

At the start of the hearing the parties submitted a hearing report, listing stipulations and issues to be decided. JBS and American Zurich waived all affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed between JBS and Myint at the time of the alleged injury.
2. Temporary benefits are no longer in dispute.
3. If the alleged injury is found to be the cause of permanent disability the disability is a scheduled member disability to the right leg.
4. At the time of the alleged injury Myint's gross earnings were \$842.59 per week, he was single and entitled to one exemption, and the parties believe his weekly rate is \$512.89.
5. \$48,234.51 in medical benefits have been paid under Iowa Code section 85.38(2) and JBS and American Zurich are entitled to a credit for the medical benefits paid.
6. Prior to the hearing Myint was paid 4.4 weeks of compensation at the rate of \$512.89 per week.

ISSUES

1. Did Myint sustain an injury which arose out of and in the course of his employment with JBS on March 15, 2017?
2. Is the alleged injury a cause of temporary disability?
3. Is the alleged injury a cause of permanent disability?
4. If the alleged injury is found to be the cause of permanent disability what is the extent of disability?
5. Is Myint entitled to recover \$3,275.62 in out-of-pocket medical expenses set forth in Exhibit 3?
6. Should costs be assessed against either party?

FINDINGS OF FACT

Myint was born in Yangon, Myanmar. (Transcript, page 23) Myint attended school through the tenth grade in Myanmar. (Tr., p. 23) Myint moved to the United States from Myanmar on February 26, 2009. (Tr., p. 23) After moving to the United States Myint attended English as a second language courses in Omaha for ten months.

(Tr., p. 23) Myint lived in Omaha and Kansas City before he moved to Marshalltown, Iowa. (Tr., pp. 23-24) Myint lives alone in Marshalltown and he does not claim any dependents on his income taxes. (Tr., p. 22) At the time of the hearing Myint was sixty-eight. (Tr., p. 22)

JBS hired Myint to work in its meat processing facility in July 2015. (Tr., p. 24; JE 1, p. 1b) Myint worked in general cleaning and packaging. (Tr., p. 24)

On March 15, 2017, Myint completed a Report of Employee Incident with the assistance of an interpreter, reporting he injured his "left low back" at 2:00 p.m. on March 15, 2017. (JE 1, p. 1) Myint documented "I was pulling on cardboard with the strings (straps) and a corner of the cardboard was split (unintelligible) and he fell backward on the concrete hitting his back." (JE 1, p. 1)

During the hearing Myint testified he was working in packaging making boxes in March 2017. (Tr., pp. 24-25) Myint relayed his job requires a lot of standing, lifting, and bending. (Tr., p. 25) Myint put together cardboard boxes, bending the boxes and tying the boxes before putting the boxes on a machine. (Tr., p. 26) Myint reported sometimes he cannot use just one foot to form a box and he has to use both feet. (Tr., p. 26) Myint reported the boxes are often wet and weigh up to twenty-five or thirty pounds. (Tr., p. 26)

When questioned about his work injury, Myint testified he injured "[t]he right – the left – the right knee, yeah, the last time." (Tr., p. 27) Myint clarified the first time he fell down onto his back, causing back pain. (Tr., pp. 27-28) Myint reported he later injured his right knee "[b]ecause when I working, when I working a lot of stuff over there. When I walk like, like – okay. When I go, I fall down on my knee on the floor, yeah." (Tr., p. 28) Myint's attorney clarified the alleged knee injury, and Myint responded, as follows:

Q. What caused you to fall?

A. The packet came in with a rap.

Q. With what? I'm sorry?

A. With rap to tie the box, yeah.

Q. Okay.

A. Because I working, the rap like --

Q. Rope? Rope?

A. Yeah. Like pulling my feet like that. That's why I fall down on my knee.

Q. Okay. Did something happen with a forklift?

A. No.

Q. Okay.

Mr. Waldron: You have to interpret that. What did he say?

Interpreter: He said no.

Q. Okay. So we're talking specifically about March 15 of 2017 when you were on a dock and fell.

Interpreter: 2000 what? Sorry.

