BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
MAR 10 2015
WORKERS' COMPENSATION

DOUGLAS COLLINS, Claimant, vs. INTERSTATE BRANDS, Employer, and ACE AMERICAN INSURANCE CO., Insurance Carrier, Defendants.	File No. 5038550 ARBITRATION DECISION Head Note Nos.: 1402.30, 1802, 1803 2501, 2502, 2907, 3001

STATEMENT OF THE CASE

Claimant, Douglas Collins, filed a petition in arbitration seeking workers' compensation benefits from Interstate Brands (Interstate), employer, and Ace American Insurance Company, insurer, both as defendants. This case was heard in Des Moines, Iowa on December 2, 2014 with a final submission date of January 14, 2015.

The record in this case consists of joint exhibits 1-25 and the testimony of claimant.

ISSUES

1. Whether claimant sustained an injury on November 3, 2009 that arose out of and in the course of employment.
2. Whether the injury is a cause of temporary disability.
3. Whether the injury is a cause of permanent disability; and if so
4. The extent of claimant's entitlement to permanent partial disability benefits.
5. Rate.

6. Whether there is a causal connection between the injury and the claimed medical expenses.

7. Whether claimant is entitled to reimbursement for an independent medical evaluation (IME) under Iowa Code section 85.39.

FINDINGS OF FACT

Claimant was 49 years old at the time of hearing. Claimant graduated from high school. He has attended several bible colleges. Claimant graduated from Western Iowa Technical Community College in Sioux City. At the time of hearing claimant was attending Morningside College in Sioux City studying religion and psychology.

Claimant has worked as a cook, done bookkeeping and performed landscaping. Claimant also worked in various manager positions with a data service company and a computer company. Claimant has also done administrative duties for a small business. (Exhibit 1, pages 2-4) For the past eight years claimant has worked part time as a pastor. At the time of hearing claimant was also teaching college classes in pastoral studies. (Ex. 18, p. 14)

Claimant's prior medical history is relevant. In 1979 claimant had a knee injury from a bike accident. This caused a tear in the medial collateral ligament and a tear of the medial meniscus. Claimant had arthroscopic surgery in 1979, 1980, and 1982. Scott Neff, D.O., performed surgery in 1979 and 1982. (Ex. 16, p. 9; Ex. 17, pp. 1, 7) Claimant testified, at hearing, that even after the surgeries, his knee would swell and grind and click. Claimant testified he had not seen a doctor for his knee problems from approximately 1984 through 2008.

Claimant began with Interstate in April of 2001. At Interstate claimant worked full time as a loader. Claimant's job duties as a loader included, but were not limited to, receiving racks of bread and cake items from semi trucks. Claimant testified he would help unload the racks from the semis. He said he had to push the racks approximately 30 feet, to staging areas behind route trucks. Once racks were staged in the area behind the route trucks, claimant would take trays off the racks and load trays of products onto the route trucks. This was done by taking a tray of product off a rack and sliding or pushing it into the route trucks' tray racks.

The racks from the semis weighed between 300 to 500 pounds. (Ex. 3, p. 1) There are wheels on the bottom of the racks. Claimant said sometimes the wheels on the racks were broken. Claimant said that when staging the racks, he pushed the racks approximately 30 feet. Each rack held 28 trays of product. (Ex. 3, p. 1) Each tray weighed between 10-15 pounds. Claimant said he believed he would lift and slide between 600 to 800 trays of product per night. (Ex. 3, p. 1)

Claimant said that when unloading the trays on the route trucks, he would have to step on the rear bumpers of the trucks to load the upper levels of the trucks.

Claimant said he spent about two hours every night in preparation and cleanup. A drawing of the product racks and the work area, drawn by claimant, are shown in Exhibits 5 and 6.

Claimant was responsible for loading four bread trucks. In 2007 he had to load six bread trucks. Claimant testified that during most of his employment he also helped unload two semi trucks of product. Claimant described his job as similar to playing basketball for four hours. He said the job involved a lot of lifting, twisting, running and walking.

Claimant testified that in approximately 2008 only one semi truck brought product, and it began arriving later in the shift. This required claimant to load the same amount of route trucks during a shorter period of time. Claimant said it was during this time in 2008 he began to notice symptoms in his left knee. He testified he reported his problems to his supervisor. He said his supervisor told him Interstate could not accept a report of a work injury unless there was a specific injury.

In July of 2008 claimant was evaluated by Thomas Schryver, M.D. for left knee pain. Dr. Schryver was claimant's family doctor. Claimant had left knee pain that had been intermittent for years, but had been bad for six to seven months. (Ex. 11, p. 2) Claimant testified at hearing he believed, at this time, his pain was work-related.

