BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SCOTT MCLEAN, Claimant, vs. QUALITY MANUFACTURING CORPORATION, Employer, and EMCASCO INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 5057909 ARBITRATION DECISION Head Note Nos.: 1802, 1803, 2500

FILED
APR 29 2019
WORKERS COMPENSATION

STATEMENT OF THE CASE

Scott McLean, claimant, filed a petition in arbitration seeking workers' compensation benefits from his employer, Quality Manufacturing, and EMCASCO Insurance Company, the workers' compensation insurance carrier.

This matter had a companion case, File No. 5057908, which was dismissed by claimant at the outset of the hearing. This matter, File No. 5057909 proceeded alone to hearing on January 16, 2019. The parties submitted post-hearing briefs on February 20, 2019 and the matter was considered fully submitted on that date.

The evidentiary record includes: Joint Exhibits JE1 through JE4; Claimant's Exhibits 1 through 9; and Defendants' Exhibits A through H. Claimant, pursuant to a stipulation at hearing, submitted the cost of the transcript of the deposition of Nathaniel Cloe post-hearing. This was done because the parties had not yet received the invoice for the transcript at the time of the hearing. The same is now included with the statement of costs attached to the Hearing Report.

Individuals providing testimony at the hearing included: claimant; Gus Straight, former co-worker of claimant; Troy Heater, co-worker of claimant; Matthew James, co-worker of claimant; Nathaniel Cloe, HR Director for the defendant employer; and Andy Sytsma, automation manager for the defendant employer.

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 and 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.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury on or about March 21, 2015, that arose out of and in the course of his employment with the defendant employer.

2. Whether the alleged injury is the cause of temporary disability. Claimant seeks temporary disability benefits for the periods of March 23, 2015 to June 14, 2015; August 7, 2015 to August 10, 2015; and August 28, 2015 to September 21, 2015. Defendants agree that if they are found liable for the alleged injury, claimant is entitled to temporary benefits for these periods of time.

3. Whether the alleged injury is the cause of permanent disability and extent thereof, if any.

4. Whether the alleged injury is a scheduled member or industrial disability.

5. Whether claimant is entitled to payment of medical expenses identified in Exhibits 6 and 7.

6. Whether claimant is entitled to reimbursement for an independent medical evaluation (IME) pursuant to Iowa Code section 85.39, as contained in the Statement of Costs attached to the Hearing Report.

7. Costs.

FINDINGS OF FACT

After a review of the evidence presented, I find as follows:

Scott McLean, claimant, was 54 years old at the time of the hearing. (Exhibit JE1-1) He graduated from high school in 1983. He attended college, but did not graduate. Claimant was in the National Guard for 8 years. He was not deployed and received an honorable discharge. (Transcript pages 12-13)

Claimant alleges an injury occurred to his right leg while he was working for the employer that resulted in an initial injury to his leg and a serious infection, leading to an injury to the body as a whole.

The parties agree that if causation is found, the injury date of March 21, 2015, is not in dispute.

Work History

Claimant previously worked for about eight to ten years for companies that did pressure grouting and drilling for customers all around the United States. He then worked for a company that built water towers for about eight years. These jobs required him to be on his feet for long periods of time and he often worked long hours.

Claimant started working for the defendant employer, Quality Manufacturing, in 2012 as a robot operator/welder. He ran a machine that produced metal parts. His job also included grinding metal parts. His job required him to lift up to 50 pounds and stand on his feet for long periods of time. He worked for the defendant employer for about 12 years and remained employed by them at the time of the hearing in the same position that he held at the time of the injury. At the time of the hearing, he was working with no restrictions.

The Injury and Subsequent Medical Treatment

Claimant alleges an injury to his right lower leg that resulted in infection. He asserts that he was working on metal parts, grinding channels, when an incident occurred a few weeks before March 21, 2015. He was walking at work and struck his leg on metal tubing, called pinnacles, which were lying on a metal pallet. The incident resulted in a cut on his right lower leg. He could feel blood running into his boot. He obtained bandages from the first aid kit and bandaged the wound himself. Claimant had to remove his boot and pull his leg out of his pants in order to apply the bandage. After bandaging his leg, he continued working. He continued working in the same job in the days after the incident.

