BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CHARLES WHITACRE, Claimant, vs. AVERA HOLY FAMILY, Self-Insured Employer, Defendant.	File Nos. 5061284, 5061285 A R B I T R A T I O N D E C I S I O N Head Note No. 1108

STATEMENT OF THE CASE

The claimant, Charles Whitacre, filed a petition for arbitration and seeks workers' compensation benefits from Avera Holy Family d/b/a Avera Holy Family Hospital, a self-insured employer. Claimant was represented by attorney David Scott. Defendant was represented by attorney, Matthew Early

The matter came on for hearing on October 7, 2020, before deputy workers' compensation commissioner Joseph Walsh in Des Moines, Iowa, via Court Call videoconferencing system. The record in the case consists of Joint Exhibits 1-8; Claimant's Exhibits 1-11, 13-14; Defense Exhibits D, E, F and G, in addition to the testimony of claimant and defense witnesses Janette Jenson, Tracey Will and Angie Olsen. The matter was fully submitted on November 12, 2020.

ISSUES AND STIPULATIONS

The following issues and stipulations were submitted via prehearing conference report:

1. Whether the claimant suffered an injury which arose out of and in the course of his employment on March 17, 2016, and/or June 13, 2016.

2. For both alleged injuries, defendant asserts the notice defense, contending it was not provided timely notice and it did not have actual knowledge.

3. The claimant contends his alleged injuries were a cause of temporary and permanent disability. Defendant disputes this.

4. Claimant is seeking healing period benefits from June 14, 2016 through August 18, 2017. The defendant contends it is not liable for such benefits,

however, the defendant stipulates if it is liable for the alleged injury, "claimant is entitled to benefits for this period of time."

5. Claimant is seeking permanent partial disability benefits. Defendant contends it is not liable for such benefits. The parties have stipulated that the claimant's disability is industrial, if the employer is liable for the injury. The parties could not agree on a commencement date for benefits.

6. The parties have stipulated to the elements comprising the rate of compensation and contend the appropriate rate would be $442.12.

7. Affirmative defenses, other than notice, have been waived.

8. The claimant is seeking medical expenses set forth in Claimant's Exhibit 11. The defendant disputes liability for such expenses.

9. Claimant seeks payment of IME expenses under Section 85.39.

10. Claimant seeks costs set forth in Claimant's Exhibits 13 and 14.

The stipulations set forth in the prehearing conference report are approved and are legally binding upon the parties.

FINDINGS OF FACT

Charles Whitacre, Jr., was born in 1953 and resides in Estherville, Iowa where he lives with his wife and his oldest son, who has a disability. He was 67 years-old on the date of hearing. He graduated from Estherville High in 1972 and has a manual labor work history. His two longest periods of employment were with John Morrell and Pepsi, both of whom no longer have operations in Estherville.

Mr. Whitacre testified live and under oath at hearing. He was not a reliable historian although his testimony generally matched with the other records in evidence. There are numerous instances where he could not recall details of events. Specific instances will be discussed in the body of the decision. There was nothing about his demeanor which caused the undersigned any concern about his truthfulness.

Mr. Whitacre had some documented low back treatment prior to the alleged work injury herein. (Joint Exhibit 1; Joint Exhibit 2, page 3) He had radiating pain in his low back down his leg and he received epidural steroid injections. There are no further records for low back treatment after July 2009.

Mr. Whitacre testified he began working for the employer in this case, Avera Holy Family Hospital (hereafter, Avera) in approximately 2011. Just prior to starting employment with Avera, Mr. Whitacre had undergone bilateral knee replacement surgeries. He was hired at Avera to perform maintenance on equipment and he performed a wide variety of duties. (Transcript, page 15) His shift was from 1:30 to

10:00 p.m. Mr. Whitacre had a relatively good and mostly uneventful work tenure with Avera until 2016.

During the course of his employment with Avera, Mr. Whitacre sustained a couple of work injuries. (Def. Exs. D and E) Mr. Whitacre testified that he did not have a good experience with receiving treatment for these injuries. He, however, reported these injuries per the employer's policy.

