

BEFORE THE WORKERS' COMPENSATION COMMISSIONER

GARY KRUSE,

Claimant,

vs.

CITY OF DES MOINES,

Employer,  
Self-Insured,

and

SECOND INJURY FUND OF IOWA,

Defendants.

File No. 5064656

ARBITRATION

DECISION

Headnotes: 1402.30, 1402.40, 1802,  
1803, 3202, 3203

Claimant Gary Kruse filed a petition in arbitration on August 7, 2018, alleging he sustained an injury to his left knee while working for the defendant, City of Des Moines ("the City") on May 22, 2018. Kruse also seeks industrial disability benefits from the defendant, Second Injury Fund of Iowa ("the Fund"), for an alleged first qualifying injury to his left upper extremity and an alleged second qualifying injury to his left lower extremity. The City filed an answer on August 21, 2018. The Fund filed an answer on August 28, 2018.

An arbitration hearing was held *via* CourtCall on April 20, 2020. Attorney Christopher Spaulding represented Kruse. Kruse appeared and testified. Assistant City Attorney John Haraldson represented the City. Assistant Attorney General Meredith Cooney represented the Fund. Joint Exhibits ("JE") 1 through 8, and Exhibits 1 through 3, and AA and BB were admitted into the record. The record was held open through May 11, 2020, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

At the start of the hearing the parties submitted a hearing report, listing stipulations and issues to be decided. The City and the Fund waived all affirmative defenses. Kruse moved to amend the petition at hearing to assert a first qualifying injury date of April 23, 2012, consistent with the Agreement for Settlement already on file. The City and the Fund did not resist the amendment, which was granted.

### STIPULATIONS

1. An employer-employee relationship existed between the City and Kruse at the time of the alleged injury.
2. Kruse sustained an injury on May 22, 2018, which arose out of and in the course of his employment with the City.
3. If the alleged injury to Kruse's left knee is found to be the cause of permanent disability, the disability is a scheduled member disability to the left lower extremity.
4. The commencement date for permanent partial disability benefits, if any are awarded, is November 12, 2019.
5. At the time of the alleged injury Kruse received gross earnings of \$1,058.79 per week, he was single and entitled to one exemption, and the parties believe his weekly rate is \$620.15.
6. Costs have been paid.

### ISSUES

1. Is the alleged injury to Kruse's left knee a cause of temporary disability during a period of recovery?
2. Is Kruse entitled to temporary benefits from September 12, 2019 through November 12, 2019?
3. Is Kruse's left knee condition work-related or caused by a non-work-related medical condition?
4. Is the alleged injury to Kruse's left knee a cause of permanent disability?
5. If the alleged injury to Kruse's left knee is a cause of permanent disability, what is the extent of disability?
6. Is Kruse entitled to alternate medical care?
7. Did Kruse sustain a prior qualifying loss to the arm on April 23, 2012?
8. Is the functional loss from the prior qualifying loss four percent of the arm?
9. Did Kruse sustain a second compensable loss to his leg on September 17, 2019?
10. Is the functional loss from the second qualifying loss thirty-seven percent to the leg?

11. If Kruse is entitled to benefits through the Fund, is the commencement date for Fund benefits August 31, 2021?

12. Is the Fund entitled to a credit?

13. Should costs be assessed against the defendants?

### FINDINGS OF FACT

Kruse lives in Des Moines. Kruse graduated from high school in 1973. (Exhibit AA, page 6; Transcript, p. 14) Kruse married after the injury that is the subject of this hearing and he has two adult children. (Tr., p. 14) At the time of the hearing Kruse was sixty-four. (Tr., p. 13)

After high school Kruse served in the United States Army Reserves from 1974 through 1980, receiving an honorable discharge. (Ex. AA, p. 7; Tr., p. 14) Kruse worked for Farm Bureau for two years after leaving the United States Army Reserves. (Tr., p. 14) In 1976, Stitzell Electric Supply hired Kruse as a delivery driver where he delivered electric supplies to jobsites, contractors, and buildings. (Tr., pp. 14-15; Ex. AA, p. 7) After two years Kruse was promoted to counter sales, and two years later he was promoted to outside sales. (Ex. AA, p. 7; Tr., p. 15) Kruse worked for Stitzell Electric Supply for twenty-two years. (Tr., p. 15)

From 1999 through 2003, Kruse worked for DHL Express, performing deliveries, until he was let go during a reorganization. (Ex. AA, p. 7; Tr., pp. 15-16)

After he was let go from DHL Kruse worked for the City as a seven-month casual worker. (Tr., p. 16) The City hired Kruse as a full-time employee in April 2005. (Ex. AA, p. 2; Tr., p. 16) Kruse worked in Parks and Recreation for two years. (Tr., p. 16) Kruse reported the position required tree work, operating chainsaws, lifting logs, using hand tools, operating weed eaters and leaf blowers, running liquid chemicals with a backpack sprayer, and mowing, which he believes contributed to his knee condition. (Tr., p. 17)