Gus Straight, a former co-worker of claimant, previously worked for the defendant employer as a robotic welder in the same area where claimant worked. Gus recalled seeing claimant bandaging his right lower leg at work with his pants down in March 2015, while he was working for the defendant employer. Gus jokingly told claimant that he had "caught him with his pants down," a comment that claimant remembered Gus saying to him. (Tr. pp. 29, 100) Gus testified that he spoke to claimant about the injury, who explained that it happened when he struck his leg on pinnacles stored on a pallet. Gus did not actually see the incident occur, he only saw claimant bandaging his leg after it happened. (Tr. p. 108) Gus testified at hearing that he and claimant went to Andy Sytsma's office. Andy was the automation manager and claimant reported an issue with his robot not functioning properly. However, Gus testified that claimant also mentioned to Andy that he had cut his leg. (Tr. p. 102) Andy Sytsma testified at hearing that he had no recollection of this conversation about an injury to claimant's leg. (Tr. p. 161) Claimant testified that initially he did not believe the cut to his leg was a significant problem and felt that he could take care of it. (Tr. p. 32)

Gus testified that he learned a few weeks later that claimant was hospitalized and he believed it was due to the leg injury. (Tr. p. 103) Gus recalls that a few months later, he was questioned at work a number of times by three people, including Nathaniel Cloe and Andy Sytsma. (Tr. pp. 104-105) He was primarily questioned about whether

or not he actually saw claimant's injury happen. As stated above, Gus did not actually see claimant's injury occur.

Gus described himself as a friend of claimant's but he has not worked with or spoken to claimant within the past year. (Tr. p. 110)

Troy Heater, claimant's co-worker, testified at hearing that in March 2015, he saw claimant at work bandaging his right leg, and that while doing so, claimant had his leg exposed outside of his pants. (Tr. p. 113) Troy asked claimant if he was okay. He does not recall claimant describing how or where the injury occurred. Troy recalls that he was questioned by the employer in March or April 2015. He did not see the injury happen.

Troy described himself as a friend of claimant and believed him to be a hard-working, credible person, but does not socialize with him outside of work. (Tr. pp. 112-113)

Matthew James, a co-worker of claimant, testified at hearing that he was questioned by the employer about any knowledge he had regarding the injuries to claimant's leg. Matthew initially stated that claimant had told him that he slipped and hit his right leg on a hitch in approximately December. However, he later told the employer that he needed to change his statement because after reviewing text messages with claimant, he believed it was actually claimant's left leg, not his right leg, he struck on the hitch. Matthew testified that he showed Andy Sytsma a screenshot of the text message indicating it was claimant's left leg that was injured on the hitch. Claimant denied any injury to his right lower leg in December 2014. (Ex. 1-2)

Matthew believed claimant to be a hard-working, credible person. (Tr. p. 119)

I find the testimony of claimant's co-workers support his claim that his right leg injury arose out of and in the course of his employment.

Nathaniel ("Nate") Cloe, the Human Resources Manager for the defendant employer, agreed that claimant had an injury to his right lower leg that led to infection and hospitalization. (Tr. p. 132) He also agreed that Gus and Troy have reported on multiple occasions that they saw claimant bandaging his right leg at work. (Tr. pp. 131-132) However, Nate testified that on March 30, 2015 he called claimant while claimant was in the hospital and asked him directly if his right leg injury occurred at work. Nate testified that claimant answered that his right leg injury did not happen at work. (Tr. pp. 137-139) Claimant denied at hearing that he ever said his right leg injury did not occur at work. Nate testified that he did not follow-up with claimant after that phone call to confirm or double-check and he was not aware of whether claimant was or was not on medication at the time that he spoke to him on the phone.

