BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MATTHEW BEERBOWER,

Claimant,

vs.

RELIABLE CONSTRUCTION SERVICES,

Employer,

and

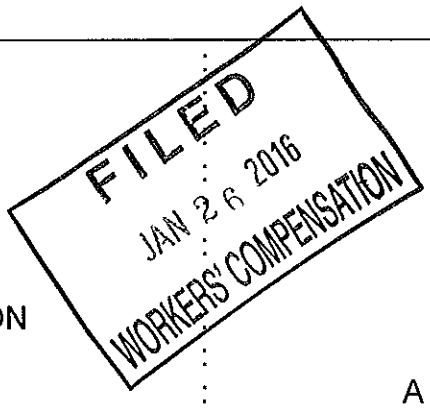
AMERICAN FAMILY MUTUAL INSURANCE CO.,

Insurance Carrier,

and

SECOND INJURY FUND OF IOWA,

Defendants.



File No. 5047809

ARBITRATION

DECISION

Head Note Nos.: 1108, 1400, 1801, 1803.1, 2701, 3200, 4000

STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, Matthew Beerbower, filed his original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on August 14, 2014. Claimant alleged he sustained a work-related injury on August 2, 2013. (Original notice and petition)

Reliable Construction Services, and its workers' compensation insurance carrier, American Family Mutual Insurance Co., filed their answer on August 14, 2014. They admitted the occurrence of the work injury. A first report of injury was filed on September 26, 2013.

The Second Injury Fund of Iowa filed an answer on August 22, 2014. The Fund denied it was liable to claimant for any benefits.

The hearing administrator scheduled the case for hearing on August 28, 2015 at 1:00 p.m. The hearing took place in Des Moines, Iowa at the Iowa Workforce Development Building. The undersigned appointed Ms. Buffy Nelson as the certified shorthand reporter. She is the official custodian of the records and notes.

Claimant testified on his own behalf. No other witnesses testified at the hearing.

The parties offered numerous exhibits. Claimant offered exhibits marked 1 through 16. Defendants, Reliable Construction Services and American Family Mutual Insurance Co., offered exhibits marked A through G. The Second Injury Fund of Iowa offered exhibits marked AA through CC. All proffered exhibits were admitted as evidence in the case.

Post-hearing briefs were filed on September 30, 2015. The case was deemed fully submitted on that date.

STIPULATIONS

The parties completed the designated hearing report. The various stipulations are:

1. There was the existence of an employer-employee relationship at the time of the alleged injury;

2. At the time of the alleged work injury, the weekly benefit rate was $582.38 per week;

3. Defendants have waived all affirmative defenses they may have had available to them;

4. Prior to the hearing, the employer and the insurance carrier have paid 15.2 weeks of permanent partial disability benefits to claimant at the rate of $582.38 per week, and defendants are entitled to a credit for all benefits paid prior to the hearing; and,

5. The parties agree the costs detailed in Exhibit 14 have been paid by claimant.

ISSUES

The issues presented are:

1. Whether claimant sustained an injury on August 2, 2013 which arose out of and in the course of his employment;

2. Whether the alleged work injury is a cause of temporary or permanent disability;

3. Whether claimant is entitled to temporary/healing period benefits or a running award;

4. Whether claimant is entitled to permanent partial disability benefits, and if so, the nature and extent of those benefits;

5. Whether claimant is entitled to alternate medical care pursuant to Iowa Code section 85.27;

6. Whether claimant is entitled to penalty benefits pursuant to Iowa Code section 86.13; and,

7. Whether claimant is entitled to benefits from the Second Injury Fund of Iowa.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This deputy, after listening to the testimony of claimant, after judging his credibility, and after reading the evidence, and the post-hearing briefs, makes the following findings of fact and conclusions of law:

The party who would suffer loss if an issue were not established has the burden of proving the issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

Claimant is 36 years old. He is married with three minor children. Claimant holds an Associate of Arts degree in General Education from Des Moines Area Community College. He has a current CDL license to drive. From 1999 through 2005, claimant held a union card as a journeyman carpenter. He stopped paying his dues in 2005 and he does not know what it would take to regain his journeyman status as a carpenter.

