BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BRYAN HEEREN, Claimant, vs. DERBY TRUCKING LLC, Employer, and GRINNELL MUTUAL REINSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5067250 A R B I T R A T I O N D E C I S I O N Head Note Nos.: 1803, 2500

STATEMENT OF THE CASE

Bryan Dean Heeren, claimant, filed a petition in arbitration seeking workers' compensation benefits against Derby Trucking, LLC, employer, and Grinnell Mutual Reinsurance Company, insurer, both as defendants for an accepted work injury date of October 19, 2017.

The hearing was held on February 13, 2020, in Sioux City, Iowa, and the case was considered fully submitted on March 5, 2020, upon the simultaneous filing briefs.

The record consists of Joint Exhibits 1-9; claimant's exhibits 1-3; Defendants exhibits A-K, and the testimony of claimant and Josh Derby.

ISSUES

The nature and extent of claimant's disability;

Whether claimant is entitled to a referral to an orthopedic surgeon for further evaluation and/or treatment.

STIPULATIONS

The parties agree the claimant sustained a work-related injury on October 19, 2017. This injury was the cause of some temporary disability during a period of recovery, entitlement to which is no longer in dispute.

The parties further agree that the claimant sustained a permanent partial disability to his left lower extremity and that the commencement date for permanent partial disability benefits is August 24, 2018. Prior to the hearing the claimant was paid 4.4 weeks of permanent partial disability benefits at the rate of $614.25 per week. Defendants would be entitled to a credit of that amount against any award of permanent benefits.

At the time of the injury the claimant's gross earnings were $1,047.00 per week. He was single entitled to one exemption. Based on the foregoing the parties believe the weekly benefit rate to be $614.25.

The defendants waive any affirmative defenses. There are no medical benefits in dispute.

FINDINGS OF FACT

Claimant was a 59-year-old person at the time of the hearing. His past education includes high school graduation and a few months of classes at Western Iowa Tech studying agricultural mechanics. He left school to start driving truck.

Claimant's past work history includes farm laborer, student driver, truck driver pulling a flatbed trailer and a production foreman. (Ex G:15) His primary and most relevant work history is as a truck driver hauling various freight. Claimant is required to undergo a DOT physical every year because of his high blood pressure. His commercial driver's license is valid and there are no medical restrictions imposed. Defendant employer sends their truck driving employees to a chiropractor in Hinton, Iowa for the physical. (Ex G:17) Defendant employer pays for this physical.

Claimant's past medical history includes a blown tendon in his ankle, a flat foot deformity in 2007, (JE 7:25), and a right shoulder injury around 2009 to 2010. He tore his biceps tendon but recovered well. He injured his left shoulder and has undergone a partial replacement. He has also had surgeries for hiatal hernia, gallbladder, and appendix. He has high blood pressure and takes medication to keep it under control. In 2004, claimant was seen for joint aches and muscle pains at Medical Associates. (Joint Exhibit 1:1) There was some concern the claimant suffered from rheumatoid arthritis. Id.

Claimant's commercial driver's license is valid and there are no medical restrictions imposed.

Claimant started working for defendant employer on January 1, 2016. (Ex. A, p. 1; Ex. K, p. 18) He was employed as a truck driver, hauling liquid protein in a tanker to dairies and cattle feedlots. (Ex. K, p. 19) On October 19, 2017, claimant stepped into a rut while delivering liquid protein and injured his left knee. (Ex. K, pp. 27, 30) Claimant reported this injury later that day to his supervisor, John Derby, the owner of the defendant employer. Claimant testified that John Derby replied they were too busy and the claimant could not get any medical care. Mr. Derby denies this. Claimant finished

his shift and continued to work for approximately a month before going to the Floyd Valley Healthcare emergency room.

On November 11, 2017, claimant went to the ER and reported he injured the left knee a few weeks back, then re-injured it again a few days prior to the health care visit. (JE 2: 2) An x-ray showed no fracture or dislocation but did reveal soft tissue swelling in the pre-patellar region. (JE 2:6) Claimant was put in a knee brace and referred to an orthopedic specialist. (JE 2: 4, 6.)