Claimant was referred by Dr. Schryver to Kevin Liudahl, M.D., an orthopedic surgeon. Claimant was evaluated by Dr. Liudahl on July 9, 2008. Claimant indicated in an intake form that his injury was not work-related. (Ex. 12, p. 2) Claimant indicated an onset date of July 2007. (Ex. 12, p. 2) Dr. Liudahl's notes indicate claimant had problems with his knee for the last 20-25 years. Claimant was assessed as having left knee arthritis. Claimant was given an injection and a heel wedge. (Ex. 12, p. 4)

Claimant indicated he told Dr. Liudahl's office the injury was not work-related, as he did not think health providers would treat him if he indicated his injury was work-related.

Claimant returned in followup with Dr. Liudahl on July 30, 2008. Claimant indicated the injection helped with his symptoms. Claimant was given an unloader brace. (Ex. 12, p. 5) Claimant testified he wore this brace at work.

In August of 2008 claimant returned to Dr. Schryver with ongoing complaints of left knee pain. Notes indicate pain had been chronic for 30 years. (Ex. 11, p. 5)

On November 3, 2009 claimant reported his knee pain to his supervisor, Bob Ruddick, and filled out an accident report. (Ex. 8; Ex. 9)

On November 12, 2009 claimant was evaluated by Dr. Schryver for knee pain. Notes indicate claimant had persistent pain for years. Claimant's pain was aggravated by work duties. Claimant was returned to Dr. Liudahl. (Ex. 11, pp. 5-6)

Claimant was seen by Dr. Liudahl on November 16, 2009. Claimant had left knee arthritis. He had increased difficulty with his knee after an increase in the velocity of his work. Synvisc treatments were recommended. (Ex. 12, p. 8)

In a January 27, 2010 report Raymond Emerson, M.D. gave his opinions of claimant's condition following an independent medical evaluation (IME). Claimant indicated his knee felt better on days off work. He noted his knee pain increased with the increased amount of work on his job. Dr. Emerson opined claimant's symptoms were not related to a specific event on November 3, 2009. He believed claimant's present symptoms were the result of a preexisting osteoarthritis in the knee. He opined claimant had preexisting osteoarthritis in the left knee aggravated by work activities. He recommended claimant decrease his weightbearing activities to those that did not cause knee pain. (Ex. 14, pp. 7-11)

In a followup letter, dated March 25, 2010, Dr. Emerson indicated claimant's osteoarthritis was not caused by claimant's work activities, but that work activities aggravated claimant's condition. (Ex. 14, p. 12)

In an August 4, 2010 letter Lonnie Mercier, M.D. gave his opinions of claimant's condition following a second IME. He found claimant had right knee patella tendonitis and secondary osteoarthritis in the left knee. He found claimant had a preexisting osteoarthritis in the left knee and that claimant's work activities did not play any role in his need for medical treatment for the left knee. He found claimant could work with no restrictions. (Ex. 15, pp. 1-3)

In a January 19, 2011 report, Michael O'Neil, M.D. gave his opinions of claimant's condition following a third IME. He opined claimant's left knee problems had been aggravated and accelerated as a result of the increased demands put on him loading and unloading bakery products. He opined claimant's work required additional medical treatment to claimant's left knee. He recommended claimant continue use of the brace and over-the-counter anti-inflammatory medications. (Ex. 16, pp. 9-16)

In a February 28, 2011 note Dr. Mercier indicated he reviewed Dr. O'Neil's report. He opined he did not believe claimant's job activities contributed in aggravating claimant's left knee. (Ex. 15, p. 5)

In an April 26, 2011 letter, Scott Neff, D.O., indicated he evaluated claimant in 2011. He opined that work activity would not be the cause of the true worsening of claimant's condition. He opined claimant's work activities would cause claimant to have symptoms. He indicated claimant's symptoms occur with activity. He opined claimant had degenerative arthritis, which progresses as claimant ages. He indicated the arthritis was not substantially aggravated by claimant's work activities. (Ex. 17, pp. 1-2)

Claimant testified Dr. Neff did not examine him in 2011. He said Dr. Neff did perform a knee procedure on him in the early 1980's, but that he had not seen Dr. Neff for approximately 30 years.

