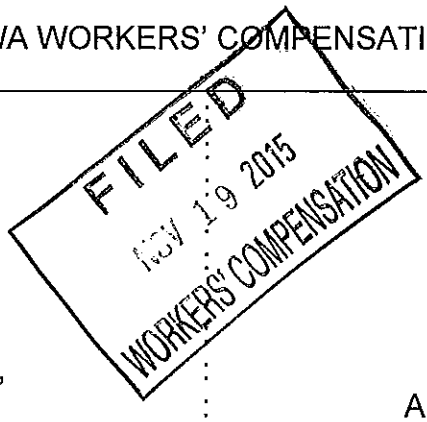
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



RANDAL CRABB,

Claimant,

vs.

STEW HANSEN HYUNDAI,

Employer,

and

SENTINEL INS. CO.,

Insurance Carrier,
Defendants.

File No. 5045983

ARBITRATION

DECISION

Head Note No.: 1100

STATEMENT OF THE CASE

Claimant, Randal Crabb, filed a petition in arbitration seeking workers' compensation benefits from Stew Hansen Hyundai, employer, and Sentinel Insurance Company, insurance carrier, both as defendants, as a result of an alleged injury sustained on May 1, 2013. This matter came on for hearing before Deputy Workers' Compensation Commissioner, Erica J. Fitch, on January 14, 2015, in Des Moines, Iowa. The record in this case consists of claimant's exhibits 1 through 9 and 11, defendants' exhibits A through H, and the testimony of the claimant and Daniel Boettcher. The parties submitted post-hearing briefs, the matter being fully submitted on February 6, 2015.

ISSUES

The parties submitted the following issues for determination:

1. Whether claimant sustained an injury on May 1, 2013 which arose out of and in the course of his employment;

2. Whether the injury is a cause of temporary disability;

3. Whether claimant is entitled to temporary disability benefits from May 1, 2013 through July 24, 2013;

4. Whether the injury is a cause of permanent disability;

5. The extent of permanent disability to claimant's right lower extremity;

6. Whether claimant is entitled to payment of various medical expenses;

7. Whether claimant is entitled to reimbursement for an independent medical examination pursuant to Iowa Code section 85.39; and

8. Specific taxation of costs.

The stipulations of the parties in the hearing report are incorporated by reference in this decision.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Claimant's testimony was clear and consistent as compared to the evidentiary record. He displayed excellent demeanor at the time of evidentiary hearing which gave the undersigned no reason to doubt claimant's veracity. Claimant is found credible.

Claimant was 56 years of age at the time of hearing. Claimant graduated high school in 1977; his only other formal education has been vocational training in car sales. He resides in Des Moines, Iowa, where he has worked for the last 22 years as a car salesperson. On the date of the alleged worker's compensation injury, May 1, 2013, claimant worked as a car salesperson for defendant-employer. (Claimant's testimony) The job description for the position of salesperson with the Ken Garff Automotive Group states a salesperson must be able to stand and move about the dealership facility for most of shift, with outdoor work and driving duties required. (Exhibit 9, page 98) The Garff Automotive Group owns defendant-employer. (Claimant's testimony; Mr. Boettcher's testimony)

Claimant testified he suffered with right ankle difficulties which predate his alleged work injury of May 1, 2013. (Claimant's testimony) Review of claimant's medical records portrays a lengthy period of care for claimant's right ankle. In February 1996, claimant presented to Jon Gehrke, M.D. of Des Moines Orthopedic Surgeons (DMOS). At that time, claimant reported sustaining a severe twisting injury of his right ankle in 1992. Claimant reported suffering with intermittent pain since that time, but worsening over the last few months. X-rays revealed degenerative changes of the ankle without significant change from 1992 and 1994 films. Dr. Gehrke assessed right ankle degenerative joint disease with persistent pain and synovitis. He ordered an MRI and began a course of conservative care. (Ex. A, p. 1) In March 1996, Dr. Gehrke reviewed claimant's MRI and assessed a talar osteochondritis dissecans lesion of the right ankle, with degenerative changes in and around the ankle joint, and synovitis of the ankle joint. He again recommended conservative care, including anti-inflammatories, physical therapy, and a steroid injection. (Ex. A, p. 2)

