BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RORY WINTERS, Claimant, vs. CURRIES MANUFACTURING Employer, and TRAVELERS INSURANCE COMPANY OF CONNECTICUT, Insurance Carrier, Defendants.	File No. 5050592 A R B I T R A T I O N D E C I S I O N Head Note Nos.: 1402.30, 2502, 2907

STATEMENT OF THE CASE

Rory Winters, claimant, filed a petition in arbitration and seeks workers' compensation benefits from defendants, Curries Manufacturing, as the employer, and Travelers Insurance Company of Connecticut, as the insurance carrier. Hearing was held on October 7, 2015.

Claimant was the only witness to testify at hearing. The evidentiary record also includes claimant's exhibits 1 through 22 and defendants' exhibits A through G. As a result of some late disclosure of evidence and an objection by the claimant, the undersigned suspended the evidentiary record at the conclusion of the live hearing. Claimant was given an opportunity to submit rebuttal evidence after the conclusion of the live hearing.

Claimant exercised that option and submitted a November 9, 2015 report from John D. Kuhnlein, D.O., as well as a billing statement from Dr. Kuhnlein. Claimant did not mark that additional exhibit. The undersigned has marked the additional exhibit from Dr. Kuhnlein as "Exhibit 23." Exhibit 23 is now formally received into the evidentiary record and the hearing record is now closed. This case was considered fully submitted to the undersigned upon filing of claimant's Exhibit 23 on November 12, 2015.

At the commencement of the arbitration hearing, the parties submitted a hearing report, which contains numerous stipulations. The parties' stipulations are accepted.

No factual findings or conclusions of law will be made in this decision regarding the parties' stipulations.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury on August 6, 2013 that arose out of and in the course of his employment with Curries Manufacturing.
2. Whether the alleged injury caused temporary disability.
3. Whether the alleged injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent disability benefits.
4. Claimant's average gross weekly earnings prior to the date of injury and the corresponding weekly workers' compensation rate.
5. Whether the claimed past medical expenses are causally related to the alleged work injury.
6. Whether claimant is entitled to reimbursement for an independent medical evaluation pursuant to Iowa Code section 85.39.
7. Whether costs should be assessed against any party.

FINDINGS OF FACT

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

Rory Winters worked for Curries Manufacturing from 1986 through 1988 and then returned to employment with Curries Manufacturing in 1992. He worked for Curries Manufacturing from 1992 through February 2014 when he resigned his employment due to physical difficulties.

Mr. Winters asserts injuries to his low back and bilateral hips as a result of his work activities at Curries Manufacturing. He asserts a cumulative injury date of August 6, 2013. He has not worked for the employer since that date.

Claimant worked various positions with Curries Manufacturing. He worked in Frame Hanging, Sheet Shear, the Brake Line, as well as the Weld Line for this employer. He described the work activities and physical requirements of each of these positions during his testimony. As he described the positions, they sounded like each of the positions required medium or heavier work activities. Claimant described the work at Curries Manufacturing as fast paced production work.

In August 2013, Mr. Winters was performing the welding job at Curries Manufacturing. He explained that he was required to weld parts onto each door frame as it came through the production line. He had to manipulate, flip, spin and stack the door frames. He estimated he processed, manipulated, and welded 500-1,000 door frames per eight-hour shift and moved carts weighing 300 to 1,500 pounds. He also estimated that he worked nine to twelve-hour days and worked six or seven days per week.

Mr. Winters testified that he began experiencing difficulties and symptoms in his hips and low back sometime between 2006 and 2008. He testified that he would not have symptoms when he reported to work for his shift but would be stiff and sore in his low back after about two hours of work. He testified that he started getting a "catching" sensation in his hips. He started noticing difficulties with sitting during his break and would have a difficult time after arising from his break when starting to walk. However, claimant testified he does not recall missing any work for his low back or hip symptoms prior to 2013.

The medical records in evidence demonstrate that claimant complained of low back pain in June 2009, which had gotten worse but existed for a long time. (Exhibit 1, pages 1-3) No evidence of lost time resulting from either low back or hip symptoms was introduced for the time period prior to August 2013.

