BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHAEL WEILAND, Claimant, vs. DOWNTOWN EAGLE, INC., d/b/a EAGLE COUNTRY MARKET, Employer, and SOCIETY INSURANCE, Insurance Carrier, Defendants.	File No. 21700391.01 ARBITRATION DECISION Headnotes: 1108, 1402.30, 2907

Claimant Michael Weiland filed a petition in arbitration on April 23, 2021, alleging he sustained an injury to his right leg while working for Defendant Downtown Eagle, Inc., d/b/a Eagle Country Market ("Eagle"), on November 30, 2020. Weiland also alleged he was entitled to benefits from Defendant Second Injury Fund of Iowa ("Fund"). The Fund filed an answer on May 15, 2021. Eagle and its insurer, Defendant Society Insurance ("Society"), filed an answer on June 8, 2021.

An arbitration hearing was scheduled for March 15, 2023. On March 6, 2023, Weiland's claim against the Fund was dismissed without prejudice.

An arbitration hearing was held on March 15, 2023. Due to technical problems with Defendants' witness, the hearing was continued to March 30, 2023. Attorney Mark Sullivan represented Weiland. Weiland appeared and testified. Attorney Stephen Spencer represented Eagle and Society. Jeff Reiter appeared and testified on behalf of Eagle and Society. Joint Exhibits ("JE") 1 through 5, and Exhibits 1 through 6 and A through K were admitted into the record. The record was held open through May 8, 2023, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

The parties submitted a hearing report listing stipulations and issues to be decided. A hearing report order was entered at the conclusion of the hearing accepting the parties' stipulations and the issues to be decided. Eagle and Society waived all affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed between Eagle and Weiland at the time of the alleged injury.

2. If the injury is found to be the cause of permanent disability, the disability is a scheduled member disability to the right leg.

3. At the time of the alleged injury claimant's gross earnings were $326.00 per week, he was single and entitled to one exemption, and the parties believe the weekly rate is $221.15.

4. Costs have been paid.

ISSUES

1. Did Weiland sustain an injury on November 30, 2020, which arose out of and in the course of his employment with Eagle?

2. Is the alleged injury a cause of temporary disability during a period of recovery?

3. Is Weiland entitled to temporary benefits from January 12, 2021, through January 26, 2022?

4. Is the alleged injury a cause of permanent disability?

5. If the alleged injury is a cause of permanent disability, what is the extent of disability?

6. If the alleged injury is a cause of permanent disability, what is the commencement date for permanent partial disability benefits?

7. Is Weiland entitled to recover the medical expenses set forth in Exhibits 1 and 6?

8. Is Weiland entitled to an award of penalty benefits?

9. Is Weiland entitled to recover the cost of the independent medical exam ("IME") under Iowa Code section 85.39?

10. Should costs be assessed against Eagle and Society?

FINDINGS OF FACT

Weiland graduated from high school in Dubuque. (Tr.:12-13) Weiland testified he has been gainfully employed since he graduated from high school. (Tr.:13) At the time of the hearing Weiland was 64. (Tr.:12)

In March 2017, Weiland commenced full-time employment as a stocker with Eagle, a grocery store. (Tr.:13) Weiland unloaded trucks three days per week, took the product to the back room, and loaded the product onto the shelves. (Tr.:14) Reiter, the general manager of Eagle, was Weiland's supervisor. (Tr.:18, 81-82)

In the summer of 2020, Weiland injured his right ankle, specifically his Achilles tendon, when he stepped in a pothole while cutting grass at his home. (Tr.:16) Weiland received treatment at Crescent Community Health Center where he receives primary care. (Tr.:17) Weiland missed work due to his ankle injury from June 13, 2020, through July 24, 2020. (Tr.:17-18) Weiland was restricted to light-duty work. (Tr.:19)

Weiland applied for Social Security retirement benefits in July 2020 and he decided to work part-time. (Tr.:18-19) On August 2, 2020, Weiland informed Reiter he wanted to reduce his hours from 33 to 12 per week. (Tr.:15; Ex. F:49)

When he reduced his hours, Weiland no longer unloaded the trucks or worked in the back room and he mainly worked on facing products on the shelves. (Tr.:15-16) When facing products Weiland worked in the aisles rotating older products forward, ensuring products had proper dates, and making sure the product shelves looked full and organized to appeal to customers. (Tr.:15-16)

Tassie Carter, ARNP with Crescent Community Health Center, released Weiland to return to work on August 18, 2020, with restrictions of no standing for long periods of time and no work beyond four hours per day due to his ankle injury. (JE 1:1; Tr.:21)