Q. 2017.

A. Sorry. Yeah.

Q. Okay. And did that injury happen on the dock, or where did it happen?

A. What happened?

Q. I'm asking him what happened.

Interpreter: But I already ask him.

Deputy Commissioner: I'm asking you what happened.

A. I not remember.

Q So did you fall over something? I guess I'm trying to get the March of 2017 injury. Did you fall over something? Did you – did something hit you? What happened?

A. I falling myself.

Q. Okay.

(Tr., pp. 28-29) Myint reported when he was walking a forklift was coming in and "I had to escape the forklift because they driving very fast. I had to try to escape myself." (Tr., p. 30) Myint reported when he fell he hurt "[t]he whole body, so like my knee, my back, both arms." (Tr., p. 31) Myint reported he continued to have problems with his whole body at the time of the hearing. (Tr., p. 31)

JBS arranged for care for Myint with Daniel Miller, D.O., an occupational medicine physician. (JE 1; JE 3) Myint received interpretation services during his appointments with Dr. Miller. (JE 3)

On March 24, 2017, Myint attended an appointment with Dr. Miller, complaining of back pain from a work injury. (JE 3, p. 12) Dr. Miller documented Myint reported “he was putting a box up when the box fell and he then also fell. Landing on his back. Patient had pain right away in the lower back and tail bone area.” (JE 3, p. 12) Myint told Dr. Miller he experienced pain when bending over and he had been using ice and wearing a back brace he purchased. (JE 3, p. 12) Dr. Miller assessed Myint with dorsalgia, unspecified and lumbar, pelvic, sacral pain/contusion, and prescribed a sitting donut. (JE 3, p. 14)

Myint agreed on cross-examination he told Dr. Miller he injured his back when he was pulling a box and fell backward, landing on his back. (Tr., p. 45) Myint testified he had a little bit of pain when he fell down, “[t]he problem was – it not my knee but my back.” (Tr., p. 45)

Myint returned to Dr. Miller on March 28, 2017. (JE 3, p. 15) Dr. Miller documented Myint reported his back was feeling better with medication, but he was still having difficulty bending and noted “the left leg is feeling better,” but he was still having some pain with sitting. (JE 3, p. 15) Dr. Miller released Myint to return to work on March 28, 2017 with restrictions of sedentary-light work lifting up to fifteen pounds occasionally and up to ten pounds frequently, pushing and pulling up to twenty-five pounds occasionally, and minimal bending/twisting at the waist. (JE 1, p. 2)

On April 18, 2017, Myint attended a follow-up appointment with Dr. Miller, complaining of back pain, bilateral leg pain, difficulty going from standing or sitting positions, difficulty walking long distances and periods, and tightness and calf cramps in his legs. (JE 3, p. 17) Dr. Miller continued Myint’s diagnoses and released Myint to return to work with restrictions of light work, lifting up to twenty pounds occasionally and up to ten pounds frequently, and pushing and pulling up to thirty pounds occasionally. (JE 1, p. 3; JE 3, p. 17) Dr. Miller documented “I informed patient that his leg complaints are not related to the work injury and he should follow-up with his PCP regarding that issue.” (JE 3, p. 18)

On May 16, 2017, Myint completed a Report of Employee Incident, with the assistance of an interpreter, alleging he sustained an injury to his right knee at 2:00 p.m. on March 15, 2017. (JE 1, p. 5) Myint reported, “[t]he pain in my knee [right] was from the fall. The pain originally got better, but as I have resumed full duty and had to do more lifting, the pain has come back. I feel my knee is very swollen. The pain is worse when working.” (JE 1, p. 5)

Myint returned to Dr. Miller on May 16, 2017. (JE 3, p. 19) Dr. Miller documented Myint reported his pain in his back was “a lot better,” but he still had pain in his tailbone and pressure in both calves, with the right being worse than the left, and noting he was experiencing difficulty walking long distances and getting up with his legs while sitting. (JE 3, p. 19) Dr. Miller continued Myint’s diagnoses, found he had reached maximum medical improvement, and released him to full duty. (JE 3, pp. 19-20)