Nate testified that the claim for the leg injury was denied because claimant told him that he did not hurt it at work and because there were different reports of how the work injury occurred. (Tr. p. 136)

The employer completed a First Report of Injury on March 25, 2015, which indicates that the specific injury date is unknown, but the employer had knowledge of the injury on March 21, 2015. It also states that "[w]e were not aware of an injury until Scott was admitted to the hospital on 3/23/15 for cellulitis on his leg. Scott told the doctor he scraped his leg at work several weeks earlier, however, Scott did not report an incident to us." (Ex. 9-63) This date of March 23, 2015 is the date that the employer became aware of the leg injury. The date of March 21, 2015 is the date the employer was aware of claimant's symptoms of general sickness.

On March 21, 2015, claimant went to the emergency room feeling poorly, with fever-like symptoms and a significant headache. He had been grinding metal tubes at work the day before and near the end of his shift, he felt ill and suspected that he had zinc poisoning based on his prior personal experience. He reported this concern to his lead person, Craig, and also sent a text message to Andy Sytsma. At the emergency room, claimant's diagnosis was, in fact: fever, zinc poisoning, body aches, and headache. (Ex. JE1-5) The record does not include any complaints of leg pain or problems at that time. Claimant testified that the doctors did not look at his legs and focused on the suspected zinc poisoning. Claimant testified that the ER gave him medication and sent him home.

After being released, claimant felt worse and went to his regular physician on March 23, 2015. (Ex. JE2-52) On that date, claimant complained of a right leg lesion with, pain, swelling, and redness since March 21. (Id.) However, the onset of symptoms was noted to be gradual. Claimant testified that he was told he had a high white blood cell count and was told to go to the emergency room. He was assessed with cellulitis of the right leg and ascending lymphangitis and was sent to the "Mercy ER for admission and IV antibiotics." (Ex. JE2-53, 54)

At the emergency room on March 23, 2015, claimant had "significant lymphangitis" and swelling of his right leg. (Ex. JE1-6) He denied any "recent injuries except for 2 weeks ago scratch of his right lower leg." (Ex. JE1-9) Claimant testified that he was told he had a serious infection and that he had a 50 percent chance of not living through the day. He stated that doctors found a mass in his leg and considered surgery to remove it. He was diagnosed with cellulitis, sepsis syndrome. (Ex. JE1-14) The infection was described as being of an "extensive nature" with worsening swelling and cellulitis. (Ex. JE1-20)

Claimant was hospitalized from March 23, 2015 to April 1, 2015. (Ex. JE3) On March 24, 2015, claimant was seen by Casey Rice, M.D. (Ex. JE3-56) Claimant advised that he "injured the leg 2 weeks ago at work, he works as a welder and had gouged his leg on a piece of metal." (Id.) Claimant testified that Dr. Rice told him the infection was due to the cut on his right shin.

On May 6, 2015, claimant had an incision to drain the right leg abscess procedure done by Paul Grossman, M.D. (Ex. JE1-44) On May 28, 2015, Dr. Grossman performed a "[s]harp debridement" of the right leg wound. (Ex. JE1-50)

There are several pictures in evidence of claimant's right leg showing the severity of the infection and various stages of its condition and healing. (Ex. 5) Claimant testified that he underwent multiple debridement and wound cleaning procedures, which required the infected tissue to be removed, necessarily making the area involved larger than the original wound. Following multiple procedures, claimant eventually had skin grafting to cover the open area on his leg. At hearing claimant displayed the condition of his leg, and described it as a depression in his right shin about 3/8 of an inch deep, 4 inches long and 1 ½ inches wide. (Tr. p. 48) Claimant's description of the size of the wound appeared generally accurate to the undersigned.