On November 13, 2017, claimant saw Jay Strittholt, M.D., and provided a history of a knee injury two weeks ago. (JE 9:49.) The doctor ordered an MRI. (JE 9:51) On the same day, claimant began physical therapy recommended by Dr. Strittholt. The history taken by the therapist was that claimant stepped into a rut on October 19, 2017, injuring his left knee. (JE 3:11) Claimant further explained that activities such as climbing in and out of his truck and walking on uneven ground worsened his pain. (JE 3:11) He ambulated with a flexed knee and reported a sharp stabbing pain in the knee across the joint along with pins and needles and numbness just below the knee area. (JE 3:11) On examination, the claimant's range of motion was -7° of extension to 101° of flexion with pain at end range. (JE 3:11) Claimant was fitted with a bilateral hinged knee brace which claimant was instructed to wear at all times except when showering. (JE 3:11) Claimant was even to wear the brace while sleeping, if possible. (JE 3:11)

The MRI was completed on November 29, 2017, and showed a large medial meniscal tear and grade III chondromalacia. (JE 2:8) On December 5, 2017, claimant visited Dr. Strittholt to review the MRI results. (JE 9:53) Dr. Strittholt recommended claimant continue to use his brace and that if the meniscal tear became symptomatic, claimant should elect to proceed with diagnostic arthroscopy. (JE 9:53)

On December 21, 2017, claimant saw Joseph Carreau, M.D. (JE 7:27) Claimant reported left knee symptoms from a work injury in October 2017. (JE 7:27) Claimant was diagnosed with a large complex tear of the posterior of the medial meniscus and MCL strain largely involving the proximal attachment of the medial femoral condyle. (JE 7:28) The two discussed injection therapy which the claimant passed on, preferring the surgery instead. (JE 7:28) Surgery was performed on January 12, 2018. (JE 7:28, 5:18) On January 17, 2018, claimant started physical therapy. (JE 4:13) Again, the claimant reported that the source of the injury was stepping into a rut on October 19, 2017. (JE 4:13)

On January 25, 2018, claimant told Dr. Carreau the previous catching and buckling events were "completely gone." (JE 7:31) The doctor noted claimant was doing fairly well and the mechanical-type symptoms had resolved; however, claimant did have persistent anterior medial knee pain. (JE 7 p. 31) Claimant testified at hearing that he reported pain and instability in the knee at every visit. On February 8, 2018, Dr. Carreau recommended injection therapy for some ongoing pain complaints but claimant declined. (JE 7:32) Claimant was released to driving and lifting up to 50 pounds. (JE 7:32) In the meantime, claimant was to continue with physical therapy. (JE 7:32)

On February 22, 2018, claimant reported ongoing anteromedial knee pain, which Dr. Carreau believed to be related to some significant arthrosis of the knee. (JE 7:33) Claimant again refused injection therapy because he has a significant needle phobia. (JE 7:33) Dr. Carreau did not have solutions for the claimant outside of the injections and recommended continuing anti-inflammatory medications along with work restrictions of no deep squatting, use of a knee brace while walking on uneven ground and no driving for more than 60 hours per week. (JE 7:33)

On March 29, 2018, claimant was struggling from a pain standpoint but outside of injection therapy, Dr. Carreau did not have good options. (JE 7:35) Dr. Carreau returned claimant to work full duty with no restrictions and suggested that claimant would be a candidate for knee replacement surgery if the pain was ever significant enough. (JE 7:35, 36.)