On September 25, 2020, Tara Morgan, ARNP with Crescent Community Health Center, released Weiland to return to work with restrictions of limiting kneeling to no more than 20 minute intervals for no more than one to two hours per day, and stating he must use a step stool for overhead work, related to a left knee condition. (JE 1:2) Weiland testified in 1994 or 1995 he injured his left knee when he slipped off a porch while helping his brother. (Tr.:22) Weiland relayed he has had problems with his left knee periodically since his injury. (Tr.:22)

Weiland testified Reiter informed him in November 2020, he was reducing his hours from 12 hours per week to nine hours per week because he did not need him to work four hours per day and his work could be completed in three hours. (Tr.:20-21) While working part-time, Weiland spent 10 to 20 percent of his time working in a kneeling or crouching position while facing products. (Tr.:22) Weiland also stood while facing products, depending on the location of the shelf he was working on. (Tr.:22) Weiland testified the most physically demanding part of his job was on the bottom shelves because he had to be on his knees. (Tr.:23)

On Friday, November 30, 2020, Weiland was facing products on the bottom shelf of Aisle 9 in the store, in the bleach section. (Tr.:23) The bleach section contains one-gallon and half-gallon containers. (Tr.:23) Weiland was bringing the older product to the front, checking the dates on the product, removing the old product, and straightening the shelf. (Tr.:23) While facing the bleach Weiland removed the bleach containers and placed them on a rubber cart before restocking the shelf. (Tr.:24) Weiland was on his hands and knees while working on the ceramic tiled floor for 10 to 12 minutes and he used the cart to help him get off the floor. (Tr.:24-25) After he got up from the floor, Weiland continued facing down the aisle from left to right and top to bottom. (Tr.:25)

Weiland testified he did not notice any particular problems or symptoms with his right knee when he was working on the floor or when he used the cart to get up from the

floor. (Tr.:25-26) Weiland relayed he first noticed symptoms when he was about 30 to 40 feet down the aisle when he was walking while facing products. (Tr.:26) Weiland testified, "[t]he pain that I felt initially was in the back of my knee, went down my foot, and it went back up into my stertum [*sic*], which is my buttocks area. It was 6 to 8 at that time." (Tr.:26)

Weiland testified he went to Reiter's office to report his injury, but he was too busy talking to other employees in the office and he did not complete an incident report. (Tr.:27; 70) Weiland finished his shift. (Tr.:28) Weiland testified before the November 30, 2020, injury he never sustained an injury to his right knee or received any treatment for his right knee. (Tr.:23)

Weiland testified the next day he woke up in severe pain. (Tr.:28) Weiland testified he could not get out of bed and his knee would not bend and was locked up. (Tr.:28) Weiland called some of the people who live in his building for help and they helped him get out of bed. (Tr.:28)

Weiland continued to work his regular part-time hours and had to engage in some squatting and kneeling at work. (Tr.:30-31) Weiland reported he struggled with his condition, but he continued to work. (Tr.:31)

Weiland did not receive any treatment for his knee for a month after the alleged injury. On December 29, 2020, Weiland attended an appointment with Rachael Ploessl, ARNP with Crescent Community Health Center, complaining of right knee pain. (JE 1:4) Ploessl noted Weiland had a history of left knee ACL damage, left knee x-rays showed severe tricompartment osteoarthritis, and Weiland had been referred to orthopedics, but he wanted to wait until he was eligible for Medicare. (JE 1:4) Ploessl documented Weiland reported he recently had to get down on his knees to move product forward on a shelf at work and the next day he noticed he had difficulty walking and he was experiencing pain in his right knee. (JE 1:5) Ploessl assessed Weiland with right and left knee degenerative joint disease, offered physical therapy and x-rays, which he declined, and noted she discussed a referral to orthopedics, but he wanted to wait. (JE 1:6) Ploessl encouraged Weiland to use his compression brace at home, and to continue using BenGay and taking meloxicam. (JE 1:6) Ploessl imposed restrictions of no standing for long periods of time, to limit kneeling to no more than 20 minute intervals no more than one to two hours per day, and to use a step stool for overhead work. (JE 1:9)

On January 12, 2021, Weiland attended an appointment with Erin Kennedy, M.D., an occupational medicine physician with Tri-State Occupational Health, for a causation opinion regarding Weiland's reported work injury. (JE 2:14) Weiland received right knee x-rays and the reviewing radiologist listed an impression of no acute findings and mild to moderate osteoarthritis. (JE 2:17) Dr. Kennedy examined Weiland, assessed him with right knee pain, ordered magnetic resonance imaging, recommended use of ice and heat, and imposed a restriction of seated work. (JE 2:13-14, 18) Eagle and Society did not approve the imaging and denied claimant's claim on January 28, 2021. (Tr.:36; Ex. I:82)

