

## BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

---

RICHARD FREESE,

Claimant,

vs.

CEMSTONE CONCRETE MATERIALS,  
LLC,

Employer,

and

ZURICH AMERICAN INSURANCE CO.,

Insurance Carrier,  
Defendants.

File No. 20006149.02

## ARBITRATION DECISION

Head Note Nos.: 1100, 1108

## STATEMENT OF THE CASE

Claimant, Richard Freese, has filed a petition for arbitration seeking workers' compensation benefits against Cemstone Concrete Materials, LLC, employer, and Zurich American Insurance Company, insurer, both as defendants.

In accordance with agency scheduling procedures and pursuant to the Order of the Commissioner in the matter of the Coronavirus/COVID-19 Impact on Hearings, the hearing was held via Zoom on June 27, 2022, and considered fully submitted upon the simultaneous filing of briefs on August 12, 2022.

The record consists of Joint Exhibits 1-4, Claimant's Exhibits 1-8, Defendants' Exhibits A-C, and the testimony of the claimant.

## ISSUES

1. Whether claimant sustained an injury on May 16, 2020, which arose out of and in the course of employment;
2. Whether the alleged injury is a cause of temporary disability, and if so, the extent;
3. Whether the alleged injury is a cause of permanent disability, and if so, the extent;

4. Whether there is a causal connection between claimant's injury and the medical expenses claimed by claimant;
5. Whether claimant is entitled to future medical care.

#### STIPULATIONS

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.

The parties stipulate that at the time of the alleged injury, claimant was an employee of the defendant employer. They further stipulate that claimant was off work from May 22, 2020 through September 13, 2020; December 16, 2020, through April 13, 2017; and March 11, 2022, through April 10, 2022.

The parties agree that if an injury is found to be a cause of permanent disability, it is a scheduled member disability to the leg.

At the time of the alleged injury, claimant's gross earnings were \$887.00 per week. He was single and entitled to one exemption. Based on the foregoing, the weekly benefit rate is \$557.23.

Defendants waive all affirmative defenses.

Prior to the hearing, defendants paid \$5,535.26 in the form of sick pay or disability income and are entitled to a credit of that amount against any award of benefits pursuant to Iowa Code section 85.38(2).

#### FINDINGS OF FACT

Claimant was a 61-year-old person at the time of the hearing. His educational background consisted of high school. His work history has primarily been as a truck driver, specifically a concrete truck driver since 1993. During the winter layoff months in 2020, claimant made deliveries for Oberg Freight Company.

His work duties for defendant employer are more thoroughly described below, but the official job description noted that the work was moderately strenuous and required approximately four hours of sitting each day and four to five hours of standing. (Claimant's Exhibit 3, page 25) While standing, claimant would be required to unload concrete, clean the truck, wash charging hoppers and fins, lift rubber hoses, 1.5 pounds of fiber mesh, empty three or five-gallon pails that could weigh approximately 5-7 pounds and up to 30-50 pounds full 11-33 percent of the time, and lift metal chutes weighing between 51-75 pounds 11-33 percent of the time. On a rare occasion, claimant would be required to lift 94 pounds of cement. (CE 3:26) There were push and pull demands consisting of the use of handles to pull oneself into and out of the truck. Id. The force would vary depending on the weight and technique. Id. There were also regular push/pull movements in maneuvering the chutes. Id. Positional requirements

include neck flexion and neck rotation, neck bending, trunk bending, squatting and climbing an eight-rung ladder, getting in and out of the truck, climbing onto the truck frequently. Id.

Claimant's work is seasonal. Usually, he is laid off before Christmas and returns to work the first or second week of March. Prior to the injury of May 2020, claimant maintains he did not take off any time from work because of right knee pain.

His past medical history includes complaints of bilateral medial knee pain with popping in November 2011. (CE 8:82) He was seen by Kristina Johnson, PA-C. Id. X-rays showed narrowing of the joint space and he was diagnosed with degenerative changes to his bilateral knees. (CE 8:83) Injection therapy was provided. Id. He returned on December 7, 2011, noting that initially the injection provided relief, but his pain had returned and was even worse in the left knee. (CE 8:85) Another injection was administered. Id. He was advised he could receive another injection in three months. Id.