On March 17, 2016, Mr. Whitacre testified that he sustained a relatively minor work injury. After his daily update, he testified that he went to the kitchen and threw some garbage bags in a dumpster. (Tr., p. 17) He wheeled heavy sacks of garbage out to the dumpster. (Tr., p. 21) He then testified that he walked up and down four flights of stairs checking on different areas of the hospital. As he was coming down the stairs, he felt a "little pop" and a burning sensation in his left knee. (Tr., p. 17) He testified that since he had undergone knee surgery previously, he decided to check in with his physician at the hospital and see if he could get an appointment. At this time, he was not claiming he sustained an injury to his low back, but rather a relatively minor knee injury. Alexander Pruitt, M.D., was in fact the physician who performed his knee replacement surgeries, as well as the 2009 low back treatment.

Medical records in evidence document that Mr. Whitacre did see Dr. Pruitt on March 17, 2016. The following is documented.

> We have not seen Charles since the 7th of December, he was seen by Sue Harman, PA-C. He is 5 years out from bilateral total knee arthroplasties when he was seen by Sue. He is having some burning in his knees. He works in maintenance here in the hospital. His date of surgery for his bilateral total knees was March of 2011, 5 years out. He was not pushing anything, just going up and down stairs and all of a sudden he had burning on the lateral aspect of his knee.
>
> EXAMINATION: He has full range of motion. He has a little bit of wear on both knees as far as medial and lateral laxity. He is not having any problems with the right-knee. He has a little bit of fluid on the left knee. I am not sure what he did, maybe twisted it. It does not open with varus/valgus stress. He has good end points bilaterally. Does not appear to have any tenderness along the collateral ligaments.
>
> X-rays show what could be a confluence of shadows or could be a nutrient vessel. Looks like he has a longitudinal split in his tibia distally.
>
> ASSESSMENT: Maybe a sprain of the lateral collateral ligament of the left knee with no opening.

(Joint Exhibit 2, page 4) He was placed on a nonsteroidal anti-inflammatory and was instructed to return in a month. The document is electronically signed by Dr. Pruitt.

Mr. Whitacre testified that he did not see Dr. Pruitt that day, but rather saw the physician's assistant, Sue Harman. (Tr., pp. 23-24) He testified that he did not think about throwing out the garbage when he talked to her because he was primarily describing going up and down the stairs, which is when the left knee pain began. (Tr., pp. 24-25) He actually did not associate his pain with pushing and lifting the garbage at the time. (Tr., p. 22)

The following day March 18, 2016, Mr. Whitacre testified that he told his immediate supervisor, Matt Dalen, exactly what happened on March 17, 2016. "I told him what I was doing. I was walking down the steps and the pain and the noise I had in my knee." (Tr., p. 26) Mr. Dalen did not testify live. He did submit an affidavit which was entered into evidence. In the sworn affidavit, Mr. Dalen stated the following. "In the Spring of 2016, Charles made no reports to me of any work injury. He did indicate that he experienced a burning sensation in his knee while walking downstairs one day, and further told me that he was going to his doctor for treatment." (Cl. Ex. 4, p. 36)

The record is actually fairly clear here. Mr. Whitacre did tell his supervisor, Mr. Dalen, about the work incident on March 17, 2016. Mr. Dalen, for reasons not described in this record, did not interpret this to be a "work injury." It is possible this is because he was aware of Mr. Whitacre's prior bilateral knee replacement surgeries. It is also possible that since Mr. Whitacre did not specifically use the magic words that he wanted to file a work injury claim, Mr. Dalen disregarded the report. In any event, since Mr. Dalen did not testify or further explain the circumstances, the record is somewhat unclear regarding his motives. What is clear is that the employer, through Mr. Dalen, knew that Mr. Whitacre felt pain and a pop in his left knee while walking down stairs in performance of his ordinary work duties and that he was seeking treatment for this incident. Mr. Dalen apparently did not report this incident to anyone in human resources or health.

