BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ROBERT A. SCHWARZ,

Claimant,

vs.

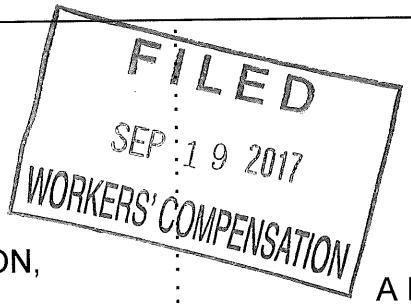
CONVERGYS CORPORATION,

Employer,

and

OLD REPUBLIC INSURANCE,

Insurance Carrier,
Defendants.



File No. 5056837

ARBITRATION

DECISION

Head Note Nos.: 1100; 1801; 1803; 2500

STATEMENT OF THE CASE

Robert Schwarz, claimant, filed a petition in arbitration seeking workers' compensation benefits from the employer, Convergys Corporation and Old Republic Insurance, the workers' compensation insurance carrier. The arbitration hearing was held on March 29, 2017. The parties filed post-hearing briefs on April 17, 2017 and the matter was considered fully submitted at that time.

Claimant's Exhibits 1 through 26 and Defendants' Exhibits A through I were offered and admitted. At hearing, claimant, Robert Schwarz, provided testimony.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury that arose out of and in the course of his employment on August 10, 2014, and/or whether the injury was idiopathic in nature.

2. Whether the alleged injury is the cause of temporary total disability.

3. Whether the alleged injury is the cause of permanent partial disability.

4. Extent of any permanent partial disability benefits.

5. Whether claimant is entitled to payment of medical expenses contained in Exhibit 23.

6. Penalty.

7. Costs.

FINDINGS OF FACT

After a review of the evidence presented, I find as follows:

Claimant was 68 years old at the time of the hearing. (Testimony)

Claimant graduated from high school and attended college, graduating from Iowa State University with a degree in biology in 1999. He also has an associate degree in gunsmithing. (Testimony)

Prior to working for the defendant employer, Convergys, claimant worked temporary jobs in the Quad Cities area in 1996. He then moved to Sioux City to work for MCI, after graduating from Iowa State University, which later closed and claimant's job ended. Then, in 2006, claimant went to work for Stream, which later became known as Convergys. He continued to work there at the time of the hearing. (Testimony)

Convergys is a company that is contracted by other companies to provide customer service support. At the time of the hearing, claimant was working for Convergys under a contract with United Health Care, responding to customers of United Health Care to help them navigate their particular health care plan. Claimant worked second shift and earned $11.00 per hour. (Testimony)

Before the August 10, 2014, injury alleged in this matter, concerning claimant's right knee, he had a left knee arthroscopy in June, 2007, again in November 2007, and a total left knee replacement in August 2008, which he testified was currently doing well. (Exhibit 1, pages 3, 8, 13; Testimony) He stated that the reason for these surgeries was due to cartilage tears related to jogging. (Testimony) Claimant has also had rotator cuff surgery and carpal tunnel release on both arms.

Claimant testified that prior to the August 10, 2014 date of injury he had no problems with his right knee. (Testimony) The medical records submitted do not indicate any right knee problems prior to the alleged work injury.

The right knee injury which is the subject of this file is alleged to have occurred on August 10, 2014, when claimant was working his regular shift at Convergys. He was in the breakroom sitting on a barstool height chair. The employer provided computers in

the breakroom for employee use and the barstools allowed employees to either sit or stand to use the computers. Claimant stated that he extended his right leg to get off the chair, put all his weight on his right leg, and felt a sharp pain in his right knee. He went back to his work station, which had a normal height desk chair, and noted that when he got up from being seated, his right knee was hurting worse. He told his supervisor, Steve Schmidt about getting hurt while getting off the breakroom chair. Claimant stated that a co-worker could see that he was hurting and offered to drive him to his car, which was about 500 feet from the building. The co-worker was kind enough to wait around about 30 minutes for him to fill out an injury report and then took claimant to his car. Claimant stated that he was in a lot of pain that night. (Testimony)