In August 2002, claimant presented to Iowa Health with complaints of swelling of the right ankle joint. Claimant was advised to return to DMOS. (Ex. D, p. 2) Claimant returned to Dr. Gehrke in October 2002. X-rays revealed significant degenerative changes and worsening of the right ankle arthritis since 1996. Dr. Gehrke assessed severe degenerative joint disease of the right ankle. In discussion of treatment options, claimant indicated he was not interested in proceeding with fusion surgery at that time. Accordingly, claimant elected to proceed with open debridement of the ankle. At that time, Dr. Gehrke cautioned claimant "may eventually require formal ankle fusion." (Ex. A, p. 5) William Maher, D.O., performed claimant's preoperative physical and assessed degenerative joint disease of right ankle. He cleared claimant for surgery. (Ex. 1, p. 2; Ex. D, p. 4) Dr. Gehrke performed surgery on November 12, 2002, consisting of right ankle debridement, to treat a diagnosis of right ankle degenerative joint disease with anterior osteophytes. (Ex. A, p. 5; Ex. B, pp. 1-2) Following surgery, claimant followed up with Dr. Gehrke and was prescribed anti-inflammatories and a plastic ankle support. (Ex. A, pp. 6-7) At an appointment in January 2003, Dr. Gehrke indicated claimant could return as needed and "he will consider ankle fusion down the road." (Ex. A, p. 6)

In April 2003, claimant presented to podiatrist, David Yount, DPM, who educated claimant on his foot condition, prescribed a course of physical therapy, and advised claimant he may need injection therapy and/or MRI. (Ex. C, p. 1) Claimant ultimately underwent an MRI of his right ankle at the order of Dr. Yount on April 20, 2005. The radiologist read the results as revealing degenerative changes of the ankle joint and ligaments. (Ex. E, p. 1)

The evidentiary record is devoid of medical records pertaining to claimant's right ankle until August 31, 2006, at which time claimant presented to John Femino, M.D. Dr. Femino's history notes claimant sustained a severe sprain of his right ankle at the age of 20, with symptoms worsening over the preceding 6 months. (Ex. 2, p. 9; Ex. F, p. 1) X-rays of claimant's right foot and ankle revealed significant degenerative joint disease with anterior extrusion of the talus, and the presence of anterior osteophytes. (Ex. 2, p. 12; Ex. F, p. 4) Following examination and review of x-rays and the April 2005 MRI, Dr. Femino assessed right ankle arthritis with significant impingement signs at the anteromedial and anterolateral ankle. He recommended surgical intervention consisting of excisional arthroplasty with a gastroc slide. (Ex. 2, p. 12; Ex. F, p. 4) Dr. Femino performed surgery on October 20, 2006, consisting of exostectomy of the distal anterior tibia, exostectomy of the medial dorsal and lateral talus, gastroc slide/Strayer procedure, and neuroplasty of the superficial peroneal nerve. In his operative notes, Dr. Femino noted postoperative diagnoses of right ankle degenerative joint disease with anterior impingement, acquired equinus deformity, and scar compression of the superficial peroneal nerve. Dr. Femino also noted claimant may not achieve long-term pain relief from the procedure and may require future surgery, including ankle fusion. (Ex. 2, pp. 14-19; Ex. F, p. 7)

Claimant returned to Dr. Femino on January 24, 2008 and reported generally doing well post-surgery, with largely improved pain. Claimant reported some subfibular pain and some decrease in fourth toe sensation. (Ex. 2, p. 24) X-rays revealed an

increase in joint space, improved alignment, and stable degenerative changes. (Ex. 2, p. 24) Dr. Femino noted improvement in claimant's complaints, but continued pain with extensive walking. (Ex. 2, p. 25) Dr. Femino noted claimant had switched jobs and then worked at a much smaller car lot, thus requiring less walking. (Ex. 2, p. 23) Dr. Femino opined claimant's posttraumatic arthritis was aggravated by his work, secondary to daily walking of up to two to three miles. He recommended claimant use a leather brace to decrease pain and edema. (Ex. 2, pp. 25, 27, 29)