Mr. Whitacre did follow up with Dr. Pruitt's office. He returned to Dr. Pruitt on April 7, 2016. At that time he documented that he "still has pain and he says that it comes up to his hip, starts at his knee and goes up. He says that his knee is not as bad, still bothering him." (Jt. Ex. 2, p. 5) "I told him it could be something from his back ..." (Jt. Ex. 2, p. 5) Dr. Pruitt ordered a bone scan and developed a plan to check out his back. Mr. Whitacre returned on April 21, 2016, and the bone scan was negative, demonstrating there was no problem from the actual knee. "He has muscle spasm and numbness on the left side of his leg. He still walks pretty camptocormic and bent over. He says he does not mean to do that but that is the only way he can walk very far as a maintenance man here in the hospital." (Jt. Ex. 2, p. 6) Dr. Pruitt ordered x-rays which demonstrated severe degenerative changes and osteophytes throughout the lumbar spine. Dr. Pruitt then ordered an MRI. (Jt. Ex. 2, p. 6) On April 28, 2016, Dr. Pruitt interpreted the MRI. It showed "that he has advanced lumbar spondylosis, worse at 4/5 right worse than left. High grade stenosis. ... Looks like there is impingement of the right L-4 nerve root." (Jt. Ex. 2, p. 7) Dr. Pruitt recommended a series of epidural steroid injections (ESI). Between that visit and June 6, 2013, two of the three ESIs were performed with some benefit.

Mr. Whitacre testified that he sustained a second work injury late in the evening – within the last hour of his shift - on June 13, 2016. He testified he carried a ladder for approximately 100 yards to change a light bulb in the clinic. When he returned the ladder, he testified he felt his back tighten up. (Tr., pp. 29-32) He testified he told his supervisor, Matt Dalen about the incident the following day after the daily update. (Tr., p. 31) He then testified he started working that day and after working for a short period, Mr. Dalen sent him home. Upon questioning by the undersigned, Mr. Whitacre could not recall for certain, however, whether he told Mr. Dalen that his back complaints were related to the ladder incident. (Tr., p. 80) Mr. Dalen apparently told Mr. Whitacre that he had received medical restrictions placing him on light-duty that day. (Tr., pp. 32-33) Mr. Whitacre testified this came out of the blue; he was confused because he never saw anyone from Dr. Pruitt's clinic that day. (Tr., pp. 33-35, 80) There is, in fact, a medical note in evidence from Dr. Pruitt's office which is somewhat confusing. The form is dated June 14, 2016 and it has Mr. Whitacre's name on it. The box for no restrictions is checked, but next to it the words "25# Lift" is hand-written. (Jt. Ex. 2, p. 9) The signature is illegible, but "PAC" is hand-written behind the signature. By my untrained eye, the signature does not closely match Sue Harman's electronic signature set forth on his other signed office notes, but it could be an original signature from her. (*Compare* Jt. Ex. 2, p. 9 with Jt. Ex. 2, p. 8) There is no corresponding office note in the record of evidence suggesting that Mr. Whitacre was not actually seen that day. In the upper right corner, "Attn: Angie Olesen" is hand-written, along with her direct fax number. (Jt. Ex. 2, p. 9; Tr., p. 124)

Angie Olsen testified live and under oath via Court Call video conferencing system. She testified she is the employee health nurse and runs occupational health as well. (Tr., p. 112) She has worked for Avera for 13 years. She testified that the first time she became aware of Mr. Whitacre's medical condition was when Mr. Dalen called her in June. "He just had concerns that Charlie might not be able to or wasn't able to do all the physical essential job functions." (Tr., p. 117) Mr. Dalen told her that Mr. Whitacre had been getting back injections. (Tr., p. 118) She further testified that Mr. Dalen arranged for Mr. Whitacre to come see her and she requested a medical note from him. She testified that she had Mr. Whitacre stay in her office while she sought a note from Dr. Pruitt's office, indicating whether he could work without restrictions. (Tr., pp. 118-119) "We actually had him stay there until we got the note." (Tr., p. 119) She testified she did not know who requested the note but that she had given him a blank form to have the doctor fill out. (Tr., p. 120) She testified that Mr. Whitacre then left and went to the maintenance department. (Tr., pp. 120-121) There was no discussion of whether his condition was work-related or not. She then testified that she received the note on Dr. Pruitt's form (different from Avera's) which is Claimant's Exhibit 4. She testified these restrictions were too significant to accommodate and Mr. Whitacre would have to go off on leave of absence. (Tr., p. 121) She testified that since the injury was not work-related, Mr. Whitacre would need a full work release to be able to continue performing his ordinary work functions. (Tr., pp. 116-117, 121)