Myint attended an appointment with Dr. Miller on May 23, 2017. (JE 3, p. 21) Dr. Miller documented Myint told him he “was lifting a box and fell, states his knee was feeling better but now is worse.” (JE 3, p. 21) Dr. Miller noted Myint reported “the pain is in the joint of the knee, he is not able to bend the knee. States he walks with a straight leg and a slight limp, when sitting, standing or walking too long he will get a ‘poking’ pain in the knee.” (JE 3, p. 21) Dr. Miller diagnosed Myint with right knee pain, ordered right knee magnetic resonance imaging, and released Myint to return to work with restrictions of sit down work only and to provide a sit/stand option. (JE 1, p. 6; JE 3, pp. 16, 21)

Myint underwent right knee magnetic resonance imaging on June 5, 2017. (JE 2, p. 1) The reviewing radiologist listed an impression of:

1. Complex tear involving the posterior horn of the medial meniscus with a macerated appearance.
2. Full-thickness loss of articular cartilage within the medial compartment with underlying osseous edema involving the medial femoral condyle and medial tibial plateau and medial extrusion of the medial meniscus.
3. Mild loss articular cartilage within the lateral and patellofemoral compartments.
4. Large joint effusion.

(JE 2, p. 11)

Myint returned to Dr. Miller on June 13, 2017, reporting his knee was “a little better,” but relaying he had pain around his knee, and up to his hip, problems with limping, and poking pain in his knee. (JE 3, p. 23) Dr. Miller diagnosed Myint with pain in the right knee, a right knee meniscal tear that is work-related, and unilateral right knee primary osteoarthritis noting the osteoarthritis is “NOT WORK RELATED” (JE 1, p. 8; JE 3, pp. 23-24) Dr. Miller released Myint to return to work with a restriction of sit down work only, and referred him to an orthopedic surgeon for the right knee meniscal tear. (JE 1, p. 8; JE 3, p. 24)

On June 28, 2017, Myint attended an appointment with Christopher Vincent, M.D., an orthopedic surgeon. (JE 6, pp. 31-35) Myint received interpretation services during the appointment. (JE 6, p. 32) Dr. Vincent examined Myint, assessed him with a complex tear of the medial meniscus of the right knee and primary osteoarthritis of the right knee. (JE 6, pp. 31-32) Myint relayed his pain began on March 15, 2017, when “he was smashing cardboard boxes, twisted his knee and felt a painful pop.” (JE 6, p. 32) Dr. Vincent discussed treatment options with Myint and Myint elected to proceed with an injection. (JE 6, p. 32) Dr. Vincent documented, “I tried my best explained [*sic*] to the patient at [*sic*] the osteoarthritis is long-standing and not a result of the injury in

March. However, there is a meniscal tear and his symptoms developed after the injury.” (JE 6, p. 32)

Myint testified he told Dr. Vincent he injured his right knee when he was smashing or stomping cardboard boxes and twisted his right knee. (Tr., p. 45) Myint testified the injury to his right knee happened before March 15, 2017, but he fell down many times on his knee before March 15, 2017. (Tr., p. 46) Myint reported he received medical treatment at JBS from “the work nurse or work therapy, physical therapy. Health service, the clinic in the workplace.” (Tr., p. 47) Myint testified he only received treatment at JBS. (Tr., p. 47)

On June 29, 2017, Myint returned to Dr. Miller. (JE 1, p. 7) Dr. Miller imposed restrictions of medium work, lifting up to fifty pounds occasionally, lifting up to twenty-five pounds frequently, and to provide a sit/stand option four hours per day. (JE 1, p. 7)

Myint attended a follow-up appointment with Dr. Vincent on August 2, 2017. (JE 6, p. 36) Dr. Vincent documented he used a telephone interpreter and “there was a significant language barrier,” noting he explained the difference between the arthritic symptoms and the meniscus symptoms, Myint inquired about knee replacement surgery, and Dr. Vincent explained he “would attribute this to his chronic underlying osteoarthritis and not to the work injury he sustained in March.” (JE 6, p. 37) Dr. Vincent offered to perform a right knee arthroscopy with partial medial meniscectomy, and explained the procedure would not cure Myint’s medial compartment osteoarthritis. (JE 6, p. 36) Myint elected to proceed with the right knee arthroscopy with partial medial meniscectomy. (JE 6, p. 36)