On April 3, 2018, claimant was discharged from physical therapy, and he met all short-term and long-term goals although claimant's return to work was light duty. (JE 4:16.) His active range of motion at the time of the discharge of physical therapy was zero to 115° on the left compared to zero to hundred 25° on the right. He had increased tenderness to palpation on the left medial knee joint line and increased diffusion in the left knee compared to the right. (JE 4:17) The claimant was discharged due to not appearing for his appointment. (JE 4:17)

On May 3, 2018, claimant returned to Dr. Carreau with complaints of ongoing left knee pain. (JE 7:37) Dr. Carreau proposed a Synvisc injection despite the claimant's long-term needle phobia. (JE 7:37) Dr. Carreau also discussed that claimant's work injury was an aggravation of a pre-existing condition. (JE 7:37) On May 24, 2018, claimant underwent the Synvisc injection but ultimately found it unhelpful. (JE 7:39, 41)

During the June 14, 2018, visit with Dr. Carreau, claimant continued to report ongoing pain. (JE 7:41) Examination revealed a small knee effusion and mild tenderness with deep palpation of the patellofemoral joint but stable ligaments in fluid range of motion with some increased discomfort and deep knee flexion. (JE 7:41) Dr. Carreau felt that early degenerative changes in the medial femoral condyle and a small lesion were the biggest pain generator. (JE 7:41) A repeat MRI was completed on June 25, 2018, which showed chondromalacia, cartilage loss, and an abnormal meniscus. (JE 2:9-10)

On July 19, 2018, claimant returned to Dr. Carreau for a review of the MRI. (JE 7:42) Dr. Carreau believed claimant "clearly has early arthritis in his knee and it is my opinion that this is the source of his continued pain and disability" (JE 7:42) The doctor again noted claimant was a good candidate for steroid therapy but claimant refused. (JE 7:42) Instead, claimant would reduce his work hours from 70 hours a week to 55 hours of driving. (JE 7:42)

On July 24, 2018, a workers comp case manager sent the claimant an email summarizing the July 19, 2018 appointment with Dr. Carreau. (Exhibit H: 18) Per Leslee Valentini's understanding, Dr. Carreau stated that it was not realistic for the claimant to expect 100 percent resolution of his knee pain due to early arthritis. While a knee replacement may be in the claimant's future, Dr. Carreau did not believe it was related to the work injury of October 2017. Claimant's instability in the knee is not structural in nature but was rather a response to pain. (Exhibit H: 18)

Dr. Carreau recommended conservative measures such as a steroid injection, increase of ibuprofen, continuing use of the knee brace, icing and heating of the left knee, elevation of the leg to reduce swelling, and decrease personal physical activities. (JE 8:19) Dr. Carreau also recommended limiting work hours to 55 per week (Exhibit H: 19)

On August 23, 2018, claimant last saw Dr. Carreau. (JE 7:43) He explained the MRI confirmed arthritis. (JE 7:43) The doctor noted claimant had some swelling but no laxity of the ligaments, no atrophy, and symmetric range of motion. (JE 7:43) Claimant again refused steroid therapy and inquired about knee replacement surgery which Dr. Carreau felt was premature. (JE 7:43) Claimant was placed at maximum medical improvement (MMI), told to continue full duty with no restrictions, and told to return as needed. (JE 7:43) Dr. Carreau provided a 2 percent lower extremity permanent partial disability rating pursuant to the AMA Guides. (JE 7:44)

On August 30, 2018, claimant was informed that based on the final report of Dr. Carreau, claimant was entitled to a 2 percent partial impairment rating to the lower left extremity entitling the claimant to 4.3 weeks of disability at the rate of $614.25 per week. A check in the amount of $2,641.27 was issued. (Exhibit E: 9) On August 31, 2018, an additional amount of $61.43 was issued when it was realized that the 2 percent impairment is based off of 220 weeks instead of 215 weeks entitling the claimant to 4.4 weeks of disability. (Exhibit E: 10)

On October 7, 2019, claimant saw his chiropractor for multiple complaints (neck, left shoulder, left heel, and upper midback) but did not receive any treatment to the left knee nor did he complain of any left knee pain although there was a diagnosis of segmental and somatic dysfunction of lower extremity. (JE 8:45.) On October 22, 2019, claimant saw PA-C Kosters again for a medication refill. (JE 9:57) The medical records noted chronic conditions of reflux and hypertension but no musculoskeletal complaints. (JE 9:57, 59)