On April 7, 2008, the agency approved compromise settlement documents regarding an alleged March 1, 2006 workers' compensation injury. The basis of claimant's claim for benefits was an alleged aggravation of claimant's right ankle condition while in employ of Stew Hansen Dodge. Claimant received a full and final settlement of $7,500.00. (Ex. H, pp. 1-2)

In late 2011, claimant worked for Holmes Hyundai. In December of that year, Holmes Hyundai was purchased and began operating as Stew Hansen Hyundai. Claimant testified while employed at Holmes Hyundai, he was able to complete his work duties, did not require medical evaluation, and did not miss time from work due to his right ankle. Claimant testified the Holmes Hyundai lot was relatively small and golf carts were provided for salespersons to utilize. When Holmes Hyundai was sold, the employees went through a hiring process with defendant-employer and claimant was hired as a salesperson. Once defendant-employer began to operate the lot, claimant testified the golf carts were no longer available. As a result, claimant testified his walking increased from one mile or less per day to two to three miles per day. Claimant testified he began to experience ankle pain and sought care from Dr. Maher. (Claimant's testimony)

Daniel Boettcher, an employee of Garff Automotive Group, testified at evidentiary hearing. Garff Automotive Group operates five car dealerships in the Des Moines metropolitan area, with Mr. Boettcher serving as general manager of these facilities. Mr. Boettcher testified defendant-employer ceased utilizing golf carts in late June 2013, as a result of a lawsuit. Mr. Boettcher testified he believed prior to this date, the carts remained in use and in generally good repair. He did not specifically recall if the golf carts were in use over the winter months and lacked specific recollections of when the carts were put into use during 2012 or when the carts were subject to routine service. Mr. Boettcher did not dispute claimant's representation that he was required to walk more for defendant-employer than for prior operator, Holmes Hyundai. Mr. Boettcher testified he also did not dispute claimant's estimation of walking two to three miles on an average per day, as he estimated salespersons likely walked greater than that distance on productive days. (Mr. Boettcher's testimony)

Mr. Boettcher's testimony was clear and well-delivered. His demeanor at the time of evidentiary hearing gave the undersigned no reason to doubt his credibility. Mr. Boettcher is found credible.

On February 24, 2012, claimant returned to Dr. Maher and requested a prescription for his right ankle pain. Dr. Maher prescribed meloxicam. (Ex. D, pp. 8-9) Claimant followed up with Dr. Maher on April 27, 2012, at which time Dr. Maher discontinued the meloxicam and prescribed Naproxen. (Ex. D, p. 11) Claimant testified he continued to perform his work duties, and his right ankle pain intensified throughout 2012. Claimant testified he ultimately began to use a cane in early 2013. (Claimant's testimony)

Due to increased complaints, claimant returned to Dr. Maher on January 8, 2013. Dr. Maher's notes indicate claimant complained of right ankle pain, with claimant expressing concern that scar tissue was preventing movement of the ankle. Dr. Maher indicated claimant presented with ankle pain which was "starting to flare up again." X-rays of the right ankle revealed chronic, degenerative changes; however, Dr. Maher indicated it was difficult to discern "if there is anything new or different." He referred claimant for a steroid shot and orthopedic evaluation. (Ex. 1, p. 3; Ex. D, p. 12)

On February 7, 2013, claimant returned to Dr. Femino and was evaluated by Dr. Femino and Joshua Tennant, M.D. Dr. Femino's note indicates claimant received significant relief from the surgical procedure five years prior, but had experienced increasing right ankle pain over preceding year. Dr. Femino noted claimant also had begun to experience a "locking sensation" of the ankle. (Ex. 2, p. 30; Ex. F, pp. 21, 25) Dr. Femino assessed right ankle end-stage osteoarthritis. He indicated claimant's options included ankle fusion and total ankle replacement. Claimant was issued a prescription for Feldene and advised to return in one month to discuss surgery. (Ex. 2, p. 31; Ex. F, pp. 17, 22, 25)