Dr. Vincent performed a right partial medial meniscectomy on Myint on September 1, 2017. (JE 6, pp. 40, 53-54) During a follow-up appointment on September 20, 2017, Myint reported he felt worse, he was unable to bend his knee, and he was experiencing a lot of pain around his kneecap. (JE 6, p. 40) Dr. Vincent noted Myint was restricted to sit down work only and was ambulating with crutches. (JE 6, p. 40)

On October 18, 2017, Myint returned to Dr. Vincent complaining of increased pain when walking or bending his knee. (JE 6, p. 42) Myint told Dr. Vincent he did not believe he could return to his normal work duties. (JE 6, p. 42) Dr. Vincent documented he told Myint his pre-existing arthritis was not caused by the injury based on the severity of arthritis present on x-ray, he provided Myint with a temporary work restriction of avoiding repetitive activities with the knee, and he agreed Myint could return to work in one month. (JE 6, p. 42)

During an appointment on November 29, 2017, Myint told Dr. Vincent he continued to have swelling and stiffness in his knee. (JE 6, p. 45) Dr. Vincent documented Myint wanted a knee replacement, noting “[a]ll the conversation was done through an interpreter which was somewhat difficult due to communication barrier. I explained again to him today which I have explained at almost every single and [sic]

visit” that the osteoarthritic changes in the knee are not related to his work injury, and that the severity of arthritis seen on x-ray could not have been caused by the work injury. (JE 6, p. 45) Dr. Vincent further documented:

[t]he patient had advanced pre-existing osteoarthritis with bone-on-bone articulation preoperatively. He still [sic] having some swelling and pain which I believe attributable to the osteoarthritis mainly. He still has a knee effusion. He changed his story today, and reports that he has been having pain for over a year related to repetitive activities at work. He only reported this to me after I explained to him that the degree of arthritis could not be attributed to the knee injury of March. He reported to me that he had an injection in the knee and has seen doctors in clinic for the knee over the last year complaining of chronic knee pain.

I was very specific during our initial interview with pointed questions to him regarding his work injury. At his initial appointment he was very adamant that his pain started very acutely after the injury occurred in March. He now has changed that story to state that he has had chronic knee pain for over a year. I believe this is all osteoarthritic pain and not related to his work injury of March. In addition, it appears that he is not been [sic] honest with me at initial presentation or he has changes [sic] story and is not being honest with me now. At any rate, it is my professional opinion that his ongoing dysfunction in the knee is related to chronic osteoarthritis, and I could not attribute the severe osteoarthritis present in his right knee to the injury that occurred in March 2017.

(JE 6, pp. 46-47) Dr. Vincent opined Myint had recovered from the right knee arthroplasty, and released him to return to work without restrictions. (JE 6, p. 47) At hearing Myint denied telling Dr. Vincent he had chronic pain in his right knee for over one year. (Tr., p. 47)

During the arbitration hearing Myint testified he sustained two injuries while working for JBS. (Tr., p. 40) Myint reported he injured his knee, both arms, and a finger, and reported he injured his knee with the second injury. (Tr., p. 40) When questioned on cross-examination whether he injured his back, Myint responded “[y]eah. The lumbar dislocation.” (Tr., p. 40)

When presented with the report of injury from March 15, 2017, Myint agreed the statement provided he fell backward hit his back, injuring his back, which is what happened. (Tr., pp. 40-42) Myint reported he hit his back and his elbows, but he did not injure his knee. (Tr., p. 42) Myint received interpretation services when he prepared his statement. (Tr., p. 42)

Myint reported he fell down when he injured his right knee, which was a different injury from when he fell backwards and injured his back. (Tr., p. 42) Myint testified the injury to his knee happened on a different day. (Tr., p. 42) Myint could not recall if he

injured his right knee before or after his back stating, "I fell down many times." (Tr., p. 43) Myint agreed at hearing that during his deposition he indicated sometime in September 2016 he fell when a rope caught his feet. (Tr., p. 44)