Claimant commenced employment with Reliable Construction Services in May of 2013. He was hired as the superintendent for a commercial project in Omaha, NE. He testified he was promised a salary of $45,000.00 per year. On August 27, 2013, claimant was demoted. His supervisors informed him he was not suitable as a supervisor. Management offered to keep him as an hourly employee, but that situation was unacceptable to claimant. As a consequence, claimant terminated his employment relationship with Reliable Construction Services.

Claimant has a long history of problems with his knees. As a young person, he received a diagnosis of Osgood-Schlatter disease in his knees. Osgood-Schlatter disease is an inflammation of the ligament with poor growth in the knee. The disease causes knee pain and tenderness at the tibial tubercle. There may be swelling of the tibial tubercle and/or tight muscles in front and back of the thigh.

Claimant experienced tenderness in both knees as early as May 16, 2002. (Exhibit A, page 1) On June 10, 2002, claimant was engaged in a game of softball. He

pivoted on his left knee, experienced a pop, and developed increasing pain and swelling in his knee. (Ex. A, p. 1) Claimant sought care from Scott A. Meyer, M.D., an orthopedic surgeon. Claimant then underwent a left knee meniscus repair.

On January 29, 2003, claimant entered Mercy Medical Center for "Generalized Joint Pain, Polyarthralgias." (Ex. B, p. 1)

On May, 1 2003, Scott Neff, D.O., performed a right knee medial meniscus surgery. (Ex. B, p. 3) Dr. Neff found right knee internal derangement. (Ex. 3, p. 13) A repeat surgery was performed in 2005 when the right knee pain returned.

On January 18, 2010, claimant had MRI testing of the right knee. Richard Bedont, M.D., interpreted the results as:

> UNUNITED TIBIAL TUBERCLE APOPHYSIS A FINDING OF NO CLINICAL SIGNIFICANCE. NO ACUTE OSSEOUS ABNORMALITY. NO JOINT EFFUSION.

(Ex. C, p. 5)

On February 5, 2010, claimant presented to Mercy Clinics, Inc. He complained of prominent pain in the right tibial tuberosity. (Ex. C, p. 6) On February 5, 2010, Brian M. Crites, M.D., performed an excision of an ossicle of the right tibial. (Ex. B, p. 4) The surgical pathology report verified there was a bone with surrounding soft tissue showing non-specific reactive changes. (Ex. B, p. 13)

On June 9, 2010, claimant reported to Mercy Clinics with increasing right knee pain after having been hit during football practice. Right knee radiographs demonstrated:

> NORMAL ALIGNMENT OF THE KNEE AND PATELLA. THERE IS MILD JOINT SPACE SPURRING OF THE MEDIAL COMPARTMENT THOUGH NO EVIDENCE OF FRACTURE OR JOINT EFFUSION.

(Ex. B, p. 11)

On the next day, MRI test results showed:

> PATIENT HAS A HISTORY OF PARTIAL MEDIAL MENISCECTOMY. THERE IS A RELATIVE DIMINUTIVE SIZE OF THE POSTERIOR HORN. THERE IS A SIGNAL ABNORMALITY PRESENT WITHIN THE POSTERIOR HORN WHICH DOES EXTEND TO THE ARTICULAR SURFACE, BEST SEEN ON IMAGE #10 SERIES 4. WHILE THIS COULD REPRESENT THE PATIENT'S PRIOR MENISCAL TEAR, FINDINGS ARE SUSPICIOUS FOR A RE-TEAR.

