BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KEITH HAISLIP, SR.,

Claimant,

vs.

NICHOLS ALUMINUM, LLC,

Employer,

and

SENTRY CASUALTY CO.,

Insurance Carrier,

and

SECOND INJURY FUND OF IOWA,

Defendants.



File No. 5059629

ARBITRATION

DECISION

Head Notes 1402.30, 1402.40, 3202

STATEMENT OF THE CASE

Keith Haislip, Sr., claimant, filed a petition for arbitration against Nichols Aluminum, LLC, as the employer and Sentry Casualty Company as the insurance carrier. Mr. Haislip also filed a claim against the Second Injury Fund of Iowa. All claims were heard simultaneously at an in-person hearing, which occurred in Davenport on October 22, 2018.

The parties filed a hearing report at 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 7, Claimant's Exhibit 1, Defendants' Exhibits A through F and H, and Second Injury Fund Exhibits AA through FF. All exhibits were received without objection.

Claimant testified on his own behalf. No other witnesses were called to testify. The evidentiary record closed at the conclusion of the arbitration hearing.

However, counsel requested the opportunity to file post-hearing briefs. Their request was granted. The parties filed post-hearing briefs on or before November 9, 2018, at which time the case was fully submitted to the undersigned.

## ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury to his left leg that arose out of and in the course of his employment on August 11, 2017.

2. Whether the injury caused temporary disability and, if so, claimant's entitlement to temporary disability, or healing period, benefits.

3. Whether the injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent disability benefits.

4. Whether claimant has proven a qualifying second injury for purposes of his Second Injury Fund claim and, if so, claimant's entitlement to benefits against the Second Injury Fund of Iowa.

## FINDINGS OF FACT

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

Keith Haislip began working at Nichols Aluminum, LLC, in approximately 2011. (Employer's Exhibit A, page 2) Mr. Haislip worked as a millwright for Nichols Aluminum, which required him to install, repair, rebuild and maintain production equipment, maintain plant services and provide upkeep to the company's building and grounds. (Employer's Ex. A, p. 2)

Mr. Haislip sustained a left knee injury while working for Nichols Aluminum on April 19, 2014. He was provided treatment through Abdul Foad, M.D. Dr. Foad obtained an MRI of the left knee, which demonstrated tearing of the posterior horn of the medial meniscus. (Joint Ex. 3) After examination, Dr. Foad diagnosed claimant with the meniscal tear and fragmentation of the tibial tuberosity. Dr. Foad recommended and performed aspiration of fluid from claimant's left knee and then injected the knee with cortisone steroid. That injection significantly reduced claimant's left knee symptoms. Dr. Foad released claimant without further treatment on December 7, 2015 but noted that he discussed the long-term prognosis with claimant. (Joint Ex. 4, p. 30) Claimant testified that, in spite of this treatment, he continued to have left knee symptoms since the April 19, 2014 injury and that he had to ice or heat the knee every day from the date of the April 19, 2014 injury until the date of the alleged August 11, 2017 injury.

Claimant acknowledges that he had no fall, twist, or other traumatic injury to his left knee on August 11, 2017. Instead, he testified that he had no symptoms upon reporting to work on August 11, 2017. However, claimant explained that he walks many stairs throughout the employer's facility. At approximately 6:30 a.m. on August 11, 2017 claimant felt like his knee was "on fire." Mr. Haislip testified that his symptoms continued to worsen throughout his day on August 11, 2017. He completed his shift but testified that he required assistance to make it through the day.

Claimant's medical records do not provide an entirely consistent history with claimant's testimony. The medical records indicate that claimant woke up with a swollen and painful left knee on August 12, 2017 and sought medical care. He was ultimately referred to an orthopaedic surgeon, Waqas M. Hussain, M.D. (Joint Ex. 5) Dr. Hussain performed a left knee arthroscopy and partial medial meniscectomy, chondroplasty of the medial femoral condyle, and removal of loose bodies on October 2, 2017. He took intra-operative photographs during this surgical procedure. (Joint Ex. 6)

Dr. Hussain's office released claimant to return to work without medical restrictions for his left knee on or about November 27, 2017. Claimant did return to Dr. Hussain a couple of times after that release and had his knee aspirated. Dr. Hussain provides no opinions regarding causation or permanent impairment.