From 2007 through 2009, Kruse worked for the Street Department in Public Works driving and operating trucks, performing asphalt work, installing concrete sidewalks, and performing street work, which he believes contributed to his knee condition. (Tr., pp. 17-18) While working with asphalt, Kruse had to hand shovel patching compound into a hot, heated box before patching holes in the streets, which required twisting, bending, and getting up and down from the truck. (Tr., pp. 18-19) With the concrete work Kruse had to tear out existing sidewalk, frame the new sidewalk, carry concrete braces or forms, and load and unload concrete forms or braces from trucks. (Tr., p. 19) Kruse relayed the work required him to be on his hands and knees. (Tr., p. 19)

Kruse returned to the Parks Department as a PAM Tech for eighteen months. (Tr., p. 19) As a PAM Tech Kruse worked at the airport for six months, six months for the Parks Department, and he returned to the airport in the winter. (Tr., p. 20) Kruse

reported he did tree work, asphalt work, concrete work, and operated heavy equipment. (Tr., p. 20) Kruse cut concrete with a saw, he had to climb up and down loaders, and he had to climb up and down stairs and ladders. (Tr., p. 20)

Kruse testified after “the airport went its own authority,” he and some of the City employees went back to the Public Works Department. (Tr., p. 20) Kruse again performed asphalt work and installed curbs like he had in the past. (Tr., p. 21) Kruse worked for the Public Works Department for two years. (Tr., p. 21)

In 2013 Kruse moved to the Sewer Department. (Tr., p. 21) In the Sewer Department Kruse drives dump trucks and other trucks, climbs up and down trucks, unhooks clamps from steel plates covering holes in the street, removes obstructions from sewers, repairs sewers, manholes and catch basins, operates pumps, moves hoses, climbs up and down ladders for pipe repair, installs pipe, carries up to 100 pounds over uneven terrain, and removes items from ditches and manholes. (Tr., pp. 21-22)

Kruse alleges he is entitled to permanent partial disability benefits for a cumulative injury to his left knee and permanent partial disability benefits from the Fund based on a prior injury to his left upper extremity in 2012 and the injury to his left knee. The City avers Kruse’s knee condition is personal and not work-related. The Fund denies Kruse sustained a first or second qualifying injury in this case.

Kruse has had several injuries since he commenced his employment in 2005. On September 27, 2010, Kruse underwent a left knee x-ray. (JE 1, p. 1) The reviewing radiologist noted the x-rays showed some left knee osteoarthritis with medial joint space narrowing. (JE 1, p. 1)

On July 11, 2012, Kruse attended an appointment with John Gaffey, M.D., an orthopedic surgeon, complaining of numbness and tingling into his thumb, index finger, long finger, and ring finger of the left hand for four or five years. (JE 1, p. 33) Kruse relayed his condition had become worse over the last year or two and he would occasionally wake up at night with a numb hand, noting it was worse at work when using vibratory tools, and reporting he had weakness and problems with his hands going to sleep when he is driving or reading. (JE 1, p. 33) Dr. Gaffey noted electromyography showed Kruse had left carpal tunnel syndrome and he assessed Kruse with left carpal tunnel syndrome. (JE 1, p. 33) Kruse elected to proceed with surgery and he underwent a left carpal tunnel release on August 2, 2012. (JE 1, p. 33; JE 2, p. 1) Following surgery Dr. Gaffey imposed a ten-pound lifting restriction and restrictions of avoiding repetitive and vigorous grasping, pinching, and pulling, releasing Kruse to full duty on September 12, 2012. (JE 1, pp. 2-3)

On December 10, 2012, Dr. Gaffey found Kruse could use his hand as tolerated, opined Kruse had reached maximum medical improvement, and released him to full duty without restrictions. (JE 1, p. 6; Ex. 2, p. 3) Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) (“AMA Guides”), Dr. Gaffey assigned Kruse a zero percent whole body impairment. (Ex. 2, p. 5)

On December 10, 2012 Kruse also attended an appointment with Jon Yankey, M.D., a treating occupational medicine physician. (Ex. 2, p. 4) Dr. Yankey noted Kruse had full motion in his wrist and hand, he was tolerating full work duties, and he was asymptomatic and had made a full recovery. (Ex. 2, p. 4) Dr. Yankey released Kruse to full duty, discharged Kruse from care, and advised Kruse continue with home exercises. (Ex. 2, p. 4)

In May 2013, Sunil Bansal, M.D., an occupational medicine physician, conducted an independent medical examination for Kruse and issued his report on June 17, 2013. (Ex. 2, pp. 6-22) Using the AMA Guides, Dr. Bansal assigned a four percent impairment to Kruse's left upper extremity for his carpal tunnel syndrome. (Ex. 2, p. 21) Dr. Bansal did not assign any permanent restrictions for Kruse's carpal tunnel syndrome.