Mr. Winters testified that on or about August 6, 2013, he bent over to pick up a steel frame. He felt symptoms increase in his low back and hips and left work. Claimant sought medical treatment through his personal physician on August 22, 2015. David Ruen, M.D. documented complaints of low back pain that started two weeks prior and noted that the symptoms radiated to claimant's hip when he moved. (Ex. 1, p. 9) Dr. Ruen also documented left leg pain as being reported on August 22, 2015. (Ex. 1, p. 9)

On August 27, 2013, one of Dr. Ruen's partners evaluated claimant. On that date, Sreevalli Dega, M.D., documented that claimant presented with back and hip pain. He noted a history that both problems had been present for five years and noted both problems were stable. (Ex. 1, p. 15)

Dr. Ruen recommended an epidural injection into claimant's low back, which was performed on September 12, 2013. (Ex. 1, p. 34) The injection helped in the sense that claimant walked without a cane after the injection, but he continued to report low back and left hip pain upon his return evaluation by Dr. Ruen on September 23, 2013. (Ex. 1, p. 35) Dr. Ruen referred claimant to a neurosurgeon, David W. Beck, M.D., for evaluation of his low back. (Ex. 1, p. 39)

Dr. Beck evaluated Mr. Winters on October 14, 2013. Dr. Beck reviewed an MRI of claimant's lumbar spine and opined that it was "essentially normal." (Ex. 5, p. 76) Dr. Beck recommended against any surgical intervention on claimant's low back and recommended physical therapy for further conservative care. (Ex. 5, p. 76)

Following Dr. Beck's evaluation, claimant returned to Dr. Ruen for care. Dr. Ruen recommended and made a referral to an orthopaedic surgeon, Timothy A. Gibbons, M.D., for evaluation of claimant's hips. (Ex. 1, p. 45) Dr. Gibbons examined claimant on November 19, 2013 and diagnosed claimant with bilateral hip degenerative joint disease. (Ex. 6, p. 78) Dr. Gibbons recommended bilateral hip replacements. However, Dr. Gibbons explained to claimant at his evaluation that his "preliminary opinion was that it would be hard for me to relate causation directly to his employment at work." (Ex. 6, p. 78)

Mr. Winters elected to seek a second orthopaedic opinion and selected Emile C. Li, M.D. to perform that evaluation. Dr. Li examined claimant on February 5, 2014. He recommended hip resurfacing. However, Dr. Li did not perform that operative procedure. Therefore, he recommended claimant seek treatment through Dr. Devon Goetz at Des Moines Orthopaedic Surgeons and scheduled claimant to be evaluated by Dr. Goetz. (Ex. 7, pp. 81-82)

No record of evaluation by Dr. Goetz appears in the evidentiary record. Instead, claimant sought orthopedic evaluation and treatment by Charles R. Clark, M.D. at the University of Iowa Hospitals and Clinics. Dr. Clark initially evaluated claimant on April 4, 2014. Dr. Clark diagnosed claimant with severe osteoarthritis of the bilateral hips and recommended bilateral hip arthroplasty. (Ex. 9, p. 88)

Dr. Clark took claimant to surgery and performed a left total hip replacement on June 18, 2014. (Ex. 9, pp. 99-103) Dr. Clark performed a right total hip replacement on claimant on July 28, 2014. (Ex. 9, pp. 117-119)

Each of the treating or evaluating physicians has rendered a causation opinion pertaining to claimant's low back and/or his bilateral hip conditions. In a report dated September 10, 2013, Dr. Ruen opined that claimant's diagnosis was degenerative arthritis throughout the lumbar spine and osteoarthritis bilaterally in the hips. Dr. Ruen opined that "his arthritis is caused by wear and tear at work over these last 20 years and over time will get worse instead of better." (Ex. 1, p. 28)

Dr. Beck opined, "Neurologically Rory has a normal neurologic exam. His MRI scan and x-rays show nothing acute. They are only consistent with age-related changes. It is my opinion within a reasonable degree of medical certainty that Mr. Winters' employment duties did not significantly contribute to his back problems." (Ex. B, p. 4)

Dr. Gibbons opined, "I do not believe the patient's problems of osteoarthritis in his hips are directly related to his employment at Curries Manufacturing. I do not believe that the patient's employment at Curries Manufacturing materially aggravated his preexisting condition." (Ex. C, p. 5)

Dr. Li authored a report dated June 9, 2014. He opined, "I find it very difficult to blame the causation of his osteoarthritis on his work, absent a specific traumatic event."