On September 20, 2019, claimant was seen by Ms. Johnson reporting a long history of bilateral knee pain. (Joint Exhibit 1:1) Pain on the right was worse than the left. He had increased medial pain and his knees felt unstable. Id. He was having a hard time getting in and out of the truck. (JE 1:2) X-rays were taken which showed degenerative changes. (JE 2:41) An injection was administered. (JE 1:2) Another injection to his right knee was provided on May 8, 2020. (JE 1:3) It was noted that the September 20, 2019, injection gave "great relief." Id. The second injection did not provide the relief the first one did. (JE 1:4) On May 22, 2020, claimant returned to Ms. Johnson and reported that his knee was locking up at times and his pain was 5 to 7 on a 10 scale. Id. He stated that "last Saturday, he was standing on the bumper of a cement truck and his knee locked and it took 10 minutes for the pain to abate." Id. He also stated that the locking of the knee occurred at home that evening. Id.

Claimant described the work incident as follows. He was on a jobsite in Rockwell City, Iowa. He backed up to a concrete pump. The concrete was too thick and needed to be scraped down the chute. He was standing on the DOT bumper approximately 28 inches off the ground. He was standing on his tiptoes and twisted, causing his right knee to lock up. He continued to have pain all evening and weekend. On Monday he went to work and called his doctor. The earliest he could be seen was May 22, 2020. He also informed his supervisor of his injury. (CE 4:28<sup>1</sup>)

Claimant testified that he climbed in and out of his truck cab 30 to 100 times a day as well as walking around on uneven ground. He maintained that as a result of this, he sustained a cumulative work injury resulting in a meniscus tear.

There is no ladder to the bumper and claimant must pull himself up. Prior to his knee replacement, claimant would place his knee on the bumper to help leverage himself up, but he can no longer do this maneuver.

Claimant was taken off work and Ms. Johnson ordered an MRI. (JE 1:5) The MRI conducted on June 3, 2020, showed tricompartmental degenerative changes, severe at

---

<sup>1</sup> The incident report is dated May 19, 2020. (CE 4:28)

medial compartment, medial meniscus tear, and mild nonspecific ventral knee region subcutaneous edema. (JE 2:44-45; 1:7)

Because he was in such great pain, he sought out his own care and was transferred to Mark Palit, M.D., for an orthopedic consult. (JE 1:8) In the subjective section, it was documented that he had right knee pain for a year, but it increased since May. Id. At hearing, claimant testified that prior to May, the pain was incidental but after May, the pain became excruciating. Dr. Palit recommended arthroscopy partial medial meniscectomy which was performed on July 1, 2020. (JE 1:12) In the pre-operative report, it was noted that claimant reported an injury to the right knee at work where he twisted the knee and has had pain ever since. (JE 3:49)

During the operation, he was noted to have grade III-IV chondromalacia. (JE 1:12, 1:17) In a follow-up appointment on July 23, 2020, claimant's history was noted to be as follows: "This morning he was walking within his house and experienced sudden onset of right knee pain medially. No specific trauma." (JE 1:15) In a September 1, 2020, follow-up visit, claimant presented to Dr. Palit with reports of ongoing pain throughout the day. (JE 1:17)

Claimant testified that when he first returned to work after the July 2020 surgery, he felt good, but after he returned to full duty activities, the pain progressed.