On January 2, 2014, the Commissioner approved an Agreement for Settlement between Kruse and the City. Kruse and the City agreed Kruse had sustained a "[p]ermanent partial disability of 1.5% loss of left upper extremity resulting in 3.75 weeks of compensation under Iowa Code § 85.34(2)(m) payable commencing 8/14/12." (Ex. 2, p. 1)

In 2016 Kruse developed a separate injury to his left shoulder and he treated with Ian Lin, M.D., an orthopedic surgeon. (JE 1, pp. 7-10) Dr. Lin noted he had treated Kruse in the past for a left hip problem and he had performed a right shoulder arthroscopy and decompression on Kruse's right shoulder in 2011. (JE 1, pp. 7, 9) Dr. Lin performed surgery on Kruse's left shoulder on November 10, 2016. (JE 1, p. 11) Dr. Lin described Kruse's recovery as "fantastic," noting Kruse had full active range of motion of his shoulder and rotator cuff strength within normal limits and he later assigned Kruse a zero percent permanent impairment rating. (JE 1, pp. 24-25, 32)

On August 28, 2017, Kruse attended an appointment with Dr. Lin to follow up on his left knee degenerative joint disease, complaining of increased pain and swelling in his left knee. (JE 1, p. 38) Dr. Lin noted Kruse had not received any significant treatment since 2010 and he had undergone an arthroscopy in the 1980s. (JE 1, p. 38) At hearing Kruse testified he injured his knee in the 1980s when he jumped off a porch at his home and tore cartilage in his knee. (Tr., p. 28) Dr. Lin assessed Kruse with left knee osteoarthritis, aspirated and injected his knee, and noted Kruse would eventually need a total knee arthroscopy. (JE 1, p. 38)

Kruse returned to Dr. Lin's office on January 17, 2018, and Shawna Swain, PA-C, examined him. (JE 1, p. 25) Swain noted Kruse had seen Dr. Lin on August 28, 2017, and at that time Dr. Lin aspirated and injected his knee and he did quite well. (JE 1, p. 25) Kruse reported he started experiencing more pain the last five days and he was uncertain what had aggravated it, but reported he was doing more bending and squatting and he had slid on the running board of his truck that week. (JE 1, p. 25) Swain assessed Kruse with left knee severe bone-on-bone degenerative arthritis and discussed treatment options with Kruse. (JE 1, p. 27) Kruse relayed he did not want to

proceed with surgery and requested an aspiration and injection, which Swain performed. (JE 1, p. 27)

Kruse testified on May 22, 2018, when he climbed up to get in a large dump truck his left knee buckled and he experienced severe pain. (Tr., p. 22) Kruse reported the seat in the truck was five feet from the street and he had to climb up three steps to get into the truck. (Tr., p. 23) Kruse relayed he has had knee pain since that date. (Tr., pp. 23-24) He also avers that his work over the years with the City performing physical labor caused his left knee condition. (Tr., p. 24)

On June 21, 2018, Kruse underwent left knee magnetic resonance imaging. (JE 4, p. 1) The reviewing radiologist listed an impression of:

1. Chronic anterior cruciate ligament tear/rupture.
2. Horizontal tearing involving the posterior horn of the lateral meniscus.
3. There is marked volume loss throughout the posterior horn and body of the medial meniscus. This likely is reflective of prior meniscectomy in this patient with history of arthroscopic surgery. There may be some fraying of the residual meniscal tissue.
4. Advanced chondromalacia changes involving the medial compartment with full-thickness chondral loss. There is a large knee joint effusion.
5. Mucoïd degeneration of the posterior cruciate ligament.

(JE 4, pp. 1-2)

Kruse returned to Dr. Lin on July 11, 2018, reporting he injured his left knee while getting into this truck on May 22, 2018, when his knee "kind of buckled on him and he has had pain ever since." (JE 1, p. 29) Dr. Lin observed Kruse's kneecap was swollen, noting Kruse had problems with his left knee in the 1980s and when he saw Kruse in September 2010 he told him his arthritis was not a work-related condition and he had only experienced a temporary aggravation of his osteoarthritis. (JE 1, p. 29) Dr. Lin assessed Kruse with severe left knee osteoarthritis, noted he likely has a chronic ACL tear based on his imaging, and documented, "I do not believe his arthritis is work-related but with his instability I think he may benefit from an ACL brace." (JE 1, p. 29) Dr. Lin aspirated and injected Kruse's knee and restricted him from walking and standing for more than two hours per day with no squatting or kneeling for three weeks. (JE 1, pp. 29, 31) Dr. Lin again noted he did not believe the condition was work-related and documented "this is just a temporary aggravation of his arthritis. He will benefit from a total knee replacement in the near future." (JE 1, p. 30)

Kruse attended an appointment with Dr. Lin on August 6, 2018, regarding his left knee degenerative joint disease. (JE 1, p. 35) Kruse relayed his knee brace had made

his knee more stable. (JE 1, p. 35) Dr. Lin assessed Kruse with left knee osteoarthritis with a temporary aggravation from his injury and recommended no further intervention, noting Kruse would need a total knee arthroplasty in the future, and he released Kruse to return to work without restrictions. (JE 1, pp. 35, 37)