Claimant returned to Dr. Maher on February 14, 2013 and reported Dr. Femino recommended fusion, waiting, or ankle replacement. Dr. Maher noted claimant ambulated with a marked limp and prescribed Vicodin. (Ex. 1, pp. 5-6; Ex. D, pp. 14-15)

On February 21, 2013, claimant returned to Dr. Femino. Claimant indicated he had considered the options of non-operative management, fusion and arthroplasty, and had elected to pursue arthroplasty. However, claimant indicated he would like to proceed at a time when his work schedule was more accommodating. (Ex. 2, p. 36; Ex. F, p. 27)

Claimant testified after this evaluation, he informed his supervisor of his need for surgery and indicated he believed the need for surgery was necessitated by walking at work. He thereafter resumed work until surgery. (Claimant's testimony)

On May 1, 2013, Dr. Femino performed surgery consisting of total ankle arthroplasty with Salto Talaris implant, dorsiflexion osteotomy of the first metatarsal, and percutaneous Achilles tendon lengthening, Hoke-type procedure. Dr. Femino noted postoperative diagnoses of degenerative joint disease of the right ankle, equinus deformity of the right ankle, and cavus foot deformity. (Ex. 2, pp. 39, 42; Ex. F, p. 28) Claimant remained hospitalized for two days. He was discharged on May 3, 2013 with

an off-work excuse and prescriptions for hydroxyzine for muscle spasms and oxycodone for pain. (Ex. 2, pp. 45-48)

Claimant testified he remained off work for just shy of three months. He then returned to work at defendant-employer under restrictions which included no heavy lifting and reduced walking. Claimant testified he voluntarily resigned his employment at defendant-employer on July 30, 2013 to accept employment at a different dealership. (Claimant's testimony)

Dr. Femino authored a letter to claimant's attorney dated November 4, 2013. By the letter, Dr. Femino noted claimant had undergone total ankle arthroplasty, dorsiflexion osteotomy of the first metatarsal and a percutaneous lengthening of the Achilles tendon. Dr. Femino indicated he had last evaluated claimant on July 11, 2013, at which time claimant was progressing well and had begun a graduated return to work. Dr. Femino expressed belief claimant would achieve maximum medical improvement (MMI) at the time of his six-month postoperative checkup. He also stated he anticipated claimant would have sustained some functional impairment, but indicated he did not personally complete impairment ratings. Dr. Femino also opined he believed it "consistent that someone with symptomatic ankle arthritis would have an increase in their pain symptoms with increased walking." (Ex. 2, p. 58; Ex. F, p. 31)

Claimant returned to Dr. Femino on November 7, 2013. At that time, claimant had returned to work without restrictions as of September 1, 2013. Claimant reported doing well, so long as he ambulated on even ground, but noted his job duties required him to move about on uneven ground at times. Claimant also reported feeling as if the ankle wanted to roll or give way occasionally. (Ex. 2, pp. 49-50) X-rays revealed stable alignment, without evidence of cystic change or change in position of the implants. Dr. Femino assessed claimant as doing well six months post right total ankle arthroplasty, with some difficulty on uneven ground and some residual peroneal weakness, and a sensation of coldness of the foot, which he anticipated would improve with time. Dr. Femino recommended claimant work on strengthening with Therabands, and utilize a structural brace for high risk activities and walking on uneven ground. (Ex. 2, p. 51)

On November 25, 2013, claimant returned to Dr. Maher and reported increased right ankle complaints. Claimant indicated Aleve failed to provide relief, leading Dr. Maher to prescribe an anti-inflammatory, diclofenac. (Ex. D, pp. 17-18)