Following claimant's release from the hospital, he received follow-up care with Dr. Rice. On June 29, 2015, claimant was seen by Lester Yen, M.D. (Ex. JE4-93, 94) Dr. Yen incorrectly described the wound to claimant's right leg occurring "as a result of contact with zinc while using a welding device. He also had an inhalation injury of some type and required hospitalization." (Ex. JE4-93) Dr. Yen noted the use of a wound vac (negative pressure dressing) from May until the week prior to this appointment. (Id.) He noted the wound had been open for some time and was unlikely to heal without surgical intervention. (Ex. JE4-93)

On April 8, 2015, claimant completed a short-term disability application made available through his employer. On that application, claimant described his injury as a "cut to leg" and "galvanized poisoning, blood poisoning, grinding." (Ex. 4-19) He stated his injury was work related. (Id.) Claimant's short-term disability application was denied. (Tr. p. 56) Despite losing his home, claimant did not change his story to obtain short-term disability payments. (Id.) Claimant's assertion that his injury was work-related and subsequent denial of his short-term disability benefits, was against his interest to receive immediate income. (Tr. p. 140)

I find that claimant's assertion that his right leg injury was work related in the midst of his denial of short-term disability benefits leading to significant financial loss supports his credible testimony at hearing that the injury occurred at work.

On August 7, 2015, Dr. Yen conducted another debridement surgery. (Ex. JE4-96) On August 28, 2015, Dr. Yen performed the skin graft surgery. (Ex. JE4-100) The skin graft included a donor site of claimant's right lateral anterior thigh. (Ex. JE4-101)

On September 3, 2015, Dr. Yen noted that the skin graft demonstrated a "100% take," and the donor site was healing well. (Ex. JE4-102)

Dr. Yen returned claimant to work on September 21, 2015. (Ex. JE4-103)

Dr. Yen, one of claimant's treating surgeons, stated that claimant "has been back to work and has been able to perform his job duties without difficulty." He placed claimant at maximum medical improvement (MMI) on or about October 22, 2015 and stated "I do not anticipate he will have any permanent disability." (Ex. B-1) Dr. Yen did not discuss the basis for his opinion concerning permanent disability or the possible application of the AMA Guides to his conclusion. It is not clear whether these factors

were considered. I therefore give Dr. Yen's assessment of permanent partial disability, less weight.

On September 10, 2015, Dr. Yen again referred to the donor site for the skin graft as the "right thigh," as he did in his operative note, and stated that it was "healing well without evidence of any problems." (Ex. JE4-103)

On October 29, 2015, Dr. Rice, claimant's treating physician, indicated his agreement to a letter drafted by claimant's counsel, that claimant's "wound and subsequent infection were caused by the patient's work," also stating that the "mechanism of injury and subsequent infection to the wound are causally related to his work injury." (Ex. JE3-89) Dr. Rice confirmed the need for claimant to be off work was "a result of the wound and infection caused by work." (Id.) He also agreed that the hospitalization and subsequent wound/infection treatment were all related to the work injury and was reasonable and necessary to treat the injury. (Ex. JE3-89, 90).

On November 29, 2017, claimant was seen by Dennis Phillips, D.O. of Medix for the purpose of an IME. Dr. Phillips issued his report on December 29, 2017. (Ex. 1-1) Dr. Phillips described the injury occurring during the week of March 2, 2015 when claimant struck his leg on a steel pallet at work. (Ex. 1-2) Claimant advised Dr. Phillips that the area around the wound became sore, with redness and swelling. (Id.) Claimant also believed he had been exposed to zinc around this time at work and developed flu-like symptoms. He reported his symptoms and his right leg complaints to his primary physician who sent him to the emergency room. (Ex. 1-3) Dr. Phillips reviewed additional medical records, conducted a physical examination and diagnosed claimant with a right leg workplace skin wound that developed into cellulitis, necrotizing fasciitis, lymphangitis, sepsis, abscess, non-healing wound with necrotic tissue and skin graft. He also stated claimant had "Metal Fume Fever" that was symptomatic about March 20, 2015. (Ex. 1-11) During the examination, Dr. Phillips did not describe any problems or concerns beyond the right lower extremity. He described the scar on claimant's right leg as "measuring 14-[centimeters]," which he further described as 9.5 centimeters long by 3 centimeters wide. (Ex. 1-11) He also noted the area was smooth, pliable, non-tender, not hot, with no ulcers, erythema or edema, with secondary hair present and light touch and pinprick sensation appearing to be intact. (Ex. 1-11)

Dr. Phillips opined that the "right distal leg skin wound that occurred the week of March 2, 2015, is work-related." (Ex. 1-12) He also opined that the metal fume fever is work related. (Id.) He assigned October 1, 2017, as the appropriate date for maximum medical improvement (MMI) concerning the right leg and associated infections. (Ex. 1-13) He stated the metal fume fever would have resolved within two days of onset in March 2015. (Id.)