On December 21, 2017, Myint attended an appointment with Dr. Vincent, complaining of right knee pain, and requesting a total knee replacement, but stating he would not proceed with the procedure unless work paid for the replacement. (JE 6, p. 49) Dr. Vincent opined there was no further treatment he could provide for the meniscus tear sustained at work and released him from care without restrictions. (JE 6, pp. 51-52)

Dr. Vincent issued an opinion letter on January 5, 2018, noting,

[Myint's] ongoing symptoms at this point, of pain, stiffness, and loss of range of motion, his gait abnormalities, and his difficulty performing work duties are all due to the bone-on-bone osteoarthritis of the knee. I explained this to him, I also explained that the severe radiographic evidence of osteoarthritis could not be caused by the single event on March of 2017. I would note that on November 29, 2017 when I explained to him that his severe osteoarthritis was not caused by the work injury of March 15, 2017, he did then change his story and states [t]hat his knee has been hurting him for over a year.

(Exhibit A, p. 1)

Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Vincent assigned Myint a two percent lower extremity impairment under Table 17-33, which he converted to a one percent whole person impairment. (Ex. A, pp. 1-2) Dr. Vincent noted "[r]ange of motion, strength, and pain levels are not an accurate gauge of impairment rating for this work injury because he has severe underlying osteoarthritis, which is not a result of this knee injury." (Ex. A, p. 1) Dr. Vincent recommended no additional treatment and assigned no permanent work restrictions as a result of the March 15, 2017 work injury, and opined Myint's poor right knee function is due to his osteoarthritis and not the March 2017 work injury. (Ex. A, p. 1)

Dr. Vincent issued a second opinion letter on September 19, 2019, which provides, in part:

[i]t is my opinion that the March 14, 2017, incident may have temporarily aggravated underlying osteoarthritis. However, this work incident was a very low energy injury and I do not believe it would have materially aggravated, accelerated or lit up osteoarthritis which would not have otherwise presented itself in the absence of the injury. It is my opinion that whether the work-related incident of March 15, 2017, occurred or did

not occur, the patient would still develop symptoms of stiffness, pain, loss of function and limitations related to severe osteoarthritis of the knee.

(Ex. A, p. 4) Dr. Vincent noted Myint is a candidate for a total knee replacement, but “it is my opinion with medical certainty that he would require this treatment in the absence of this incident. It is more likely than not the patient would be seeking out treatment and knee replacement even in the absence of this injury. I do not feel his need for knee replacement has been accelerated, caused or aggravated materially by the work incident in March of 2017.” (Ex. A, pp. 4-5)

Myint eventually underwent a total knee replacement with another physician. (Tr., pp. 34, 50) JBS and American Zurich did not authorize the total knee replacement. Myint testified after the second surgery, the total knee replacement, he continues to have problems with pain, range of motion, and weakness in his right knee. (Tr., pp. 34-35)

Sunil Bansal, M.D., an occupational medicine physician, conducted an independent medical examination for Myint on September 12, 2019, and issued his report on October 23, 2019. (Ex. 2) Myint testified Dr. Bansal did not perform any measurements or tests on him. (Tr., p. 37)

Dr. Bansal diagnosed Myint with a right knee medial meniscus tear, status post right knee arthroscopy with partial medial meniscectomy, and aggravation of right knee osteoarthritis, status post right knee replacement. (Ex. 2, p. 7) With respect to causation, Dr. Bansal opined, on March 15, 2017,

[h]e was cleaning cupboards, and saw a forklift driving towards him. As he tried to get out of the way and avoid being hit by the forklift, he tripped and fell to the floor. He landed on the dock, and most of the impact was to his right knee. He was able to get up.

This mechanism involving torsion and landing on his right knee caused a right knee medial meniscal tear, and set in motion a series of biochemical events as that led to the aggravation of his degenerative joint disease.

“Anterior cruciate ligament (ACL) and meniscal injuries are common in both athletes and the general population. Such injuries may lead to early-onset post traumatic osteoarthritis (OA) in 50 to 60% of patients.”