On November 26, 2018, Kruse attended an appointment with Mark Fish, D.O., an orthopedic surgeon, complaining of left knee pain since May when his knee gave out while he was getting out of a truck. (JE 5, pp. 1, 4) Kruse reported experiencing medial and lateral pain keeping him up at night, catching of the knee, and occasional swelling, noting his pain is aggravated by stairs and kneeling. (JE 5, pp. 1, 4) Dr. Fish noted Kruse had undergone a knee arthroscopy in 1989. (JE 5, pp. 1, 4) Dr. Fish examined Kruse, reviewed his prior imaging, and listed an impression of left knee pain, left knee unilateral primary osteoarthritis, left knee spontaneous disruption of the anterior cruciate ligament, and left knee tear of the lateral meniscus. (JE 5, pp. 2, 4) Dr. Fish noted the tears were current injuries. (JE 5, pp. 2, 4) Dr. Fish discussed Kruse's condition and its natural progression, noted past cortisone injections and aspirations had provided good relief, but had been giving him diminishing returns, and opined a knee replacement would give Kruse the best chance at pain relief and return of function. (JE 5, pp. 3, 5)

Kruse returned to Dr. Fish on December 27, 2018, requesting a knee aspiration and injection, which Dr. Fish performed. (JE 5, pp. 7, 9-10)

On January 31, 2019, Dr. Fish responded to a check-the-box letter from Kruse's attorney, responding "yes" to the question, "[d]id the work that Mr. Kruse performed at the City of Des Moines as set out above a substantial causal, accelerating, aggravating or exacerbating factor in Mr. Kruse's left knee condition and need for surgery?" (Ex. 1, p. 1) Dr. Fish did not provide any handwritten comments. (Ex. 1, p. 1)

Kruse returned to Dr. Fish on April 11, 2019, reporting he received no relief from the previous injection, and he requested another injection. (JE 5, pp. 11, 13) Dr. Kruse performed the aspiration and injection. (JE 5, pp. 11-12, 13-14)

On June 10, 2019, Kruse attended a follow-up appointment with Dr. Fish reporting he received good relief from the injection, but he was still having pain which was bothering him when performing activities of daily living and he requested a total knee arthroplasty. (JE 5, pp. 15-18)

Dr. Fish performed a left total knee arthroplasty on Kruse on September 17, 2019. (JE 7, p. 1) Dr. Fish listed a pre and postoperative diagnosis of left knee varus degenerative joint disease. (JE 7, p. 1)

Following surgery Dr. Fish examined Kruse on October 31, 2019, and released him to return to work with restrictions on November 12, 2019. (JE 5, p. 21)

Kruse's attorney sent Dr. Fish a letter on March 20, 2020, noting Dr. Fish had performed a left total knee replacement on Kruse, and asking him to assign a permanent functional impairment rating under the AMA Guides. (Ex. 1, p. 4) On April

2, 2020, Dr. Fish opined Kruse had sustained a thirty-seven percent impairment to his left lower extremity. (Ex. 1, p. 4)

Kruse testified he has continued to have tingling, numbness and a loss of strength in his left upper extremity up until the time of the April 2020 hearing. (Tr., p. 24) Kruse also reported he has similar symptoms in his right wrist. (Tr., p. 33) As of the date of the hearing Kruse was performing his duties for the City without any restrictions related to his left and right upper extremities. (Tr., p. 33)

Kruse relayed he also has problems with his left knee. (Tr., p. 25) Kruse reported “[j]ust every day from range of motion, when I get on my hands and knees and walking and crawling, to a strange feeling which is painful. It’s painful but I’m doing everything I’m asked to do.” (Tr., p. 25) Kruse takes Tylenol and he occasionally takes an anti-inflammatory for his knee. (Tr., p. 25) Kruse reported he is able to perform his job for the City. (Tr., p. 25) Kruse testified crawling down a ladder into a manhole, climbing up the box and getting in the back of a dump truck, crawling over the box and coming back down a dump truck give him the most problems. (Tr., p. 26) Kruse continues to work in his same position for the City. (Tr., p. 34)

## CONCLUSIONS OF LAW

### I. Applicable Law

This case involves the issues of nature and extent of disability, entitlement to benefits under the Fund, and costs and interest under Iowa Code sections 85.34, 85.64, 86.40, and 535.3. In 2017, the Iowa Legislature enacted changes to Iowa Code chapters 85, 86, and 535 effecting workers’ compensation cases. 2017 Iowa Acts chapter 23 (amending Iowa Code sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.45, 85.70, 85.71, 86.26, 86.39, 86.42, and 535.3). Under 2017 Iowa Acts chapter 23 section 24, the changes to Iowa Code sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.71, 86.26, 86.39, and 86.42 apply to injuries occurring on or after the effective date of the Act. Kruse alleges he is entitled to benefits from the City for an alleged injury to his knee occurring after July 1, 2017, therefore, the provisions of the new statute involving nature and extent of disability under Iowa Code section 85.34 apply to this case. No changes were made to the subchapter involving the Fund, Iowa Code sections 85.63 through 85.69.