(Ex. 8, p. 83) Instead, Dr. Li concluded, "I believe that this is a case of severe osteoarthritis, the etiology of which is degenerative in nature." (Ex. 8, p. 83)

Dr. Clark initially responded to an inquiry from claimant's counsel in a report dated June 9, 2014, noting, "The activities you describe can aggravate a hip condition, however, I do not believe they accelerated his overall degenerative arthritis." (Ex. 10, p. 130) Dr. Clark clarified his opinions in response to an inquiry from defense counsel. In a report dated June 18, 2014, Dr. Clark opined:

> [T]he most likely cause of his osteoarthritis was genetics and degenerative disease. He had not mentioned an occurrence of trauma during our visit. His employment activities may have contributed to his symptoms but I do not feel that it was probable that his employment activities were a substantial contributing factor to materially aggravating or accelerating his bilateral hip osteoarthritis.

(Ex. 12, p. 133)

After receipt of these various medical opinions, Mr. Winters sought an independent medical evaluation through Dr. Kuhnlein, who evaluated claimant on April 7, 2015. Dr. Kuhnlein reviewed claimant's job requirements and appears to have had a thorough medical history. With respect to claimant's low back condition, Dr. Kuhnlein opined, "The work performed by Mr. Winters was a substantial more than minor factor in the development of his back pain, if the work is as he described it. As he describes the work, the job tasks would include lumbar stressors." (Ex. 14, p. 147)

Dr. Kuhnlein also addressed claimant's bilateral hip conditions and opined:

> There is literature that suggests that work in the heavy physical demand level can be associated with hip osteoarthritis. Mr. Winters' work included work in the heavy to very heavy physical demand level, if the history he presents is accurate. As such, the work at Curries would be a substantial more than minor factor as it relates to the hip osteoarthritis. There are multiple factors responsible for the development of Mr. Winters' hip osteoarthritis, and work was one of these factors. However, given the work he describes, the work would be a substantial more than minor factor in the development of his hip osteoarthritis.

(Ex. 14, pp. 147, 148)

Defendants had not yet disclosed the opinions of Dr. Gibbons or Dr. Beck at the time Dr. Kuhnlein evaluated claimant or rendered his initial opinion. Therefore, the undersigned allowed claimant the opportunity to secure a rebuttal report from Dr. Kuhnlein after the hearing date. Dr. Kuhnlein authored his November 9, 2015 report, which is included in the evidentiary record as Exhibit 23. In that report, Dr. Kuhnlein confirms that he was provided copies of both Dr. Beck's letter and

Dr. Gibbons' letter. Dr. Kuhnlein further confirmed that neither of those causation opinions changed his previously stated opinions, as outlined above. (Ex. 23)

The initial disputed factual issue in this case is whether claimant sustained an injury to either his low back and/or his bilateral hips as a result of his work activities at Curries Manufacturing. Having considered the various physicians' causation opinions, I find that claimant has not proven that his low back or that his bilateral hip conditions are the result of or materially aggravated by his work activities at Curries Manufacturing.

Dr. Ruen is claimant's family physician and has a longstanding doctor-patient relationship with claimant. This gives him the advantage of knowing claimant's medical history first-hand and having a perspective in which to put claimant's condition and complaints. Dr. Ruen opined that the low back condition was causally related to claimant's work at Curries Manufacturing. Yet, Dr. Ruen is not a specialist and deferred to other physicians, who are specialists, to evaluate and treat claimant's low back and hip conditions.

Dr. Beck is the only surgeon who evaluated claimant's low back. He is a neurosurgeon to whom Dr. Ruen referred claimant for evaluation of the low back. No significant or invasive procedures were performed after claimant was evaluated by Dr. Beck. Dr. Beck concluded that claimant's low back condition is consistent with age-related changes and that his work at Curries Manufacturing did not significantly contribute to claimant's low back problems.

Dr. Kuhnlein offered an opinion that claimant's low back condition is causally related to claimant's work activities at Curries Manufacturing. Dr. Kuhnlein evaluated claimant once at claimant's attorney's request. Although it appears Dr. Kuhnlein had a thorough history, I find that the opinions of the treating specialist, Dr. Beck, are most convincing in this situation. Claimant's MRI was read as essentially normal by Dr. Beck.

Dr. Kuhnlein refers to Dr. Beck's evaluation in October 2013. Claimant's counsel's March 19, 2013 letter to Dr. Kuhnlein references a copy of the MRI of claimant's lumbar spine in September 2013. However, it is not clear whether Dr. Kuhnlein saw the actual films of this MRI or only a report. His medical report does not interpret the MRI findings or dispute Dr. Beck's interpretation of the MRI. Dr. Kuhnlein does note that the MRI "was thought to show no appreciable interval change since the March 15, 2006, MRI scan." (Ex. 14, p. 142) Dr. Kuhnlein provides no analysis of the reason why there is not a demonstrable change in the lumbar MRI between 2006 and 2013.