IN ADDITION TO THIS, THERE IS A SAGITTALLY ORIENTED FULL THICKNESS CARTILAGINOUS DEFECT OF THE CENTRAL WEIGHT-BEARING PORTION OF THE MEDIAL FEMORAL CONDYLE BEST SEEN ON IMAGE #10 AS WELL. THIS MEASURES APPROXIMATELY 2 TO 3 MM TRANSVERSELY AND COVERS A DISTANCE ANTEROPOSTERIORLY OF 11 MM. THERE IS ADJACENT SUBCHONDRAL MARROW EDEMA. A JOINT EFFUSION IS DEMONSTRATED WITHIN THE SUPRAPATELLAR RECESS. THERE IS MILD SYNOVIAL PROLIFERATION. THE PATELLA IS APPROPRIATELY POSITIONED AND EXTENSOR MECHANISM IS INTACT. THERE IS SOME INCREASED SIGNAL INTENSITY IN THE PATELLAR TENDON NEAR ITS TIBIAL INSERTION SUGGESTING PATELLAR TENDON TENDINITIS. THIS IS ALSO SOMEWHAT AMORPHOUS AND ENLARGED. QUADRICEPS TENDON IS UNREMARKABLE. REMAINDER OF MARROW SIGNAL INTENSITY WITHIN NORMAL LIMITS.

(Ex. C, pp.10-11)

On October 15, 2012 claimant visited Mercy North Family Practice. Timothy Colby, D.O., ordered MRI testing of the right knee. (Ex. C, p. 13) The MRI occurred on October 22, 2012. The results showed an improved tendinopathy, as well as decreased definition of the full-thickness fissure in the cartilage with persistent edema and partial delamination of the adjacent cartilage. (Ex. C, p. 16)

Dr. Colby referred claimant to Scott A. Meyer, M.D. (Ex. A, p. 6) Claimant described his level of pain as an 8 out of 10 on an analog scale of 1 to 10 with 10 being the worst pain imaginable. (Ex. A, p. 6) Claimant underwent a bone length study pursuant to the direction of Dr. Meyer. (Ex. A, p. 11) Dr. Meyer informed claimant that chondromalacia was found on the right knee. There was an indication claimant had the early stages of arthritis. (Ex. A, p. 10) Dr. Meyer recommended a high tibial osteotomy or a cartilage repair surgery. (Ex. A, p. 10) The surgery would require claimant to sit while at work for at least three months. Claimant declined the surgery.

Claimant had two work-related incidents involving his right knee on August 2, 2013. The first incident occurred when claimant stepped into a hole and twisted his right knee. Claimant testified he telephoned the owner of the company and reported the incident. Claimant kept working that day. Claimant also testified, later on the 2nd, he was involved in another incident with his right knee. He was carrying plywood up some stairs. He lost his balance, landed on his right kneecap, and experienced pain. Claimant testified he once again telephoned his supervisor and reported the subsequent incident. Claimant testified the supervisor was annoyed. However, claimant completed his shift. He also filled out the requisite accident report. (Ex. 15)

Claimant's first medical appointment following his incidents on August 2, 2013 occurred on August 27, 2013. Claimant presented to his family physician, Dr. Colby. Claimant reported:

> Pt was stepping off of the bottom rung of a ladder and stepped in a hole twisting his knee. Felt it pop. Now has pain with walking.
>
> Associated symptoms include pain, swelling, locking, clicking and instability, but no redness, no bruising, no abrasion, no laceration, no lower leg/foot weakness, no lower leg/foot numbness and no injury to other areas.

(Ex. 3, p. 23) Dr. Colby recommended MRI testing. (Ex. 3, p. 24)

Daniel C. Miller, D.O., ordered MRI testing. (Ex. 5, p. 27) The results showed a tear of the body and posterior horn of the medial meniscus. There were also cartilaginous abnormalities. (Ex. 5, p. 27) Dr. Miller informed claimant the tear was consistent with the incidents that occurred on August 2, 2013. (Ex. 6, p. 28)

Claimant was referred to Timothy R. Vinyard M.D., an orthopedic surgeon. (Ex. 1, p. 7) Dr. Vinyard discussed right knee surgery with claimant. The orthopedic surgeon suggested the following options:

> He is having some early degenerative changes. His magnetic resonance imaging demonstrates a meniscal tear. We discussed several different surgical options including osteotomy, arthroscopic debridement, advanced cartilage procedures and partial and full knee replacement. Obviously, he is quite young to consider arthroplasty. Also, his cartilage damage appears to be on the mild-to-moderate side. I think that perhaps his best option would be to consider a diagnostic arthroscopy. I would perform partial medial meniscectomy and chondroplasty as needed. If he has an isolated, chondral defect then I would likely consider him a candidate for autologous chondrocyte implantation. I will plan on performing a cartilage biopsy at that time. Then in approximately 6-8 weeks, we will return to the operating room to perform autologous chondrocyte implantation. At that time, I would likely also recommended [sic] a high tibial osteotomy to offload his medial compartment.

(Ex. 1, p. 10) Dr. Vinyard opined claimant's underlying condition was materially aggravated by his underlying work injury. (Ex. 1, p. 10) Dr. Vinyard imposed work restrictions of no lifting greater than 20 pounds, no repetitive bending or twisting from the knee and no squatting. (Ex. 6, p. 29)

Defendants did not consent to the surgical procedures recommended by Dr. Vinyard. The company and the insurance carrier scheduled a second opinion with Mark Kirkland, D.O. Claimant presented to Dr. Kirkland on March 18, 2014.

Dr. Kirkland opined the incident on August 2, 2013 was at least an aggravation of a pre-existing condition. (Ex, E, p. 3) Dr. Kirkland recommended home exercises and physical therapy. (Ex. E, p. 3) The orthopedist prescribed 7.5 mg pf Meloxicam to be taken twice per day. Dr. Kirkland did not recommend the surgical procedures that Dr. Vinyard had proposed. (Ex. E, p. 3) The orthopedist continued the same restrictions that Dr. Vinyard had imposed. Dr. Kirkland diagnosed claimant with:

IMPRESSION:

1. Right knee medial compartment mild-to-moderate osteoarthritis.

2. Patellofemoral syndrome of the right knee.

3. Status post prior arthroscopies for the right knee.

(Ex. E, p. 2)

Pursuant to a recommendation from Dr. Kirkland, claimant participated in a functional capacity evaluation (FCE) at Accelerated Rehabilitation Center. (Ex. E, p. 10) The physical therapist, John Simonsen, PT, CEAS, determined the FCE was valid. Mr. Simonsen placed claimant in the heavy category of work. (Ex. E, p. 10) Claimant was to avoid crawling and kneeling.

Dr. Kirkland rated claimant as having a 5 percent permanent impairment to the right lower extremity secondary to patellofemoral pain. Dr. Kirkland indicated he based his opinion on table 17-31 on page 544 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Ex. E, p. 10) Dr. Kirkland deemed the heavy category of work appropriate for claimant. (Ex. E, p. 11)

Dr. Kirkland opined claimant needed to continue performing home exercises for his right knee. Dr. Kirkland did not consider any surgery medically necessary to treat claimant's work injury of August 2, 2013. (Ex. E, p. 16) Dr. Kirkland recommended over-the-counter Aleve or ibuprofen to alleviate pain or inflammation. (Ex. E, p. 14)

On December 8, 2014, claimant exercised his right to an independent medical examination pursuant to Iowa Code section 85.39. John D. Kuhnlein, D.O., MPH, diagnosed claimant with:

Diagnoses

1. Medial meniscal tear right knee with quadriceps/VMO atrophy.

2. Old left knee injury with medial meniscectomy.

3. Complaints of low back pain.

(Ex. 9, p. 63)

Dr. Kuhnlein related the right medial meniscal tear to the work injury on August 2, 2013. (Ex. 9, p. 63) Dr. Kuhnlein also indicated there was an old injury to the left knee which necessitated a medial meniscectomy. (Ex. 9, p. 63)