Instead, claimant and the employer each obtained an independent medical evaluation. Claimant selected Marc E. Hines, M.D., as his evaluator. Dr. Hines evaluated claimant on August 17, 2018. (Claimant's Ex. 1)

The employer selected former treating surgeon, Dr. Foad, to perform an evaluation at their request. Dr. Foad evaluated claimant on August 30, 2018. (Employer's Ex. C)

When I review and compare the medical opinions of Dr. Hines and Dr. Foad, I find the opinions offered by Dr. Foad to be more convincing and credible. Dr. Foad has been a board-certified orthopaedic surgeon for nearly 20 years. (Employer's Ex. D) He evaluated and treated claimant's left knee prior to August 11, 2017. As part of his examination, Dr. Foad reviewed claimant's left knee x-ray, MRI, operative report, and intra-operative photographs.

Dr. Foad is in a unique position to have seen and treated claimant's left knee prior to August 11, 2017 and then re-evaluated it after the alleged August 11, 2017 injury date. Moreover, claimant testified in his deposition that he believes Dr. Foad is a good doctor, and that Dr. Foad did a fantastic job with surgical intervention on claimant's right knee. Claimant believes that Dr. Foad is well qualified and that his medical skills are good. Claimant expressed confidence in Dr. Foad both in his deposition and again at trial.

Dr. Hines also evaluated claimant both before and after the August 11, 2017 injury date. However, Dr. Hines' report does not address the pre-existing treatment of

claimant's left knee that occurred after another work injury in 2014. Dr. Hines did not possess the left knee operative report. He indicates that claimant's left knee x-rays "apparently looked reasonable." (Claimant's Exhibit 1, page 4) Again, it appears that Dr. Hines did not personally review the claimant's left knee x-rays.

Dr. Hines' report notes a return visit to Dr. Hussain on September 5, 2017 that references an MRI. However, it is apparent that Dr. Hines did not personally review the MRI report, as he does not even mention the MRI report as a document he reviewed. Dr. Hines apparently did not review Dr. Hussain's operative report. Dr. Hines also notes in his initial history that claimant "tripped, but did not fall and had been seeing a doctor for his left knee subsequently." (Claimant's Ex. 1, p. 1) It is not clear in his history whether Dr. Hines believes the trip occurred on August 11, 2017. Claimant clearly testified that no such trip occurred on that date. I am not confident that Dr. Hines had all of the medical documentation to review or that he accurately understood the history surrounding the claimed August 11, 2017 left knee injury.

Dr. Hines refers to claimant's left knee as having persistent instability. Dr. Hines is a neurologist. His curriculum vitae demonstrates no experience or training in orthopaedic surgery or specifically treatment of the knees. (Claimant's Ex. 1, pp. 10-25) No other physician, and specifically neither of the orthopaedic surgeons that have evaluated or treated claimant's left knee, have identified instability in the knee. The operative notes do not identify any tendon or ligament ruptures in the left knee. Rather, claimant had a medial meniscus tear and degenerative arthritis in his left knee when inspected intra-operatively. Dr. Foad clearly had an advantage in this respect, as he specifically describes the operative findings he can see by reviewing the operative photographs of claimant's left knee.

Dr. Hines also imposes medical restrictions that appear inconsistent with claimant's actual return to work after the alleged August 11, 2017 work injury. In fact, claimant returned to work full-duty after this alleged injury and performed the millwright position duties without accommodation until he sustained an unrelated injury in May 2018. Claimant conceded in his deposition that he quit the millwright position after the subsequent facial injury and that he could have continued with Nichols Aluminum, or obtained work as a millwright with another employer, if he chose to do so. When considering claimant's real life activities after the alleged August 11, 2017 work injury, Dr. Hines' restrictions do not seem reasonable or credible.

Dr. Hines' prior report and impairment rating were previously rejected by another deputy workers' compensation commissioner in claimant's prior worker's compensation claim. (Employer's Ex. A) Similar to the prior deputy commissioner, I find the medical opinions expressed by Dr. Foad to be more convincing and credible than the opinions expressed by Dr. Hines.

Dr. Foad specifically opines that claimant did not injure his knee as a result of work activities on August 11, 2017. Dr. Foad further clarifies that claimant did not

materially aggravate or accelerate his left knee arthritis as a result of his work duties at Nichols Aluminum.