I find Ms. Olsen's testimony to be generally credible. Based upon the evidence presented, I find it likely that Mr. Whitacre told Mr. Dalen about his June 13, 2016, work

incident (carrying the ladder) and his ongoing back treatment on June 14, 2016. It is unclear whether he was attempting to report a true work injury as he testified that he could not recall with certainty whether he told Mr. Dalen that the back condition was related to the incident. (Tr., p. 80) I find it likely that Mr. Dalen contacted Ms. Olsen and told her that Mr. Whitacre had a back problem which was interfering with his ability to perform his work tasks. As previously mentioned, Mr. Dalen did not testify at hearing. The most likely scenario is that Mr. Dalen simply did not tell Ms. Olsen that Mr. Whitacre had reported the two work incidents. Again, Mr. Dalen, in his sworn affidavit, admitted that he knew of the first work injury when Mr. Whitacre reported a sharp pain in his knee while walking the stairs. For whatever reason, Mr. Dalen did not consider this to be a work injury. In any event, it is most likely that Ms. Olsen was unaware of all this. She then followed her protocols as the employee nurse to determine whether he could safely perform the essential functions of his job. In this record, it is unclear who obtained the medical note (Jt. Ex. 2, p. 9) from Dr. Pruitt's office. I tend to believe Mr. Whitacre's testimony that he did not actually request it, although it is possible he did but did not recall doing so. The reality is, Mr. Whitacre recalled few details of the events surrounding being sent home on June 14, 2016. (See Tr., pp. 34-35) The record reflects that this was an upsetting event for him. I do tend to believe Ms. Olsen that she did not request it. It is possible that Matt Dalen requested it as well.

Mr. Whitacre was placed upon what amounts to an involuntary leave of absence on June 14, 2016. He was sent home. On June 23, 2016, Dr. Pruitt prepared some type of medical restrictions form. The form indicates that Mr. Whitacre has increased low back pain with lifting activities and placed him under restrictions from June 14, 2016, through September 12, 2016. Dr. Pruitt checked the box that the condition was not work related, although this is not defined in any way on the form. (Jt. Ex. 2, p. 10) From there, Mr. Whitacre's treatment escalated rapidly.

On June 30, 2016, Dr. Pruitt complained that Mr. Whitacre had been unable to receive his third ESI. It had been denied by "insurance." (Jt. Ex. 2, p. 12) Dr. Pruitt told him to call his insurance company to get approval. The circumstances of this denial and what Mr. Whitacre was supposed to do about it are somewhat mysterious in this record. While there is no indication it was denied through workers' compensation, it is entirely unclear in this record why his personal health insurance through Avera would have denied this treatment. Mr. Whitacre himself described his efforts to secure approval, however, could not recall any significant details. (Tr., pp. 28-29) In any event, it does not appear he ever received the third ESI and was instead referred to a back specialist, Walter Carlson, M.D., by Dr. Pruitt in July 2016. On July 22, 2016, Mr. Whitacre filled out a form for Dr. Carlson describing his condition. He checked the box that his back injury did not happen at work. (Jt. Ex. 4, p. 37) Mr. Whitacre essentially testified that he was attempting to avoid going through workers' compensation to receive treatment because he feared long delays. (Tr., pp. 72-74) Shortly thereafter, Dr. Carlson performed low back surgery described as a decompressive laminectomy with lumbar fusion. (Jt. Ex. 5, p. 51) He was then started on physical therapy. (Jt. Ex. 4, p. 40)

Mr. Whitacre testified that he never returned to work. He maintained contact with

Ms. Olsen during his leave of absence. (Def. Ex. F, pp. 4-5; Tr., pp. 118-120) In November 2020, Mr. Whitacre made an informal complaint to Avera's patient advocate, Tracey Will. Ms. Will testified under oath at hearing. Her testimony is credible. She testified that Mr. Whitacre visited her and complained that Avera employees had violated his medical privacy rights by securing a medical form from Dr. Pruitt's office without authorization. (Tr., pp. 103-104) During this conversation, he told her that he had never claimed this condition to be workers' compensation. (Tr., pp. 106-107) Mr. Whitacre also testified that he told Ms. Will this was never a workers' compensation situation. "Because I never reported it as a work comp. Because of what Sue Harman said. ... I knew I needed surgery and I needed it as soon as I could get it." (Tr., p. 73) In her investigation, Ms. Will spoke with Dr. Pruitt's physician's assistant who could not recall if the form was requested by Mr. Whitacre or someone else. (Tr., pp. 106, 109-110)