On May 8, 2014, claimant returned to Dr. Femino for a one-year post-surgery evaluation. Claimant reported significant improvement in his right ankle as compared to preoperatively. He indicated the ankle felt stable and he was pleased with the overall status. (Ex. 2, p. 53; Ex. F, p. 32) Following x-rays and examination, Dr. Femino released claimant to continue activities as tolerated and advised claimant to follow up in one year. (Ex. 2, p. 56)

Defendants' counsel authored a letter to Dr. Femino dated October 28, 2014, following a conference between the two on October 16, 2014, during which they discussed treatment and opinions regarding claimant's right ankle condition. Counsel set forth his understanding of Dr. Femino's opinions and asked Dr. Femino to sign, expressing agreement, if counsel properly stated Dr. Femino's opinions. (Ex. F, p. 34) On November 5, 2014, Dr. Femino signed the letter, thereby expressing agreement with the following statements:

> You stated that [claimant] has had an arthritic right ankle. Arthritis is a progressive condition that continues to deteriorate over time. Therefore, you stated the question of causation in this matter is whether or not the on-the-job walking required of [claimant] in the performance of his job accelerated his right ankle arthritis. You stated that the walking [claimant] would have done between October 20, 2006 (the date of the first surgery you performed) and the arthroplasty performed on April 30, 2013 [sic] did not, within a reasonable degree of medical certainty, accelerate [claimant's] right ankle arthritis. Likewise, you stated you do not believe [claimant] needed a right ankle replacement earlier because of the walking he did on the job as opposed to when he otherwise would have likely needed that replacement surgery. You stated that in comparison to not using an arthritic ankle, that low impact weight bearing and motion for an arthritic joint is actually beneficial to the remaining cartilage and to keep the joint capsule from becoming more stiff. Finally, you stand by your statement in your letter dated November 4, 2013 that "it is consistent that someone with symptomatic ankle arthritis would have an increase in their pain symptoms with increased walking." Nonetheless, you clarified that the activity of walking would not accelerate [claimant's] right ankle arthritis.

(Ex. F, p. 34)

At the arranging of claimant's counsel, on October 31, 2014, claimant presented for independent medical evaluation (IME) with board-certified occupational and environmental medicine physician, John Kuhnlein, D.O. Dr. Kuhnlein issued a report of his findings and opinions dated November 24, 2014. As components of his evaluation, Dr. Kuhnlein performed a records review and interview/history. (Ex. 3, pp. 61-67) In the history portion of his evaluation, Dr. Kuhnlein made the following notation:

> During the postoperative period [following the May 1, 2013 surgery], [claimant] relates that he was going to use Short-Term Disability Benefits rather than workers' compensation benefits for this ankle procedure and condition, but the Short-Term Disability Insurer told him that he did not qualify because he had seen Dr. Maher within the last year for ankle pain and because there was a clause in the Employer's Short-Term Disability Policy that essentially prohibited [claimant] from receiving Short-Term Disability Benefits. [Claimant] received the denial after surgery, and says that he had been off work for three months without pay, and so filed a

> workers' compensation claim because the Short-Term Disability Benefits were denied.

(Ex. 3, p. 65)

Following records review, interview, and examination, Dr. Kuhnlein diagnosed end-stage degenerative joint disease of the right ankle with 2002 debridement, 2006 open exostectomy and debridement with gastroc slide/Strayer procedure, 2013 total ankle arthroplasty and metatarsal osteotomy, and chronic intermittent right ankle pain. Dr. Kuhnlein opined claimant had significant preexisting right ankle degenerative joint disease; however, in continued work at defendant-employer, Dr. Kuhnlein opined claimant would have been exposed to the same stressors that Dr. Femino opined aggravated claimant's condition in 2008. Dr. Kuhnlein opined claimant described developing a "stuck sensation" in his right ankle tendons, as noted by Dr. Maher in January 2013, and as a result, claimant was referred to Dr. Femino and eventually treated with a total ankle arthroplasty. (Ex. 3, p. 69) Dr. Kuhnlein opined:

> This represents an aggravation of the pre-existing severe degenerative joint disease in his right ankle, associated with his [defendant-employer] work activities.