Following the incident, claimant went to see his regular family physician, Michael Brenner, M.D. (Ex. 3, pp. 1-3) Dr. Brenner noted that claimant had sudden onset of right knee pain when "he was getting out of a high stool at work and had a sudden sharp pain to [his] knee." (Ex. 3, p. 1)

Claimant was sent to Mercy Business Health Services by his employer and was seen by Mike Bobier, PA-C on August 13, 2014, who noted that claimant was "getting down from a computer height chair when he developed sharp pain in his right knee." (Ex. 4, p. 1)

The description of the injury is repeated throughout the medical records and described as: "getting down from a computer chair;" "stepping off a computer chair;" and, "getting off a stool at work." (Ex. 4, pp. 4-5, 9; Ex. 6, p. 1)

On September 8, 2014, claimant underwent an MRI, at the request of Dr. Brenner, his family physician.

On September 12, 2014, claimant was seen by Mr. Bobier, who stated that the MRI revealed "an advanced degenerative and complex tear of the posterior horn and posterior body of the medial meniscus," as well as "marrow edema involving the medial tibial plateau, which was felt to be secondary to impaction fracture." (Ex. 4, p. 9) He also noted bone necrosis in the distal femur and a "grade 2 sprain of the distal adductor magnus muscle and a rather large Baker cyst." (Id.) Mr. Bobier's assessment included: 1) Impaction fracture, right medial tibial plateau, and 2) Posterior horn, posterior body medial meniscus complex tear. (Id.) Claimant was referred to an orthopedic physician.

On October 7, 2014, claimant was seen by Michael Nguyen, M.D., at CNOS. The plan at that time was to have claimant be non-weight bearing for two weeks and transition to an off-loader brace, if that did not improve his symptoms, arthroscopic surgery including debridement may be needed. (Ex. 6, p. 3)

On November 20, 2014, it is noted by Dr. Nguyen that claimant had a medial meniscal tear and a medial tibial plateau fracture and is continuing to have "on again, off again pain," although he was able to do most things at work while wearing a brace. (Ex. 6, p. 10) An injection was administered for the right knee,

On December 11, 2014, Dr. Nguyen stated that the injection provided a few weeks of relief. He noted that although physical therapy had been previously ordered, it had apparently not been approved, which he described as "unfortunate." (Ex. 6, p. 15) He then recommended diagnostic arthroscopy with potential meniscectomy and he was referred to an arthroscopic specialist at CNOS. (Id.)

On January 6, 2015, claimant was seen by Steven Stokesbary, M.D., of CNOS who agreed that claimant would be appropriate for debridement of the right knee, but cautioned claimant "that with the intra-articular fracture and some early degenerative changes he may have some ongoing symptoms that require further or future treatment. In the meantime I do think this would improve his situation." (Ex. 7, p. 5) On the same date, a request for authorization for surgery was sent to the workers' compensation third party administrator. (Ex. 7, p. 7)

On January 30, 2015, a denial letter was sent to claimant, denying "any further treatment." (Ex. 12, p. 1) The basis for the denial was that "the incident did not amount to any injury arising out of your employment under the provisions of the IA Workers' Compensation Act . . ." (Id.) On February 1, 2015, the insurance adjuster sent confirmation to Dr. Stokesbary and his clinic, CNOS, that further medical treatment would not be authorized. (Ex. C)

Claimant testified that although he wanted to proceed with the surgery as recommended by the authorized provider, Dr. Stokesbary, payment through his regular health insurance provider, presented an out-of-pocket financial challenge that prevented him from moving forward immediately. This is supported by the record of medical expenses provided at Exhibit 23.

On May 13, 2015, counsel for defendant sent a letter to claimant's attorney, which included a photo of the area in which claimant was injured, the table and chair height and an assertion that "there was nothing incident to the employment that was a direct cause of his injury," and the claim was confirmed as denied. (Ex. H) Again, as was the case in the January 30, 2015, letter of denial, there was no indication of any medical opinion that defendants relied upon to support their conclusion.

