in a permanent aggravation of his previously asymptomatic degenerative condition. There is no evidence that claimant had any symptoms or treatment related to his right knee prior to the June 8, 2017 injury. The greater weight of evidence supports claimant's argument that the injury caused a permanent aggravation of his preexisting degenerative condition.

Having found that claimant sustained a permanent injury, the next issue to be decided is the extent of claimant's permanent partial disability.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u).[1] The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

As noted above, I found that Dr. Bansal and Dr. Neff provided more recent impairment ratings, after claimant had received additional treatment, and their opinions are entitled to greater weight with respect to impairment. The greater weight of evidence suggests that claimant's work injury resulted in an ACL tear with permanent instability. It is less clear from the evidence whether the incident caused the medial and lateral meniscal tears. However, as Dr. Neff points out, claimant has not had surgery for the meniscal tears, and it is therefore inappropriate to provide an impairment rating under the AMA Guides. Therefore, I find Dr. Neff's 7 percent lower extremity rating to be the most persuasive. Claimant is entitled to 7 percent permanent partial disability of his right lower extremity, which is equal to 15.4 weeks of benefits, at the stipulated weekly benefit rate of $596.89. Benefits commence on the stipulated date of October 5, 2017.

Claimant seeks reimbursement for medical expenses he has incurred for medical treatment related to his right knee injury after October 5, 2017, when Dr. DeWall opined further treatment would be under his personal health insurance. Claimant is not entitled to reimbursement for medical bills unless claimant shows that they were paid from his own funds. See Caylor v. Employers Mutual Casualty Co., 337 N.W.2d 890 (Iowa Ct. App. 1983). Otherwise, claimant is entitled only to an order directing the responsible defendants to make such payments directly to the provider. See Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Where medical payments are made from a plan to which the employer did not contribute, the claimant is entitled to a direct payment. Midwest Ambulance Service v. Ruud, 754 N.W.2d 860, 867-68 (Iowa 2008) ("We therefore hold

[1] Claimant's date of injury, June 8, 2017, predates the 2017 amendments to the Iowa Workers' Compensation Act. As such, the prior version of the code is referenced in this decision.

that the commissioner did not err in ordering direct payment to the claimant for past medical expenses paid through insurance coverage obtained by the claimant independent of any employer contribution.") See also: Carl A. Nelson & Co. v. Sloan, (Iowa App. 2015) 873 N.W.2d 552 (Iowa App. 2015) (Table) 2015 WL 7574232 15-0323. Claimant has the burden of proving that the fees charged for such services are reasonable. Anderson v. High Rise Construction Specialists, Inc., File No. 850096 (App. July 31, 1990).

Having found that claimant's injury caused a permanent aggravation of claimant's underlying arthritis, I find that the treatment claimant has received since October 5, 2017, is causally connected to his work injury. As such, defendants are liable for that medical care. Defendants shall reimburse claimant for the portions of the medical bills he paid from his own funds. Defendants shall further authorize ongoing treatment, including injections, to treat claimant's right knee symptoms.

Because I found the medical care is related to claimant's work injury, defendants are also responsible for the mileage claimant has accrued in attending those appointments. Claimant set forth calculations for mileage in his post-hearing brief for a total of $161.62 in mileage reimbursement. I find claimant's calculations reasonable and supported by the evidence. As such, defendants shall reimburse claimant $161.62 for mileage.

There was some question at hearing as to whether claimant will be entitled to a total knee replacement surgery in the future. Claimant did not specifically request such a finding at this time. Additionally, no doctor has recommended that claimant undergo that procedure in the immediate future. As such, the issue of whether the need for a total knee replacement surgery is related to the claimant's work injury is not ripe for consideration.

The next issue to address is whether claimant is entitled to reimbursement for Dr. Bansal's IME report. Defendants dispute claimant's entitlement to reimbursement pursuant to Iowa Code section 85.39.

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).

Regarding the IME, the Iowa Supreme Court provided a literal interpretation of the plain-language of Iowa Code section 85.39, stating that section 85.39 only allows

the employee to obtain an independent medical evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 847 (Iowa 2015).

Under the Young decision, an employee can only obtain an IME at the employer's expense if an evaluation of permanent disability has been made by an employer-retained physician. Iowa Code section 85.39 limits an injured worker to one IME. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842 (Iowa 2009).