In November 2016, Dr. Carlson continued Mr. Whitacre on restrictions for another three months. (Jt. Ex. 4, p. 43) In December 2016, Avera terminated Mr. Whitacre. Janette Jensen, human resources partner at Avera, testified live and under oath. Her testimony was credible. She testified that by December 2016, Mr. Whitacre had exhausted all of his leaves of absence and Avera had no choice but to terminate. (Tr., p. 90) She testified that on his last day of employment, after she had terminated, Mr. Whitacre told her "if I'd have known how this was going to turn out, I should have claimed it was work comp." (Tr., p. 91)

In May 2017, Dr. Carlson documented Mr. Whitacre's office visit.

> Charles is frustrated I think primarily because he has not been able to get back to any gainful employment and he is 68. He is seeking disability and I certainly would support him being on full-term disability. In the meantime, we are going to see if a lumbar MRI scan would be financially possible through his insurance and also physical therapy. ... His muscoloskelatal exam reveals weakness with toe stand with stiffness to his lumbar spine."

(Jt. Ex. 4, p. 44)

Both parties secured expert medical reports. Claimant obtained an IME from Robin Sassman, M.D., in October 2017. (Cl. Ex. 1) Dr. Sassman took history, reviewed appropriate medical records and examined Mr. Whitacre. She recorded his current symptoms as of October 2017. (Cl. Ex. 1, p. 7) She diagnosed low back pain post L3-4-5 fusion. She provided the following expert opinion related to medical causation.

> While it is true he had previous back issues dating back to 2009, it is also true that he had a series of epidurals at that time and these symptoms significantly improved. In fact, based on his history and the medical records provided, there is no evidence that he was seen for low back complaints from that time in 2009 and when he was seen after noting the

> symptoms at work on March 17, 2016. It was on that date that Mr. Whitacre recalls having to lift a very large bag of garbage and then walking down some stairs when he noted a burning sensation in his left thigh. Because he had the previous issues with his knees, he assumed it was the knee that was causing the problem. He was able to get into see Dr. Pruitt shortly thereafter. It was subsequently noted to be his lower back that was causing his symptoms. He was then noted to have spinal stenosis. Based on my understanding of the history in this case, while I do not believe the work injury caused the spinal stenosis, I do believe the work activities of that day were a substantial aggravating factor in bringing about the low back radicular symptoms that became present on that day. Mr. Whitacre subsequently underwent the fusion procedure on August 18, 2016.

(Cl. Ex. 1, pp. 10-11) She opined he reached maximum medical improvement on August 18, 2017, and assigned a whole body impairment rating of 28 percent and severe permanent work restrictions. (Cl. Ex. 1, p. 12)

Defendant had Mr. Whitacre examined by Douglas Martin, M.D., in August 2020. (Def. Ex. G) Dr. Martin reviewed the history and examined Mr. Whitacre. He diagnosed multilevel lumbar degenerative joint disease/spondylolisthesis resulting in central canal stenosis. (Def. Ex. G, p. 7) He opined this condition began in at least 2009. "The 2 work events that have been described in March and June of 2016 are not injuries but, instead, are intolerances to an ever worsening and progressive degenerative condition." (Def. Ex. G, p. 8) He further opined that there was no aggravation or exacerbations because the described work activities were "routine activities of daily living." (Def. Ex. G, p. 8)

Dr. Sassman updated her report in September 2020. Her opinions did not change. (Cl. Ex. 2) Claimant also secured vocational evidence from MVR Consulting Services, Tom Audet, CRC. Mr. Audet reviewed a number of documents, including Mr. Whitacre's recommended restrictions and opined that he was precluded from 90-99 percent of the labor market. (Cl. Ex. 3, pp. 32-33)

CONCLUSIONS OF LAW

The first issue is whether the claimant suffered an injury which arose out of and in the course of employment on March 17, 2016 and/or June 13, 2016.

