BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KENNETH STREIT, Claimant, vs. STREIT CONSTRUCTION, INC., Employer, and EMC INSURANCE COMPANIES, Insurance Carrier, Defendants.	FILED DEC -7 2016 WORKERS' COMPENSATION File No. 5043612 A P P E A L D E C I S I O N Head Note No: 1100, 1108,1800

Defendants Streit Construction, Inc., employer and its insurer, EMC Insurance Company, appeal from an arbitration decision filed on May 7, 2015. Claimant Kenneth Streit responds to the appeal. The case was heard on January 30, 2015, and it was considered fully submitted in front of the deputy workers' compensation commissioner on March 23, 2015.

The deputy commissioner found claimant carried his burden of proof that he sustained an injury which arose out of and in the course of his employment with defendant-employer on October 13, 2012. The deputy commissioner awarded claimant healing period benefits from October 13, 2012, through April 1, 2013. The deputy commissioner awarded claimant 60 percent industrial disability, which entitles claimant to 300 weeks of PPD benefits starting April 2, 2013. The deputy commissioner ordered defendants to reimburse claimant for past medical expenses itemized in Exhibit 3, and for medical mileage itemized in Exhibit 6, which the deputy commissioner found were necessitated by the work injury. The deputy commissioner ordered defendants to pay the future medical expenses of claimant necessitated by the work injury. The deputy commissioner ordered defendants to reimburse claimant $4,300.00 for the cost of the independent medical evaluation (IME) performed by John D. Kuhnlein, D.O., on January 6, 2015. The deputy commissioner also ordered defendants to pay claimant's costs of the arbitration proceeding.

Defendants assert on appeal that the deputy commissioner erred in finding claimant carried his burden of proof that he sustained an injury arising out of and in the course of his employment on October 13, 2012. Defendants assert the deputy

commissioner erred in awarding claimant healing period benefits from October 13, 2012, through April 1, 2013. Defendants assert the deputy commissioner erred in awarding claimant 60 percent industrial disability, which entitles claimant to 300 weeks of PPD benefits. Defendants assert the deputy commissioner erred in ordering defendants to reimburse claimant for the past medical expenses itemized in Exhibit 3 and for the medical mileage itemized in Exhibit 6. Defendants assert the deputy commissioner erred in ordering defendants to pay the future medical expenses of claimant necessitated by claimant's condition. Defendants also assert the deputy commissioner erred in ordering defendants to reimburse claimant for the cost of Dr. Kuhnlein's IME.

Claimant asserts on appeal that the arbitration decision should be affirmed in its entirety.

Those portions of the proposed arbitration decision pertaining to issues not raised on appeal are adopted as part of this appeal decision.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, pursuant to Iowa Code sections 86.24 and 17A.15, I reverse the determination of the deputy commissioner and I find claimant failed to carry his burden of proof that he sustained an injury arising out of and in the course of his employment on October 13, 2012. I find the deputy commissioner erred in awarding claimant healing period benefits from October 13, 2012, through April 1, 2013. I find the deputy commissioner erred in awarding claimant 60 percent industrial disability, which entitles claimant to 300 weeks of PPD benefits. I find the deputy commissioner erred in ordering defendants to reimburse claimant for the past medical expenses itemized in Exhibit 3 and in ordering defendants to reimburse claimant for the medical mileage itemized in Exhibit 6. I find the deputy commissioner erred in ordering defendants to pay the future medical expenses of claimant necessitated by claimant's condition. I find the deputy commissioner erred in ordering defendants to reimburse claimant for the cost of Dr. Kuhnlein's IME. I find the deputy commissioner erred in ordered defendants to pay claimant's costs of the arbitration proceeding. I provide the following analysis regarding those issues:

FINDINGS OF FACT

Claimant testified he was 54 years old at the time of the arbitration hearing. (Hearing Transcript, page 8) He testified he graduated from high school in 1978 (Tr. p. 9) He completed a one-year construction program at Iowa Lakes Community College following high school (Id.) Claimant started his own construction company in 1979 (Tr. pp. 9-10) Claimant's company, defendant-employer herein, has been in business continuously since 1979 and continues in business today. (Tr. p. 79)

Claimant testified he performed physical and manual labor for his company from the day the company was started. (Tr. p. 10) He testified he has worked on both residential and commercial projects throughout his employment. (Tr. p. 11) Claimant testified his business has also performed a fair amount of concrete work (Id.)