Weiland testified after Dr. Kennedy imposed the restriction of seated work he called Reiter and Reiter told him there was no work available for him with his restriction. (Tr.:38-39, 70) Weiland reported he was never allowed to return to work after January 12, 2021. (Tr.:39)

Weiland attended an appointment with David Hart, M.D., an orthopedic surgeon with Physicians' Clinic of Iowa, P.C., on July 16, 2021, complaining of right knee pain. (JE 3:24) Dr. Hart examined Weiland, assessed him with primary osteoarthritis of the right knee, right knee pain, and a right hamstring muscle strain, referred him to physical therapy, prescribed meloxicam, and offered an injection, which Weiland declined. (JE 3:25)

Dr. Hart issued a letter on July 16, 2021, reporting Weiland was under his care for his right knee and excusing him from engaging in mowing, weed eating, and snow removal, and any activities that include kneeling or squatting at his group home, noting he could do light housework, including dishes, laundry, dusting, sweeping, vacuuming, and other general cleaning duties. (JE 3:27)

The attorney for Eagle and Society sent Dr. Kennedy a letter on October 3, 2021, asking for her opinion on whether Weiland's right knee complaints for which she saw him were work-related. (Ex. A:1) Dr. Kennedy sent a handwritten response, portions of which are not legible. (Ex A:2) Dr. Kennedy documented she could not causally relate his condition. (Ex. A:2)

On October 15, 2021, Dr. Hart performed a right total knee arthroplasty on Weiland. (JE 5:55-66) Dr. Hart listed a postoperative diagnosis of right knee osteoarthritis. (JE 5:56) Weiland was admitted to the hospital for his surgery on October 15, 2021, and he was discharged on October 18, 2021. (JE 5:95-98)

On November 24, 2021, Weiland returned to Dr. Hart following his total knee replacement. (JE 3:40) Weiland reported his therapy was going well and he was pleased with his condition following surgery. (JE 3:40) Dr. Hart continued his physical therapy and medications and imposed restrictions of light duty at home with no mowing or shoveling and no lifting, pushing, or pulling over 10 pounds. (JE 3:41-42)

Weiland attended a follow-up appointment with Dr. Hart on January 26, 2022, reporting he was doing well, he had excellent pain relief, and his function was improving. (JE 3:43) Dr. Hart documented he had provided work restrictions in November 2021, but Eagle had not accommodated the restrictions. (JE 3:43) Dr. Hart examined Weiland and imposed a restriction of no kneeling. (JE 3:43, 45)

Weiland testified after he received Dr. Hart's note with the restriction he returned to Eagle and informed Reiter he could return to work with a restriction of no kneeling and Reiter told him he needed to contact the store owner to see if he could return to work. (Tr.:44) Weiland relayed he heard back from Reiter and Reiter told him the store owner would not allow him to return to work unless he could work without restrictions. (Tr.:45) Weiland has not returned to work. (Tr.:45)

Dr. Hart issued a letter on February 3, 2022, stating he first saw Weiland on July 16, 2021, and until his arthroplasty on October 15, 2021, he was able to complete light duty tasks. (JE 3:47)

Pursuant to an inquiry from Weiland's counsel, Dr. Hart issued a letter on April 18, 2022, opining the November 30, 2020, injury at Eagle "was a substantial aggravating factor contributing to his right knee condition." (Ex. 2:14) Dr. Hart noted Weiland reached maximum medical improvement at his last appointment on January 26, 2022, and using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Hart assigned Weiland 37 percent right lower extremity impairment for a total knee replacement with good result under Table 17-33, page 547. (Ex. 2:14) Dr. Hart assigned a permanent restriction of no kneeling. (Ex. 2:14)

On January 29, 2023, Thomas Gorsche, M.D., an orthopedic surgeon, conducted a records review IME for Eagle and Society without examining Weiland. (Ex. B:5-6) Dr. Gorsche opined,

> In the statement and in the deposition, he describes no injury. He states that he was just walking down the aisle and developed knee pain. Therefore based on the fact that by his own statement there is no injury to the knee, in my medical opinion based on a reasonable degree of medical certainty, Mr. Weiland walking down the aisle at the store did not have any significant aggravation to his underlying pre-existing arthritis to the knee. The need for his knee replacement surgery is unrelated to any activity at work. Mr. Weiland was already on restrictions at work due to an ankle and foot injury.
>
> In my opinion, Mr. Weiland's work activity of kneeling and stocking the grocery shelves prior to him developing right knee pain after walking down the aisle did not significantly or materially aggravate his underlying knee arthritis. Based on his detailed statements in the deposition and recorded phone call, his employment activities are unrelated to his need for medical care including a total knee replacement for his underlying pre-existing knee arthritis.