Dr. Phillips assigned permanent impairment of five percent of the whole person based on Table 8-2, page 178 and placement in Class I, under the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition. (AMA Guides). This section of the AMA Guides rates permanent skin disorders. Paragraph 8.3, page 176, of the AMA Guides specifically addresses scars and skin grafts,

including elements for consideration for the assessment of permanent partial disability. Those considerations include such things as shape, anatomical location, evidence of ulceration; pliability; and smoothness of the skin, among other things. I note that Dr. Phillips recorded his observations and measurements concerning the scar during his physical examination.

I note that 5 percent of the whole person would convert to 12 to 13 percent of the lower extremity per the AMA Guides, Table 17-3, at page 527.

During the examination with Dr. Phillips, claimant described his current symptoms as: daily swelling in the right lower leg; the wound area being sensitive to touch; a sensation that his right foot goes to sleep; and intermittent cramps in the right calf muscles and upper leg. (Ex. 1-8) He did not describe any symptoms outside of his right lower extremity.

I find Dr. Phillips' IME examination and report to be thorough and well informed with sufficient detail to allow for an understanding of the basis of his conclusions. I give Dr. Phillips' IME report and opinions therein significant weight.

On September 6, 2018, claimant was seen by J. Joe Hawk, M.D., at defendants' request for the purpose of an IME. Dr. Hawk issued a letter/report on December 17, 2018. (Ex. A) Dr. Hawk agreed with Dr. Yen that claimant would have no permanent partial disability for the right lower extremity injury. (Ex. A-1) Dr. Hawk referred to a report from a Dr. Bansel that he partly agreed with and partly disagreed with. (Id.) I am unable to find a report from Dr. Bansel or Dr. Bansal in the evidence provided. He further opined that claimant's injury was limited to his right lower leg and did not extend to the body as a whole. (Id.) Dr. Hawk noted claimant "has decreased sensation," and "pain when swelling." (Ex. A-2) Dr. Hawk does not discuss the criteria for considering permanent impairment related to scars as set forth in paragraph 8.3, page 176 of the AMA Guides. I further note that his IME report is quite brief with limited information to ascertain the basis of his conclusions. I therefore give Dr. Hawk's assessment of permanent impairment less weight.

Causation

Considering the expert opinions regarding causation, I note that Dr. Yen did not offer an opinion on the issue of causation. Dr. Rice, claimant's treating physician, agreed with a letter drafted by claimant's counsel, that claimant's "wound and subsequent infection were caused by the patient's work." (Ex. JE3-89) Dr. Phillips, claimant's IME physician, opined that the "right distal leg skin wound that occurred the week of March 2, 2015, is work-related." (Ex. 1-12) Dr. Hawk agreed with Dr. Yen that claimant would have no permanent partial disability for the right lower extremity injury, but did not offer a specific opinion on causation. (Ex. A-1)

I accept the opinions of Dr. Rice and Dr. Phillips concerning causation which are not specifically rebutted by Dr. Yen or Dr. Hawk.

I have found above that the lay testimony of claimant's co-workers who witnessed claimant bandaging his leg at work support his claim that the injury occurred at work.

Nate Cloe testified that he recalls claimant told him on March 30, 2015, that he did not injure his leg at work, but that conversation occurred over the phone while claimant was hospitalized without knowledge of the effect of any medication that claimant was receiving. Also, the conversation was largely focused on the zinc poisoning that claimant believed he had. (Tr. p. 137) In addition, claimant strongly denied ever telling Nate that his leg was not work related. Further, claimant reported to medical providers a week earlier, on March 24, 2015, that "[h]e had injured the leg 2 weeks ago at work, he works as a welder and had gouged his leg on a piece of metal." (Ex. JE3-56) Nate also indicated that there were multiple versions of the story of how claimant was injured. I find that these versions are reasonably explained by the nature of claimant's work environment and multiple names, including slang terms given to items in the work area. I do not find the alleged different renditions of the occurrence to be persuasive.