(Ex. 3, p. 69)

Given claimant's pre-existing significant degenerative joint disease, Dr. Kuhnlein opined:

> [I]t would have taken less of an exposure to these stressors to produce further problems, and that appears to be what has happened. In addition, [claimant] may have formed scar tissue which accounted for the "stuck sensation" that he discussed. Regardless, the ongoing exposure to work-related stressors more likely than not was a significant factor in producing this aggravation of the underlying pre-existing degenerative joint disease of the right ankle. The exposure to the stressors while working for [defendant-employer] would be a substantial factor but by no means sole factor in aggravating the degenerative joint disease, leading to the total ankle arthroplasty.

(Ex. 3, p. 70)

Dr. Kuhnlein opined claimant achieved MMI as of June 1, 2014, one year post-surgery. (Ex. 3, p. 70) Given the total ankle arthroplasty with what Dr. Kuhnlein opined was a good result, Dr. Kuhnlein opined claimant sustained a permanent impairment of 37 percent right lower extremity, the equivalent of 15 percent whole person. Dr. Kuhnlein opined activity modification would be important for claimant, with an ability to lift 50 pounds occasionally floor to waist, 75 pounds occasionally waist to shoulder, and 50 pounds occasionally over shoulder level. He recommended claimant squat and

crawl occasionally and not work on ladders or at heights. Dr. Kuhnlein indicated claimant could kneel without restriction, but may have difficulty rising from kneeling without support. Dr. Kuhnlein also noted selection of good, supportive shoes would be important. (Ex. 3, p. 71)

At defendants' referral, on November 14, 2014, claimant presented for IME with William Jacobson, M.D. of Capital Orthopedics. Dr. Jacobson authored a report of his findings and opinions on the same date. (Ex. G, p. 8) Through the undersigned's experience as a deputy workers' compensation commissioner, I am aware of Dr. Jacobson's status as a board-certified orthopedic surgeon.

Following records review, interview, and examination, Dr. Jacobson assessed degenerative arthritis of the right ankle. He elaborated to state the condition is typically progressive in nature and deteriorates over time. Dr. Jacobson opined claimant had sustained a permanent impairment of 15 percent whole person as a result of undergoing total ankle arthroplasty. (Ex. G, p. 8-9) However, on the question of causation, Dr. Jacobson opined:

> I do not believe the walking that [claimant] describes during the course of his employment in auto sales either caused, materially aggravated, or significantly accelerated [claimant's] right ankle arthritis/degenerative condition...
>
> I do not believe the walking materially accelerated the need for the right ankle replacement...
>
> I would agree with Dr. Femino's assessment that arthritic ankles may become more symptomatic with walking activities; however, it would not accelerate the right ankle arthritic condition of [claimant]. Again, I do agree with Dr. Femino's comments regarding this.

(Ex. G, p. 8)

Claimant's attorney authored a letter to Dr. Femino dated November 20, 2014. The letter stated the two had engaged in a telephone conference call, during which they discussed the effect claimant's duties as a car salesman and the extensive walking required had upon claimant's right ankle symptoms. Counsel requested Dr. Femino sign the letter indicating his agreement if counsel properly stated Dr. Femino's opinion. (Ex. 2, p. 59; Ex. F, p. 36) On December 3, 2014, Dr. Femino signed below the following statement:

> It is my opinion, within a reasonable degree of medical certainty or more likely than not, that [claimant's] right ankle post traumatic arthritis pain symptoms were aggravated or increased by his job duties as a car salesman, secondary to his extensive daily walking.