Claimant testified October 13, 2012, was a normal day of work for him. (Tr. p. 23) He testified he cleaned up on a job site that day. (Id.) He testified that particular day was to be the last day for his company to be at that job site. (Tr. pp. 23-24) He testified he worked alone that day (Id.) He spent part of the day picking up cement forms that weighed between 40 and 80 pounds (Id.) He did not recall doing anything at that job site on October 13, 2012, to injure his back. (Id.)

Claimant was evaluated in the emergency department at Trinity Regional Medical Center (TRMC) early in the morning of October 14, 2014, reporting back pain. (Exhibit 1, p.1) According to the ER note, claimant reported his pain was "present in the thoracic spine." (Id.) Claimant also reported left rib pain, arm pit-area pain with spasms into his left shoulder blade and down into the left side of his back. (Ex. 1, p. 4) Claimant was prescribed some medication and discharged to go home on October 14, 2012. (Ex. 1, pp. 3-4)

Claimant was evaluated at Gowrie Family Chiropractic Clinic, P.C., on October 16, 2012, reporting pain in the "right lower torso region at the lumbopelvic area and right mid-torso region at the mid-back area." The clinical note indicated claimant's symptoms had been present since October 10, 2012. (Ex. 1, p. 5)

Claimant was seen at TRMC again on October 17, 2012, for back pain. The clinical note stated the following: "The pain is associated with no known injury." (Ex. 1, p. 8)

Claimant was evaluated at McCrary-Rost Clinic in Gowrie on October 18, 2012. According to the clinical note, claimant presented with "hip pain." (Ex. 1, p. 14) The history in the note indicated the following:

> Had pain in left side chest and left shoulder blade pain which developed Sunday afternoon. Patient states it was so severe he thought he was having a heart attack . . . He went to chiropractor on Tuesday. After his adjustment by the chiropractor, the pain moved to his right hip on Tuesday.
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> . . .
>
> Patient to be evaluated for hip pain.

(Id.)

Multiple tests were ordered by the physicians at McCrary-Rost Clinic, including a blood culture test. (Ex. 1, p. 17) The clinical note of October 19, 2012, indicated claimant's blood cultures came back positive and claimant was directed to go to TRMC. (Ex. 1, p. 18)

Claimant was admitted to TRMC on October 19, 2012, where he was evaluated and treated by James Comstock M.D., and the emergency room staff. Claimant was diagnosed with septicemia, an infection of the blood, caused by methicillin-resistant staphylococcus aureus (MRSA). MRSA is a bacterium which causes infections in different parts of the body. It is more difficult to treat than most strains of staphylococcus aureus, or staph, because it is resistant to some commonly used antibiotics. (See WebMD, "MRSA – definition.")

Claimant was transferred to Iowa Methodist Medical Center (IMMC) on October 21, 2012. (Ex. 1, p.29) While at IMMC, claimant was evaluated by multiple physicians, one of whom was Christopher D. Nelson, D.O. Dr. Nelson's note stated the following: "He is diagnosed with MRSA bacteremia. At this point, there is not an exact source." (Ex. 1, p. 36) Another note from IMMC states the following:

> The patient does report a long history of picking at sores and lesions from abrasions during his work. He says that when he sweats a lot he breaks out with sores on his scalp, within his beard, as well as his arms. He states he picks them a lot and occasionally they will have pus associated with them. He also reports this seems to have worsened approximately two summers ago. He does state he has chills on and off, although has not taken his temperature. He also reports his son has a history of MRSA skin infections yearly from wrestling in high school, starting in his freshman year approximately four years ago.

(Ex. 1, p. 38)

Claimant was evaluated by Sudhir Kumar, M.D., an infectious disease doctor, while he was a patient at IMMC. (Ex. 1, p. 40) Claimant was also evaluated and treated by David Boarini, M.D., neurosurgeon, while he was a patient at IMMC. (Id.) Claimant was treated by Dr. Boarini for discitis in his spine caused by the MRSA. (Ex. C, p. 2) Claimant was discharged from IMMC on October 26, 2012. (Ex. 1, p. 42)

Claimant testified at hearing that the doctors who treated him for the MRSA infection told him the MRSA has resolved. (Tr. p. 88) He testified he no longer receives medical treatment for MRSA. (Id.) Claimant testified he never had pain in his back and legs and numbness and tingling in his legs until he had the MRSA infection. (Tr. p. 63) He testified that the back and leg pain and the numbness and tingling in his legs continued after the MRSA infection resolved and was still present at the time of the arbitration hearing. (Id.) Claimant testified he also has frequent cramping in his right

leg. (Tr. pp.43-44) He stated his back and leg pain affect his ability to stand and walk. (Tr. p. 44) He stated he has difficulty with balance. (Id.)