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

In this case, employer-selected, authorized treating physician, Dr. DeWall, issued a disability rating on October 5, 2017. Claimant then asked for a second opinion regarding impairment, as he is entitled pursuant to Iowa Code section 85.39. Claimant credibly testified that he asked for his second opinion to take place at Iowa Ortho, but he did not chose the physician. Iowa Ortho assigned Dr. Beecher, who saw claimant on April 19, 2018. However, Dr. Beecher did not provide an impairment rating in his subsequent letter, despite being asked to do so by the insurance carrier. (Jt. Ex. 4, p. 9) Later, when claimant's attorney asked for defendants to pay for an additional report from Dr. Beecher in order to obtain his opinion regarding impairment, defendants denied that request. (Jt. Ex. 4, pp. 11-12) Claimant later sought an IME with Dr. Bansal, who did provide an impairment rating. Claimant argues that he is entitled to reimbursement for Dr. Bansal's IME, because the purpose of section 85.39 is to allow the claimant to obtain an impairment rating, which Dr. Beecher did not provide. Defendants argue that they met their burden under section 85.39 by providing claimant with an IME with Dr. Beecher, and that claimant did not apply to the Commissioner to receive reimbursement and provide notice to the employer and carrier as required by Iowa Code section 85.39(2).

In Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015) (hereinafter "DART"), the Iowa Supreme Court spent a good deal of time discussing the purpose of Iowa Code section 85.39. The Court noted that the purpose of section 85.39 is to provide for the "examination of an injured worker for the purpose of ascertaining 'the extent and character of the injury' for purposes of paying benefits in the event of a disability resulting from the injury." DART, 867 N.W.2d at 843. (citing Daugherty v. Scandia Coal Co., 219 N.W. 65, 67 (Iowa 1928)) The Court further notes that the legislature created section 85.39 "to govern examinations of an injured worker in order to obtain a disability rating to determine the amount of benefits required to be paid by the employer." DART, 867 N.W.2d at 847 (emphasis added).

The Court recognized that an injured worker "needs to be evaluated by a physician under the workers' compensation law to determine an award of compensation for permanent disabilities. The assessment is a critical component to an award of

benefits for permanent disabilities." DART, 867 N.W.2d at 844. (internal citations omitted). In other words, an independent medical evaluation that does not contain a functional impairment rating is fairly useless in helping the agency determine an award of compensation, and does not comport with the legislature's purpose in enacting section 85.39. In this particular instance, Dr. Beecher's report is not one from which the parties could infer a zero percent rating. Rather, Dr. Beecher completely ignored the issue of whether any permanent impairment existed. Under section 85.39, claimant was entitled to an evaluation of permanent impairment, and Dr. Beecher did not provide that.

Further, section 85.39 states that the injured worker is entitled to an examination by a physician of the employee's own choice. In this case, claimant chose the clinic, but did not specifically choose Dr. Beecher as the physician to perform his examination. Finally, while claimant did not file a separate petition for IME reimbursement, this agency has never held that to be an absolute prerequisite to reimbursement. Dr. Beecher's evaluation and report did not satisfy the purpose of section 85.39, which is to provide the claimant with an evaluation of permanent impairment made by a physician of his choosing. As such, I find that claimant is entitled to reimbursement of Dr. Bansal's IME in the amount of $3,378.00. (Cl. Ex. 3)

The final issue to be decided is claimant's entitlement to costs. Claimant seeks the following costs: $100.00 for the filing fee; $103.25 for claimant's deposition transcript. Because claimant was generally successful in his claim, an assessment of costs is appropriate.

Assessment of costs is a discretionary function of this agency. Iowa Code § 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33.

Because I found claimant was generally successful in his claim, I exercise my discretion and conclude an assessment of costs against the defendants is appropriate. I conclude it is appropriate to assess the cost of the $100.00 filing fee, as well as the $103.25 cost of the deposition transcript. 876 IAC 4.33(2)(7). In total, I assess costs against defendants in the amount of $203.25.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant permanent partial disability benefits for fifteen point four (15.4) weeks, beginning on the stipulated commencement date of October 5, 2017.

All weekly benefits shall be paid at the stipulated rate of five hundred ninety-six and 89/100 dollars ($596.89) per week.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due

which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Defendants shall pay claimant medical expenses as set forth in this decision.

Defendants shall reimburse claimant one hundred sixty-one and 62/100 dollars ($161.62) for medical mileage as set forth in this decision.

Defendants shall reimburse claimant in the amount of three thousand three hundred seventy-eight and 00/100 dollars ($3,378.00) for Dr. Bansal's IME.

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

Signed and filed this _____2nd_____ day of August, 2021.

JESSICA L. CLEEREMAN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Greg Egbers (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.