On January 22, 2016, Scott Meyer, M.D., of Iowa Ortho, issued a report following a December 14, 2015 independent medical exam (IME). Confusingly, defendant submitted a copy of a letter requesting the IME, dated February 2, 2016, about two weeks after the report was already issued. (Ex. E, p. 2) Presumably, the letter contained at exhibit E is not the original letter and was re-issued to correct the date of

injury, which had been incorrectly stated in the initial letter requesting the IME. (Ex. E, p. 1)

The IME with Dr. Meyer occurred over 10 ½ months after the claim had been denied on January 30, 2015. The report following the IME was issued nearly one year after said denial.

Dr. Meyer's IME report includes an assessment of osteoarthritis of the right knee. (Ex. 8, p. 5) His diagnosis also includes: degenerative medial meniscus tear; degenerative lateral meniscus tear, medial compartment arthritis; and, a healed medial tibial plateau nondisplaced fracture. (Id.) Dr. Meyer concluded that the incident of stepping off the stool was not what he would consider "an injury." (Id.) He stated that this event "seems like a rather insignificant episode." (Id.) He stated that "[h]e was merely stepping off a stool placing his foot on the ground when he had the onset of pain. This could have happened getting up from his kitchen table at home." (Ex. 8, p. 6) However, he also stated that "It is quite clear that he had underlying pre-existing arthritis since such a minimal mechanism led to his increased knee pain." (Id.) Therefore, Dr. Meyer does not seem to reject the fact that the incident of stepping off the stool, led to the increased knee pain. Rather, Dr. Meyer opined that this right knee injury occurred coincidentally at work, because it "could have happened anywhere." (Ex. 8, p. 6) He goes on to state that future treatment may include arthroscopic debridement, but that claimant may also require a knee replacement, "which would provide the more long-term definitive solution." (Ex. 8, pp. 7-8) He believed claimant had reached maximum medical improvement (MMI) but failed to address permanent impairment because he believed that "it is not a work injury." (Ex. 8, p. 8) However, he assigned restrictions based on "having arthritis" to include: restricting time on his feet, avoiding standing or walking for prolonged periods of time, and avoid frequent kneeling and squatting.

On March 25, 2016, defense counsel sent a letter to claimant's counsel stating, "please be advised that based upon the IME Report of Dr. Meyer, my client is denying coverage for the alleged knee injury." (Ex. 15) This followed defendants communication of denial of coverage for this injury on January 30, 2015, reiterated on May 13, 2015, but now included Dr. Meyer's opinion as a basis for that determination. (Ex. 15, p. 1) However, as noted above, Dr. Meyer did not reject the fact that the incident of stepping off the stool, led to claimant's increased knee pain. (Ex. 8, p. 6)

On April 21, 2016, claimant returned to see Dr. Stokesbary and described continuing pain in his knee and advised that he wanted to proceed with the arthroscopy that Dr. Stokesbary recommended over a year earlier. (Ex. 7, pp. 7, 9) There was no evidence presented of any intervening incident between Dr. Stokesbary's recommendation for surgery and claimant's request to move forward with surgery in April, 2016.

On May 11, 2016, claimant underwent right knee arthroscopic surgery with Dr. Stokesbary for the medial meniscal tear. (Ex. 7, p. 14) Claimant was taken off work at that time. On the same date, Dr. Stokesbary referred claimant for physical therapy at which time it was noted that claimant's mechanism of injury was: "[t]he patient reports that in August, 2014, he was stepping down from a high chair and experienced a sharp pain in his right knee." (Ex. 9, p. 1)

Following surgery, claimant was released to return to work on May 20, 2016. (Ex. 7, p. 22)

On December 6, 2016, Sunil Bansal, M.D., issued a report following an IME that occurred on November 11, 2016 at the request of claimant's counsel. (Ex. 10, p. 1, 17) Dr. Bansal concluded concerning the right knee that: "[i]n my medical opinion, the injury on August 10, 2014 was a significant contributing factor for Mr. Schwarz's medial meniscal tear and need for surgery." (Ex. 10, p. 15) He opined that most likely, claimant had a degenerated medial meniscus which was torn when claimant experienced a hyperextension injury to his right knee from dismounting a tall chair at work. (Id.) He determined that claimant had reached MMI on June 16, 2016, and assigned an impairment rating of two (2) percent to the right lower extremity, under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. He assigned restrictions of avoiding multiple stairs and steps. (Ex. 10, p. 16)