The calculation of interest is governed by Sanchez v. Tyson, File No. 5052008 (Ruling on Defendant’s Motion to Enlarge, Reconsider, or Amend Appeal Decision Re: Interest Rate Issue), which holds interest for all weekly benefits payable and not paid when due which accrued before July 1, 2017, is payable at the rate of ten percent; all interest on past due weekly compensation benefits accruing on or after July 1, 2017, is payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. Again, Kruse alleges an injury to his knee while working for the City occurring after July 1, 2017, and the new provision on interest applies to that claim. Interest accrual against the Fund was not modified with the statutory changes in 2017.



## II. Nature of the Injury – Left Knee

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of and in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment, and not merely incidental to the employment. Koehler Elec. v. Willis, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held an injury occurs "in the course of employment" when:

it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of his employer.

Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979).

The parties stipulated Kruse sustained an injury arising out of and in the course of his employment with the City on May 22, 2018. Kruse avers the alleged injury to his left knee and his work over the years caused a cumulative injury resulting in a temporary and permanent disability, requiring him to undergo a total left knee replacement. The City and the Fund aver Kruse's left knee osteoarthritis and need for a total knee replacement preexisted his work injury and that his work injury did not cause a temporary or permanent impairment. The City raises an industrial disability analysis involving the left upper extremity with the alleged knee injury. Kruse only alleges a claim for industrial benefits from the Fund. These arguments involve medical causation.

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997). When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other

factors which bear upon the weight and value” of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

It is well-established in workers’ compensation that “if a claimant had a preexisting condition or disability, aggravated, accelerated, worsened, or ‘lighted up’ by an injury which arose out of and in the course of employment resulting in a disability found to exist,” the claimant is entitled to compensation. Iowa Dep’t of Transp. v. Van Cannon, 459 N.W.2d 900, 904 (Iowa 1990). The Iowa Supreme Court has held,

a disease which under any rational work is likely to progress so as to finally disable an employee does not become a “personal injury” under our Workmen’s Compensation Act merely because it reaches a point of disablement while work for an employer is being pursued. It is only when there is a direct causal connection between exertion of the employment and the injury that a compensation award can be made. The question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause.

Musselman v. Cent. Tel. Co., 261 Iowa 352, 359-60, 154 N.W.2d 128, 132 (1967).

A cumulative injury is an occupational disease that develops over time, resulting from cumulative trauma in the workplace. Baker v. Bridgestone/Firestone, 872 N.W.2d 672, 681 (Iowa 2015); Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842, 851 (Iowa 2009); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368, 372-74 (Iowa 1985). “A cumulative injury is deemed to have occurred when it manifests – and ‘manifestation’ is that point in time when ‘both the fact of the injury and the causal relationship of the injury to the claimant’s employment would have become plainly apparent to a reasonable person.’” Baker, 872 N.W.2d at 681.

Two physicians have provided expert opinions in this case, Drs. Lin and Fish, both treating orthopedic surgeons. Dr. Fish performed a total left knee replacement on Kruse, examining the interior of his knee. Dr. Lin opined Kruse’s left knee osteoarthritis was not caused by his employment and Dr. Fish opined Kruse’s employment with the City was “substantial causal, accelerating, aggravating or exacerbating factor” in Kruse’s left knee condition and need for surgery. (Ex. 1, p. 1) I find Dr. Fish’s opinion to be more persuasive.

In 2010 Dr. Lin assessed Kruse with left knee osteoarthritis and he later documented he told Kruse in 2010 his osteoarthritis was not work-related. (JE 1, p. 29) Kruse did not receive any significant treatment for his left knee until August 2017 and January 2018, when he underwent aspirations and injections. (JE 1, pp. 25-27, 38) During these appointments Dr. Lin and Swain discussed a total knee replacement with Kruse. Swain documented Kruse received relief from the first aspiration and injection and he began experiencing problems following an aggravation in January 2018, five days before his appointment. (JE 1, pp. 25-27) Kruse relayed he was doing more bending and squatting. (JE 1, p. 26)

Kruse returned to Dr. Lin on July 11, 2018, reporting another aggravation injury in May 2018. Dr. Lin noted Kruse most likely had a chronic ACL tear, documented, “I do not believe his arthritis is work-related but with his instability I think he may benefit from an ACL brace,” opined Kruse had only experienced a temporary aggravation of his osteoarthritis, and noted Kruse would benefit from a total knee replacement in the future. (JE 1, p. 29)