On December 7, 2012, in response to a question regarding whether claimant's MRSA diagnosis was work-related, Dr. Kumar stated the following, in pertinent part:

> Patient was not seen by me in the past for reported skin condition/infections post injuries
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> I am unable to determine if his current infection is work related.

(Ex. A)

On January 22, 2013, Kayla Blanchard, Claims Adjustor for defendant-insurer, wrote to Dr. Comstock, the staff physician at Trinity Regional Medical Center who treated claimant when claimant was hospitalized at TRMC from October 19, 2012, through October 21, 2012. Ms. Blanchard asked Dr. Comstock to provide his opinion regarding causation of claimant's MRSA infection. (Ex. 7, p. 1) In an undated written response, Dr. Comstock stated the following:

> Kenny Streit came to the Trinity Regional Health systems emergency room in the fall of 2012, suffering from an acute illness. This was his third visit to a health care facility in his attempt to discover the cause of, and obtain treatment for this illness. He appeared acutely ill, and indeed, had positive blood cultures for methicillin resistant staphlycoccus (sic) aureus obtained on a previous ER visit. By the time we saw him over a week had gone by since the onset of his illness, making it difficult to pinpoint the exact start of his illness. He was found to have a septicemia (blood stream infection), with remote sites of infection in his body. He was started on powerful intravenous antibiotics, and was ultimately transferred to a Des Moines hospital for further evaluation and care. MRSA infections (as these are called), typically start with a portal of entry by way of a skin or mucous membrane cut, abrasion, or microabrasion. It is unheard of to contract this sort of infection by other means (ie: ingestion or inhalation). Mr. Streit is subjected to microabrasions on a regular basis in the course of his work as a carpenter. It is very unlikely any other mechanism would be the cause of his illness. It would be unfair to make Mr. Streit determine which microabrasion was the start of his illness, as that would be humanly impossible. The overwhelming possibility is that his illness arose out of his working conditions.

(Ex. 7, p.2)

In a letter to McCrary-Rost Clinic electronically signed by Dr. Boarini on February 1, 2013, Dr. Boarini stated the following:

> The patient is quite unhappy today because he wanted me to write a letter declaring that this was a Workers' Compensation case. I explained that I could not do that and deferred to the infectious disease specialist in terms of how this started. He has already talked to him and insisted that I had to write the letter. I explained that I could not do that and he was quite distraught. I told him I did not need to follow him any further at this point. I suggested he contact you or the infectious disease people for further follow up. I will certainly be happy to see him if there is something that he needs from neurosurgery.

(Ex. C, p.1)

In a letter to Ms. Blanchard dated May 10, 2013, Kevin Cunningham, M.D., of Iowa Clinic Internal Medicine, stated the following, in pertinent part:

> . . . After review of the notes you provided related to this claim it is my opinion that there is no adequate evidence that his work was related to the cause of his infection. His occupation would not be considered a high risk occupation in the context of MRSA exposure and his available records did not indicate any history of specific exposure to high risk areas or surfaces. The record did not indicate any history of acute cellulitis or other skin/soft tissue infection directly related to work exposure either.

(Ex. B)

Claimant was evaluated by David Hatfield, M.D., orthopedic surgeon, on February 26, 2014, for chronic back pain. Dr. Hatfield noted the following, in pertinent part:

> HISTORY OF PRESENT ILLNESS: This is a 53-year-old gentleman here today with back pain that started October 2012. He has had chronic back pain ongoing for many years. The pain does wake him at night. It is worse in the evening; however constant. It is sharp in character. It is worse early morning and late evening. It improves with medication and walking. He also feels like working helps him forget the pain. He has noticed weakness in his legs and feet. He has had fevers, chills and sweats. Neck pain is 5, arm pain 4, back pain 9, buttock pain 3 and leg pain 7.
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> The spine intake form was reviewed and retained in the chart . . . He is otherwise healthy. Denies neck or back surgery; however he was in the hospital in October 2012 due to MRSA which he tells me was along his spine

. . .