Specifically, Dr. Foad opines, "there was no new distinct work injury on 8/11/17." (Employer's Ex. C, p. 6) He further opines, "The complaints of Mr. Haislip, which led to his care by Dr. Hussain and ultimate surgery were the result of a natural and chronic, progressive pre-existing arthritic condition that began even before the 4/19/14 work injury and unrelated to his work activities at Nickels [sic] Aluminum/Aleris." (Employer's Ex. C, p. 6) Finally, Dr. Foad concluded, "his work exposure ... did not accelerate or precipitate a pre-existing left knee condition beyond normal/natural progression as a substantial factor.... In other words, the progressive underlying degenerative changes of the left knee would have occurred with or without his work injury of 4/19/14 or 8/11/17." (Employer's Ex. C, p. 4)

I accept Dr. Foad's causation opinions as most convincing and credible in this evidentiary record. Therefore, I find that claimant failed to prove that he sustained a work injury to his left knee that was directly related to his work activities, either traumatically or cumulatively, at Nichols Aluminum on or about August 11, 2017. Similarly, I find that claimant failed to prove that his work activities at Nichols Aluminum materially aggravated or accelerated his left knee condition after his prior April 19, 2014 work injury.

## CONCLUSIONS OF LAW

Mr. Haislip contends that he sustained a left knee injury that arose out of and in the course of his employment with Nichols Aluminum on August 11, 2017. 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" referred 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).

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

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).

Having weighed the competing medical opinions in this case, I found the opinions of Dr. Foad to be most convincing and credible. In reliance upon those opinions, I found that claimant failed to prove he sustained a left knee injury that arose out of and in the course of his employment on August 11, 2017. Similarly, I found that claimant failed to prove his work, either traumatically or cumulatively, caused a material aggravation or

acceleration of his underlying arthritis in his left knee. Therefore, I conclude that claimant failed to prove by a preponderance of the evidence that he sustained an injury of the left knee that arose out of and in the course of his employment on August 11, 2017. I conclude that Mr. Haislip's claim for worker's compensation benefits against Nichols Aluminum for the August 11, 2017 injury date fails. Claimant is not entitled to an award of either temporary or permanent disability benefits.

Mr. Haislip also asserts a claim against the Second Injury Fund of Iowa. Section 85.64 governs Second Injury Fund liability. Before liability of the Fund is triggered, three requirements must be met. First, the employee must have lost or lost the use of a hand, arm, foot, leg, or eye. Second, the employee must sustain a loss or loss of use of another specified member or organ through a compensable injury. Third, permanent disability must exist as to both the initial injury and the second injury.

The Second Injury Fund Act exists to encourage the hiring of handicapped persons by making a current employer responsible only for the amount of disability related to an injury occurring while that employer employed the handicapped individual as if the individual had had no preexisting disability. See Anderson v. Second Injury Fund, 262 N.W.2d 789 (Iowa 1978); 15 Iowa Practice, Workers' Compensation, Lawyer, Section 17:1, p. 211 (2014-2015).

The Fund is responsible for the industrial disability present after the second injury that exceeds the disability attributable to the first and second injuries. Section 85.64. Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467 (Iowa 1990); Second Injury Fund v. Neelans, 436 N.W.2d 335 (Iowa 1989); Second Injury Fund v. Mich. Coal Co., 274 N.W.2d 300 (Iowa 1970).

Having found that claimant did not prove a compensable, work-related left knee injury occurred on August 11, 2017, I conclude that claimant failed to establish a second qualifying injury for purposes of his Second Injury Fund claim. Therefore, I conclude that claimant has failed to establish Second Injury Fund liability, and his petition against the Second Injury Fund should be dismissed.

ORDER

THEREFORE, IT IS ORDERED:

Claimant shall take nothing from the employer and insurance carrier.

Claimant shall take nothing from the Second Injury Fund of Iowa.

All parties shall pay their own costs.

Signed and filed this 1st day of February, 2019.

William H. Grell

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

James P. Hoffman
Attorney at Law
PO Box 1087
Keokuk, IA 52632
jamesphoffman@aol.com

Richard C. Garberson
Attorney at Law
PO Box 2107
Cedar Rapids, IA 52406
rcg@shuttleworthlaw.com

Amanda R. Rutherford
Assistant Attorney General
Dept. Justice
Hoover State Office Bldg.
Des Moines, IA 50319
amanda.rutherford@ag.iowa.gov

WHG/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.