(Ex. 2, p. 60; Ex. F, p. 37)

At the time of evidentiary hearing, claimant testified he believes his right ankle is "better" than pre-surgery. However, he continues to suffer with pain, weakness, and swelling. Claimant related difficulties with prolonged walking and weather changes. He continues to use an arthritis medicine to control swelling symptoms and utilizes a handicapped parking placard. He is reevaluated by Dr. Femino on an annual basis. Following his resignation from defendant-employer, claimant successfully regained employment as a car salesperson. However, claimant testified his ongoing limitations restrict his employment activities, as he is unable to quickly report to potential customers and thus loses customers to other salespersons. (Claimant's testimony)

CONCLUSIONS OF LAW

The first issue for determination is whether claimant sustained an injury on May 1, 2013 which arose out of and in the course of his 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.

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition

of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

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

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

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).

The central issue of this claim revolves around the answer to one question: Did claimant's work-related walking at defendant-employer materially aggravate, accelerate, worsen or light up claimant's preexisting degenerative arthritis of the right ankle such as to produce a compensable workers' compensation injury? The facts which lay a foundation for this question are not the subject of dispute; the parties admit claimant presented with a significant preexisting condition of his right ankle. The undersigned must therefore determine whether claimant's subsequent condition arose out of his employment with defendant-employer or is idiopathic in nature. The answer to this question requires consideration of whether claimant's work stressor, extensive walking, is causally related to claimant's worsened condition and resulted in the need for a total ankle arthroplasty. Given the nature of this question, the undersigned relies strongly upon the medical opinions in evidence, as it is physicians who have the requisite training and expertise to opine as to whether a stressor may cause a material aggravation, acceleration, worsening, or lighting up of a significant preexisting condition. Three physicians have offered opinions as to causation, Drs. Femino, Kuhnlein, and Jacobson.

Dr. Femino served as claimant's treating surgeon. As a result, Dr. Femino was the only opining physician who observed and evaluated claimant on multiple occasions and the only opining physician with the benefit of physically observing the condition of claimant's right ankle during surgery. Dr. Femino is also an orthopedic surgeon and thus, has specialized knowledge and experience in evaluating and treating orthopedic conditions. Dr. Femino authored a medical note on November 4, 2013, whereby he stated it would be "consistent" for a person with symptomatic ankle arthritis to suffer with increased pain as a result of increased walking. This is the only opinion of Dr. Femino in the evidentiary record which is authored by his own hand.

The other of Dr. Femino's opinions in evidence are authored by counsel for claimant or defendants, whereby Dr. Femino signed in agreement to statements purporting to summarize opinions Dr. Femino provided in personal conferences. On November 5, 2014, Dr. Femino opined: (1) the walking claimant performed between the 2006 surgery and the arthroplasty did not accelerate claimant's right ankle arthritis; (2) the walking claimant performed did not result in the need for arthroplasty sooner than claimant otherwise would have needed the procedure; and (3) while it is consistent that the pain symptoms of a person with symptomatic ankle arthritis would increase with increased walking, the activity of walking would not accelerate the arthritic condition. On December 3, 2014, Dr. Femino opined claimant's right ankle arthritic pain symptoms were more likely than not aggravated by his job duties.

Dr. Jacobson acted as defendants' IME physician. Dr. Jacobson only evaluated claimant on one occasion, but is a board-certified orthopedic surgeon, thus possessing specialized training and experience in orthopedic conditions. Dr. Jacobson opined the

walking claimant performed at work did not cause, materially aggravate, or significantly accelerate claimant's right ankle arthritis and also did not materially accelerate claimant's need for right ankle arthroplasty. He expressed agreement with Dr. Femino's opinion that arthritic ankles can become more symptomatic with walking and with the opinion the walking would not accelerate the arthritic condition.