In response to the IME from Dr. Bansal, Dr. Meyer provided additional opinions on December 23, 2016, at defense counsel's request. Dr. Meyer confirmed his agreement with the diagnosis of "impaction of the tibial plateau and medial meniscus tear," but reiterated his opinion that claimant did not sustain an "injury" stepping off of the stool, stating "[T]hat is not an injury mechanism. That is normal life." (Ex. 8, p. 10) He disagreed that the injury was due to hyperextension and stated that the records do not support this conclusion, and disagreed that the meniscal tear occurred at the time of the work injury and suggested that claimant may have had the meniscus tear prior to this incident. (Ex. 8, p. 11) This is, at least in part, based on Dr. Meyer's opinion that stepping off the stool would not create sufficient force to cause the tear. He did however agree that claimant reached MMI and sustained a two (2) percent permanent partial impairment as described by Dr. Bansal. (Ex. 8, pp. 11-12) Finally, Dr. Meyer again states his opinion that the work injury "may have aggravated a meniscus tear at worst. This may have resulted in the need for a meniscus surgery, but again this was a clearly compromised knee before this alleged incident occurred." (Ex. 8, p. 12) He then states that the incident "may have led to the short-term need for treatment of a sore knee, and that would include arthroscopic surgery . . ." (Id.) However, he states that it would not lead to future knee replacement because of the pre-existing arthritis. (Id.)

On March 27, 2017, Dr. Meyer gave a deposition. (Ex. I) Concerning the act of stepping off the tall stool, Dr. Meyer was asked whether such a mechanism would have enough force to cause an injury and in response he stated, "I don't think it would have

caused an injury . . ." (Ex. I, p. 13) However, he also stated "I don't think I'd say it's an injury. It seems like he had an at-risk compromised knee joint . . . So whatever was damaged was already compromised." (Ex. I, p. 14) Dr. Meyer testified that a meniscus tear, like claimant had, can occur "in a degenerative fashion," but also stated they are most commonly caused by trauma, which is "more of a flexion rotational injury, not an extension injury." (Ex. I, p. 15) However, he stated that "[t]hey can also occur in a degenerative manner where just simple activities of daily living they get torn, and usually in that situation, there are underlying arthritic conditions associated with it." (Id.) When asked whether stepping down off the stool made claimant's pre-existing condition symptomatic, Dr. Meyer responded: "It sounds like it might have, yeah." (Ex. I, p. 18)(emphasis added) He confirmed this opinion when asked again whether the work incident exacerbated claimant's knee condition, he responded: "I guess I'd say it appears so, yes." (Ex. I, p. 19)(emphasis added) Dr. Meyer was then asked to describe what makes osteoarthritis symptomatic, he stated:

> That's a good question. We don't always know. Sometimes whatever the straw is that breaks the camel's back. Sometimes it might be an episode, a misstep. Maybe something more significant. A lot of times there's not an obvious episode.

(Ex. I, p. 21) Dr. Meyer agreed that the injury of August 10, 2014, caused the need for future medical treatment by Dr. Ngyuen and Dr. Stokesbary, and that stepping off a tall stool would be a different type of movement or stress on the knee than standing from a regular chair. (Ex. I, pp. 19-20) He further agreed that claimant was credible and he had no doubt that claimant would have pain and stiffness in his right knee and difficulty with squatting, kneeling, walking on uneven surfaces, standing for long periods of time and going up and down stairs. (Ex. I, pp. 17-18) Dr. Meyer agreed that there were no medical records that he was aware of indicating that claimant had any problems with his right knee prior to August 10, 2014.

Considering Dr. Meyer's IME report, follow-up report, and his deposition, it appears that Dr. Meyer's opinion is that claimant sustained an aggravation of a pre-existing condition in his right knee on August 10, 2014, when he stepped down off a tall stool at work, which led to the need for medical treatment and will require treatment in the future. Defendants did alter their position of denying the claim after Dr. Meyer's deposition on March 27, 2017.

