BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RICHARD DE LORTO, Claimant, vs. CRST VAN EXPEDITED, INC., Employer, Self-Insured, Defendant.	: : : : : : : : : : : :	File No. 1662945.01 ARBITRATION DECISION Headnotes: 1100, 1402.30, 1402.40, 1802, 1803

STATEMENT OF THE CASE

Claimant Richard De Lorto filed a petition in arbitration seeking workers' compensation benefits from defendant CRST Van Expedited, Inc., self-insured employer. The hearing occurred before the undersigned on October 18, 2021, via CourtCall video conference.

The parties filed a hearing report at the commencement of the arbitration hearing. In 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.

The evidentiary record consists of: Joint Exhibits 1 through 13; Claimant's Exhibits 1 through 6; and Defendant's Exhibits A through U. Claimant testified on his own behalf. Charles Mooney, M.D., and Deb Mentzer also testified. The evidentiary record was closed on October 18, 2021, and the case was considered fully submitted upon receipt of the parties' briefs on December 17, 2021.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury that arose out of and in the course of his employment on April 10, 2019.

2. If claimant sustained a work-related injury, whether claimant is entitled to temporary and/or permanent disability benefits and the extent of any such entitlement.

3. The commencement date for any permanent partial disability (PPD) benefits.

4. Whether claimant is entitled to reimbursement for medical expenses.

5. Whether claimant is entitled to reimbursement for costs.

FINDINGS OF FACT

Claimant alleges he sustained an injury on April 10, 2019. Per claimant's hearing testimony, he was climbing up into the top sleeper bunk in a semi-truck when his foot "slipped and twisted" and he "popped" his right knee. (Hearing Transcript, p. 18) There are contradicting accounts as to whether claimant's co-driver, Mr. Buckley, saw the incident and called an ambulance on his own accord or whether claimant requested an ambulance. (See Tr., pp. 19-20, 78, 86-87) Regardless, claimant was taken by ambulance to the emergency room where the notes indicate claimant "heard pop in right knee while climbing into truck." (Joint Exhibit 1, p 4) Claimant was restricted from returning to work until he could be seen in orthopedics. (JE 1, p. 6)

That evaluation occurred in mid-May of 2019 when claimant was seen by Nikhil Verma, M.D. Per Dr. Verma's notes, claimant reported "he was getting up and out of a truck when he had a twist and pop" of his knee. (JE 2, p. 8) Dr. Verma attempted an injection to "quiet" the aggravation of claimant's preexisting arthritis, but when the injection provided no relief, Dr. Verma referred claimant to a joint specialist. (JE 2, pp. 11-13) Dr. Verma instructed claimant to remain off work until he established care with a specialist.

In the interim, claimant sought treatment at a different "immediate care" clinic for ongoing right knee pain after he "accidentally twisted" his knee as he was getting into the top bunk. (JE 5; see JE 5, p. 77) At claimant's appointment on August 1, 2019, claimant was referred to Theodore Suchy, D.O., due to his persistent pain. (JE 5, p. 84)

Before claimant's initial evaluation with Dr. Suchy, he fell at home and landed on his right shoulder. (Tr., p. 21; see JE 6, p. 86) Claimant testified he fell after his "knee went sideways." (Tr., p. 21) As a result, when he presented with Dr. Suchy, he complained of right knee pain after "going from the upper bunk to lower [and] dislocated his right knee" but also right shoulder pain after his "right knee gave out." (JE 7, p. 89) Dr. Suchy injected claimant's right knee and recommended physical therapy for his right shoulder "dislocation." (JE 7, pp. 90-91) Claimant was restricted from returning to work. (JE 7, p. 91)

When claimant continued to complain of right knee and shoulder pain at his next appointment at the end of August of 2019, Dr. Suchy injected claimant's right shoulder and recommended surgery for the right knee. (JE 7, pp. 98-99)

That surgery was performed by Dr. Suchy in October of 2019. (JE 2, p. 31) It revealed a degenerative medial meniscal tear, extensive synovitis, and grade 4 chondromalacia. (JE 3, p. 31)

When claimant returned to Dr. Suchy in February of 2020 with continued pain, he recommended a total knee arthroplasty. (JE 7, p. 124) Per claimant's hearing testimony, however, that surgery has not occurred due to his heart condition. (Tr., pp. 25-26)