Due to ongoing pain and instability along with the presence of significant degeneration, Dr. Palit recommended a total knee replacement. (JE 1:19) Claimant underwent his surgery on December 16, 2020. (JE 1:24)

On December 8, 2020, Dr. Vincent performed an IME at the request of the defendants. (Defendants' Exhibits A:1) At the appointment, claimant maintained the onset of pain was May 16, 2020. (DE A:3) The severity level was 6 on a 10 scale. Id. Pain occurred intermittently and was fluctuating. Id. During the interview portion, claimant admitted he had right knee pain for years but that such pain worsened in May. (DE A:3) Dr. Vincent's examination found claimant to have pain with motion in the right knee, an antalgic gait, mild effusion, mild swelling, tenderness at the right lateral joint line and right medial joint line, and moderate crepitation on the right and mild crepitation on the left. (DE A:4)

Dr. Vincent concluded claimant suffered from primary osteoarthritis of the right knee, status post arthroscopy of the knee for a prior old medial meniscus tear. (DE A:5) According to Dr. Vincent, the meniscus tear was horizontally based and degenerative in nature. Id. It was longstanding and did not represent an acute tear based on the orientation. Id. Orthopedic literature demonstrates that horizontal tears develop degeneratively. Id. In addition, the medical records document that claimant's symptoms did not improve with the treatment of the meniscus tear. Id. As a result, Dr. Vincent concluded that based on a review of the medical records, long-standing pre-existing pain, previous medical treatment, the type of tear, and the post-surgical results, the claimant's condition was not work related. (DE A:6)

Dr. Vincent further opined claimant was not at MMI as of December 8, 2020, as claimant needed a total knee arthroplasty. (DE A:6)

On December 15, 2021, claimant underwent an IME with Sunil Bansal, M.D. (CE 1:1) In the subjective portion, Dr. Bansal documented that the claimant's incident occurred as follows:

As he went to scrape the thick wet concrete out of the chute he twisted and torqued his right knee. His knee locked up, and he had severe pain. He was able to complete his workday, as luckily it was a Saturday and a short day of four hours. At first he thought he had just pulled a muscle, and did not think much of it.

(CE 1:6) Claimant relayed to Dr. Bansal that part of claimant's job duties involved frequent climbing up and down to get in and out of his cement truck as well as twisting and turning while maneuvering the cement chutes. (CE 1:6-7) Claimant set up chutes, unloaded cement into the chute, and attached chutes weighing 40-50 pounds each. (CE 1:7) The trucks were rough-riding and bouncy. Id. He would climb in and out of the truck approximately 50-100 times per day. Id.

His current condition at the time of the December 15, 2021, examination included constant right knee pain and swelling. (CE 1:6) It was painful for him to navigate stairs and he used handrails for assistance. Id. He was unable to stand for longer than 20 minutes nor could he walk more than a block. Id. He had limited range of motion and strength. Id.

Dr. Bansal concluded that claimant's cumulative work was an aggravating, worsening or accelerating factor to the right knee meniscal tear and arthritic condition which in turn accelerated the need for a knee replacement. (CE 1:9) Dr. Bansal based this conclusion on the following:

- 1) Clinical change.
- 2) Medical literature is replete with research on a biochemical level elucidating the processes occurring to the knee from mechanical loading that led to arthritic changes and articular cartilage damage.
- 3) Excessive mechanic stress can directly damage the cartilage extracellular matrix and shift the balance in chondrocytes to favor catabolic activity over anabolism. Repetitive impact loading of 5 MPa at 0.3Hz induces collagen network damage, chondrocyte necrosis, and apoptosis, suggesting that impact damage is cumulative.
- 4) Activities such as carrying heavy objects while navigating stairs would involve contraction of the quadriceps and hamstrings as well as increased knee adduction, greatly stressing the medial compartment.

(JE 1:8-9)

In regard to the above, while claimant did end up having surgery for a meniscus tear, it is unclear whether Dr. Bansal considered the treatment claimant had for his right knee on May 8, 2020, just a week before his alleged injury. Dr. Bansal does not

articulate what the “mechanical loading” might be that claimant engaged in, what level of mechanical loading would lead to the damage he surmises. He stated that the repetitive impact loading of 5 PMa at 0.3 Hz incudes damage but does not have any measurements of the megapascal pressure unit (MPa) that claimant’s work would have. Simply stating studies without specific application to the case at hand does not elucidate the process for the undersigned.