(Ex. B:6)

CONCLUSIONS OF LAW

I. Arising Out of and in the Course of Employment

Eagle and Society allege Weiland's alleged injury "was one of those unexplained injuries that are not compensable." (Defendants' Brief at 1) Eagle and Society appear to be alleging not that an injury occurred, but rather Weiland's injury is idiopathic, or unexplained, and, thus, not compensable. Eagle and Society claim Iowa Code section 85.61(7)(c) supports their argument without providing any explanation of their argument.

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).

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 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 v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa 1997). 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).

Iowa Code section 85.61(7)(c) provides,

> 7. The words "personal injury arising out of and in the course of employment" shall include injuries to employees whose services are being performed on, in, or about the premises which are occupied, used, or controlled by the employer, and also injuries to those who are engaged elsewhere in places where their employer's business requires their presence and subjects them to dangers incident to the business. . . .
>
> *c.* Personal injuries due to idiopathic or unexplained falls from a level surface onto the same level surface do not arise out of and in the course of employment and are not compensable under this chapter.

Defendants' argument raises an issue of statutory interpretation. The goal of statutory interpretation is "to determine and effectuate the legislature's intent." Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 769 (Iowa 2016) (citing United Fire & Cas. Co. v. St. Paul Fire & Marine Ins. Co., 677 N.W.2d 755, 759 (Iowa 2004)). The court begins with the wording of the statute. Myria Holdings, Inc. v. Iowa Dep't of Rev., 892 N.W.2d 343, 349 (Iowa 2017). When determining legislative intent, the court looks at the express language of the statute, and "not what the legislature might have said." Id. (citing Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 337 (Iowa 2008)). If the express language is ambiguous the court looks to the legislative intent behind the statute. Sanford v. Fillenwarth, 863 N.W.2d 286, 289 (Iowa 2015) (citing Kay-Decker v. Iowa State Bd. of Tax Review, 857 N.W.2d 216, 223 (Iowa 2014)). A statute is ambiguous when reasonable persons could disagree as to the statute's meaning. Ramirez-Trujillo, 878 N.W.2d at 769 (citing Holstein Elect. v. Breyfogle, 756 N.W.2d 812, 815 (Iowa 2008)). An ambiguity may arise when the meaning of particular words is uncertain or when considering the statute's provisions in context. Id.

When the legislature has not defined a term in a statute, the court considers the term in the context in which it appears and applies the ordinary and common meaning to the term. Id. (citing Rojas v. Pine Ridge Farms, L.L.C., 779 N.W.2d 223, 235 (Iowa 2010). Courts determine the ordinary meaning of a term by examining precedent, similar statutes, the dictionary, and common usage. Sanford, 863 N.W.2d at 289.

Eagle and Society aver Iowa Code section 85.61(7)(c) precludes an employee from recovering from an alleged "unexplained injury." Defendants misconstrue the plain meaning of the subsection by arguing the statute extends to "unexplained injuries." The statute addresses idiopathic or unexplained "falls" on level surfaces. The text is not broadly written to apply to injuries on level surfaces. I find Defendants' argument has no merit.

The issue in this case is whether Weiland's preexisting right knee condition was aggravated, accelerated, worsened, or lit up by the work injury. Three physicians

provided causation opinions in this case, Dr. Kennedy, an occupational medicine physician, Dr. Hart, a treating orthopedic surgeon, and Dr. Gorsche, an orthopedic surgeon who performed a records review IME without examining Weiland. I find the opinion of Dr. Hart, the treating orthopedic surgeon, to be the most persuasive.

In January 2021, Eagle and Society sent Weiland to Dr. Kennedy for an opinion on causation. After examining Weiland, Dr. Kennedy documented, "[b]ased on presentation, high liklihood [*sic*] of internal derangement. One [*sic*] specific diagnosis is determined, will provide opinion of causation considering the mechanism of injury which is walking." (JE 2:15) Dr. Kennedy stated, "I have ordered MRI to assess anatomy and arrive at diagnosis. I will see back for results. He may ice and heat knee in interim. He is issued restrictions for seated work." (JE 2:15) In her diagnosis, Dr. Kennedy opined "[r]ight knee pain of unclear etiology. Causation opinion will be issued once MRI results are reviewed," and she stated Weiland would be scheduled for a follow-up appointment to discuss the results of the magnetic resonance imaging." (JE 2:18)

Instead of authorizing the magnetic resonance imaging ordered by Dr. Kennedy to "arrive at a diagnosis," Eagle and Society denied Weiland's claim. (Tr.:36; JE 2:19; Ex. I:82)

Pursuant to an inquiry from Eagle and Society, Dr. Kennedy later provided a causation opinion on October 5, 2021. The text of Dr. Kennedy's handwritten report is faint, covered with some other document, and is difficult to read. (Ex. A:2) Dr. Kennedy noted Weiland had

> sudden onset of right knee pain. He did not trip or fall leading up to the onset of pain. Though he had been working to face lower shelves from a crouched or kneeling position, he did not have pain in this position, upon rising to stand, or with initial walking. Essentially Mr. Weiland could not identify specific biomechanical factors associated with onset of pain.