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 Elec. 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.

The claimant testified that he felt a pain in his left knee while he was walking down the stairs at work on March 17, 2017. This was after he had dumped heavy garbage bags a short time before. I find that the greater weight of evidence supports a finding that this incident indeed happened. Mr. Whitacre's testimony that this incident occurred is supported by the medical note from Dr. Pruitt's clinic as well as Mr. Dalen's affidavit. (Jt. Ex. 2, p. 9; Cl. Ex. 4)

The claimant's testimony that his back locked up following carrying a ladder on June 13, 2016, is also believable. By this time, he had been diagnosed with severe spinal stenosis and was very symptomatic. It is very likely that his routine work activities would have aggravated his underlying condition. This incident is not as well documented as the March 17, 2016, work injury, however, I believe Mr. Whitacre that it happened. Mr. Whitacre testified that he told Mr. Dalen about his back locking up the next day, June 14, 2016. That same day, it is undisputed that Mr. Dalen began to question whether Mr. Whitacre was capable of performing the essential functions of his job. I find it likely that Mr. Dalen did this because he reported the ladder incident.

I therefore find that the claimant has met his burden of proof that he sustained injuries which arose out of and in the course of his employment on both March 17, 2016, and June 13, 2016.

The next issue is whether the employer has proven a notice defense.

Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

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

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

I find that the greater weight of evidence supports a finding that Mr. Whitacre did provide notice to his employer. Mr. Whitacre testified credibly that he told his supervisor, Mr. Dalen, about both incidents in question, each time the following day after the occurrence. Mr. Dalen did not testify live. He did provide an affidavit which was admitted into evidence without objection. In this affidavit, however, Mr. Dalen admits that Mr. Whitacre specifically told him about the incident walking down the stairs. (Cl. Ex. 4, p. 36) While Mr. Dalen made no specific reference to the June 13, 2016, ladder incident, it is apparent from the fact that Mr. Dalen began to question Mr. Whitacre's ability to perform the essential functions of his maintenance job on June 14, 2016, that he told him something at that time. I find it is most likely that Mr. Dalen began to question Mr. Whitacre's fitness for duty on that date because he reported the ladder incident.

The law does not require an injured worker to provide a formal written notice or even specifically follow an employer's written personnel policy. The employer contends that Mr. Whitacre knew and understood the employer's policy regarding notice of injury because he had done it before. (Def. Exs. D and E) This is true. The employer further contends that Mr. Whitacre was attempting to game the system by specifically not claiming his injury was work-related so he could receive treatment without having to go through workers' compensation protocols. I find this is likely true as well. Mr. Whitacre admitted under oath that he was not trying to push his injuries as workers' compensation at the time. When asked why he told Ms. Will that it was not a workers' compensation situation, he explained bluntly, "Because I never reported it as a work comp. Because of what Sue Harman said. ... I knew I needed surgery and I needed it as soon as I could get it." (Tr., p. 73) I interpret this testimony to mean that Mr. Whitacre understood that Sue Harman did not believe the condition was work-connected and, further, he subjectively believed his treatment would be delayed if he claimed it as such. Therefore, it appears while Mr. Whitacre had technically complied with Section 85.23 in the most basic sense, he was deliberately attempting to avoid having his claim processed as a work injury claim under the employer's policies.

Nevertheless, the employer has failed to prove an affirmative notice defense in this case. Without the live, sworn testimony of Mr. Dalen, the employer has failed to meet its burden on this subject. The greater weight of evidence supports the finding that Mr. Dalen played into claimant's efforts to have it both ways by not reporting what he had been told to Angie Olsen.

The next issue is whether either or both of the work injuries were a cause of any 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).

Mr. Whitacre relies upon the expert medical opinion of Dr. Sassman. Dr. Sassman provided a detailed explanation regarding how the March 17, 2016, work accident likely aggravated his underlying degenerative condition. She noted that Mr. Whitacre had not undergone any type of low back treatment between 2009 and his work injury on March 17, 2016.