Dr. Bansal assigned a 50 percent lower extremity impairment based on the lack of flexion, anterolateral, medial and lateral stability and continued knee pain. (CE 1:9) He recommended restrictions of avoiding multiple stairs and no prolonged standing greater than 30 minutes at a time. He also opined claimant would need to undergo revision knee replacement surgery within his lifetime. (CE 1:9)

By March 16, 2021, claimant reported doing well following the surgery with only minimal pain. (JE 1:28) He had good range of motion and could ambulate with a normal gait. Id. On June 15, 2021, claimant reported that his pain was 2 on a 10 scale but that pain increased with activities such as ladder use and getting in and out of his truck. (JE 1:30) Modifying activities, rest, Tylenol, and ibuprofen provided temporary relief. Id. There was a clunking in his knee and Dr. Palit suggested knee arthroscopy to address the patella clunk. (JE 1:32) Claimant was in his busy season and could not be off work for a sustained period of time. Id. Instead, claimant would return during the off-season.

On March 11, 2022, claimant underwent right knee arthroscopy debridement of medial, lateral and patellofemoral compartments. (JE 1:34) In the March 25, 2022, follow-up, claimant reported “quite a bit of improvement. He has full range of motion.” (JE 1:38) On April 5, 2022, claimant presented to Dr. Palit’s office anxious to return to work. (JE 1:39) He had a normal gait, no signs of tenderness, infection, or effusion. (JE 1:39) Dr. Palit returned claimant to regular duty starting April 11, 2022, and directed claimant to follow up as needed. (JE 1:39-40)

Claimant has no work restrictions.

On April 29, 2022, Dr. Vincent authored a response to Dr. Bansal’s opinion. (DE A:10) First, Dr. Vincent felt that Dr. Bansal’s report omitting pre-existing knee pain and treatment for the knee pain was significant. Id. Second, Dr. Vincent believed Dr. Bansal’s conclusion was flawed when he stated that the claimant’s cumulative work for defendant employer necessitated the total knee replacement. Id. In Dr. Vincent’s opinion, Dr. Bansal provided no scientific rationale for the statement that the meniscus tear was related to cumulative work. Id. Dr. Vincent also disagreed with Dr. Bansal’s opinion claimant would need a revision surgery.

Respectfully, Sunil Bansal is not trained in orthopedic surgery. I am a board certified orthopedic surgeon specializing in knee pathology, specific cartilage abnormalities. Current 20-year survivorship for total knee replacement is greater than 90% in many studies. With that being said, it is highly unlikely that Mr. Freese will need a revision knee replacement in his lifetime.

(DE A:13)

Finally, Dr. Vincent pointed out that the difference in impairment rating he gave of 37 percent and the impairment rating assigned by Dr. Bansal was due to the subjective report of pain by the claimant. (DE A:13)

On June 17, 2022, Dr. Bansal issued an updated report based on the surgical and treatment records of 2022. (CE 1:11-13) He wrote,

I have reviewed the above additional records and stand by my opinions as stated in my IME report. . . While Mr. Freese had pre-existing degenerative joint disease in his right knee, it was aggravated from his work at Cemstone Concrete. Until he started work at Cemstone Concrete, there was no recommendation made for a total knee replacement. The right knee degenerative joint disease aggravation led to an accelerated need for a knee replacement. Moreover, when he started working at Cemstone Concrete he had to perform job duties that required him to climb in and out of a truck 50 to 100 times a day. It would have been implausible to perform this job for several years coming forward to May 2020 if his knee had been at the point of needing a knee replacement.

(CE 1:13)

Dr. Bansal charged \$532.00 for the examination and \$2,364.00 for the report. (CE 1:14)

Claimant's medical bills total \$111,391.37. (CE 6:36) Claimant paid \$2,985.10 personally while the remainder was paid via health insurance. Id. The outstanding balance is \$7,025.51.

Claimant was evasive on cross-examination. He did not answer questions directly put to him. He reported to Ms. Johnson that he had sustained no injury. He did not bring up his past work but instead related that the pain in the right knee had been present for at least a year. He received two injections prior to the alleged May 2020 injury including one on May 8, 2020. In his deposition, he testified that he did not receive injections prior to 2019; however, late received medical records revealed at least two injections in 2011. In the September 20, 2019, medical visit, it was noted that he had relief with past injections. (JE 1:1) During his deposition, when presented with the September 20, 2019, notes, he then testified that he had injections in his right knee a couple of years before 2019.

