BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SANTIAGO RIVERA-AVILAR, Claimant, vs. FARMLAND FOODS, INC., Employer, and SAFETY NATIONAL, Insurance Carrier, Defendant.	File No. 5057081 A R B I T R A T I O N D E C I S I O N Head Notes: 1402.30, 1802, 1803, 2401, 2700, 2801, 2907

STATEMENT OF THE CASE

Santiago Rivera-Avilar, claimant, filed a petition in arbitration and seeks workers' compensation benefits from defendants, Farmland Foods, Inc. (hereinafter referred to as "Farmland"), as the employer and Safety National, as the insurance carrier. Hearing occurred before the undersigned on August 16, 2017, in Sioux City.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision. No factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 3, Claimant's Exhibits 1, 13 through 18, 22 through 31, and 34 through 35. Defendants did not offer a separate set of exhibits. All exhibits were received without objection.

Claimant testified on his own behalf, utilizing the services of an interpreter. Defendants called Cindy Schweers to testify. No other witnesses testified live. The evidentiary record closed at the conclusion of the arbitration hearing.

However, counsel for the parties requested an opportunity to submit post-hearing briefs. Their request was granted. The parties filed simultaneous post-hearing briefs on September 18, 2017, at which time the case was considered fully submitted to the undersigned.

ISSUES

1. Whether claimant sustained an injury that arose out of and in the course of his employment with Farmland Foods, Inc. on September 24, 2014.

2. Whether claimant is barred from recovery of benefits for failure to give timely notice of his injury.

3. Whether the alleged right knee injury is a sequela of the alleged September 24, 2014 left knee injury.

4. The extent of claimant's entitlement to permanent disability benefits, if any.

5. Whether claimant is entitled to alternate medical care, including future care with his knee surgeon, Bradley Lister, M.D.

6. Whether costs should be assessed against either party.

FINDINGS OF FACT

Having considered all of the evidence and testimony in the record, recognizing that there may be competing or contradictory facts within this evidentiary record, I find the following facts:

Santiago Rivera-Avilar began his employment with Farmland in February 2009. Mr. Rivera-Avilar performed a job at Farmland referred to as a Skinner position. In this position, claimant was required to stand continuously during his shift and he walked numerous stairs throughout the day. He testified that the floor was hard and that ergonomic rubber mats were not plentiful or available for him to use most of the time.

Claimant began developing symptoms in his left knee in 2013. He reported his symptoms to his supervisor and was sent to the company's nurse's station. At the nurse's direction, Mr. Rivera-Avilar sought medical care through his personal physician's office.

I find that Mr. Rivera-Avilar likely, or objectively should have known, by June 2013 that he had a left knee injury and that it was likely work related. (Tr., pp. 46-47) Certainly, by September 24, 2014, claimant knew or should have known about the work-related nature of his left knee condition. However, claimant was not removed from work, other than for a couple of days' rest, in 2013 or 2014. Not until June 30, 2015, was claimant notified that he may require a total knee replacement of his left knee. At

that juncture, claimant was aware, or should have known, of the serious nature of his left knee injury. (Joint Exhibit 2, p. 42)

Defendants contend that Mr. Rivera-Avilar failed to give timely notice of his injuries to the employer. Defendants relied upon the testimony of claimant to establish their defense. Mr. Rivera-Avilar provided contradictory testimony on the issue of notice. On direct examination, he testified that he advised the company nurse about the suspected cause of his left knee injury, namely standing and walking stairs in 2013. (Transcript, pages 35, 48)

However, Mr. Rivera-Avilar also made concessions during cross-examination that he did not provide timely notice. In fact, he conceded on cross-examination that he did not tell the employer about the work-related nature of his knee injury until shortly before his left knee replacement in December 2015. (Tr., p. 39) He contradicted this testimony again on re-direct, noting that he told the nurse several times about the work-related nature but she would not listen, did not pay attention, and would not obtain the assistance of an interpreter to understand this issue. (Tr., pp. 48-49)

When considered separately, claimant's testimony made sense on direct and re-direct examination. It was believable. However, claimant's testimony during cross-examination also made sense and could be believed. Obviously, claimant could not have given notice of his injury in 2013 and also not given notice of his injury at that time. Ultimately, without additional evidence to demonstrate one way or the other, claimant's testimony was contradictory, confusing, and ultimately not credible on the notice issue.

Having observed claimant, pondered his various statements in context with his medical care and the other evidence in this case, I am not able to determine whether claimant gave notice of a work-related injury within 90 days of him objectively understanding that his left knee injury was likely work related and serious in nature. Therefore, I find that defendants did not prove by a preponderance of the evidence that claimant failed to give notice of his work-related, left knee injury within 90 days of him objectively learning, or objectively should have known, that he had a left knee injury, that it was likely work-related, and that it was a serious condition.