Denies any physical therapy or epidural steroid injection for this problem. He is taking Percocet.

. . .

IMPRESSION AND PLAN: This is a 53-year-old gentleman with pain in his back. History of discitis treated nonoperatively. He notes rare history of fevers, chills and sweats; however not as severe as what he had previously. No current tobacco intake. No pain with lumbar percussion or palpation. Grade 5 strength in both lower extremities. Diffuse degenerative changes in lumbar spine

We had a long review of his current findings. There is nothing to suggest a recurrent of his prior discitis. He certainly has multi-level changes in his back. I would not advocate any operative intervention for him. I do not believe epidural steroid injection would be of any help to him either. I would anticipate non-operative management. He is in agreement with the above.

(Ex. D, pp. 1-2)

In a letter to defendants' attorney dated June 6, 2014, Dr. Boarini stated the following, in pertinent part:

. . . I took care of Kenneth Streit starting with a consultation for possible discitis. That was his final diagnosis. I used both clinical examination and sequential MRIs to document his problem and follow his progress. His treatment was intravenous antibiotics recommended and administered by infectious disease consultation. This patient did improve over time clinically by biochemical markers and by history, his condition improved as expected.

He did have preexistent degenerative changes on his MRI simply due to aging. At no time that I saw him did he require surgery and I would not anticipate for the problems for which I saw Him that he will need that in the future.

(Ex. C, p. 2)

On October 29, 2014, claimant was evaluated by Shahnawaz Karim, M.D., neurologist in Fort Dodge. In his report, Dr. Karim stated the following in pertinent part:

> Kenneth is a 54 y.o. male who complains of back pain and tingling and numbness in his leg on the right side. The onset of symptoms was sudden in 2012. He had posterior epidural abscess (L2-L3) as well as bilateral psoas abscess.
>
> He also had sepsis and was treated with IV antibiotics, after which he received physical therapy and occupational therapy, but he continues to have back pain. He works in construction. Currently he does not have any limitations as far as his work is concerned, but he states that when he comes back home he is in a lot of pain . . . I have reviewed his MRI of the lumbosacral spine, which shows mild scoliosis at L3-L4 disk space and marked degenerative and diskogenic changes noted at L2-3. These are the sequela of the epidural abscess. He has been evaluated at the pain clinic and has been prescribed oxycodone for now.
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> . . .
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> ASSESSMENT AND PLAN: A 54-year-old male with back pain, likely from degenerative disk disease of the spine s/p epidural abscess and discitis and clinical exam also suggestive of lumbar radiculopathy. Currently there is no concern for peripheral neuropathy. I have counseled the patient that this condition will likely progress; however, we are not exactly sure about the extent of progression. I have advised physical therapy and occupational therapy for this patient to minimize any further degenerative changes in his spine.

(Ex. 1, pp. 72, 74)

Dr. Karim did not indicate whether he believes claimant's MRSA infection and its effect upon his pre-existing degenerative back condition is related to claimant's employment with defendant-employer.

Claimant testified at hearing that he neither performed nor requested any testing of the work site on October 13, 2012, or at any time after that, which proved the presence of MRSA anywhere at the work site. (Tr. p. 89)

At the direction of his attorney, claimant had an IME with John D. Kuhnlein, D.O. on January 6, 2015. (Ex. 2) Following his evaluation of claimant and his review of the medical records, Dr. Kuhnlein concluded that proving Claimant's diagnosis of MRSA is causally related to claimant's employment would require proof that claimant acquired the MRSA through dermal transmission through open cuts and sores while working in an environment in which claimant had actual exposure to MRSA in a fashion which

would infect the cuts and sores. (Ex. 2, p. 15) Dr. Kuhnlein stated the following in his IME report, in pertinent part:

> Mr. Streit adamantly expresses the belief that he was infected with MRSA through the open cuts, scrapes and sores on his body. Dermal transmission typically requires open cuts and sores, which Mr. Streit had on his body at the time. Therefore, one loop of the causation argument has been made. Mr. Streit had open cuts, scrapes and sores, so there was an avenue for infection *if* he was exposed to MRSA in a fashion where these areas could also be infected by MRSA bacteria, which would lead to the MRSA septicemia and the noted abscesses and discitis. To say that he had open wounds while working and therefore his MRSA is work-related is insufficient, as the other half of the argument is missing.
>
> To close the causation loop, one must also prove that in addition to the cuts, scrapes and sores on his body, Mr. Streit also had actual exposure to MRSA in a fashion that would infect the cuts, scrapes and sores. It must be shown that he was exposed to the MRSA in some work environment, or at least was in an environment where it was more likely than not that such work related exposure occurred in appropriate fashion. Dr. Kumar's notes discussing being hospitalized or visiting people in nursing homes was to some extent trying to determine such a potential exposure site, as was the discussion about his MRSA infected son.
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> . . .
>
> One possible worksite source of the MRSA infection would be the worksite itself where he was working at Paton Iowa in October 2012, given the incubation period and the time frame before the infection became prominent. Given the history, this was a very dirty worksite, and Mr. Streit says that he may have been in close contact with some of the other workers. However, to prove that Mr. Streit was actually exposed to MRSA at this work site would be difficult to do at this late date and relate it to an October 2012 MRSA infection, as it would require proof that MRSA was present in that work site at the time in 2012, or that it was more likely than not that this site could have MRSA present. I am not aware that the work site where he was working in October 2012 was cultured to prove MRSA was present, and have no information other than Mr. Streit's statements that it was a higher than usual risk area for MRSA. If MRSA was present in that workplace at that time and this can be shown by culture or that there was some likelihood that it was present, then it becomes far more likely that he was exposed to MRSA at this work site. If this can't be shown, this workplace could not be considered a potential MRSA source within reasonable medical certainty, and the MRSA infection with end

organ infection could not be shown to be related to exposure originating from that particular site.

. . .

At this time, there is no objective evidence that the MRSA entered his body through one of the cuts on his arms – I do not find any evidence that the arms were cultured to show that they were MRSA infected. That is a reasonable presumption however.

If it could be shown that Mr. Streit had work-related exposure to MRSA in one of the fashions as described above, then it becomes more likely that Mr. Streit's MRSA infection was work-related. Please note that all theories of work-relatedness depend upon actual exposure to MRSA that can be proven in a work-related setting. If there is no objective proof of work-related MRSA exposure, then it is speculative to assume that this was work-related MRSA. Simply saying that one's arms have cuts and scrapes and therefore the MRSA is work-related is insufficient evidence to medically prove work place exposure.

The other issue in this particular case is whether the back pain developed as a result of his work activities independent of the MRSA infection. Mr. Streit alleges that when he awakened at 2:00 or 3:00 in the morning with such severe pain that he was unable to move, he relates that he had pain from his low back all the way to both shoulders, and down the back of both legs. Unfortunately, this was not the primary history documented in the Trinity Emergency Room note of October 14, 2012, where the primary complaints were of chest wall pain, left rib and left shoulder blade pain although pain down the left back was mentioned. He described pain everywhere not just in his back but also states today that he thought he threw his back out. Back pain doesn't appear to have been the prime consideration by the ER staff as the diagnosis was chest wall pain.

He was noted to have significant low back pain when he was seen in the emergency room three days later. Unfortunately, at the time, it appears that Mr. Streit was developing the MRSA septicemia, which developed into the bilateral iliopsoas abscesses, and the epidural abscess in the low back area, so it would be very difficult if not impossible to separate a musculoskeletal back injury from back symptoms related to iliopsoas abscesses and discitis. Any work-related low back pain would have been confounded by the symptoms caused by the MRSA infection. In addition, Mr. Streit did not describe any specific work related issue or potential injury that would produce specific low back pain at the work environment prior to the onset of his symptoms when he awakened at 2:00 or 3:00 in the morning of October 14,