Dr. Kuhnlein provided permanent impairment ratings for both lower extremities. (Ex. 9, p. 64) He relied on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. The evaluating physician opined:

> With respect to the right knee, and turning to Table 17-33, page 546, 2% right lower extremity impairment would be assigned for the medial meniscectomy. Turning to Table 17-31, page 544, the 2-mm of medial joint space would translate to a 20% right lower extremity impairment. . . . Turning to Table 17-2, page 526, these values may be combined. Turning to Table 17-3, page 527, a 22% right lower extremity impairment converts to a 9% whole person impairment, if indicated.
>
> With respect to his left knee, he would have the same impairment for the meniscectomy and the arthritic changes, so he has a 22% left lower extremity impairment for the prior left knee injury.

(Ex. 9, p. 64)

Dr. Kuhnlein differed in his opinions about restrictions. He strongly disagreed with Dr. Kirkland and Mr. Simonsen about the category of labor claimant could perform. Dr. Kuhnlein opined claimant could lift 20 pounds occasionally from the floor to the waist; 40 pounds occasionally from the waist to the shoulder as long as the weights were kept close to the body; 30 pounds occasionally if claimant was lifting more than an elbow's distance from the body; and claimant could lift 20 pounds occasionally over the shoulder.

Dr. Kuhnlein opined claimant could sit, stand, bend from the waist, and walk without any restrictions. Claimant could only crawl or kneel on an occasional basis. Because of the left knee issues, Dr. Kuhnlein had concerns for claimant's ability to maintain a 3-point safety stance on a frequent basis. Dr. Kuhnlein recommended claimant only work off ground or on ladders on an occasional basis. (Ex. 9, p. 64) Dr. Kuhnlein also suggested claimant wear kneepads when kneeling. (Ex. 9, p. 64)

In his final report of May 27, 2015, Dr. Vinyard expressed a detailed opinion concerning the cause of claimant's right knee problems. The orthopedist opined there was a material aggravation of a pre-existing condition. (Ex. 1, p. 15) Dr. Vinyard found it somewhat difficult to predict the type of medical treatment claimant would need in the future. (Ex. 1, p. 16)

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire and Casualty Co., 526 N.W.2d 845 (Iowa 1995).

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.

It is the determination of this deputy; claimant sustained an injury to his right leg on August 2, 2013 which arose out of and in the course of his employment. Claimant testified credibly about the two incidents that occurred on the job site that day. He reported the incidents to his supervisor. Claimant returned to work until the pain reached a point where claimant was in need of medical treatment. Claimant reported the work incidents to his medical providers in a consistent manner.

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).

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).

When an expert's opinion is based upon an incomplete history it is not necessarily binding on the commissioner or the court. It is then to be weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the facts. Musselman v. Central Telephone Company, 154 N.W.2d 128, 133 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 521, 522, 133 N.W.2d 867 (1965).

Claimant has established his pre-existing right knee condition was materially aggravated by his two work injuries on August 2, 2013. There is no disagreement; claimant has had problems with his right knee dating back many years. Nevertheless, Dr. Miller, Dr. Vinyard, Dr. Kirkland and Dr. Kuhnlein all agreed the underlying condition was aggravated by claimant's work injuries.

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). 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).

Two physicians provided permanent impairment ratings for claimant's right knee. Dr. Kirkland indicated claimant had a 5 percent permanent impairment rating to the right lower extremity according to the AMA Guides to the Evaluation of Permanent Impairment. Dr. Kuhnlein rated claimant as having a 22 percent permanent impairment rating to the right lower extremity according to the AMA Guides to the Evaluation of Permanent Impairment. Both doctors relied on the same table on page 544 to calculate their ratings.

Dr. Kirkland opined claimant could perform labor in the heavy category. Dr. Kuhnlein imposed more strenuous restrictions, especially in the area of lifting. It

seems plausible; claimant's restrictions are more in line with 12 percent to the right lower extremity, (leg).