I find that the experts disagree whether or not the action of stepping off a tall stool would generate sufficient force to cause a meniscal tear. However, I also find that both experts agree that claimant had a pre-existing condition in his right knee that was aggravated when this incident occurred. I also find that claimant had no symptoms in his right knee prior to August 10, 2014 and that he had significant symptoms thereafter that led to arthroscopic surgery on May 11, 2016 with Dr. Stokesbary.

I find from Dr. Bansal's opinion and from Dr. Meyer's opinion that the August 10, 2014 incident of stepping down from a high stool at work was a substantial factor in the aggravation or lighting-up of claimant's pre-existing right knee condition, that led to the need for medical treatment, including the arthroscopic knee surgery with partial medial meniscectomy performed by Dr. Stokesbary on May 16, 2016 and that defendants are liable for said injury.

The parties stipulated in the Hearing Report that if defendant is liable for the alleged injury, then claimant is entitled to temporary benefits for the period of May 11, 2016 through May 20, 2016. (Hearing Report, p. 1) On May 11, 2016, claimant underwent arthroscopic surgery with Dr. Stokesbary and was released to return to work with no restrictions on May 20, 2016. (Ex. 7, pp. 14-22)

Concerning healing period benefits I find that claimant was off work from the date of the surgery on May 11, 2016 through the date that he was returned to work on May 20, 2016. (Ex. 7, pp. 17, 22)

Considering the extent of permanent partial disability, I find that Dr. Bansal assigned two (2) percent permanent impairment to the right lower extremity. (Ex. 10, p. 16) I also find that Dr. Meyer agreed with this assessment when he stated:

> Since he did have the arthroscopic surgery and the partial meniscectomy, even though I do not know that the alleged incident caused the meniscus tear, I generally would give the benefit of the doubt to the patient and let them have the 2% partial impairment rating for a partial meniscectomy related to a work injury. However, the arthritis changes are not part of the work injury.

(Ex. 8, p. 12) Based on the opinions of Dr. Bansal and Dr. Meyer, I find that claimant sustained two (2) percent permanent partial disability to his right leg as a result of the August 10, 2014 injury.

Regarding medical expenses, I note that claimant's exhibit 23 contains a recap of medical expenses in this case, some of which have already been paid by the defendant workers' compensation insurance carrier.

The initial authorized care took place with Mr. Bobier, PA-C at Mercy Business Health. Claimant was seen multiple times and then referred to Dr. Ngyuen at CNOS, who referred claimant to Dr. Stokesbary at CNOS, it was after Dr. Stokesbary recommended surgery that the January 30, 2015, letter denying further treatment was issued. Thereafter, claimant sought treatment on his own without any authorized care available. Prior to January 30, 2015, claimant also saw his family physician, Dr. Brenner, who was not authorized by defendant although it appears from claimant's exhibit 23 that the defendant insurance carrier paid some of those bills.

Claimant described his surgery as successful. (Testimony) I find that claimant's medical care as set forth in exhibit 23 was reasonable and beneficial to claimant.

CONCLUSIONS OF LAW

The first issue is whether claimant sustained an injury that arose out of and in the course of his employment on August 10, 2014.

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 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).

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).

Defendants argue that claimant did not sustain an injury that arose out of his employment, but that his injury was idiopathic. However, the presence of a preexisting knee condition (which the experts agree was aggravated from the work incident) does not create an idiopathic condition. Our case history is replete with cases of a preexisting condition that is lighted up, materially aggravated, or made worse from a work activity and the same are compensable. In this case there was an incident that occurred, stepping off a tall stool, which both physicians agree aggravated the pre-existing condition. I reject the argument that claimant's knee injury is not compensable on the basis that it was an idiopathic injury.