Claimant was last seen by Dr. Suchy in April of 2020 for ongoing shoulder complaints. Dr. Suchy recommended another course of physical therapy. (JE 7, p. 132)

Claimant began working for Western Express shortly after his last appointment with Dr. Suchy. (See Tr., pp. 22-23; Defendant's Ex. P) In July of 2020, claimant reported a back contusion to Western Express after he "skipped the ladder as he was getting something out of his bunk in the cab of the truck." (Def. Ex. P, p. 139) A month later, claimant reported a right shoulder fracture after he "fell out of the bottom bunk." (Def. Ex. P, p. 140)

As a result, claimant reported to the emergency room with concerns that his shoulder was dislocated. (JE 10, p. 146) An x-ray revealed moderate right rotator cuff arthropathy and mild acromioclavicular arthritis but no fracture or dislocation. (JE 10, p. 150) Claimant was given pain medication and advised to follow-up with orthopedics with any worsening symptoms. (JE 10, p. 150)

Claimant subsequently reported to the emergency room in December of 2020 with chronic low back pain that had "increased since August of this year when he fell approximately 4 feet from a ladder climbing to the top bunk." (JE 4, p. 64)

Notably, claimant complained of low back pain at various points between the alleged April 10, 2019 injury and his falls while working for Western Express. In May of 2019, for example, claimant reported to the emergency room with "chronic back pain that is constant," right knee pain, right shoulder pain, and neck pain. (JE 3, p. 16) The notes indicate there was "no triggering event" for the increase in claimant's reported pain. (JE 3, p. 17) Claimant also appeared in the emergency room in January of 2020 with "chronic back pain" after "surgery done in 2015 on low back." (JE 4, p. 59)

Claimant also sought treatment in the emergency room for right hip complaints in June of 2020 after he was struck by a car. (JE 3, p. 38; JE 9)

At hearing, claimant asserted he sustained work-related aggravations of his underlying right knee, right shoulder, low back and hip conditions as a result of the incident on April 10, 2019.

I turn first to claimant's right knee. Defendant asserts, among other arguments, that there are several versions of claimant's alleged injury in the records. Defendant is correct that the description of the incident does vary from medical record to medical record. It should be noted, however, that claimant suffered memory loss after a low

back surgery in 2015 went awry and he experienced substantial blood loss. (Tr., pp. 15-17) Thus, I afford some leeway with respect to the specifics of the mechanism of claimant's alleged injury.

In the medical records most contemporaneous with the alleged injury, claimant reported a "twist" with a resulting "pop" as he was climbing into the bunk; this was consistent with claimant's hearing testimony. Throughout his treatment, claimant continued reporting a "pop" or a "dislocation" due to twisting his knee.

Claimant's co-driver, Mr. Buckley, indicated he noticed claimant limping before he claimed he injured his knee. Mr. Buckley also stated he did not witness claimant sustain an injury while climbing in or out of the bunk. (Def. Ex. B) I believe Mr. Buckley, but both of his statements can be true without negating the possibility that claimant felt his knee pop while getting into the bunk. In other words, just because Mr. Buckley did not witness the injury does not mean it did not happen. Mr. Buckley witnessing claimant limping earlier similarly does not mean the incident did not happen.

Given the consistent accounts in claimant's medical records and testimony, I find claimant sustained an injury when he was climbing into his bunk and his right knee twisted, resulting in a pop.

Claimant was evaluated by David Segal, M.D., for purposes of an independent medical examination (IME) prior to hearing. As Dr. Segal understood it, claimant "was trying to get up into the bunk" when he "slipped and fell backwards" and as he fell "his right foot stayed stuck in the opening for a short time, twisting his right knee." (Claimant's Ex. 1, p. 1) It was Dr. Segal's understanding that claimant "landed on his right shoulder and right knee." (Cl. Ex. 1, p. 1) More specifically, Dr. Segal believed claimant "hit the ground with his right shoulder and knee. The impact was transferred to his entire shoulder girdle and low back as well. When [claimant] fell, he was about 7-8 feet high . . . . This was a major injury to [claimant's] body." (Cl. Ex. 1, p. 14)

As it pertains to claimant's right knee, Dr. Segal stated, "The mechanism of injury of the April 10, 2019, work incident is that [claimant] twisted on his right leg with the knee as a pivot, and then landed on his right knee." (Cl. Ex. 1, p. 15) Dr. Segal then opined as follows:

> This injury caused a simultaneous substantial load compression impact following flexion and rotation of the knee, with the knee acting as pivot focus and then a direct impact, this combination caused meniscus injury. A lateral impact such as [claimant] experienced with his right knee is associated with considerable cartilage damage. This is relevant for [claimant] because this injury has caused increased risk of cartilaginous breakdown, acceleration of the arthritic process, and need for treatment compared to his risks if he did not have these injuries.