Viewing the facts in their entirety, I find the greater weight of the evidence in this case supports a finding that claimant's initial cut on his leg occurred when he struck his leg on metal at work during the normal course of his job. I further find that this cut became infected and required the medical attention described above. I therefore find that claimant's right leg injury and subsequent infection injury arose out of and in the course of his employment with the defendant employer on or about March 21, 2015.

I find that the injury to claimant's right leg is a proximate cause of the disability on which the claim is based. I note that defendants' argument is based largely on whether or not the injury occurred at work, not whether the injury is a proximate cause of the disability claimed.

Scheduled Member versus Whole Body and Permanent Disability

Dr. Rice did not offer an opinion concerning whether claimant sustained permanent impairment or the extent thereof.

Dr. Yen described the injury as limited to the right lower extremity. He stated that "I do not anticipate he will have any permanent disability." (Ex. B-1) As stated above, I gave Dr. Yen's opinion of permanency little weight because he did not discuss the basis for his opinion or the possible application of the AMA Guides or any other tool that he may have relied upon to reach the conclusion that claimant has no permanent impairment.

Dr. Hawk also believed the injury was limited to the right lower extremity and he agreed with Dr. Yen that claimant would have no permanent partial disability, despite stating that claimant "has decreased sensation," and "pain when swelling." (Ex. A, pp. 1-2) Dr. Hawk, like Dr. Yen, does not discuss the basis for his conclusion that claimant has no permanent impairment or any tools that he may have utilized to reach

that conclusion. Also, Dr. Hawk referred to a report from a Dr. Bansel, which is not found in the exhibits presented at hearing. As stated above, I gave Dr. Hawk's assessment of permanent impairment less weight.

Dr. Phillips did not describe any physical concerns beyond the right lower extremity and made specific observations of the injured area that relate to the assessment of permanent impairment under the AMA Guides, as described above. (Ex. 1-11) Dr. Phillips then assigned 5 percent permanent impairment of the whole person based on Table 8-2, page 178 and placement in Class I, under the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition. (AMA Guides). (Ex. 1-13) Working backwards in Table 17-3, page 527 of the AMA Guides, the 5 percent body as a whole rating is 12 to 13 percent permanent impairment to the lower extremity.

Claimant described his symptoms as occurring within the right lower extremity. (Ex. 1-8)

I find the situs of the injury and the donor skin graft location are both limited to the right lower extremity as supported by the records of Dr. Yen, the treating surgeon, and supported by Dr. Hawk. I also note that although Dr. Phillips assigned an impairment rating to the whole person, he describes the symptoms and injury in his report as only involving the right lower extremity.

I find that claimant sustained 13 percent permanent impairment to the right lower extremity as a result of the March 21, 2015 work injury based on the opinion of Dr. Phillips. Thirteen (13) weeks is 28.6 weeks (220 weeks multiplied by 13 percent = 28.6 weeks).

Additional Findings

I find that the parties have stipulated that if defendants are found liable for the work injury, that claimant is entitled to temporary disability benefits for the periods of March 23, 2015 to June 14, 2015; August 7, 2015 to August 10, 2015 and August 28, 2015 to September 21, 2015. (Hearing Report)

Claimant incurred medical expenses after defendants denied coverage. Those expenses are contained in Exhibits 6 and 7. Defendants stipulated that the expenses are causally related to the medical condition at issue in this matter and that the same are reasonable and necessary and the amounts paid by insurance and the amounts involving out-of-pocket expenses for claimant are fair and reasonable. (Hearing Report) The dispute concerning medical expenses is related to the liability for the work injury, which has been found in claimant's favor above.