Jazrawi LM, intra-articular hyaluronic acid: potential treatment of younger patients with knee injury and/or post-traumatic arthritis. Phys Sportsmed. 2011 May;39(2):107-13.

The aggravated degenerative joint disease necessitated a knee replacement.

(Ex. 2, p. 8) Dr. Bansal found Myint reached maximum medical improvement on May 12, 2019. (Ex 2, p. 8) Using Table 17-33 of the AMA Guides, Dr. Bansal opined given Myint underwent a right knee replacement, he is assigned a thirty-seven percent lower extremity impairment. (Ex. 2, p. 8) Dr. Bansal recommended restrictions of avoiding multiple stairs, no frequent kneeling or squatting, and no prolonged walking greater than thirty minutes at a time. (Ex. 2, p. 8)

Myint testified he told Dr. Bansal he was cleaning out cupboards when he saw a forklift driving toward him and when he tried to get out of the way he tripped and fell on the floor. (Tr., p. 48) When questioned about the fall and the timing of when the fall occurred, Myint and the attorney for JBS and American Zurich engaged in the following exchange:

Q. You told Dr. Bansal that you were cleaning out cupboards and you saw a forklift driving toward you and you tried to get out of the way and you tripped and fell on the floor. Did you fall forwards?

A. Yeah. Forward.

Q. So did this forward fall happen before or after March 15 of 2017?

A. Again, the same. I fell down many times, again and again.

Q. Did the fall where you're trying to avoid a forklift and you fell forward, did that happen before or after March 15 of 2017, where you fell backwards?

A. Again, the same answer. I fell down again and again.

(Tr., p. 48)

Myint testified since his work injury he cannot stand up very long before needing to rest. (Tr., p. 38) At the time of the hearing Myint was performing his packaging job at JBS without restrictions. (Tr., p. 51)

CONCLUSIONS OF LAW

I. Applicable Law

This case involves several issues, including causation, extent of disability, commencement date for permanency, recovery of medical bills, alternate medical care, and interest under Iowa Code sections 85.27, 85.34, 85.39 and 535.3. In March 2017, the legislature enacted changes (hereinafter "Act") relating to workers' compensation in Iowa. 2017 Iowa Acts chapter 23 (amending Iowa Code sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.45, 85.70, 85.71, 86.26, 86.39, 86.42, and 535.3). Under 2017 Iowa Acts chapter 23 section 24, the changes to Iowa Code sections 85.33 and 85.34 apply to injuries occurring on or after the effective date of the Act. This case

involves an alleged work injury occurring before July 1, 2017, therefore, the provisions of the new statute involving Iowa Code sections 85.34 and 85.39 do not apply to this case. The calculation of interest is governed by Sanchez v. Tyson, File No. 5052008 (Ruling on Defendant's Motion to Enlarge, Reconsider, or Amend Appeal Decision Re: Interest Rate Issue), which holds interest for all weekly benefits payable and not paid when due which accrued before July 1, 2017, is payable at the rate of ten percent; all interest on past due weekly compensation benefits accruing on or after July 1, 2017, is 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.

II. Credibility Generally

During the hearing I assessed Myint's credibility by considering whether his testimony was reasonable and consistent with other evidence I believe, whether he had made inconsistent statements, his "appearance, conduct, memory and knowledge of the facts," and his interest in the case. State v. Frake, 450 N.W.2d 817, 819 (Iowa 1990).

Myint struggles with English. Myint received interpretation services when reporting his work injury, at medical appointments, and during the hearing. There were problems with the first interpreter at the hearing, Garvey, who also provided interpretation services during Myint's deposition. Given my experience with Garvey at the hearing I have concerns whether her interpretation during the deposition was accurate. Dr. Vincent also described difficulty communicating with Myint using an interpreter. The interpretation difficulties present in this case are troubling to me.

Myint has an obvious interest in the outcome of this case. I had the opportunity to observe Myint testify under oath. Myint's testimony was not clear or consistent. At times he appeared to follow questions appropriately through use of an interpreter; other times he did not.