Defendants also argue that claimant had prior problems with his left knee that led to a total left knee replacement, and therefore, one can reasonably conclude that claimant's right knee had similar degenerative problems that pre-existed this injury. This pre-existing condition, combined with his advanced age (claimant was 66 years old at the time of the incident) and through a process of ordinary wearing down, claimant was in the inevitable position of suffering an onset of symptoms in his right knee and it was mere coincidence that this occurred at work while stepping off of a tall stool on August 10, 2014. Defendants rely on the opinion of Dr. Meyer who stated that stepping off a stool is not an "injury" but was merely an "episode." (Ex. I, p. 19) However, Dr. Meyer also states on multiple occasions that it was this "episode" of stepping off the stool that aggravated claimant's underlying condition and led to the need for treatment, including surgery. (Id.) Dr. Bansal agrees with Dr. Meyer that the August 10, 2014, incident of stepping off a high stool resulted in an aggravation of an underlying condition. The disagreement between the experts rests in their understanding of the specific mechanism of injury (whether claimant's knee was hyperextended) and the specific injury claimant sustained (whether the incident produced the meniscal tear or aggravated an existing meniscal tear). However, both Dr. Bansal and Dr. Meyer agree that the event of stepping off the tall stool aggravated the underlying degenerative knee condition, such that claimant experienced symptoms that did not previously exist and required medical treatment including arthroscopic surgery.

The Iowa Supreme Court has previously stated that:

> [T]here is no general principle in workers' compensation law that requires, as a condition of compensability, that workplace activities must involve more hazard or exertion than a claimant's activities outside of the workplace. That requirement is only true in selected instances, such as claims for heart attacks or mental illness.

Floyd v. Quaker Oats, 646 N.W.2d 105, at 108 (Iowa 2002). This conclusion of the Court was cited favorably in Lakeside Casino v. Blue, 743 N.W.2d 169, at 174-175 (Iowa 2007), in which the Court concluded that "we have abandoned any requirement that the employment subject the employee to a risk or hazard that is greater than that faced by the general public."

In the case at bar, Dr. Meyer agreed that stepping off a tall stool presented a different type of movement or stress on the knee than standing from a regular chair. (Ex. I, pp. 19-20) The fact that stepping off a tall stool at work was a type of potential hazard that may have existed outside of work does not render the claim non-compensable. As stated above, both expert medical witnesses, Dr. Bansal and Dr. Meyer agree that stepping off the tall stool aggravated the underlying degenerated condition of claimant's right knee.

I therefore conclude that on August 10, 2014, claimant sustained an injury to his right knee, which was aggravation of a pre-existing condition that led to the need for medical treatment, including arthroscopic surgery with Dr. Stokesbary on May 11, 2016, and that the injury was not idiopathic.

The next issue is whether the alleged injury is the cause of temporary total disability.

Healing period benefits are payable to an employee who has sustained a permanent partial disability,

> [B]eginning on the first day of disability after the injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

Iowa Code section 85.34(1)

The parties stipulated in the Hearing Report that if defendant is liable for the alleged injury, then claimant is entitled to temporary benefits for the period of May 11, 2016 through May 20, 2016. (Hearing Report, p. 1) On May 11, 2016, claimant underwent arthroscopic surgery with Dr. Stokesbary and was released to return to work with no restrictions on May 20, 2016. (Ex. 7, pp. 14-22)

I conclude that defendants are obligated to pay claimant healing period benefits for the period of May 11, 2016 through May 20, 2016, based on the conclusion that the injury is compensable and the parties' stipulation that if defendants were found liable for the alleged injury, claimant is entitled to benefits for this period of time.

The next issue is whether the alleged injury is the cause of permanent partial disability.

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).

The courts have repeatedly stated that for those injuries limited to the schedules in Iowa Code section 85.34(2)(a-t), this agency must only consider the functional loss of the particular scheduled member involved and not the other factors which constitute an "industrial disability." Iowa Supreme Court decisions over the years have repeatedly cited favorably the following language in the 66-year-old case of Soukup v. Shores Co., 222 Iowa 272, 277; 268 N.W. 598, 601 (1936):

> The legislature has definitely fixed the amount of compensation that shall be paid for specific injuries . . . and that, regardless of the education or qualifications or nature of the particular individual, or of his inability . . . to engage in employment . . . the compensation payable . . . is limited to the amount therein fixed.