(Cl. Ex. 1, p. 15) Dr. Segal went on to provide permanent impairment ratings for claimant's right knee range of motion deficits, arthritis and limb length discrepancy. (Cl. Ex. 1, pp. 40-42)

The issue is that Dr. Segal's causation opinion is based, at least in part, on the premise that claimant landed on his right knee from seven to eight feet in the air. Claimant specifically denied a fall in his initial hospital treatment on April 10, 2019, and the treatment records are devoid of mentions of claimant landing on his right side. (See JE 1, p. 2) Further, though claimant stated he "slipped and fell" in his answers to interrogatories, he never mentioned landing on his right side, nor did he mention falling backwards in his deposition. (Cl. Ex. 3, p. 88) Had claimant sustained a "major injury" as a result of the impact of a fall, as Dr. Segal described it, it would presumably be mentioned in claimant's medical records, his discovery responses or his testimony. But given its absence, I simply do not find Dr. Segal's description of the mechanism of claimant's right knee injury or his resulting causation opinion to be credible. Because Dr. Segal did not address the twisting mechanism by itself, I am unable to adopt the impairment ratings assigned by Dr. Segal for claimant's right knee.

Because there is no other expert opinion in the record addressing the twisting mechanism by itself, there is insufficient evidence to determine which of claimant's pre-existing conditions, if any, were aggravated by the April 10, 2019 incident in which claimant twisted his knee.

Dr. Segal's opinions regarding claimant's right shoulder, low back and hips suffer from the same shortcomings. Notably, claimant is not alleging his right shoulder injury resulted from landing on his right side on April 10, 2019. Instead, claimant asserts his right shoulder injury is the result of a fall at home, months later, when his knee gave out. (See Tr. p. 21; Cl. Ex. 3, p. 89) Again, I believe claimant's account of this incident at home in August of 2019.

However, Dr. Segal's report does not reference this fall at claimant's home in explaining his understanding of the mechanism of claimant's injury or when offering his causation opinions. (See Cl. Ex. 1, pp. 5-6, 14) Dr. Segal likewise failed to mention the fall claimant subsequently sustained while working for Western Express. (See Cl. Ex. 1, pp. 5-6, 14) Without consideration of these subsequent incidents, including the incident that claimant himself alleges caused his right shoulder injury, I do not find Dr. Segal's opinions regarding claimant's right shoulder to be persuasive.

With respect to claimant's low back and hips, Dr. Segal's report again erroneously assumes claimant fell "onto his right side with substantial impact" on April 10, 2019. (Cl. Ex. 1, p. 14) He opined that "[o]n impact, there was sufficient force to cause the spondylolisthesis to become symptomatic and possibly to become unstable." (Cl. Ex. 1, p. 27) He also opined that the combination of "flexion, rotation, as well as lateral impact causing compression of the spine" caused claimant's annular tear and disc herniation. (Cl. Ex. 1, p. 29) Because I do not find Dr. Segal's history of claimant falling and landing on his right side to be accurate, I likewise do not find his opinions regarding claimant's low back to be persuasive.

For claimant's hip, Dr. Segal indicates claimant developed a compensatory gait from the incident on April 10, 2019, which in turn caused aggravation of claimant's degenerative disease. (Cl. Ex. 1, p. 26) Dr. Segal fails to explain how the April 10, 2019 incident caused the abnormal gait, however. Dr. Segal also neglected to address how claimant's significant pre-existing low back condition could have been contributing to claimant's gait or how claimant getting hit by a car in June of 2020 could have impacted his degenerative disease or bursitis. Given Dr. Segal's reliance on an inaccurate, or at the very least, incomplete history, I do not find his opinions regarding claimant's right hip to be convincing.

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" refer 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.