I have concerns about Myint's conflicting statements to Dr. Vincent. He initially reported he sustained a traumatic injury, and then later alleged his knee had been hurting for over a year. I also have concerns about Myint's reports to Dr. Miller concerning the alleged knee injury. Myint did not mention a knee injury in his first report of injury or to Dr. Miller. However, as noted above, I also have concerns about the interpretation services Myint has received.

I did not find Myint's testimony reliable, reasonable, or consistent throughout the hearing. Based on my personal observations at hearing, I did not find Myint to be a credible witness. Despite this finding, claimants who are not credible sustain work injuries. JBS and American Zurich provided Myint with medical care for a torn meniscus, a traumatic injury. JBS and American Zurich paid Myint 4.4 weeks of permanent partial disability benefits based on Dr. Vincent's impairment rating of two percent to the right lower extremity. JBS and American Zurich refused to authorize a total knee replacement. Myint avers his need for a total knee replacement was caused

by the March 2017 work injury. JBS and American Zurich deny his need for a total knee replacement was caused by the March 2017 work injury.

III. Arising Out of and in the Course of Employment

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of and in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). 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, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs "in the course of employment" when:

it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of his employer.

Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174, 177 (Iowa 1979) (quoting Bushing v. Iowa Ry. & Light Co., 208 Iowa 1010, 1018, 226 N.W. 719, 723 (1929)).

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 cause does not need to be the only cause, "[i]t only needs to be one cause." Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60, 64 (Iowa 1981).

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 deputy 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 had 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).

Two expert witnesses have provided opinions on causation with respect to Myint's osteoarthritis and need for a total knee replacement, Dr. Vincent, a treating orthopedic surgeon who performed surgery on Myint's right knee, and Dr. Bansal, an occupational medicine physician who conducted an independent medical examination for Myint. I find Dr. Vincent's opinion more persuasive than Dr. Bansal's opinion. Dr. Vincent has superior training to Dr. Bansal as an orthopedic surgeon. And he treated and performed surgery on Myint's knee. Dr. Bansal examined Myint after he had undergone a total knee replacement.

Throughout his treatment of Myint, Dr. Vincent documented he told Myint his underlying osteoarthritis and need for a total knee replacement were not related to the March 15, 2017 work injury. Dr. Vincent initially opined his torn meniscus was related to the work injury. Dr. Vincent opined while the work injury may have temporarily aggravated Myint's underlying osteoarthritis, he did not believe "it would have materially aggravated, accelerated or lit up" his osteoarthritis, which would have presented itself in the absence of his work injury. (Ex. A, p. 4)

Dr. Bansal opined the mechanism of the torsion and landing on his right knee caused a right meniscal tear, "and set in motion a series of biochemical events as that led to the aggravation of his degenerative joint disease." (Ex. 2, p. 8) Dr. Bansal cited to literature stating individuals with anterior cruciate ligament and meniscal injuries "may

lead to early-onset post traumatic osteoarthritis (OA) in 50 to 60% of patients.” (Ex. 2, p. 8) Dr. Bansal’s report does not discuss the findings on imaging within months of the traumatic injury of bone-on-bone articulation, and how such a condition could have advanced to the need for a total knee replacement. (Ex. 2) Dr. Vincent, in contrast, provided an explanation of his findings, as follows:

[Myint’s] ongoing symptoms at this point, of pain, stiffness, and loss of range of motion, his gait abnormalities, and his difficulty performing work duties are all due to the bone-on-bone osteoarthritis of the knee. I explained this to him, I also explained that the severe radiographic evidence of osteoarthritis could not be caused by the single event on March of 2017. I would note that on November 29, 2017 when I explained to him that his severe osteoarthritis was not caused by the work injury of March 15, 2017, he did then change his story and states [t]hat his knee has been hurting him for over a year.

(Ex. A, p. 1) Based on the foregoing, I find Dr. Vincent’s opinion to be most persuasive. Myint has not established the March 15, 2017 work injury permanently aggravated, accelerated, worsened, or “lighted up” up his right knee osteoarthritis, necessitating a total knee replacement. Given I found Myint failed to establish the work injury permanently aggravated, accelerated, worsened, or “lighted up” up his right knee osteoarthritis, necessitating a total knee replacement, I find Myint is not entitled to recover the out-of-pocket cost of \$3,275.62 for his total knee replacement set forth in Exhibit 3.