Our court has even specifically upheld the constitutionality of the scheduled member compensation scheme. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404 (Iowa 1994). Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Graves, 331 N.W.2d 116; Simbro v. DeLong's Sportswear 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C. M. Co., 194 Iowa 819, 184 N.W. 746 (1921). Pursuant to Iowa Code section 85.34(2)(u) the workers' compensation commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Co., 164 N.W.2d 84 (Iowa 1969).

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, 222 Iowa 272, 268 N.W. 598. 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).

I have found above that claimant has sustained a two (2) percent permanent partial disability to his right leg for the reasons there stated and conclude that defendants are responsible for payment of the same.

The next issue for determination is whether claimant is entitled to payment of medical expenses contained in Exhibit 23.

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 16, 1975).

Prudent persons customarily rely upon their physician's recommendation for medical care without expressly asking the physician if that care is reasonable. Proof of reasonableness and necessity of the treatment can be based on the injured person's testimony. Sister M. Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963).

It is said that "actions speak louder than words." When a licensed physician prescribes and actually provides a course of treatment, doing so manifests the physician's opinion that the treatment being provided is reasonable. A physician practices medicine under standards of professional competence and ethics. Knowingly providing unreasonable care would likely violate those standards. Actually providing care is a nonverbal manifestation that the physician considers the care actually provided to be reasonable. A verbal expression of that professional opinion is not legally mandated in a workers' compensation proceeding to support a finding that the care provided was reasonable. The success, or lack thereof, of the care provided is evidence that can be considered when deciding the issue of reasonableness of the care. A treating physician's conduct in actually providing care is a manifestation of the physician's opinion that the care provided is reasonable and creates an inference that can support a finding of reasonableness. Jones v. United Gypsum, File No. 1254118 (App. May 2002); Kleinman v. BMS Contract Services, Ltd., File No. 1019099 (App. September 1995); McClellon v. Iowa Southern Utilities, File No. 894090 (App. January 1992). This inference also applies to the reasonableness of the fees actually charged for that treatment.

Claimant is entitled to an order of reimbursement only if he has paid treatment costs; otherwise, to an order directing the responsible defendants to make payments directly to the provider. See, Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Defendants should also pay any lawful late payment fees imposed by providers. Laughlin v. IBP, Inc., File No. 1020226 (App., February 27, 1995).

The Court in Bell Bros. stated:

> We do not believe the statute can be narrowly construed to foreclose all claims by an employee for unauthorized alternative medical care solely

> because the care was unauthorized. Instead, the duty of the employer to furnish reasonable medical care supports all claims for care by an employee that are reasonable under the totality of the circumstances, even when the employee obtains unauthorized care, upon proof by a preponderance of the evidence that such care was reasonable and beneficial. In this context, unauthorized medical care is beneficial if it provides a more favorable medical outcome than would likely have been achieved by the care authorized by the employer.

Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010)

I have found above that defendant denied further medical treatment as of January 30, 2015. (Ex. 12, p. 1) I have also found that claimant required medical care as a result of the August 10, 2014 work injury, as supported by the medical expert opinions. This treatment included arthroscopic surgery. I have found that claimant described the surgery as successful. I conclude that it was reasonable for claimant to proceed with the medical treatment as recommended by the treating physicians and that the treatment he received was beneficial and that defendants are therefore obligated to pay those medical expenses set forth in exhibit 23.

The next issue is whether claimant is entitled to penalty benefits.

Iowa Code section 86.13(4) provides that:

> (a) If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, of chapter 85, 84A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed or terminated without reasonable or probable cause or excuse.
>
> (b) The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (1) The employee has demonstrated a denial, delay in payment, or termination of benefits.
>
> (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.
>
> (c) In order to be considered a reasonable or probable cause or excuse under paragraph "b", an excuse shall satisfy all the following criteria:

(1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.

(2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.