On November 20, 2012 Dr. O'Neil evaluated claimant for left knee problems. He again opined claimant's work resulted in the acceleration or permanent worsening of a preexisting condition. He found claimant had permanent impairment to the left knee, one-half of which was due to claimant's preexisting osteoarthritis condition. Based on this he found claimant had an 18 percent permanent impairment to the left knee. (Ex. 16, pp. 18-20)

Claimant testified that in May of 2011 he left Interstate to have medical treatment for a work-related neck and shoulder injury. Those injuries are not at issue in this case. Claimant testified he did not return to work on the docks at Interstate after May of 2011.

In December of 2012 Interstate closed its business.

In a January 3, 2013 note, written by defendants' counsel (and mistakenly dated as January 3, 2012) Dr. Neff indicated claimant's condition was not materially aggravated by his work. (Ex. 17, pp. 3-4)

On January 7, 2013 claimant returned in followup with Dr. Schryver with complaints of continued left knee pain. Claimant was counseled in weight reduction and referred to an orthopedic specialist. (Ex. 11, p. 8)

In a January 15, 2013 letter Dr. Neff indicated he reviewed claimant's deposition. In that deposition, Dr. Neff said, claimant indicated increased knee pain, even though he stopped working for Interstate in May of 2011. Based on this, Dr. Neff opined claimant's progression of his left knee symptoms was not due to work activity. (Ex. 17, p. 4)

On March 11, 2013 claimant was evaluated by James Froggatt, M.D. Claimant was assessed as having osteoarthritis in the left knee. He found claimant's ongoing symptoms of left knee pain related to trauma claimant had as a teenager. (Ex. 18, p. 3)

Claimant returned to Dr. Froggatt on March 25, 2013. Claimant indicated increased problems with his right knee. He was assessed as having end-stage osteoarthritis in the left knee and ongoing chondromalacia of the right knee. An MRI of the right knee was recommended. (Ex. 18, p. 4)

Claimant returned to Dr. Froggatt on April 3, 2013. An MRI showed degeneration of the medial meniscus. Claimant was assessed as having mild degenerative changes in the right knee and advanced posttraumatic osteoarthritis in the left knee. Claimant was recommended to have a unicompartmental left knee replacement. (Ex. 18, p. 6)

Claimant was evaluated by Duane Nelson, M.D. on April 17, 2013. A knee replacement was discussed and chosen as a treatment option. (Ex. 18, p. 7)

On June 4, 2013 claimant underwent a left knee unicompartmental arthroplasty. Surgery was performed by Dr. Nelson. (Ex. 18, pp. 9-12)

Claimant followed up with Dr. Nelson on September 25, 2013. Claimant had some intermittent discomfort but was doing well overall. (Ex. 18, p. 4)

In a February 6, 2014 report Sunil Bansal, M.D., gave his opinions of claimant's condition following an IME. Claimant was glad he had the partial knee replacement. Claimant still had a little pain and decreased range of motion. Claimant had difficulty with stairs. He could walk from a half to three-quarters of a mile. Dr. Bansal found claimant was at maximum medical improvement (MMI) as of September 25, 2013. He found claimant had a 37 percent permanent impairment to the left lower extremity. He opined claimant's work activities at Interstate permanently aggravated his preexisting condition. (Ex. 19, pp. 6-19)

In a February 19, 2014 letter, written by claimant's counsel, Dr. Nelson opined it is more likely than not that claimant's work at Interstate aggravated and accelerated the need for surgery on claimant's left knee. (Ex. 18, pp. 15-20)

In a September 2, 2014 report Dr. Neff again opined claimant's need for surgery was caused by the natural degenerative changes associated with his knee injury. Dr. Neff indicated that intense activity could make symptoms worse. However, he noted claimant stopped working for Interstate a year and a half prior to his knee symptoms progressing. This led Dr. Neff to believe the need for the partial knee replacement was not caused or materially aggravated by claimant's work activity. (Ex. 17, pp. 6-14)

Claimant testified he believed most of his medical bills had been covered by his health insurance plan. He said he believed he paid approximately $3,000.00 out of pocket.

For the 13 weeks before the date of injury claimant earned the following amounts:

Week #	Week Ending Date	Hourly Pay Rate	Total Hours Worked	Shift Differential	Gross Wage
1	10/31/2009	$14.22	45.5		$647.01
2	10/24/2009	$14.22	43.5		$618.57
3	10/17/2009	$14.22	43.5		$618.57
4	10/10/2009	$14.22	41.5		$590.13
5	10/3/2009	$14.22	47.25		$671.90
6	9/26/2009	$14.22	50		$711.00

7	9/19/2009	$14.22	48.25		$686.12
8	9/12/2009	$14.22	50.50		$718.11
9	9/5/2009	$14.22	48.5		$689.67
10	8/29/2009	$14.22	49		$696.78
11	8/22/2009	$14.22	50		$711.00
12	8/15/2009	$14.22	46.25		$657.68
13	8/8/2009	$14.22	49.75		$707.45

TOTAL $8,723.99

(Ex. 10; Ex. 23)

CONCLUSIONS OF LAW

The first issue to be determined is if claimant's injury to his left knee arose out of and in the course of employment.