(Ex. A:2) Dr. Kennedy opined she could not, within a reasonable degree of medical certainty causally relate Weiland's right knee pain to an alleged injury on November 30, 2020. (Ex. A:2)

Dr. Hart initially examined Weiland on July 16, 2021. (JE 3:24) Dr. Hart assessed Weiland with primary osteoarthritis of the right knee, right knee pain, and a right hamstring muscle strain. (JE 3:25) He later performed a total right knee arthroplasty on October 15, 2021, and listed a postoperative diagnosis of right knee osteoarthritis. (JE 5:56) Pursuant to an inquiry from Weiland's counsel, Dr. Hart issued an opinion letter on April 18, 2022, opining the November 30, 2020 injury "was a substantial aggravating factor contributing to [Weiland's] right knee condition." (Ex. 2:14) Using Table 17-33 of the AMA Guides, Dr. Hart assigned claimant 37 percent impairment of the right lower extremity for a total knee replacement with a good result. (Ex. 2:14)

Eagle and Society asked Dr. Gorsche to conduct a records review IME in late December 2022. (Ex. B:3-4) The attorney for defendants advised Dr. Gorsche, "I would advise you that the Iowa Workers' Compensation Act was amended in 2017. The

statute now seems to say if a worker's knee basically gives out or becomes symptomatic merely by walking on a flat surface, such may not be compensable under Workers' Compensation." (Ex. B:4) As analyzed above, Defendants' statement to Dr. Gorsche misstates the law in Iowa. The statute addresses idiopathic or unexplained falls, not injuries on flat surfaces generally.

After reviewing Weiland's medical records, Dr. Gorsche opined Weiland described "no injury," because he was just walking down the aisle when he developed knee pain. (Ex. B:6) Dr. Gorsche opined the activity of kneeling and stocking before walking down the aisle did not materially aggravate Weiland's underlying arthritis and found his employment activities are unrelated to his need for a total knee replacement. (Ex. B:6)

Eagle and Society point out discrepancies in the record concerning whether Weiland reported or discussed his work injury with his coworkers and when he reported the alleged injury to his supervisor. At hearing I had the opportunity to assess Weiland's credibility. In assessing Weiland's credibility, I considered whether his testimony was reasonable and consistent with other evidence I believe, whether he 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). Weiland has an obvious interest in the outcome of this case. I had the opportunity to observe Weiland testify under oath. During his testimony he engaged in direct eye contact, his rate of speech was appropriate, and he did not engage in any furtive movements.

The record contains inconsistencies about whether Weiland reported or discussed his work injury with his coworkers and when he reported the alleged injury to his supervisor. (Exs. C:19, 21; E; J; G:63, 66; Tr.:27, 33 42, 70, 74-75, 81-82, 86) While the record contains inconsistencies about whether Weiland reported or discussed his work injury with his coworkers and when he reported the alleged injury to his supervisor, I find Weiland's statements and testimony that he felt pain when walking down the aisle after he had been kneeling on the tile floor facing bleach is consistent with the record evidence.

Dr. Hart and Dr. Gorsche have superior training to Dr. Kennedy as orthopedic surgeons. Dr. Kennedy examined Weiland and ordered magnetic resonance imaging to determine Weiland's diagnosis and causation. Eagle and Society did not authorize the imaging Dr. Kennedy ordered. In her October 2021 causation opinion, Dr. Kennedy stated she could not causally relate Weiland's right knee condition to the alleged work injury. She did not address whether Weiland's preexisting right knee condition was aggravated, accelerated, worsened, or lit up by the alleged work injury.

Dr. Gorsche did not examine Weiland before issuing his IME report. Dr. Hart treated Weiland over the course of many months and performed surgery on him. There is no evidence in the record Weiland sought treatment for his right knee or that he complained of right knee pain before the work injury. It was not until the November 30, 2020, incident that he complained of right knee pain. Considering all the record evidence, I find Dr. Hart's opinion most persuasive on the issue of causation. I find

Weiland has met his burden of proof the November 30, 2020, work injury permanently aggravated, accelerated, worsened, or lit up his preexisting right knee condition and need for the right total knee replacement.