Claimant seeks reimbursement for an IME pursuant to Iowa Code section 85.39, as contained in the Statement of Costs attached to the Hearing Report. The IME expense claimed for Dr. Phillips is $2,172.00. Claimant's evaluation with Dr. Phillips occurred on November 29, 2017. (Ex. 1-1) Prior to the IME, on August 28, 2015,

Dr. Yen opined that claimant had no permanent impairment. I find that the amount of $2,172.00 is reasonable.

I find that the parties have stipulated that any permanent partial disability that may be awarded should commence on September 22, 2015. (Hearing Report)

I find that the parties have stipulated that the applicable workers' compensation weekly rate in this matter is $638.22. (Hearing Report)

CONCLUSIONS OF LAW

1) Whether claimant sustained an injury on or about March 21, 2015, that arose out of and in the course of his employment with the defendant employer.

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 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).

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).

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.

I have found above for the reasons there stated that claimant's cut to his right leg and the subsequent infection occurred and arose out of and in the course of his employment with the defendants on or about March 21, 2015.

2) Whether the alleged injury is the cause of temporary disability.

Claimant seeks temporary disability benefits for the periods of March 23, 2015 to June 14, 2015; August 7, 2015 to August 10, 2015 and August 28, 2015 to September 21, 2015.

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, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

Defendants agreed in the Hearing Report that if they are found liable for the alleged injury, claimant is entitled to temporary benefits for this period of time.

Having concluded above that claimant's injury arose out of and in the course of his employment with defendants, I now conclude that claimant is entitled to healing period benefits for the periods of March 23, 2015 to June 14, 2015; August 7, 2015 to August 10, 2015 and August 28, 2015 to September 21, 2015.

3) Whether the alleged injury is the cause of permanent disability and if so, does it involve a scheduled member or the body as a whole and the extent thereof.

An injury to a scheduled member may, because of after effects or compensatory change, result in permanent impairment of the body as a whole. Such impairment may in turn be the basis for a rating of industrial disability. It is the anatomical situs of the permanent injury or impairment which determines whether the schedules in section 85.34(2)(a) - (t) are applied. Lauhoff Grain v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943). Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

Claimant argues that the infection and "venous insufficiencies" place the injury in the category of the body as a whole, but does not cite to any authority for this argument. (Claimant's Post-Hearing Brief, p. 29)

Skin disorders may be treated as an industrial disability. However, the nature of scarring is specific in its location. It is not the sort of skin disorder that may be intermittent or spread around the body from one location to another such as dermatitis or psoriasis. A scar by its nature is permanently located in a particular area. In this case, neither the scar nor the donor site for the skin graft extend beyond the right lower extremity. Also, there was no evidence that the scarring limited function to any unscheduled part of claimant's body. Further claimant's symptoms were found above to be limited to the right lower extremity. Therefore, I conclude that the injury is to a scheduled member, the right leg, and not to the body as a whole.

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).

I have found above that claimant sustained a 13 percent permanent impairment to the right lower extremity as a result of the work injury based on the opinion of Dr. Phillips as described above.

4) Whether claimant is entitled to payment of medical expenses identified in Exhibits 6 and 7.

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).

Prudent persons customarily rely upon their physician's recommendation for medical care without expressly asking the physician if that care is reasonable. Proof of reasonableness and necessity of the treatment can be based on the injured person's testimony. Sister M. Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963).

It is said that "actions speak louder than words." When a licensed physician prescribes and actually provides a course of treatment, doing so manifests the physician's opinion that the treatment being provided is reasonable. A physician practices medicine under standards of professional competence and ethics. Knowingly providing unreasonable care would likely violate those standards. Actually providing care is a nonverbal manifestation that the physician considers the care actually provided to be reasonable. A verbal expression of that professional opinion is not legally mandated in a workers' compensation proceeding to support a finding that the care provided was reasonable. The success, or lack thereof, of the care provided is evidence that can be considered when deciding the issue of reasonableness of the care. A treating physician's conduct in actually providing care is a manifestation of the physician's opinion that the care provided is reasonable and creates an inference that can support a finding of reasonableness. Jones v. United Gypsum, File No. 1254118 (App. May 2002); Kleinman v. BMS Contract Services, Ltd., File No. 1019099 (App. September 1995); McClellon v. Iowa Southern Utilities, File No. 894090 (App. January 1992). This inference also applies to the reasonableness of the fees actually charged for that treatment.