Permanent disabilities for the loss of a leg are governed by Iowa Code section 85.34(2)(o). The sub-section provides:

> o. The loss of two-thirds of that part of a leg between the hip joint and the knee joint shall equal the loss of a leg, and the compensation therefor shall be weekly compensation during two hundred twenty weeks.

Therefore, in light of Iowa Code section 8.34(2)(o), claimant is entitled to 26.4 weeks of permanent partial disability benefits at the stipulated rate of $582.38 per week and commencing from June 2, 2014. Defendants shall be given credit for 15.2 weeks of permanent partial disability benefits previously paid to claimant.

In arbitration proceedings, interest accrues on unpaid permanent disability benefits from the onset of permanent disability. Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1979); Benson v. Good Samaritan Ctr., File No. 765734 (Ruling on Rehearing, October 18, 1989).

The next issue for resolution is whether claimant is entitled to alternate medical care pursuant to Iowa Code section 85.27. The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 16, 1975).

By challenging the employer's choice of treatment and seeking alternate medical care, claimant assumes the burden of proving the authorized care is unreasonable. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

Determining what care is reasonable under the statute is a question of fact. Id. The employer's obligation turns on the question of reasonable necessity, not desirability. Id.: Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983).

An employer's right to select the provider of medical treatment to an injured worker does not include the right to determine how an injured worker should be diagnosed, evaluated, treated or other matters of professional medical judgment. Assman v. Blue Star Foods, File No. 866389 (Declaratory Ruling May 19, 1988). The employer is not entitled to interpose its judgment in contravention of the recommendation of the authorized treating physician.

An employer's failure to follow recommendations of an authorized physician in matters of treatment is commonly a failure to provide reasonable treatment. Boggs v. Cargill, Inc., File No. 1050396 (Alt Care Dec., January 31, 1994).

In the present case, both Dr. Vinyard and Dr. Kirkland had been authorized to treat claimant's right knee. Initially, Dr. Vinyard had recommended surgery for the right knee. A second opinion was sought from Dr. Kirkland. Then Dr. Kirkland was authorized to treat claimant. Dr. Kirkland recommended conservative care only. Claimant later returned to Dr. Vinyard. Once again, Dr. Vinyard recommended surgery after claimant explained he did not receive a good result from the conservative care he had experienced under the direction of Dr. Kirkland. Dr. Vinyard acknowledged it was difficult to predict the treatment modalities claimant would need. As a consequence, it is the determination of the undersigned; claimant's care is to remain with Dr. Vinyard. Defendants shall not interfere with Dr. Vinyard's treatment recommendations, even if the recommendations involve right knee surgery. Claimant's request for alternate medical care is granted.

In the event claimant should require surgery, defendants would be liable for healing period benefits, if appropriate. Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

Claimant alleges he is entitled to penalty benefits pursuant to Iowa Code section 86.13. In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."
>
> Christensen, 554 N.W.2d at 260.
>
> The supreme court has stated:
>
> (1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no

penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.

(2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.

(3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).

(4) For the purpose of applying section 86.13, the benefits that are underpaid as well as late-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse. Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application of wrong wage base; in absence of excuse, commissioner required to apply penalty).

> If we were to construe [section 86.13] to permit the avoidance of penalty if any amount of compensation benefits are paid, the purpose of the penalty statute would be frustrated. For these reasons, we conclude section 86.13 is applicable when payment of compensation is not timely . . . or when the full amount of compensation is not paid.

Id.

(5) For purposes of determining whether there has been a delay, payments are "made" when (a) the check addressed to a claimant is mailed (Robbennolt, 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112), or (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235.

(6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the

information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

(7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.

Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

Weekly compensation payments are due at the end of the compensation week. Robbennolt, 555 N.W.2d 229, 235.

Penalty is not imposed for delayed interest payments. Davidson v. Bruce, 593 N.W.2d 833, 840 (Iowa App. 1999). Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008).