JBS and American Zurich further contend the work injury did not cause Myint’s right knee meniscus tear. Dr. Miller, a treating occupational medicine physician, diagnosed Myint with pain in the right knee, a right knee meniscal tear that is work-related, and unilateral right knee primary osteoarthritis noting the osteoarthritis is “NOT WORK RELATED” (JE 1, p. 8; JE 3, pp. 23-24) In his first opinion Dr. Vincent also noted Myint “sustained [a] right medial meniscal tear on March 15, 2017.” (Ex. A, p. 2) In his second opinion, Dr. Vincent noted the osteoarthritis was longstanding and not the result of the March 2017 injury, and that Myint’s symptoms and history were consistent with an acute onset of a meniscal tear, but with additional inconsistent history provided by Myint, he could not say with medical certainty whether the meniscus tear was or was not related to the work injury. (Ex. A, pp. 3-4) I find the record evidence supports Myint sustained a meniscal tear caused by the March 2017 work injury.

IV. Extent of Disability

Dr. Vincent assigned Myint at two percent lower extremity impairment under the AMA Guides for the torn meniscus, finding “[r]ange of motion, strength, and pain levels are not an accurate gauge of impairment rating for this work injury because he has severe underlying osteoarthritis, which is not a result of this knee injury.” (Ex. A, p. 1) Based on this rating, JBS and American Zurich paid Myint 4.4 weeks of permanent partial disability benefits.

Knee impairments are included as scheduled losses. Iowa Code § 85.34(2)(o); Caylor v. Employers Mut. Cas. Co., 337 N.W.2d 890, 894 (Iowa Ct. App. 1983). The schedule provides a maximum award of 220 weeks of compensation. Iowa Code § 85.34(2)(o). Dr. Vincent assigned an impairment rating of two percent of the lower extremity and one percent of the whole person. I found his opinion most persuasive as discussed above. Therefore, under the schedule, Myint is entitled to 4.4 weeks of permanent partial disability benefits, which has already been paid. Myint shall take nothing further in this case.

V. Independent Medical Examination

Myint seeks to recover the \$2,583.00 cost of Dr. Bansal's examination. (Ex. 4) Iowa Code section 85.39, provides, in part:

[a]fter an injury, the employee, if requested by the employer, shall submit for examination at some reasonable time and place and as often as reasonably requested, to a physician or physicians authorized to practice under the laws of this state or another state, without cost to the employee; but if the employee requests, the employee, at the employee's own cost, is entitled to have a physician or physicians of the employee's own selection present to participate in the examination. If an employee is required to leave work for which the employee is being paid wages to attend the requested examination, the employee shall be compensated at the employee's regular rate for the time the employee is required to leave work, and the employee shall be furnished transportation to and from the place of examination, or the employer may elect to pay the employee the reasonable cost of the transportation. . . . If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the 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 choice, and reasonably necessary transportation expenses incurred for the examination. . . .

Myint retained Dr. Bansal to conduct an independent medical examination after Dr. Vincent provided his impairment rating. Under the statute, Myint is entitled to recover the cost of the independent medical examination.

VI. Costs

Myint seeks to recover the \$100.00 filing fee. 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 IAC 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.

Myint was not successful in proving his claim that the March 15, 2017 work injury permanently aggravated, accelerated, worsened, or "lighted up" up his right knee osteoarthritis, necessitating a total knee replacement. Given he was not successful in proving his case, I find the parties should bear their own costs.

ORDER

IT IS THEREFORE ORDERED, THAT:

Claimant shall take nothing further in this case.

Defendants shall reimburse the claimant two thousand five hundred eighty-three and 00/100 dollars (\$2,583.00) for the cost of Dr. Bansal's report.

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 15th day of January, 2020.


HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Sarah Baumgartner (via WCES)

Patrick V. Waldron (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.