Claimant is entitled to an order of reimbursement only if he has paid treatment costs; otherwise, to an order directing the responsible defendants to make payments directly to the provider. See, Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Defendants should also pay any lawful late payment fees imposed by providers. Laughlin v. IBP, Inc., File No. 1020226 (App., February 27, 1995).

The Court in Bell Bros. stated:

> We do not believe the statute can be narrowly construed to foreclose all claims by an employee for unauthorized alternative medical care solely because the care was unauthorized. Instead, the duty of the employer to furnish reasonable medical care supports all claims for care by an employee that are reasonable under the totality of the circumstances, even when the employee obtains unauthorized care, upon proof by a preponderance of the evidence that such care was reasonable and beneficial. In this context, unauthorized medical care is beneficial if it

> provides a more favorable medical outcome than would likely have been achieved by the care authorized by the employer.

Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010).

I have found above that defendants stipulated that claimant's medical expenses contained in Exhibits 6 and 7 are causally related to claimant's medical condition and that the same are reasonable and necessary and the amounts paid by insurance and the amounts involving out-of-pocket expenses for claimant are fair and reasonable. (Hearing Report) The dispute concerning medical expenses in this case is based on the question of liability for the work injury, which has been found in claimant's favor above.

Having found above that claimant sustained an injury arising out of and in the course of his employment and in view of the parties' stipulations, and applying Iowa Code section 85.27, I conclude that defendants are responsible for payment of the medical bills contained in Exhibit 6 and 7.

5) Whether claimant is entitled to reimbursement for the IME with Dr. Phillips pursuant to Iowa Code section 85.39, as contained in the Statement of Costs attached to the Hearing Report.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

I have found above that claimant's IME expense with Dr. Phillips is $2,172.00, which occurred on November 29, 2017. (Ex. 1-1) Prior to the IME, on August 28, 2015, Dr. Yen opined that claimant had no permanent impairment. Defendants make no argument in their post-hearing brief on this issue. I conclude that claimant is entitled to reimbursement for his IME with Dr. Phillips in the amount of $2,172.00.

6) Costs.

Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner

or workers' compensation commissioner hearing the case. 876 IAC 4.33. I conclude that claimant was generally successful in this claim and therefore exercise my discretion and assess costs against the defendants in this matter in the amount of $100.00 for the filing fee and $87.75 for the cost of the copy of the transcript from claimant's deposition. In addition, the parties stipulated at the time of the hearing to the post-hearing submission of the cost of the transcript for the deposition of Nate Cloe, which is $359.10, including a rush fee to obtain the transcript prior to hearing.

Defendant shall therefore pay costs in the total amount of $546.85.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant healing period benefits for the periods of: March 23, 2015 to June 14, 2015; August 7, 2015 to August 10, 2015; and August 28, 2015 to September 21, 2015.

Defendants shall pay claimant permanent partial disability benefits of twenty-eight point six (28.6) weeks, beginning on the stipulated commencement date of September 22, 2015 until all benefits are paid in full.

Defendants shall be entitled to credit for all weekly benefits paid to date, if any.

All weekly benefits shall be paid at the stipulated rate of six hundred thirty-eight and 22/100 dollars ($638.22) per week.

All accrued benefits shall be paid in a lump sum.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent, See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Defendants shall reimburse claimant for his out-of-pocket medical expenses set forth in Claimant's Exhibits 6 and 7 and shall pay, reimburse, and/or otherwise satisfy all remaining medical expenses contained therein.

Defendants shall reimburse claimant two thousand one hundred seventy-two and 00/100 dollars ($2,172.00) for the cost of claimant's IME with Dr. Phillips.

Defendant shall pay costs in the amount of five hundred forty-six and 85/100 dollars ($546.85).

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 29th day of April, 2019.

TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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TJG/srs

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.