Having considered each of these three physicians' opinions, I find Dr. Beck's opinion to be most convincing. Dr. Beck was hired on referral from claimant's personal physician. He was hired by claimant to examine and treat claimant's low back condition and asked to provide medical opinions that were ultimately contrary to claimant. Claimant acknowledged that he knew of Dr. Beck before Dr. Beck examined him and that he had no problems with Dr. Beck and likes him. Given Dr. Beck's credentials as a

surgeon, hired by claimant, and his personal examination and review of the MRI outside of the workers' compensation context, I find his opinions to be most credible and convincing in this case. Therefore, I find that claimant has not proven his low back condition is causally connected to or materially aggravated by his work activities at Curries Manufacturing.

With respect to his bilateral hip conditions, having considered the causation opinions of each of the five physicians that offered opines, I find the opinions of the three orthopedic surgeons to be consistent and convincing.

Again, I recognize that Dr. Ruen has a longstanding relationship with claimant. However, he is not an orthopedic specialist and referred claimant to Dr. Gibbons for evaluation and treatment of the hip conditions. Similarly, Dr. Kuhnlein is not an orthopedic specialist.

All three orthopedic specialists offering opinions have concluded that claimant's work activities at Curries Manufacturing did not cause or materially aggravate claimant's hip conditions. Dr. Gibbons evaluated claimant for purposes of rendering treatment and upon referral from claimant's personal physician. Claimant selected Dr. Li to perform a second opinion. Similarly, claimant selected Dr. Clark to provide further treatment and submitted to not one but two total hip replacements.

Dr. Gibbons, Dr. Li, and Dr. Clark all examined and treated claimant outside the auspices of the workers' compensation system. None of them were retained by the defendants. Given their independence from defendants, their credentials as orthopedic surgeons, and the fact that all three orthopedic surgeons reached very similar causation opinions, which were all contrary to the desires of their patient, I find the opinions of Dr. Gibbons, Dr. Li and Dr. Clark to be convincing. Having reached this finding, I find that claimant has not proven that his work activities at Curries Manufacturing caused or materially aggravated his bilateral hip conditions.

Having reached these factual findings, I consider claimant's request for award of past medical expenses. I find that claimant failed to prove a causal connection between his claimed medical expenses and the alleged injury date or work activities as Curries Manufacturing.

CONCLUSIONS OF LAW

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).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

In this instance, I found the medical causation opinions expressed by the four specialists, Dr. Beck, Dr. Li, Dr. Gibbons, and Dr. Clark, to be most convincing. Each of those physicians opined that claimant's back and/or hip conditions were not causally related to his work activities at Curries Manufacturing. Relying upon those medical opinions, I found that claimant failed to prove his alleged work injury(ies) were causally related to or materially aggravated by his work activities at Curries Manufacturing. Therefore, I conclude that claimant has failed to prove he sustained an injury to either his low back or his hips that arose out of and in the course of his employment with Curries Manufacturing on or about August 6, 2013.

Claimant also asserts a claim for past medical expenses pursuant to Iowa Code section 85.27.

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).

Defendants stipulated that the claimed medical expenses were reasonable and necessary medical care. (Hearing Report) However, defendants disputed causal connection of the medical expenses to the alleged injury. Having determined that claimant failed to prove he sustained an injury that arose out of and in the course of employment with Curries Manufacturing, I similarly conclude that claimant has failed to establish entitlement to past medical expenses.

Mr. Winters also seeks reimbursement of his independent medical evaluation pursuant to Iowa Code section 85.39. Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

In this case, claimant obtained an independent medical evaluation with Dr. Kuhnlein on April 7, 2015. Defendants had not obtained an impairment rating from any physician of their choosing prior to April 7, 2015. Therefore, claimant has failed to establish the necessary prerequisites to qualify for an employer-reimbursed examination pursuant to Iowa Code section 85.39. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 843-844 (Iowa 2015).

Finally, claimant seeks assessment of his costs. Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Having concluded that claimant failed to prove entitlement to benefits, I exercise the agency's discretion and conclude that no costs should be assessed in this case.

ORDER

THEREFORE, IT IS ORDERED:

Claimant shall take nothing.

The parties shall bear their own costs.

Signed and filed this 21st day of January, 2016.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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WHG/sam

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.