Kruse did not receive treatment from July 11, 2018 until November 26, 2018, when he attended his first appointment with Dr. Fish. Dr. Fish examined Kruse and reviewed his prior imaging when Kruse was treating with Dr. Lin, and listed an impression of left knee pain, left knee unilateral primary osteoarthritis, left knee spontaneous disruption of the anterior cruciate ligament, and left knee tear of the lateral meniscus. (JE 5, pp. 2, 4) Dr. Fish noted the tears were current injuries. (JE 5, pp. 2, 4) Dr. Fish discussed Kruse’s condition and its natural progression, noted past cortisone injections and aspirations had provided good relief, but had been giving him diminishing returns, and opined a knee replacement would give Kruse the best chance at pain relief and return of function. (JE 5, pp. 3, 5)

On January 31, 2019, Dr. Fish responded to a check-the-box letter from Kruse’s attorney, responding “yes’ to the question, “[d]id the work that Mr. Kruse performed at the City of Des Moines as set out above a substantial causal, accelerating, aggravating or exacerbating factor in Mr. Kruse’s left knee condition and need for surgery?” (Ex. 1, p. 1) Dr. Fish later performed a left total knee replacement on Kruse.

Dr. Fish noted the tears he observed in Kruse’s knee were “current tears.” (JE 5, pp. 2, 4) No request was made to Dr. Lin on whether he concurred with Dr. Fish that the tears were current. Dr. Lin was not asked to opine whether he believed Kruse’s work for the City had aggravated, accelerated, worsened, or “lighted up” his left knee condition, accelerating his condition and need for surgery. Dr. Fish also most recently examined and operated on Kruse. He did not alter his opinion following surgery.

The record reflects Kruse did not seek medical treatment for his left knee from 2010 until August 2017 and again in January 2018, undergoing aspirations and injections, long after he commenced his employment with the City. I find Kruse has established the May 2018 work injury accelerated his need for surgery. The City did not raise any affirmative defenses in this case. I find Kruse’s left knee condition manifested by at least September 17, 2019.

### **III. Extent of Impairment – Left Knee**

Permanent partial disabilities are divided into scheduled and unscheduled losses. Iowa Code § 85.34(2). If the claimant’s injury is listed in the specific losses found in Iowa Code section 85.34(2)(a)-(u), the injury is a scheduled injury and is compensated by the number of weeks provided for the injury in the statute. See Second Injury Fund v. Bergeson, 526 N.W.2d 543, 547 (Iowa 1995) (under earlier version of Iowa Code section 85.34). “The compensation allowed for a scheduled injury ‘is definitely fixed according to the loss of use of the particular member.’” Id. (quoting Graves v. Eagle

Iron Works, 331 N.W.2d 116, 118 (Iowa 1983)). Under Iowa Code section 85.34(2)(p) (2018), an injury to the knee, a part of the leg, is a scheduled member injury. The schedule provides a maximum of 220 weeks of compensation. Iowa Code § 85.34(2)(p).

Iowa Code section 85.34(2)(x) provides when determining functional disability under Iowa Code section 85.34(2)(p), “the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American medical association, as adopted by the workers’ compensation commissioner by rule pursuant to chapter 17A.” The Commissioner has adopted the AMA Guides 5th Edition. 876 IAC 2.4. Using the AMA Guides Dr. Fish opined Kruse had sustained a thirty-seven percent impairment to his left lower extremity. (Ex. 1, p. 4) Dr. Fish’s opinion is un rebutted and I am not permitted to substitute my opinion, even if it would differ. I find Kruse has established he sustained a thirty-seven percent impairment to his left lower extremity, and he is entitled to 81.4 weeks of permanent partial disability benefits from the City, at the stipulated rate of \$620.15 per week, commencing on the stipulated commencement date of November 12, 2019.

#### **IV. Healing Period Benefits**

Iowa Code section 85.33 (2018) governs temporary disability benefits, and Iowa Code section 85.34 governs healing period and permanent disability benefits. Dunlap v. Action Warehouse, 824 N.W.2d 545, 556 (Iowa Ct. App. 2012).

An employee has a temporary partial disability when because of the employee’s medical condition, “it is medically indicated that the employee is not capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee’s disability.” Iowa Code § 85.33(2). Temporary partial disability benefits are payable, in lieu of temporary total disability and healing period benefits, due to the reduction in earning ability as a result of the employee’s temporary partial disability, and “shall not be considered benefits payable to an employee, upon termination of temporary partial or temporary total disability, the healing period, or permanent partial disability, because the employee is not able to secure work paying weekly earnings equal to the employee’s weekly earnings at the time of the injury.” Id.

As a general rule, “temporary total disability compensation benefits and healing-period compensation benefits refer to the same condition.” Clark v. Vicorp Rest., Inc., 696 N.W.2d 596, 604 (Iowa 2005). The purpose of temporary total disability benefits and healing period benefits is to “partially reimburse the employee for the loss of earnings” during a period of recovery from the condition. Id. The appropriate type of benefit depends on whether or not the employee has a permanent disability. Dunlap, 824 N.W.2d at 556. I found Kruse sustained a permanent impairment, therefore, any temporary benefits he is entitled to would be healing period benefits.

Iowa Code section 85.34(1) governs healing period benefits, as follows:

the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning 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.