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

The 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.

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).

Claimant had a preexisting condition in his left knee. He testified that from approximately 1983 until 2007 he had not seen a doctor for knee problems. He testified his job as a loader with Interstate required a lot of pushing, climbing, and twisting. He testified his work load was made more strenuous when he was required, in approximately 2008, to perform the same job in a more compressed period of time.

Claimant said it was during this period of time he began to experience left knee symptoms due to the accelerated pace of work. Claimant's testimony regarding his work as a loader and his accelerated level of duties in 2008 is not contested by defendants.

Medical records from the summer of 2008 suggest claimant's injury was not work-related. (Exs. 11 and 12) Claimant testified at hearing he initially told physicians his injury was not work-related because his supervisor told him Interstate would not accept a work injury without a specific date. Claimant also testified he did not think he would get treatment, given what he was told by his supervisors, if he told physicians he had a work-related injury. I found claimant's testimony credible regarding this issue.

A number of experts have opined regarding claimant's left knee injury. Claimant was first sent by defendants, for a causation opinion, to Dr. Emerson. Dr. Emerson opined claimant's job activities worsened and aggravated his knee condition. (Ex. 14, pp. 10-12)

Defendants then sent claimant to Dr. Mercier. Dr. Mercier opined claimant's knee problems were caused by his prior knee injuries. There is little detail in Dr. Mercier's report regarding claimant's job activities, and it is unclear if Dr. Mercier knew much, if any, of claimant's specific job requirements. (Ex. 15, pp. 1-2)

Claimant was then sent, by his attorney, to Dr. O'Neil. Dr. O'Neil opined claimant's preexisting knee problems were aggravated and accelerated by his job at Interstate. (Ex. 16, p. 15)

Dr. Neff indicated he evaluated claimant in 2011. He opined that while claimant's work activities would cause his knee to have symptoms, his work would not be a cause for the worsening of claimant's arthritis. (Ex. 17, p. 2) Dr. Neff also opined that based on his review of claimant's deposition, claimant indicated a worsening of his condition over a year and a half after working for Interstate. Dr. Neff believed this was further evidence that claimant's need for knee replacement was not work related. (Ex. 17, pp. 3-4)

Claimant testified he was not evaluated by Dr. Neff in 2011 and had not seen Dr. Neff for approximately 30 years. The portion of claimant's deposition, cited by Dr. Neff as evidence that claimant's knee condition was not work related, actually indicates claimant's symptoms had improved since leaving work in May of 2011. (Ex. 17, pp. 3-4; Ex. 21, pp. 42-44)

Claimant also saw Dr. Bansal for an IME. Dr. Bansal opined claimant's work at Interstate materially aggravated claimant's preexisting arthritis in his left knee. (Ex. 19, p. 19)

Dr. Nelson, who performed claimant's knee surgery, also opined claimant's work aggravated and accelerated his need for surgery. (Ex. 18, p. 20)

Two experts opined claimant's knee condition was not materially aggravated by his work activities with Interstate. As noted, it is unclear from Dr. Mercier's report if he was aware of claimant's job activities. Dr. Neff's opinions indicated he evaluated claimant in 2011, when all other evidence indicates Dr. Neff did not actually see claimant. Based on this, and for the other reasons detailed above, it is found that opinions of Dr. Mercier and Dr. Neff regarding causation are not convincing.

Claimant's unrebutted testimony is that his knee condition worsened as his work load accelerated. Four experts opine claimant's work aggravated or accelerated his degenerative knee condition. The opinions of Dr. Mercier and Dr. Neff regarding causation are found not convincing. Given this record, claimant has carried his burden of proof that his injury of November 3, 2009 arose out of and in the course of employment.

The next issue to be determined is whether claimant's injury resulted in a temporary disability. Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

Defendants indicate in their post-hearing brief they agree if claimant's injury is found to have risen out of and in the course of employment, claimant is due healing period benefits from June 4, 2013 through September 25, 2013. (Defendants' post-hearing brief, p. 16) Based on this, claimant is due healing period benefits from June 4, 2013 through September 25, 2013.