II. Healing Period Benefits

Weiland seeks healing period benefits beginning on January 12, 2021, when Dr. Kennedy imposed a restriction of seated work only, through January 26, 2022, when Dr. Hart placed him at maximum medical improvement. (JE 2:18; Ex. 2:14)

Iowa Code section 85.33 (2020) governs temporary disability benefits, and Iowa Code section 85.34 governs healing period and permanent disability benefits. Dunlap v. Action Warehouse, 824 N.W.2d 545, 556 (Iowa Ct. App. 2012).

An employee has a temporary partial disability when because of the employee's medical condition, "it is medically indicated that the employee is not capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability." Iowa Code § 85.33(2). Temporary partial disability benefits are payable, in lieu of temporary total disability and healing period benefits, due to the reduction in earning ability as a result of the employee's temporary partial disability, and "shall not be considered benefits payable to an employee, upon termination of temporary partial or temporary total disability, the healing period, or permanent partial disability, because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury." Id.

As a general rule, "temporary total disability compensation benefits and healing-period compensation benefits refer to the same condition." Clark v. Vicorp Rest., Inc., 696 N.W.2d 596, 604 (Iowa 2005). The purpose of temporary total disability benefits and healing period benefits is to "partially reimburse the employee for the loss of earnings" during a period of recovery from the condition. Id. The appropriate type of benefit depends on whether or not the employee has a permanent disability. Dunlap, 824 N.W.2d at 556. In this case I found the work injury permanently aggravated, accelerated, worsened, or lit up his preexisting right knee condition. Therefore, if Weiland is entitled to temporary benefits, he is entitled to healing period benefits.

Temporary total, temporary partial, and healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986); Stourac-Floyd v. MDF Endeavors, File No. 5053328 (App. Sept. 11, 2018); Stevens v. Eastern Star Masonic Home, File No. 5049776 (App. Dec. Mar. 14, 2018).

Iowa Code section 85.33(3) provides:

> *a.* If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, and be compensated with temporary partial benefits. If the employer offers the employee suitable work and the employee refuses to accept the suitable work offered by the

> employer, the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal. Work offered at the employer's principal place of business or established place of operation where the employee has previously worked is presumed to be geographically suitable for an employee whose duties involve travel away from the employer's principal place of business or established place of operation more than fifty percent of the time. If suitable work is not offered by the employer for whom the employee was working at the time of the injury and the employee who is temporarily, partially disabled elects to perform work with a different employer, the employee shall be compensated with temporary partial benefits.
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> *b.* The employer shall communicate an offer of temporary work to the employee in writing, including details of lodging, meals, and transportation, and shall communicate to the employee that if the employee refuses the offer of temporary work, the employee shall communicate the refusal and the reason for the refusal to the employer in writing and that during the period of the refusal the employee will not be compensated with temporary partial, temporary total, or healing period benefits, unless the work refused is not suitable. If the employee refuses the offer of temporary work on the grounds that the work is not suitable, the employee shall communicate the refusal, along with the reason for the refusal, to the employer in writing at the time the offer of work is refused. Failure to communicate the reason for the refusal in this manner precludes the employee from raising suitability of the work as the reason for the refusal until such time as the reason for the refusal is communicated in writing to the employer.

The record supports after receiving the restriction of seated work only, Weiland asked to return to work and he was told there was no work available for him. (Tr.:38-39)

Dr. Hart performed a right total knee replacement on Weiland on October 15, 2021. (JE 5:55-66) Weiland underwent additional physical therapy and treatment following surgery until Dr. Hart placed him at maximum medical improvement on January 26, 2022.

There is no evidence Eagle ever offered Weiland work after January 12, 2021. Eagle and Society never sent Weiland back to Dr. Kennedy or to another provider to inquire whether the restriction could be lifted, whether Weiland required any additional restrictions, or whether he could be released to full duty with respect to his right knee. I find Weiland is entitled to healing period benefits from January 12, 2021, through January 26, 2022, when Dr. Hart placed him at maximum medical improvement.

III. Extent of Disability and Commencement

The parties stipulated if the injury is found to be the cause of permanent disability, the disability is a scheduled member disability to the right leg. Under Iowa Code section 85.34(2)(p), for loss of a leg, weekly compensation is limited to 220 weeks. Weiland alleges in his post-hearing brief permanent partial disability benefits

should commence on January 27, 2022, at the end of his healing period when Dr. Hart found he had reached maximum medical improvement.