(3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Weekly compensation payments are due at the end of the compensation week. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229, 235 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commission must impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

In the case at bar, defendants did conduct an investigation, which initially involved a determination of the height of the work station and chair that claimant stepped off of when he was injured. Based on this information, without the benefit of any medical opinion supporting their conclusion, defendants denied further medical

coverage on January 30, 2015. This was confirmed on May 13, 2015, again without any medical opinion to support their conclusion. It was not until January 22, 2016, nearly a year after the original denial that defendants obtained the report of Dr. Meyer who stated that the event of stepping down off the stool was "rather insignificant," and that because of claimant's pre-existing arthritis it "could have happened anywhere." (Ex. 8, p. 6). However, Dr. Meyer also stated "[i]t is quite clear that he had [an] underlying pre-existing arthritis since such a minimal mechanism led to his increased knee pain." (Ex. 8, p. 5) Dr. Meyer later agreed in his deposition that the work incident made claimant's pre-existing condition symptomatic, aggravating the underlying condition. (Ex. I, pp. 18, 19) I found above that both Dr. Bansal and Dr. Meyer opined that the incident of stepping off the stool aggravated claimant's pre-existing knee condition.

As noted above, the question of causal connection is essentially within the domain of expert testimony. 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). Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994). In the case at bar the experts agree that the incident of stepping off the tall stool aggravated the underlying condition in claimant's right knee.

Defendants denied coverage without a medical investigation or opinion regarding causation and apparently failed to reconsider their denial after the IME with Dr. Bansal and the deposition of their own physician, Dr. Meyer. I conclude that under the facts as presented in this case, although defendants conducted an investigation into the height of the stool and the work station, that it was unreasonable to deny liability without considering medical causation. Defendants did not seek a medical opinion on the issue of medical causation for over 10 months after the denial and the opinion was not received for nearly a year after the initial denial.

I have found above that claimant is entitled to both healing period and permanent partial disability benefits. The permanent partial disability of two percent of the lower extremity was assigned by Dr. Bansal and agreed to by Dr. Meyer. There is no medical opinion that the work injury caused permanent impairment of less than two percent. Defendants have paid no weekly benefits.

I conclude that claimant is entitled to penalty benefits on both healing period and the permanent partial disability based on defendants unreasonable denial of the same.

When determining the amount of penalty, the commissioner is to consider "the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the prior penalties imposed against the employer under section 86.13." Robbennolt v. Snap-On Tools, Corp., 555 N.W.2d 229, at 237. In this case the delay was substantial and defendants delayed for nearly 10 months before obtaining a medical opinion. However, the record also lacks any

evidence regarding defendants' penalty history. Therefore, I conclude that the amount of penalty should be in the neighborhood of 40 percent.

The healing period benefits of May 11, 2016 through May 20, 2016, is a period of 10 days or 1.429 weeks. The stipulated rate of $281.34 multiplied by 1.429 weeks is $402.03. Forty percent of $402.03 is about $160.00

The permanent partial disability benefits of two percent of the leg is 4.4 weeks, multiplied by the stipulated rate of $281.34 is $1,237.90. Forty percent of $1,237.90 is about $495.00.

Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. I conclude that claimant was successful in this claim and therefore exercise my discretion and assess costs as contained in claimant's affidavit of costs attached to the hearing report.

ORDER

IT IS THEREFORE ORDERED:

Defendants shall pay claimant healing period benefits for the period of May 11, 2016 through and including May 20, 2016.

Defendants shall pay claimant permanent partial disability benefits of four and four tenths (4.4) weeks, beginning on the stipulated commencement date of June 16, 2016, until all benefits are paid in full.

Defendants shall be entitled to credit for all weekly benefits paid to date, if any.

All weekly benefits shall be paid at the stipulated rate of two hundred eighty one and 34/100 dollars ($281.34) per week.

All accrued benefits shall be paid in a lump sum.

Defendants shall pay interest on any accrued weekly benefits pursuant to Iowa Code section 85.30

Defendants shall reimburse claimant for his out-of-pocket medical expenses set forth in the claimant's exhibit 23 and shall pay, reimburse, and or otherwise satisfy all remaining medical expenses contained therein.

Defendants shall pay claimant penalty benefits of about forty (40) percent, in the amount of one hundred sixty and no/100 dollars ($160.00) for unreasonably denied healing period benefits plus four hundred ninety-five and no/100 dollars ($495.00) for unreasonably denied permanent partial disability benefits.

Defendants shall pay the costs as set forth in claimant's affidavit of costs attached to the hearing report.

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 19th day of September, 2017.

TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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