> It was on that date [March 17, 2016] that Mr. Whitacre recalls having to lift a very large bag of garbage and then walking down some stairs when he noted a burning sensation in his left thigh. Because he had the previous issues with his knees, he assumed it was the knee that was causing the problem. He was able to get in to see Dr. Pruitt shortly thereafter. It was subsequently noted to be his lower back that was causing his symptoms. He was then noted to have spinal stenosis. Based on my understanding of the history in this case, while I do not believe the work injury caused the spinal stenosis, I do believe the work activities of that day were a

> substantial aggravating factor in bringing about the low back radicular symptoms that became present on that day.

(Cl. Ex. 1, pp. 10-11)

The problem is in the details. The claimant sustained a left knee injury on March 17, 2016. He had undergone bilateral knee replacement surgeries five years previous by Dr. Pruitt. He was seen in Dr. Pruitt's clinic the same day as the injury. The following is documented.

> We have not seen Charles since the 7th of December, he was seen by Sue Harman, PA-C. He is 5 years out from bilateral total knee arthroplasties when he was seen by Sue. He is having some burning in his knees. He works in maintenance here in the hospital. His date of surgery for his bilateral total knees was March of 2011, 5 years out. He was not pushing anything, just going up and down stairs and all of a sudden he had burning on the lateral aspect of his knee.
>
> EXAMINATION: He has full range of motion. He has a little bit of wear on both knees as far as medial and lateral laxity. He is not having any problems with the right-knee. He has a little bit of fluid on the left knee. I am not sure what he did, maybe twisted it. It does not open with varus/valgus stress. He has good end points bilaterally. Does not appear to have any tenderness along the collateral ligaments.
>
> X-rays show what could be a confluence of shadows or could be a nutrient vessel. Looks like he has a longitudinal split in his tibia distally.
>
> ASSESSMENT: Maybe a sprain of the lateral collateral ligament of the left knee with no opening.

(Jt. Ex. 2, p. 4) There is nothing in this record regarding any low back pain, thigh pain, hip pain or radicular pain of any type.

At his next visit, on April 7, 2016, he was still reporting some left knee pain, but he was primarily complaining of thigh pain. "He still has pain and he says that it comes up to his hip, starts at his knee and goes up." (Jt. Ex. 2, p. 5) The note specifically documented that the radicular pain was new. "I told him that it could be something from his back but because his main complaint when he saw us a few weeks ago was his knee and nothing was going on in his back." (Jt. Ex. 2, p. 5) In other words, it appears that the thigh symptom reported was a new symptom.

Therefore, it is evident that Mr. Whitacre did not have thigh pain on March 17, 2016, as suggested by Dr. Sassman. He testified and the records verify that he felt and heard a pop and burning sensation in his left knee, not his thigh or hip. He clearly believed his knee was injured on that date, not his back. Now, it may be that the burning in his knee that day was actually radicular pain caused by his back which was

just poorly described. The problem is there are a number of explanations. Given the fact that Mr. Whitacre is not a particularly reliable historian because of his efforts to initially avoid the workers' compensation system, I cannot find that he met his burden of proof.

I should point out that I take no joy in making this finding. The simple reality is that Mr. Whitacre mucked the record in this case by not following the proper protocols. It may very well be that the work injury on March 17, 2016, was in fact the incident that started the process of making his low back become symptomatic. It may also be that he had been having symptoms in his low back and leg for some period of time that he simply did not seek treatment for, as suggested by Dr. Martin. It may also be that after his March 17, 2016, left knee injury, his low back simply started becoming symptomatic as a result of the progression of the degenerative condition in his low back. Because Dr. Sassman did not have an accurate history of these circumstances, I cannot rely on her opinions. Given the unreliability of the claimant as an historian, it is impossible to rely upon his testimony to cure the deficiencies in Dr. Sassman's opinion. As such, the claimant has failed to meet his burden of proof.

ORDER

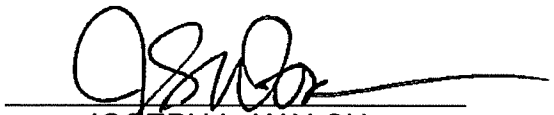
THEREFORE IT IS ORDERED

Claimant shall take nothing further from these proceedings.

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

Each party shall pay their own costs.

Signed and filed this 20th day of July, 2021.



JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

David A. Scott (via WCES)

Matthew Early (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.