As discussed above, I found Dr. Hart's opinion on causation to be the most persuasive. Dr. Hart assigned Weiland 37 percent impairment of the right lower extremity for a total knee replacement with a good result. (Ex. 2:14) Dr. Hart is the only physician to assign a permanent impairment rating. I find Weiland is entitled to 81.4 weeks of permanent partial disability benefits at the stipulated weekly rate of $221.15, commencing on January 27, 2022, after his healing period ended.

IV. Penalty Benefits

Weiland seeks an award of penalty benefits based on the delay in seeking a causation opinion from Dr. Kennedy until October 3, 2021. Eagle and Society aver Weiland is not entitled to an award of penalty benefits because the claim was fairly debatable.

Iowa Code section 86.13 (2020) governs compensation payments. Under the statute's plain language, if there is a delay in payment absent "a reasonable or probable cause or excuse," the employee is entitled to penalty benefits, of up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse. Iowa Code § 86.13(4); see also Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996) (citing earlier version of the statute). "The application of the penalty provision does not turn on the length of the delay in making the correct compensation payment." Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 236 (Iowa 1996). If a delay occurs without a reasonable excuse, the commissioner is required to award penalty benefits in some amount to the employee. Id.

The statute requires the employer or insurance company to conduct a "reasonable investigation and evaluation" into whether benefits are owed to the employee, the results of the investigation and evaluation must be the "actual basis" relied on by the employer or insurance company to deny, delay, or terminate benefits, and the employer or insurance company must contemporaneously convey the basis for the denial, delay, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits. Iowa Code § 86.13(4). An employer may establish a "reasonable cause or excuse" if "the delay was necessary for the insurer to investigate the claim," or if "the employer had a reasonable basis to contest the employee's entitlement to benefits." Christensen, 554 N.W.2d at 260. "A 'reasonable basis' for denial of the claim exists if the claim is 'fairly debatable.'" Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 267 (Iowa 2012). "Whether a claim is 'fairly debatable' can generally be determined by the court as a matter of law." Id. The issue is whether the employer had a reasonable basis to believe no benefits were owed to the claimant. Id. "If there was no reasonable basis for the employer to have denied the employee's benefits, then the court must 'determine if the defendant knew, or should have known, that the basis for denying the employee's claim was unreasonable.'" Id.

Benefits must be paid beginning on the 11th day after the injury, and "each week thereafter during the period for which compensation is payable, and if not paid when

due," interest will be imposed. Iowa Code § 85.30. In Robbennolt, the Iowa Supreme Court noted, "[i]f the required weekly compensation is timely paid at the end of the compensation week, no interest will be imposed . . . . As an example, if Monday is the first day of the compensation week, full payment of the weekly compensation is due the following Monday." Robbennolt, 555 N.W.2d at 235. A payment is "made" when the check addressed to the claimant is mailed, or personally delivered to the claimant. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996) (abrogated by Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299 (Iowa 2005) (concluding the employer's failure to explain to the claimant why it would not pay permanent benefits upon the termination of healing period benefits did not support the commissioner's award of penalty benefits)).

When considering an award of penalty benefits, the commissioner considers "the length of the delay, the number of the delays, the information available to the employer regarding the employee's injuries and wages, and the prior penalties imposed against the employer under section 86.13." Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 336 (Iowa 2008). The purposes of the statute are to punish the employer and insurance company and to deter employers and insurance companies from delaying payments. Robbennolt, 555 N.W.2d at 237.

Eagle and Society sent Weiland to Dr. Kennedy for an opinion on causation in January 2021. After examining Weiland, Dr. Kennedy recommended magnetic resonance imaging to issue her causation opinion on January 12, 2021. (JE 2:18) Instead of authorizing the magnetic resonance imaging ordered by Dr. Kennedy to "arrive at a diagnosis" and to determine causation, Eagle and Society denied Weiland's claim. (Tr.:36; JE 2:19; Ex. I:82)

There is no evidence Eagle or Society took any additional steps to investigate the claim until they asked Dr. Kennedy for a causation opinion in October 2021, nearly 10 months later.

At the time of the January 2021 appointment, Dr. Kennedy imposed a restriction of seated work only. Eagle did not accommodate the restriction. As analyzed above, I found Weiland is entitled to healing period benefits starting on January 12, 2021, and continuing after October 15, 2021. I find defendants' failure to follow up with Dr. Kennedy or to investigate the claim further was not reasonable. I find Weiland is entitled to an award of $2,000.00 in penalty benefits, to deter Eagle and Society and other employers and insurance carriers from engaging in similar unreasonable conduct in the future.