Under Iowa Code section 85.33(6), “employment substantially similar to the employment in which the employee was engaged at the time of the injury’ includes, for purposes of an individual who was injured in the course of performing as a professional athlete, any employment the individual has previously performed.”

The parties stipulated the commencement date for permanency is November 12, 2019, the date Kruse avers his healing period ended. Kruse seeks healing period benefits when he was off work from starting on September 17, 2019. Kruse is entitled to healing period benefits from the City from September 17, 2019 through November 11, 2019, when his healing period ended, at the stipulated rate of \$620.15 per week.

#### **V. Alternate Medical Care**

On the hearing report Kruse noted he was requesting alternate medical care. In his post-hearing brief Kruse did not address alternate medical care. Given my finding Kruse has established he sustained a permanent impairment to his knee caused by a cumulative injury he sustained while working for the City, the City is responsible for any future care that he needs that is causally related to the work injury. No request was made for alternate care with a specific provider. The City retains the right to direct Kruse’s care.

#### **VI. The Fund’s Liability**

Kruse seeks benefits through the Fund. The Fund contends it has no liability in this case.

Under Iowa Code section 85.64,

[i]f an employee who has previously lost, or lost the use of, one hand, one arm, one foot, one leg, or one eye, becomes permanently disabled by a compensable injury which has resulted in the loss of or loss of use of another such member or organ, the employer shall be liable only for the degree of disability which would have resulted from the latter injury if there had been no preexisting disability. In addition to such compensation, and after the expiration of the full period provided by law for the payments thereof by the employer, the employee shall be paid out of the “Second Injury Fund” created by his division and the remainder of such compensation as would be payable for the degree of permanent disability involved after first deducting from such remainder the compensable value of the previously lost member or organ.

Thus, an employee is entitled to Fund benefits if the employee establishes: (1) the employee sustained a permanent disability to a hand, arm, foot, leg, or eye, a first qualifying injury; (2) the employee subsequently sustained a permanent disability to another hand, arm, foot, leg, or eye, through a work-related injury, a second qualifying injury; and (3) the employee has sustained a permanent disability resulting from the first and second qualifying injuries exceeding the compensable value of the “previously lost member.” Gregory v. Second Injury Fund of Iowa, 777 N.W.2d 395, 398-99 (Iowa 2010).

#### **A. First Qualifying Loss**

Kruse alleges he sustained a first qualifying injury on April 23, 2012, to his left upper extremity. The Fund avers Kruse has not met his burden that he sustained a prior loss or loss of use of his left arm.

Dr. Gaffey, the treating orthopedic surgeon, found Kruse did not sustain a permanent impairment to his left upper extremity. (Ex. 2, p. 5) Dr. Bansal, an occupational medicine physician who conducted an independent medical examination for Kruse, assigned Kruse a four percent permanent impairment to his left upper extremity. (Ex. 2, p. 21) Dr. Bansal did not assign any permanent restrictions for Kruse’s carpal tunnel syndrome. On January 2, 2014, the Commissioner approved an Agreement for Settlement between Kruse and the City. Kruse and the City agreed Kruse had sustained a “[p]ermanent partial disability of 1.5% loss of left upper extremity resulting in 3.75 weeks of compensation under Iowa Code § 85.34(2)(m) payable commencing 8/14/12.” (Ex. 2, p. 1)

Kruse returned to full duty after undergoing carpal tunnel surgery, but testified he has continued to experience tingling, numbness, and a loss of strength up until the time of the April 2020 hearing. (Tr., p. 24) I had the opportunity to observe Kruse testify under oath. During his testimony, Kruse engaged in direct eye contact, his rate of speech was appropriate, and he did not make any furtive movements. I found his testimony was consistent throughout the hearing, and reasonable and consistent with the other evidence I believe. While Kruse’s injury to his left upper extremity resulted in a slight impairment, it resulted in an impairment nonetheless. The record supports Kruse has sustained a first qualifying loss to his left upper extremity.

#### **B. Second Qualifying Loss**

As analyzed above, I found Kruse sustained a permanent impairment to his left knee, also a scheduled member. Based on this finding, I conclude Kruse has proven he sustained a second qualifying loss.

#### **C. Industrial Disability**

“Industrial disability is determined by an evaluation of the employee’s earning capacity.” Pease, 807 N.W.2d at 852. In considering the employee’s earning capacity, the deputy commissioner evaluates several factors, including “consideration of not only the claimant’s functional disability, but also [his] age, education, qualifications,

experience, and ability to engage in similar employment.” Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (Iowa 2010). The inquiry focuses on the injured employee’s “ability to be gainfully employed.” Id. at 138. The new statute also requires consideration of the number of years it is reasonably anticipated the employee would work at the time of the injury.

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u). When considering the extent of disability, the deputy commissioner considers all evidence, both medical and nonmedical. Evenson v. Winnebago Indus., Inc., 818 N.W.2d 360, 370 (Iowa 2016). When determining the Fund’s liability, the trier of fact subtracts the two scheduled amounts for the first and second qualifying injuries from the full amount of the industrial disability. Second Injury Fund of Iowa v. Shank, 516 N.W.2d 808, 813 (Iowa 1994).