Only one physician has offered a causation opinion in this case. Sunil Bansal, M.D. opines, "that the cumulative work Mr. Rivera performed at Farmland Foods was a significant contributing factor for the aggravation of his left knee degenerative joint disease." (Joint Exhibit 3, p. 162) Dr. Bansal explained that "[t]he medical literature strongly supports this relationship as it has been shown that the odds ratio increases a marked 2.7 times for knee arthritis in occupations where an individual has to traverse 10 or more flights of stairs a day." (Joint Exhibit 3, p. 162)

With respect to claimant's right knee condition, Dr. Bansal opines:

> Mr. Rivera accelerated his right knee degenerative joint disease in the same manner as the left knee from the repetitive stair climbing at

> Farmland. Against that backdrop, it was further aggravated from the left knee replacement, as the weight will be shifting to the leg that is not in a convalescent state.

(Joint Exhibit 3, p. 165)

Dr. Bansal's causation opinions are supported by citation of medical research. His opinions are reasonable and make sense as drafted. No contrary medical opinions are contained within this evidentiary record. Therefore, I accept Dr. Bansal's medical causation opinions and find that claimant's left knee arthritis was aggravated and accelerated by his walking of stairs at Farmland. Similarly, I find that his right knee was aggravated by his walking of stairs at Farmland but that it was also specifically aggravated after the left knee replacement, as claimant shifted his weight to his right leg while convalescing from his left knee replacement. Therefore, I find the right knee injury to be a sequela of the left knee replacement.

Dr. Bansal also offers unrebutted opinions pertaining to permanent impairment. Specifically, Dr. Bansal opines that claimant sustained 37 percent permanent impairment of each lower extremity as a result of his work-related injuries. (Joint Exhibit 3, pp. 164, 166) Dr. Bansal converted each of these impairment ratings to equate to 15 percent of the whole person for each knee, but he did not combine those impairment ratings. (Joint Exhibit 3, pp. 164, 166) Given that Dr. Bansal's causation opinions are accepted in this case and given that his impairment ratings are not contradicted in this evidentiary record, I accept Dr. Bansal's impairment ratings as accurate and convincing.

As noted by Dr. Bansal, pursuant to Table 17-3 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, page 527, a 37 percent impairment of the lower extremity converts to a 15 percent impairment of the whole person. According to Combined Values Chart located on page 604 of the AMA Guides, Fifth Edition, the 15 percent whole person impairment ratings attributed to each leg combine for a 28 percent permanent impairment of the whole person.

Having considered that claimant has returned to work for the employer, and considering claimant's testimony about his ongoing symptoms and abilities, I find that the 28 percent permanent impairment rating is consistent and is an appropriate estimate of claimant's permanent functional disability as a result of his bilateral knee injuries.

Claimant has established a treating relationship with an orthopaedic surgeon, Dr. Lister. It is reasonable to continue treatment through, or at the direction of, Dr. Lister.

CONCLUSIONS OF LAW

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial

Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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

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

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

occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

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

Having accepted Dr. Bansal's causation opinion, I found that claimant proved by a preponderance of the evidence that his left knee injury arose out of and in the course of his employment with Farmland Foods. Claimant likely became aware of the nature of his condition and its potential work-related nature in June 2013 and certainly by September 24, 2014. Therefore, I conclude that claimant's left knee injury manifested on or about September 24, 2014.

Having accepted Dr. Bansal's opinions, I further found that Mr. Rivera-Avilar proved by a preponderance of the evidence that his right knee injury was caused by a sequela of the left knee injury. Therefore, I conclude that the right knee injury similarly arose out of and in the course of claimant's employment with the initial manifestation of the left knee injury on September 24, 2014.

Defendants asserted an affirmative defense, alleging that claimant failed to give timely notice of his injury and that any recovery was barred by Iowa Code section 85.23. Iowa Code section 85.23 requires an employee to give notice of the occurrence of an

injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

I was unable to find credible evidence to establish the precise date when claimant gave the employer notice of this injury. Defendants essentially relied upon claimant's testimony to establish the date he gave notice. Claimant's testimony varied as to the date, manner and substance of any notice he gave to the employer. Ultimately, I was not able to determine the precise date, manner, or content of the notice given by claimant to the employer. Ironically, as a result of not being able to determine the accuracy of claimant's testimony or the precise date he gave notice to the employer, I conclude that the defendants failed to prove their affirmative defense. Iowa Code section 85.23.

In the hearing report, the parties stipulated that, if claimant proved that his left knee injury arose out of and in the course of his employment and that he was entitled to weekly benefits, then claimant is entitled to healing period benefits for the left knee from November 9, 2015 through March 6, 2016. (Hearing Report) Similarly, the parties stipulated that claimant would be entitled to healing period benefits from July 14, 2016, through July 15, 21016, August 7, 2016, and November 1, 2016 through February 8, 2017, if the right knee was found to be a sequela of the left knee injury. Having concluded that claimant proved he sustained a left knee injury on September 24, 2014 that arose out of and in the course of his employment and having concluded that the right knee injury is a sequela of that injury, I accept the parties' stipulation and conclude that claimant is entitled to healing period benefits for the above periods of time.

Claimant also asserts a claim for permanent disability related to each knee. 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).