> 2012. He does have extensive degenerative disc disease as noted in the multiple radiographic studies, as well as disc herniations in his lumbar spine. However, the question would be whether the pre-existing lumbar disease was "lit-up" and materially aggravated by the work activities Mr. Streit performed at the job site at the grain storage bin in Paton, Iowa, on or about October 13, 2012. The history presented by Mr. Streit, and the available record, does not suggest that his degenerative disc disease was aggravated or "lit up" by his work. This would not have been a cumulative back injury over time as Mr. Streit describes the sudden onset of back pain with awakening. Cumulative injuries tend to cause the gradual development of symptoms as the injury slowly progresses over time and that's not the case here.
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> Another scenario is that the MRSA infection "lit up" the underlying degenerative disc disease, in combination with scar tissue formed by the epidural abscess and the bilateral iliopsoas abscesses. If it can be proven that the MRSA infection was work-related, then it becomes more likely that the degenerative disc disease was "lit up" and materially aggravated by the MRSA infection. If the MRSA infection is deemed to be work-related (which must medically depend on proof of work related exposure in such a way he was infected), then it becomes more likely that his current low back pain is work-related through the deleterious effects of the MRSA infection. If it cannot be shown that the MRSA infection was work-related, then it cannot be shown that his back condition is work-related related to the known MRSA infection.
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> In brief summary, Mr. Streit did have cuts, abrasions and breaks in his skin. To close the causation loop and make his MRSA infection work-related, it must also be shown that he was infected by MRSA in a work-related scenario where it is likely the MRSA entered his cuts, scrapes or open sores. All must be present in this case. You cannot simply assume that because he had cuts and because he was working in a dirty environment, then he had MRSA. MRSA is community-acquired in very specific circumstances, and it can typically be proven to exist in those circumstances, such as in contact sports, in military camps, childcare centers and jails. If it can be proven he had such MRSA exposure in a work related fashion then the MRSA exposure would be related to his work, and all the conditions, including the back condition, would be work related.

(Ex. 2, pp. 15-18)

Dr. Kuhnlein determined claimant has seven percent impairment of the body as a whole for his back and leg condition resulting from the MRSA infection. (Ex. 2, p. 19) Dr. Kuhnlein limited claimant to 40 pounds lifting occasionally at all levels. (Ex. 2, p. 20) Dr. Kuhnlein determined claimant can sit, stand or walk on an as-needed basis and he

can squat, bend, crawl or kneel occasionally. Dr. Kuhnlein determined claimant can work no more than occasionally at or above shoulder height because of the effect on his lumbar spine. (Id.) Dr. Kuhnlein determined that when traveling, claimant will need to take frequent breaks because of back pain. (Id.) Dr. Kuhnlein also determined claimant can use vibratory tools only occasionally at or above shoulder height. (Id.) No other physicians have issued work restrictions for claimant in this matter.

CONCLUSIONS OF LAW

The first issue in this case is whether claimant sustained an injury arising out of and in the course of his employment on October 13, 2012. Closely related are the issues of whether any temporary or permanent disability is causally related to any work injury which may have occurred.

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" refer to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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).

Claimant's claim is based on the assertion he suffered cuts and scrapes while doing construction work, which resulted in him contracting a MRSA infection. I find claimant failed to prove he sustained an injury which arose out of and in the course of his employment and I reverse the deputy commissioner's finding in that regard.

In reaching this conclusion, I find the greatest weight to the opinions of Dr. Kumar, Dr. Boarini, Dr. Cunningham and Dr. Kuhnlein.

Claimant relies on Dr. Comstock's opinion to assert that the MRSA diagnosis is causally related to an alleged injury on October 13, 2012. However, Dr. Comstock stated, "The overwhelming possibility is that his illness arose out of his working conditions." A possibility, even one that is supposedly "overwhelming," does not satisfy claimant's burden of proof. It is very well established in Iowa that what is required is a probability, or a reasonable degree of medical certainty, and Dr. Comstock's opinion does not satisfy that requirement. I therefore find Dr. Comstock's opinion unconvincing.

Drs. Kumar, Boarini and Cunningham all stated they were unable to determine whether claimant's MRSA infection was work-related. (See, e.g., Ex. A, Ex. B and Ex. C, p.1)

Dr. Kuhnlein, the doctor whom claimant saw for his own IME, thoroughly addressed the issue of causal connection and the alleged work-relatedness of claimant's MRSA diagnosis in great detail. (Ex. 2) In addressing this issue, Dr. Kuhnlein stated claimant must first prove he was exposed to MRSA in the workplace. Dr. Kuhnlein stated that without proving this particular point, claimant's claim fails. (Ex 2, pp. 15-18)

Dr. Kuhnlein also pointed out that even if it were proven there was MRSA in the workplace, there is no objective evidence that the MRSA entered claimant's body through any of the work-related cuts or abrasions. Dr. Kuhnlein stated, "I do not find any evidence that the arms were cultured to show that they were MRSA infected." (Ex. 2, p. 17) I find that without such proof, claimant's claim definitively fails. I therefore find Dr. Kuhnlein's analysis regarding causation to be most convincing.