Dr. Kuhnlein acted as claimant's IME physician. Dr. Kuhnlein is board certified in occupational and environmental medicine and therefore, lacks the orthopedic expertise of Drs. Femino and Jacobson. He however, performed a lengthy and extensive records review, history, and examination, yielding an extensive IME report. On the issue of causation, Dr. Kuhnlein opined claimant would have been exposed to work stressors which Dr. Femino opined aggravated claimant's condition in 2008 and developed a "stuck sensation" of the right ankle tendons. Dr. Kuhnlein opined this development represented an aggravation of claimant's preexisting severe degenerative disease of the right ankle which was associated with his work duties. Dr. Kuhnlein opined slight stressors would have been all that was needed to cause worsening of claimant's condition given the significant preexisting condition. He further opined claimant "may have" formed scar tissue which accounted for the "stuck sensation." Finally, Dr. Kuhnlein opined the ongoing exposure to walking at work more likely than not was a significant factor in "aggravation of the underlying pre-existing degenerative joint disease of the right ankle."

Dr. Kuhnlein's opinions are rational: a weakened condition exposed to a stressor resulted in a worsening of the condition. Dr. Kuhnlein specifically references potential development of scar tissue as a worsening of the physical condition of the ankle and offered a more blanket opinion that regardless of the potential scar tissue, claimant's work activities were a significant factor in aggravating the underlying arthritic condition. However, this theory of worsening of the physical condition of the ankle is not supported by the opinions of orthopedic surgeons, Dr. Femino and Dr. Jacobson. Each of these specialists specifically rejected the possibility for claimant's work-related walking to aggravate or accelerate the underlying degenerative condition. The undersigned provides greater weight to the opinions of orthopedic specialists, Drs. Femino and Jacobson. Accordingly, the opinions of Dr. Kuhnlein are entitled to little weight.

Although the undersigned rejected Dr. Kuhnlein's opinion the continued work-related walking resulted in acceleration or aggravation of claimant's preexisting arthritis, claimant may still recover on another basis. The question therefore becomes whether worsened symptomatology, without a worsening of the underlying condition or an acceleration of a need for surgery, is sufficient to support a determination claimant sustained a work-related injury arising out of his employment. It is the opinion of the undersigned that claimant failed to carry his burden of proving this basis for recovery.

It is undisputed that claimant's symptoms worsened in 2013, such as required total ankle arthroplasty. However, the worsening may have been due to the natural progression of an arthritic condition. Claimant has a long history of right ankle degeneration and suffered with periods of sporadic worsening. He had been warned of

his potential need for significant ankle surgery on multiple occasions. It is possible that his work activities accelerated the condition such that surgery was required immediately, thus supporting the finding of a work-related injury. However, claimant suffered no traumatic injury, and Drs. Femino and Jacobson each opined the activity of walking at work did not accelerate claimant's need for surgery. There are no rebuttal opinions in evidence.

Therefore, it is determined claimant failed to carry his burden of proving he sustained a right ankle injury arising out of his employment with defendant-employer. As claimant has failed to prevail on this threshold issue, consideration of the issues of temporary disability, permanent disability, and medical benefits is unnecessary, as moot.

The next issue is whether claimant is entitled to reimbursement of Dr. Kuhnlein's IME expense in the amount of $3,110.00. (Ex. 4, p. 74)

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).

At the time Dr. Kuhnlein performed his IME on October 31, 2014, no employer-retained physician had evaluated claimant, let alone opined on the extent of claimant's permanent impairment. Although Dr. Femino had released claimant from care on May 8, 2014, and previously indicated claimant would have likely sustained permanent impairment, Dr. Femino was not selected by defendant-employer. If Dr. Femino had been an authorized physician, these actions would likely have triggered claimant's right to an IME. However, as no employer-retained physician had previously been involved in claimant's care or evaluation, there is no action which triggered claimant's right to a section 85.39 exam. Accordingly, claimant is not entitled to reimbursement of Dr. Kuhnlein's IME expense.

The final issue for determination is a specific taxation of costs pursuant to Iowa Code section 86.40 and rule 876 IAC 4.33. As claimant has failed to prevail on any issue presented for consideration, costs shall not be assessed against defendants.

ORDER

THEREFORE, IT IS ORDERED:

Claimant shall take nothing from these proceedings.

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

Costs are taxed to claimant pursuant to 876 IAC 4.33.

Signed and filed this 19th day of November, 2015.

ERICA J. FITCH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.