Benefits for permanent partial disability of two members caused by a single accident is a scheduled benefit under section 85.34(2)(s); the degree of disability must be computed on a functional basis with a maximum benefit entitlement of 500 weeks. Simbro v. DeLong's Sportswear, 332 N.W.2d 886 (Iowa 1983).

In this case, I concluded that Mr. Rivera-Avilar proved he sustained a left knee injury that arose out of and in the course of his employment. I concluded that his right knee injury was a sequela of that injury. Therefore, I conclude that claimant has established he sustained a bilateral scheduled member injury that is compensable pursuant to Iowa Code section 85.34(2)(s).

Having accepted Dr. Bansal's impairment ratings for each of his knees, I found that claimant proved a 37 percent permanent impairment of each leg. The Iowa Workers' Compensation Commissioner has adopted the Fifth Edition of the Guides to the Evaluation of Permanent Impairment, published by the American Medical Association as a guide for determining permanent disabilities pursuant to Iowa Code section 85.34(2)(s). See 876 IAC 2.4. I found that claimant's injuries resulted in a combined permanent impairment rating of 28 percent of the whole person under the Fifth Edition of the Guides. Similarly, I found that the impairment rating offered by the Guides was a reasonable estimate of the functional disability sustained by claimant when considering his own testimony about his residual symptoms and abilities. Therefore, I conclude that claimant is entitled to a permanent partial disability award equivalent to 28 percent of the body as a whole.

As noted above, bilateral injuries are compensated pursuant to Iowa Code section 85.34(2)(s), using a 500-week schedule. Claimant is entitled to a proportional award equivalent to 28 percent of 500 weeks. Iowa Code section 85.34(2)(v). Therefore, I conclude that claimant is entitled to an award of 140 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(s).

Pursuant to the parties' stipulations, all weekly benefits shall be paid at the rate of $469.02, and the permanent partial disability benefits shall commence on March 7, 2016 and be payable as stipulated to by the parties in the hearing report.

Claimant also seeks alternate medical care. Claimant's request is not specific as to care or a specific procedure to be performed. Instead, claimant seeks to continue future care at defendants' cost with his treating orthopaedic surgeon, Dr. Lister.

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 1975).

In this instance, the employer denied liability for this claim. Claimant sought reasonable care and has an established treating relationship with Dr. Lister. Dr. Lister has evaluated claimant's knees surgically and performed the total knee replacements. It is reasonable and appropriate for claimant to continue care with Dr. Lister unless some intervening event transpires that would no longer make that treating relationship appropriate. Therefore, I will order defendants to provide future medical care for claimant's bilateral knees, including care through or at the recommendation of Dr. Lister.

Claimant also seeks assessment of his costs. Assessment of costs is a discretionary function of the agency. Iowa Code section 86.40.

Claimant has prevailed on the merits and obtained an award of permanent disability benefits. Therefore, I conclude it is reasonable to assess some of claimant's costs against defendants in this file.

Claimant seeks assessment of his filing fee ($100.00). This is a reasonable request and is assessed pursuant to 876 IAC 4.33(7).

Claimant also seeks assessment of the cost of Dr. Bansal's report in the amount of $2,239.00. Pursuant to 876 IAC 4.33(6), this agency can assess the cost of a physician's report in lieu of testimony. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015). Review of Dr. Bansal's invoice demonstrates that he did not itemize the time spent preparing only his medical report. Dr. Bansal itemized the time he spent performing a physical examination, but included all time he performed a record review and drafted his report as a separate charge. Dr. Bansal's report did not quantify the amount of time spent on the various tasks.

I am not inclined to guess as to the amount of time, or the charges, Dr. Bansal would submit for the sole purpose of drafting his report. However, I interpret Young to preclude the assessment of costs related to Dr. Bansal's review of the medical records. If Dr. Bansal were to testify live or via deposition, claimant could obtain assessment of costs up to $150.00 pursuant to 876 IAC 4.33(5). Therefore, I find this to be a reasonable amount to assess as costs under these circumstances.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant healing period benefits from November 9, 2015 through March 6, 2016, from July 14, 2016 through July 15, 2016, August 7, 2016, and November 1, 2016 through February 8, 2017, pursuant to the parties' stipulation in the hearing report.

Defendants shall pay claimant one hundred forty (140) weeks of permanent partial disability benefits commencing on March 7, 2016 and payable as stipulated to by the parties in the hearing report.

All weekly benefits shall be paid at the rate of four hundred sixty-nine and 02/100 dollars ($469.02) per week.

Defendants shall be entitled to those credits stipulated to by the parties in the hearing report, including the stipulation of short-term disability credit for the right knee healing period.

Defendants shall provide claimant reasonable future medical care for his bilateral knee injuries for all causally related conditions and treatment, including care through or at the recommendation of the treating orthopaedic surgeon, Dr. Lister.

Defendants shall reimburse claimant's costs totaling two hundred fifty and 00/100 dollars ($250.00).

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

Signed and filed this 27th day of December, 2017.

William H. Grell

WILLIAM H. GRELL
DEPUTY WORKERS'
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WHG/sam

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.