In this case, I found claimant sustained an injury on April 10, 2019, when his right knee twisted as he was climbing into the sleeper bunk of his semi. Although there are some variations of this account in the records, claimant's description of his knee twisting and popping was consistent throughout. As a result, I find claimant sustained an injury that arose out of and in the course of his employment with defendant.

The bigger issue is the extent of claimant's injury and any resulting temporary or permanent disability. 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).

Based on claimant's complaints in the medical records on and after April 10, 2019, it is apparent claimant's right knee was affected by the twisting incident. However, the extent to which his right knee was affected cannot be discerned because Dr. Segal's opinions were based on an inaccurate understanding of the mechanism of claimant's injury. The well-established law is clear that an expert's opinion is not necessarily binding when it is based on an incomplete or inaccurate history. Dunlavey v. Economy Fire & Cas. Co., 526 N.W.2d 845, 853 (Iowa 1995) (citing Bodish v. Fischer, Inc., 133 N.W.2d 867, 870 (1965)).

All of Dr. Segal's opinions are reliant on a premise that claimant fell several feet and landed on his right side, including his right knee. I found insufficient evidence that any such fall or impact occurred. Because Dr. Segal opined that claimant's right knee conditions were caused, at least in part, by a fall that did not occur, I found his opinions unpersuasive and unreliable.

There are no other expert opinions in the record that causally relate claimant's right knee conditions to the twisting incident on April 10, 2019. As a result, I conclude claimant failed to prove which of his right knee conditions, if any, are causally related to the April 10, 2019 incident or that he sustained any temporary or permanent disability therefrom.

I understand this is a frustrating outcome for claimant. Given claimant's medical treatment after April 10, 2019, I presume some of his underlying right knee conditions were at least temporarily aggravated by the twisting incident. However, without an expert opinion considering the proper mechanism of injury, I am unable to make that determination.

As discussed above, Dr. Segal's opinions regarding claimant's right shoulder, low back, and right hip conditions suffer from the same deficiencies. Dr. Segal also failed to consider subsequent events, including the actual incident that claimant alleges caused his right shoulder injury, that may have had an impact on causation and/or impairment. As a result, I conclude claimant failed to carry his burden to prove that his right shoulder, low back, and right hip conditions are causally related to the April 10, 2019 incident.

Claimant, therefore, failed to prove his entitlement to any temporary or permanent disability benefits.

Because claimant failed to prove a causal relationship between his alleged conditions and the April 10, 2019 incident, I also conclude claimant failed to prove his entitlement to reimbursement for medical expenses relating to these conditions.

With respect to costs, claimant seeks reimbursement for his IME with Dr. Segal and deposition transcript costs. (Cl. Ex. 6, p. 103) For claimant to be entitled to reimbursement for the entirety of Dr. Segal's IME, the reimbursement provisions of Iowa Code section 85.39 must be triggered. More specifically, there must be "an evaluation of permanent disability . . . made by a physician retained by the employer." Iowa Code § 85.39(2).

In this case, Dr. Segal's evaluation was performed on June 24, 2021 and his report was issued on July 22, 2021. Defendant had not retained a physician to evaluate claimant's permanent disability by this point, nor had any employer-retained physician offered any opinions on causation. Neither occurred until defendant obtained their own IME with Charles Mooney, M.D., on July 26, 2021. (See Def. Ex. C) As a result, I conclude claimant is not entitled to reimbursement for Dr. Segal's IME under Iowa Code section 85.39.

However, the Iowa Supreme Court has held that the costs associated with preparation of a written IME report can be reimbursed under rule 876-4.33. DART v. Young, 867 N.W.2d 839, 846-47 (Iowa 2015).

Assessment of costs is a discretionary function of this agency. Iowa Code § 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. In this case, I did not find Dr. Segal's report to be credible or persuasive. As a result, I decline to tax the defendant with the cost of his report. Defendant, however, is taxed with the cost of the deposition transcript costs in the amount of $169.61. 876 IAC 4.33(2).

ORDER

THEREFORE, IT IS ORDERED:

Claimant shall take nothing further with respect to permanent disability, temporary disability, or medical benefits.

Pursuant to rule 876 IAC 4.33, defendant shall reimburse claimant's costs in the amount of one hundred sixty-nine and 61/100 dollars ($169.61).

Defendant 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 __7th___ day of January, 2022.

STEPHANIE J. COPLEY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Jason Neifert (via WCES)

Chris Scheldrup (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.