It is found that claimant's credibility is suspect based on his evasive and varying testimony pertaining to past care to his right knee. The claimant's presentation at hearing is balanced against the evidence that claimant is a hard worker, and his work was labor intensive.

#### CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3).

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

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.

Claimant alleges he sustained an aggravation to a pre-existing degenerative condition in his right knee which ultimately led to a knee replacement. In support of this position, he relies on the medical testimony and opinions of Sunil Bansal, M.D. Dr. Bansal is an occupational medicine specialist. He does not specialize in orthopedic medicine like Dr. Palit, claimant's treating surgeon, or Dr. Vincent, the orthopedic doctor retained by the defendants.

Dr. Bansal's medical specialty does not automatically render his opinions invalid. However, in this particular case, his opinions appear to be based on a more superficial understanding of the mechanics of claimant's degenerative disease and meniscal tear. For instance, Dr. Vincent wrote that the tear in the meniscus was horizontal, and that medical literature noted that horizontal meniscus tears were more likely degenerative in nature. The diagnostic studies from 2011 through 2020 also support a degenerative condition in claimant's right knee. The 2011 x-ray demonstrated narrowing of the medial joint space, and the May 2020 x-rays, taken just 6 days before the alleged injury, showed severe degenerative changes in the medial compartment. Yet another sign of degeneration was that claimant was initially responsive to injections in 2011 but did not obtain lasting relief from the May 2020 injection. Finally, claimant's pain improved after the knee replacement surgery which was yet another sign that the torn meniscus was not the root of the claimant's problem.

These clinical signs were supported by the medical literature. Claimant had degenerative disease in his right knee that advanced to the point that a total knee replacement was necessary.

Claimant argues that Dr. Vincent disregards the changes represented in the post-injury x-rays and MRI. This is inaccurate. Dr. Vincent opines that the changes, which show extensive degeneration particularly in the medial compartment, are consistent with degeneration rather than a work injury necessitating the total knee replacement.

The evidence that claimant's degenerative disease was lit up or aggravated by claimant's work which included significant climbing in and out of his truck and around the cement trailer, is a temporal one. In other words, the premise of claimant's claim is that he did not need knee replacement surgery prior to May 16, 2020, that the work must be the substantial factor in bringing about the need for the knee replacement.

Dr. Bansal opined that because claimant did not have the need for a knee replacement surgery prior to May 16, 2020, that the need arose because of the work claimant performed for defendant employer. Dr. Bansal opined that it would not have been possible for claimant to perform his job for several years coming forward to May

2020 if claimant's knee had been at the point of needing a knee replacement. This statement is actually disproven by claimant's own actions. He was advised he would need a knee replacement surgery in September 2020 and claimant delayed the surgery until the off-peak season when he was laid off. He continued to work several months without the knee replacement surgery. Claimant was capable of working even full duty work without restrictions with a knee in need of replacement, albeit with pain. Similarly, claimant worked fully duty pre-May 16, 2020, with knee pain treated by injection therapy.

There was not substantial evidence to support a finding that claimant's knee replacement surgery was the result of work duties aggravating a pre-existing degenerative condition. Accordingly, the remainder of the issues are moot.

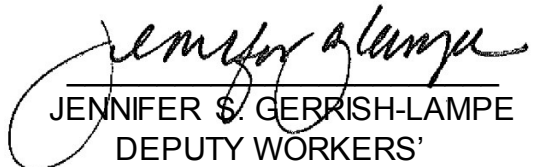
ORDER

THEREFORE IT IS ORDERED:

Claimant shall take nothing.

The parties shall share equally in the costs of the transcript.

Signed and filed this 5<sup>th</sup> day of October, 2022.

  
JENNIFER S. GERRISH-LAMPE  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Mary Hamilton (via WCES)

Patrick Waldron (via WCES)

**Right to Appeal:** This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.