On December 13, 2019, claimant saw Robin Sassman, M.D., at his attorney's request for an independent medical examination (IME). (Cl. Ex. 3 p. 11) Claimant had full range of motion of the lumbar spine, sensation in the bilateral lower extremities was within normal limits and calf circumference was the same bilaterally. (Cl. Ex. 3:19) He had bilaterally collapsed arches, more severe on the left. (Cl. Ex. 3:19) On the left knee, he was tender to palpation on the medial aspect and able to only flex the knee to 105 degrees. (Cl. Ex. 3:19) Mild edema was noted. (Cl. Ex. 3:19) Dr. Sassman concluded

that claimant suffered an aggravation of pre-existing asymptomatic condition as a result of his work injury. (Cl. Ex. 3:20) Dr. Sassman believed that claimant was not at MMI and would need a second opinion from an orthopedic surgeon to determine if there are other surgical options to ameliorate pain. (Cl. Ex. 3:21)

However, if the claimant was deemed to be at MMI, Dr. Sassman assigned a 10 percent lower extremity permanent partial disability rating for "loss of flexion." (Cl. Ex. 3 p. 21.)

On December 14, 2019, claimant received written disciplinary warning for unapproved absence on October 29, 2019 and December 13, 2019. (Exhibit D: 7-8) Claimant maintains that he received a text message approving this leave of absence and it was not until December 14 when he was written up for both the October 29 and December 13 absence. Claimant was in Boone for the IME on December 13, 2019. On December 31, 2019, the date of his last unauthorized leave of absence, he was dispatched outside of Iowa, but he could not leave due to a lapsed medical card. He attempted to get his medical card updated on the 31st, but the chiropractor used by the defendant employer was not available.

On January 3, 2020, claimant was terminated by defendant employer due to unapproved absences, no-call no-show, and failure to maintain DOT medical certification. (Cl. Ex. 1 pp. 3, 4.) On January 30, 2020, claimant was denied unemployment. (Exhibit J: 26) The unemployment decision is on appeal. The owner, Josh Derby, testified that the claimant was terminated due to missed work and the lack of an appropriate medical card. Claimant was not terminated, according to the owner, due to health reasons.

After the work injury, claimant continued to work for the defendant employer for two years, and his rate of pay increased from $16.32 per hour to $20.00 per hour. (Ex. K:22, 43.) He did not have any time off of work once he was healed from the surgery. There were no work restrictions in place. Claimant has not treated since August 2018, and no additional treatment has been recommended. (Ex. K:37)

Claimant testified that he walks with a limp and that his knee is very sore. The pain is worse by the end of the day because of use. He treats his pain with elevation, rest and over-the-counter medications. He testified that he needs to get his knee fixed and that his city driving, which requires frequent use of the clutch, aggravates his pain. He believes that he could be able to return to his position with defendant employer but that some delivery locations would present difficulties due to uneven ground at the delivery sites.

Defendants argue that claimant is not a credible witness and point to a few instances in the medical records where claimant may have stated the wrong date or time for his left knee pain. On the whole, claimant's account of how his left knee was injured has been consistent. For example one of the discrepancies the defendants cite is the November 13, 2017, visit with Dr. Strittholt where Dr. Strittholt recorded the origin

of the claimant's knee injury to be two weeks prior. Yet, on the same day, claimant began physical therapy and the therapist recorded the date of injury as October 19, 2017. Either claimant was mistaken or Dr. Strittholt made the error, but either way, it does not support a credibility finding against the claimant.

There is nothing in the claimant's demeanor during testimony that would give rise to a non-credible finding. He answered the questions in a straightforward manner regardless of whether he was on cross-examination or direct examination. The mistakes or contradictions in testimony appeared to be related more to forgetfulness than intentional mistruths.

Therefore, based upon the foregoing, it is determined claimant was a credible witness.

CONCLUSIONS OF LAW

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).

The parties agree claimant sustained a left knee injury during his work duties. The nature and extent of that injury is in dispute. Based on the medical expert opinions, claimant sustained an aggravation of a pre-existing condition. Prior to his work injury, claimant had no left knee symptomatology. Where the parties deviate is to what degree the current symptomatology of the claimant is attributable to his knee injury.