The next issue to be determined is if claimant's injury resulted in a permanent disability. Claimant's knee injury resulted in a partial knee replacement. Two experts, Dr. Bansal and Dr. O'Neil, both opined claimant's injury resulted in a permanent disability. There is no evidence contradicting those opinions. Claimant has carried his burden of proof his injury resulted in a permanent disability.

The next issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

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).

Dr. Bansal found claimant had a 37 percent permanent impairment to the left lower extremity. (Ex. 19, p. 17) Dr. O'Neil also gave opinions regarding claimant's permanent impairment prior to claimant's surgery. As Dr. Bansal's opinions reflect claimant's impairment after his knee surgery, it is found his opinion is more convincing. Claimant is due 81.4 weeks of permanent partial disability benefits (220 weeks times 37 percent).

The next issue to be determined is rate. Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Section 85.36(6).

The parties essentially agree in using most of the 13 weeks before claimant's date of injury, except for the week ending on September 12, 2009. Defendants contend this week should be excluded, as it does not reflect claimant's customary earnings. (Defendants' post-hearing brief, pp. 16-18) In the week in question, claimant worked 28 hours and received 8 hours holiday pay. This resulted in a work week of 36 hours. Claimant also worked 14-1/2 hours of overtime. It is true that this is the most overtime claimant worked in the 13 weeks prior to the date of injury to determine an average weekly wage (AWW). It is also true that during the same period of time claimant worked 10 hours of overtime twice. Because claimant was paid a total of 36 straight hours, for the week ending September 12, 2009, and also worked 10 hours overtime twice during the 13 weeks before the injury, I find the week ending on September 12, 2009 should be included in the calculation of claimant's AWW.

Defendants also indicate claimant, in his calculation, failed to calculate overtime hours at a straight time rate. A review of claimant's calculations of his AWW indicates this is correct. Overtime hours are used to determine gross weekly earnings but only at the straight time rate. Rule 876 IAC 8.2.

Based on this, claimant's AWW is $671.08 per week. Claimant was married with four exemptions. Claimant's rate is $467.13 per week.

The next issue to be determined is if claimant's injury is causally related to the claimed medical expenses. 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).

Claimant received treatment for his left knee injury. Records indicate costs detailed in the medical bills are related to the care and treatment claimant received for his left knee injury. There is no evidence that the bills detailed in the records are not causally connected to claimant's left knee injury. There is no evidence that the costs related to this treatment are not fair and reasonable. Based on this, defendants are liable for the claimed medical expenses.

The final issue to be determined is if claimant is due reimbursement for IME expenses associated with Dr. Bansal's 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).

Iowa Code section 85.39 limits the injured worker to one IME, regardless if the examination is paid by the employer or its insurance carrier. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842 (Iowa 2009). Reimbursement of an IME is not a recoverable cost under rule 876 IAC 4.33. Des Moines Area Regional Transit Authority v. Young, No. 14-0231, filed October 1, 2014 (Iowa Court of Appeals), unpublished 856 N.W.2d 383 (Table).

Claimant incurred costs for IMEs with Dr. O'Neil, after the reports of Drs. Emerson and Mercier. Given this, Dr. O'Neil's IME and followup report are reimbursable under Iowa Code section 85.39. The fee for Dr. Nelson's report is also

reimbursable under 876 IAC 4.33. Dr. Bansal's IME is not reimbursable under rule 876 IAC 4.33 or under Iowa Code section 85.39.

ORDER

THEREFORE IT IS ORDERED:

That defendants shall pay claimant healing period benefits from June 4, 2013 through September 25, 2013 at the rate of four-hundred sixty-seven and 13/100 dollars ($467.13) per week.

That defendants shall pay claimant eighty-one point four (81.4) weeks of permanent partial disability benefits at the rate of four-hundred sixty-seven and 13/100 dollars ($467.13) per week commencing on September 26, 2013.

That defendants shall pay accrued benefits in a lump sum.

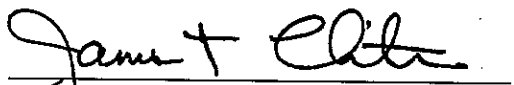
That defendants shall pay interest on unpaid weekly benefits as awarded above and as set forth in Iowa Code section 85.30.

That defendants shall pay medical bills as detailed above.

That defendants shall pay the costs of this matter as detailed above, but shall not be liable for the expenses associated with Dr. Bansal's IME.

That defendants shall file subsequent reports of injury as required under rule 876 IAC 3.1(2).

Signed and filed this 10th day of March, 2015.



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