When an employee's claim for benefits is fairly debatable based on a good faith dispute over the employee's factual or legal entitlement to benefits, an award of penalty benefits is not appropriate under the statute. Whether the issue was fairly debatable turns on whether there was a disputed factual dispute that, if resolved in favor of the employer, would have supported the employer's denial of compensability. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

There was no unreasonable denial of the claim or failure to pay benefits. Defendants paid 13.3 weeks of healing period benefits and 15.2 weeks of permanent partial disability benefits. Claimant did not provide any evidence to support his penalty claim.

The next issue to address is whether claimant is entitled to benefits from 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); Iowa Practice, Workers' Compensation, Lawyer and Higgs, section 17-1 (2006).

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).

Claimant has failed to establish he is entitled to benefits from the Second Injury Fund of Iowa, hereinafter, "The Fund". Claimant neglected to prove he had a qualifying first injury to the left leg. In June of 2002, claimant was playing softball. He twisted his left knee which resulted in a left medial meniscal tear. Dr. Neff performed an arthroscopic meniscectomy on July 26, 2002. Claimant suffered no complications following the surgery. (Ex. 2, p. 20) Dr. Neff did not provide a permanent impairment rating.

In his deposition, claimant testified Dr. Neff did not impose any restrictions on the use of the left leg. (Ex. AA, p. 17) Claimant also testified in his deposition; he returned to full duty work after six weeks, and he has not had any other medical treatment for his left knee. (Ex. AA, p. 17) When he was treating for his right knee, he did not ask any of the treating physicians to examine his left knee.

Subsequent to his return to full duty work, claimant maintained employment as a journeyman carpenter in the union. He worked at the Sedlin Company, Heartland Co-op, BH Management, Reliable Construction, and Action Electric. Claimant's left knee did not negatively impact his employment with any of the cited employers. Additionally, claimant testified he played semi-pro football following his left knee surgery.

It is acknowledged Dr. Kuhnlein did provide a permanent impairment rating for the left knee. Dr. Kuhnlein wrote in his report of February 27, 2015:

> With respect to his left knee, he would have the same impairment for the meniscectomy and the arthritic changes, so he has a 22% left lower extremity impairment for the prior left knee injury.

(Ex. 9, p. 64) Dr. Kuhnlein did not explain in detail why he arrived at the 22 percent rating nor did Dr. Kuhnlein know the length and depth of sporting activities claimant involved himself in following treatment for his left knee.

Claimant has failed to prove by a preponderance of the evidence that he sustained a permanent disabling first injury to his left knee on June 10, 2002 that contributes to any loss of earning capacity. As a result, claimant is not entitled to benefits from the Second Injury Fund of Iowa.

The final issue is costs to litigate. The deputy workers' compensation commissioner has discretion to tax costs. Dickenson v. John Deere Products Engineering, 395 N.W. 2d 644, 647 (Iowa Ct. App. 1986). The subsequent costs are

assessed to defendants, Reliable Construction and American Family Mutual Insurance Co.:

Report from Iowa Ortho	$175.00
Filing Fee	$100.00

ORDER

THEREFORE, IT IS ORDERED:

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

Defendants, Reliable Construction Services and American Family Mutual Insurance Co., shall pay unto claimant twenty-six point four (26.4) weeks of permanent partial disability benefits commencing from June 2, 2014 and payable at the stipulated rate of five hundred eighty-two and 38/100 dollars ($582.38) per week.

Accrued benefits shall be paid in a lump sum, together with interest at the rate allowed by law.

Defendants, Reliable Construction Services and American Family Mutual Insurance Co., shall take credit for all benefits previously paid, including the 15.2 weeks of permanent partial disability benefits previously paid to claimant.

Alternate medical care pursuant to Iowa Code section 85.27 is transferred to Dr. Vinyard.

Costs as established in the body of the decision are assessed to defendants, Reliable Construction Services and American Family.

Defendants shall file all reports as required by this division.

Signed and filed this 26th day of January, 2016.

Michelle A. McGovern

MICHELLE A. MCGOVERN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.