At the time of the hearing Kruse was sixty-four. (Tr., p. 13) Kruse is a high school graduate. While Kruse is of advanced age, there was no evidence presented he intends to retire. Kruse has worked in manual labor of the City for fifteen years. He also has past experience in sales. I found Kruse articulate at hearing. Kruse has worked for the City since 2005 performing a variety of jobs. I find he is capable of retraining. Moreover, following his most recent work injury, Kruse returned to his normal duties. Kruse does not have any permanent restrictions. Kruse testified he has continued to have tingling, numbness and a loss of strength in his left upper extremity. (Tr., p. 24) Kruse relayed he also has problems with his left knee. (Tr., p. 25) Kruse reported “[j]ust every day from range of motion, when I get on my hands and knees and walking and crawling, to a strange feeling which is painful. It’s painful but I’m doing everything I’m asked to do.” (Tr., p. 25) Kruse takes Tylenol and he occasionally takes an anti-inflammatory for his knee. (Tr., p. 25) Kruse reported he is able to perform his job for the City. (Tr., p. 25) Kruse testified crawling down a ladder into a manhole, climbing up the box and getting in the back of a dump truck, crawling over the box and coming back down a dump truck give him the most problems. (Tr., p. 26) Considering all the factors of industrial disability, I find Kruse has sustained a twenty percent industrial disability, entitling him to 100 weeks of permanent partial disability benefits.

The Fund is responsible only for the amount of the industrial disability from which the employee suffers, reduced by the compensable value of the first and second injuries. Second Injury Fund v. Nelson, 544 N.W.2d 258, 269 (Iowa 1995). In the event the credits due to the Fund exceed the industrial disability resulting from the qualifying injuries, the Fund has no liability. Crudo v. Second Injury Fund of Iowa, Case No. 98-828 (Iowa App. July 23, 1999).

The two scheduled amounts for Kruse’s first and second qualifying injuries must be subtracted from 100 weeks. The schedule provides a maximum of 250 weeks of compensation for the loss of an arm. Iowa Code § 85.34(2)(p). Four percent of 250 is ten weeks. I also found Kruse has established he sustained a thirty-seven percent

impairment to his left lower extremity and he is entitled to 81.4 weeks of permanent partial disability benefits from the City. Adding the first and second injuries totals 91.4 weeks of permanent partial disability benefits. The Fund is entitled to a credit for the 91.4 weeks. Kruse is entitled to 8.6 weeks of benefits from the Fund at the stipulated rate of \$620.15 per week.

## VII. Costs

Kruse seeks to recover the \$100.00 filing fee, and the \$1,150.00 cost of Dr. Fish's report. (Ex. 3) As noted by the Fund in its post-hearing brief, costs cannot be assessed to the Fund. Iowa Code §§ 85.64, 85.66; Hannan v. Second Injury Fund of Iowa, File No. 5052402 (App. July 25, 2018).

Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Rule 876 IAC 4.33(6), provides

[c]osts taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes.

I find under the rule, Kruse is entitled to recover the \$100.00 filing fee.

According to the bills, Kruse paid Dr. Fish \$500.00 for a conference, \$300.00 for a conference, and \$350.00 for his report. (Ex. 3, pp. 3-7) The rule does not allow for the recovery of the cost of a conference. The rule allows for the recovery of the cost of the report. See also Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 846-47 (Iowa 2015). I find Kruse is entitled to recover the \$350.00 cost of the report from the City.

## ORDER

IT IS THEREFORE ORDERED, THAT:

The City shall pay Kruse healing period benefits from September 17, 2019 through November 11, 2019, at the stipulated rate of six hundred twenty and 15/100 dollars (\$620.15) per week.

The City shall pay Kruse eighty-one point four (81.4) weeks of permanent partial disability benefits at the stipulated rate of six hundred twenty and 15/100 dollars



(\$620.15) per week, commencing on the stipulated commencement date of November 12, 2019.

The City shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. Sanchez v. Tyson, File No. 5052008 (Apr. 23, 2018 Ruling on Defendant's Motion to Enlarge, Reconsider, or Amend Appeal Decision Re: Interest Rate Issue).

The Fund shall pay Kruse eight point six (8.6) weeks of permanent partial disability benefits at the stipulated rate of six hundred twenty and 15/100 dollars (\$620.15) per week, commencing after all benefits have been paid by the City.

Interest accrues on unpaid Fund benefits from the date of this decision.

The City shall reimburse the claimant one hundred and 00/100 dollars (\$100.00) for the filing fee and three hundred fifty and 00/100 dollars (\$350.00) for Dr. Fish's report.

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

Signed and filed this 22<sup>nd</sup> day of May, 2020.

  
HEATHER L. PALMER  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Christopher Spaulding (via WCES)  
John Haraldson (via WCES)  
Meredith Cooney (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.