V. Medical Bills and Medical Mileage

Weiland seeks to recover medical bills he incurred related to his right knee condition set forth in Exhibit 6 and medical mileage totaling $302.47 set forth in Exhibit 5. Eagle and Society did not set forth any argument on medical bills or mileage in their post-hearing brief.

An employer is required to furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, hospital

services and supplies, and transportation expenses for all conditions compensable under the workers' compensation law. Iowa Code § 85.27(1). The employer has the right to choose the provider of care, except when the employer has denied liability for the injury. Id. "The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee." Id. § 85.27(4).

If the employee is dissatisfied with the care, the employee should communicate the basis for the dissatisfaction to the employer. Id. If the employer and employee cannot agree on alternate care, the commissioner "may, upon application and reasonable proofs of the necessity therefor, allow and order other care." Id. The statute requires the employer to furnish reasonable medical care. Id. § 85.27(4); Long v. Roberts Dairy Co., 528 N.W.2d 122, 124 (Iowa 1995) (noting "[t]he employer's obligation under the statute turns on the question of reasonable necessity, not desirability"). The Iowa Supreme Court has held the employer has the right to choose the provider of care, except when the employer has denied liability for the injury, or has abandoned care. Iowa Code § 85.27(4); Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010).

Eagle and Society denied Weiland's claim and he sought treatment on his own for his right knee condition. I found Weiland established a compensable claim. I also find the treatment he received was reasonable and beneficial. I find Defendants are responsible for all causally connected medical bills, including medical mileage for Weiland's right knee condition and for all future causally connected medical care to his right knee condition.

VI. Dr. Hart's IME

Weiland seeks to recover the $1,000.00 cost of Dr. Hart's report under Iowa Code section 85.39.

Iowa Code section 85.39(2) provides:

> 2. 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. . . . An employer is only liable to reimburse an employee for the cost of an examination conducted pursuant to this subsection if the injury for which the employee is being examined is determined to be compensable under this chapter or chapter 85A or 85B. An employer is not liable for the cost of such an examination if the injury for which the employee is being examined is determined not to be a compensable injury. A determination of the reasonableness of a fee for an examination made pursuant to this subsection, shall be based on the

> typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted.

After Dr. Kennedy issued her opinion finding no causation, Weiland asked Dr. Hart to provide an opinion on causation and impairment rating. In Kern v. Fenchel, Doster & Buck, P.L.C., No. 20-1206, 2021 WL 3890603 (Iowa Ct. App. Sept. 1, 2021) the defendants' expert found there was no causation. Kern disagreed with the opinion and sought an IME at the defendants' expense. The Commissioner found Kern was not entitled to recover the cost of an IME. The Iowa Court of Appeals reversed, finding the "opinion on lack of causation was tantamount to a zero percent impairment rating," which is reimbursable under Iowa Code section 85.39. Under Kern, Weiland is entitled to recover the cost of Dr. Hart's IME from Eagle and Society.

Defendants argue Dr. Hart's $1,000.00 charge is not reasonable. Defendants also retained an orthopedic surgeon, Dr. Gorsche, to conduct a records review IME, yet offered no evidence on what Dr. Gorsche's hourly rate is for use in determining what is the typical rate charged by an orthopedic surgeon who performs an IME and whether Dr. Hart's fee is unreasonable. I find Defendants' argument lacks merit.

VII. Costs

Weiland seeks to recover the $100.00 filing fee. Iowa Code section 86.40 (2020), 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.

Weiland was successful in proving his claim in this case. Using my discretion, I find defendants should reimburse Weiland for the filing fee.

ORDER

IT IS THEREFORE ORDERED, THAT:

Defendants shall pay Claimant healing period benefits from January 12, 2021, through January 26, 2022, at the stipulated weekly rate of two hundred twenty-one and 15/100 dollars ($221.15).

Defendants shall pay Claimant 81.4 weeks of permanent partial disability benefits commencing on January 27, 2022, at the stipulated weekly rate of two hundred twenty-one and 15/100 dollars ($221.15).

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

Defendants shall pay Claimant two thousand and 00/100 dollars ($2,000.00) in penalty benefits.

Defendants are responsible for the medical bills set forth in Exhibit 6 and medical mileage set forth in Exhibit 5 causally related to the work injury set forth in this decision, and are responsible for all future medical care causally related to the work injury.

Defendants shall reimburse Claimant one thousand and 00/100 dollars ($1,000.00) for the cost of Dr. Hart's IME under Iowa Code section 85.39.

Defendants shall reimburse Claimant one hundred and 00/100 dollars ($100.00) for the cost of the filing fee under 876 Iowa Administrative Code 4.33.

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 __5th____ day of July, 2023.

HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Mark Sullivan (via WCES)

Stephen Spencer (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.