The surgeon, Dr. Carreau, wrote in his medical records that the early degenerative changes in the medial femoral condyle and small lesion were the biggest pain generator. The second MRI conducted on June 25, 2018 showed chondromalacia, cartilage loss, and an abnormal meniscus. Dr. Carreau read the MRI as confirming that claimant had early arthritis in the knee and that it was the source of his continued pain and disability. Dr. Sassman opined claimant's post injury symptoms as related to the work injury itself due to claimant's pre-existing asymptomatic condition.

Neither Dr. Carreau nor Dr. Sassman are legal experts and their opinions must be interpreted by applying the standard of law. 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).

Thus, while Dr. Carreau attributes claimant's current symptomatology to the early arthritis in his knee, the framework of the Iowa law allows for the claimant to recover for any aggravation of that early arthritis. Dr. Sassman's more direct connection between the claimant's ongoing symptomatology and the work injury is not a rebuttal of Dr. Carreau's opinions nor are the two expert opinions contradictory. Dr. Carreau concludes that the current pain suffered by claimant relates to the original arthritis and Dr. Sassman opines that the claimant's original arthritis was lit up or aggravated by the work injury. There is no temporary aggravation, because claimant has never returned to pain free baseline.

Thus, based on the two expert opinions, the greater weight of the evidence supports a finding that claimant had degeneration and arthritis in his left knee that was asymptomatic until his work injury of October 19, 2017.

Where an injury is limited to scheduled member the loss is measured functionally, not industrially. Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983).

Evidence considered in assessing the loss of use of a particular scheduled member may entail more than a medical rating pursuant to standardized guides for evaluating permanent impairment. A claimant's testimony and demonstration of difficulties incurred in using the injured member and medical evidence regarding general loss of use may be considered in determining the actual loss of use compensable. Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936). Consideration is not given to what effect the scheduled loss has on claimant's earning capacity. The scheduled loss system created by the legislature is presumed to include compensation for reduced capacity to labor and to earn. Schell v. Central Engineering Co., 232 Iowa 421, 4 N.W.2d 339 (1942).

Dr. Carreau assessed a 2 percent impairment rating and Dr. Sassman assessed a 10 percent impairment rating. Claimant has received no treatment for his left knee since August 23, 2018. Claimant has had ongoing pain with knee instability and loss of flexion due to that pain. Claimant has refused injection therapy which Dr. Carreau believes could be helpful.

Claimant returned to his preinjury duties and worked those preinjury duties with no restrictions or accommodations for approximately two years. However, Dr. Carreau did advise claimant to reduce his work hours by approximately 20 percent from 70 hours to around 55 hours per week due to pain and decreased function. This reduction of hours is more aligned with Dr. Sassman’s impairment rating than that of Dr. Carreau.

Based on the foregoing, it is determined that claimant has sustained 20 percent functional loss to his lower left extremity.

The claimant also asks for the right for a second opinion regarding treatment for the claimant’s left knee. Dr. Carreau has proferred injection therapy but does not believe surgical intervention such as a knee replacement is advisable.

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 has ongoing pain and instability related to that pain arising out of a work injury. He is entitled to further care including a second opinion. However, as defendants point out, claimant is not asserting he is entitled to alternate care and there is no basis for the defendant to lose their statutory rights to direct claimant's care and choose his care providers.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant forty-four (44) weeks of permanent partial disability benefits at the rate of six hundred fourteen and 25/100 dollars ($614.25) per week from August 24, 2018.

That claimant is entitled to a second opinion regarding his left knee but that the defendants retain their statutory right to direct care and choose the healthcare providers.

That defendants shall pay accrued weekly benefits in a lump sum.

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

That defendants are to be given credit for benefits previously paid.

That defendant shall pay the costs of this matter pursuant to rule 876 IAC 4.33.

Signed and filed this 13th day of April, 2020.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Willis Hamilton (via WCES)

Aaron Oliver (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.