In support of his assertion that he sustained an injury arising out of and in the course of his employment, claimant references the following three cases in his brief: IBP, Inc v. Buress, 779 N.W.2d 210 (Iowa 2010); Perkins v. HEA of Iowa, Inc., 651 N.W.2d 40 (Iowa 2002) and Ford v. Goode, 240 Iowa 1219, 38 N.W.2d 158 (1949). However, the three cited cases are not on point in this matter because in all three cases it was established that the diseases which injured those claimants resulted from exposures which occurred within the workplace itself. In this case, it has only been

established that claimant's exposure to MRSA might possibly have occurred within claimant's workplace. A probability of such exposure has not been established in this case.

Furthermore, in all three cases cited by claimant, it was clearly established that when exposed to the diseases in question, those diseases entered the claimants' bodies through specifically identified sites. As Dr. Kuhnlein pointed out in his IME report, in this case, there is no proof that the MRSA bacteria entered claimant's body through any of the work-related sores or abrasions because none of those sites were cultured to determine whether the MRSA bacteria were actually present at those sites.

Therefore, because claimant has not established he was exposed to MRSA within the workplace itself, and because claimant has not established that the MRSA bacteria actually entered his body through any work-related cuts or abrasions, claimant has failed to prove he sustained an injury which arose out of and in the course of his employment with defendant-employer. To conclude otherwise is simply conjecture.

Because I find claimant failed to prove by a preponderance of the evidence that he sustained a work-related injury in this matter, I also find it necessary to reverse the deputy commissioner's award of healing period benefits, industrial disability benefits, medical benefits including past medical expenses and medical mileage, and the award for future medical treatment for claimant's condition.

The final issue to be determined is whether claimant is entitled to reimbursement in the amount of $4,300.00 for the cost of Dr. Kuhnlein's IME.

Claimant has the burden of proving he is entitled to reimbursement under Iowa Code section 85.39 for the cost of an IME. Section 85.39 provides as follows, in pertinent part:

> If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination.

(Iowa Code section 85.39)

In this case, defendants denied the claim from the very beginning. (defendants' appeal brief, p. 18) Defendants did not retain any physician to give an opinion on permanent disability, (Id.) and the only physician to render an opinion on permanent disability was Dr. Kuhnlein, claimant's IME physician.

On page 14 of the arbitration decision, the deputy commissioner stated:

> Defendants submitted reports by Dr. Boarini, Dr. Cunningham, and Dr. Kumar expressing opinions on causation. Although those opinions do not explicitly offer ratings of permanent impairment, they in effect offer ratings of zero impairment caused by this injury. Claimant was therefore entitled to an independent medical opinion under Iowa Code Section 85.39 to rebut those opinions. He obtained one from Dr. Kuhnlein. (Ex. 5) Under Iowa Code section 85.39, claimant is entitled to be reimbursed for the costs of the IME.

(Arb. Dec., p. 14)

The deputy commissioner's conclusion is not correct. None of the physicians mentioned by the deputy commissioner, Drs. Boarini, Cunningham and Kumar, addressed the issue of permanent impairment and/or permanent disability. Neither Dr. Boarini nor Dr. Kumar was ever retained by defendants for any purpose in this case. (Id.) Dr. Cunningham was asked by defendants to review medical records and provide an opinion on the issue of causation. (Id.) Dr. Cunningham was not asked by defendants to address permanent disability. Therefore, it was incorrect for the deputy commissioner to conclude that the opinions of Drs. Boarini, Cunningham and Kumar are "in effect . . . ratings of zero impairment caused by this injury." (Id,)

Because the key requirements of Iowa Code section 85.39 have not been met in this case, the deputy commissioner erred in ordering defendants to reimburse claimant for Dr. Kuhnlein's IME.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of May 7, 2015, is reversed in its entirety.

Claimant shall take nothing in this matter.

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

Pursuant to rule 876 IAC 4.33, the parties shall bear their own the costs of the arbitration proceeding and claimant shall pay the costs of the appeal, including the cost of the hearing transcript.

Signed and filed this 7th day of December, 2016.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
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