BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHIAL KANE,

Claimant,

vs.

SECOND INJURY FUND OF IOWA,

Defendant.

File No. 5051249

ARBITRATION

DECISION

Head Note Nos.: 1108, 3200

STATEMENT OF THE CASE

Michial Kane filed a petition for arbitration seeking workers' compensation benefits from The Second Injury Fund of Iowa. The claim was initially filed against his employer as well, Archer Daniels Midland Company. The claim for a left knee disability was settled against the employer on an Agreement for Settlement on December 2, 2015.

The matter came on for hearing on January 9, 2018, before deputy workers' compensation commissioner Joseph L. Walsh in Des Moines, Iowa. The record in the case consists of Joint Exhibit 1 (pages 1 through 103); Claimant's Exhibits 1 through 6; Fund Exhibits A through G; as well the sworn testimony of claimant, Michial Kane, vocational expert, Kim Wren and Lucas Brinkman, M.D. The record was held open for the claimant and employer to submit the Agreement for Settlement. The parties specifically requested the agency take administrative notice of the agreement. The parties briefed this case and the matter was fully submitted on February 27, 2018.

It is noted, on December 4, 2017, claimant amended his petition to include the odd-lot theory for permanent total disability. Claimant also amended the injury to include the theory that his left leg injury was caused by overuse "due to the fact that he favored his right knee for such an extended time that it caused overuse injury to his left knee." (Application to Amend, December 4, 2017) Those amendments were accepted at hearing. (Transcript, page 11)

ISSUES

1. Whether the claimant suffered a qualifying injury to his left leg on September 12, 2012, in order to invoke the applicability of the Second Injury Fund Compensation Act. Whether claimant's alleged injury is a cause of permanent loss of function in his left knee.

2. The total credit to which the Second Injury Fund is entitled is disputed.

3. The claimant alleges permanent and total disability and has alleged the odd-lot theory. The Fund disputes that claimant is permanently and totally disabled and argues that the amount of the credits to which they would be entitled (assuming Fund applicability) exceeds the claimant's industrial disability.

STIPULATIONS

Through the hearing report, the parties stipulated to the following:

1. The claimant and Archer Daniels Midland had an employer-employee relationship at the time of the injury.

2. Affirmative defenses have been waived.

3. The weekly rate of compensation for any permanent disability benefits is $430.65 per week based upon gross wages of $602.00 and being married with five exemptions.

4. Medical benefits are not in dispute.

FINDINGS OF FACT

Michial Kane was born in 1963 and was 54 years old at the time of hearing. He is married and has three minor children. He graduated from Washington High School in Cedar Rapids, Iowa in 1982. He has taken 2 years of classes at Kirkwood Community College, however, never attained a degree or certificate.

Mr. Kane testified live and under oath at hearing. I find him to be generally credible. His testimony was consistent with the exhibits in this record. He was a generally accurate historian and I find no reason to disbelieve any of his testimony. There was nothing about his demeanor during the hearing which caused me any concern about his willingness or ability to tell the truth.

Mr. Kane's work history is in the record. Most of his work history is in the management of grocery stores. He worked for an extended period with Hy-Vee, an Iowa-based grocery store. He began working at Hy-Vee in approximately 1985, working his way up from shift manager to store manager. His management duties included standard store management duties, such as ordering product and supervising employees. He also worked as needed in all of the various store departments. In approximately 1998, Mr. Kane moved his family to New Hampton, Iowa to manage a small town grocery store known as Liddles or Little Super Value. The store closed in 2001, and Mr. Kane took a position with Nash Finch, managing several different grocery stores in northeast Iowa, until Nash Finch closed in 2007.

Mr. Kane next worked at Archer Daniels Midland (hereafter ADM). He was hired as a warehouseman in February 2007. His duties involved loading trucks with a two-wheel cart with product such as bulk and bag feed, as well as palletizing product. He earned $16.55 per hour in this position. In 2011, for approximately four months, Mr. Kane returned to the retail grocery industry and worked as a shift supervisor.

Mr. Kane suffered an injury to his right leg, specifically his knee, at ADM on October 1, 2009. He described the incident of injury in some detail at hearing. (Tr., pp. 35-36) Prior to this incident, Mr. Kane apparently had no significant medical issues with either of his legs, or at least there is nothing in the record suggesting any prior medical issues. He reported the issue and was authorized to seek medical treatment with Lucas Brinkman, D.O., a family practice physician in Fredricksburg, Iowa. Dr. Brinkman also testified live at hearing via telephone. His testimony is credible.

After some initial workup, including an MRI, Dr. Brinkman referred Mr. Kane on to Michael Scherb, M.D., an orthopedist, in late October 2009. Dr. Scherb performed arthroscopic surgery on Mr. Kane's right knee on December 4, 2009. The surgery is described as a right knee arthroscopy, with partial medial meniscectomy and chondroplasty of the medial femoral condyle. (Joint Exhibit 1, p. 21) Within just a few weeks, Mr. Kane returned to full-duty. In February 2010, Dr. Scherb released Mr. Kane from his care and assigned a two percent right leg impairment.

By July 2011, however, Mr. Kane suffered a recurrence of right knee pain and sought to return to the doctors. The recurrent symptoms came on gradually and became significant by July 2011. After re-evaluation and workup, Dr. Scherb eventually recommended a second right knee surgery, which occurred on September 16, 2011. This surgery was described in a similar fashion, a right knee arthroscopy, with partial medial meniscectomy and chondroplasty of the medial femoral condyle, however, it also included excision of plica of the lateral gutter of the knee. (Jt. Ex. 1, p. 30) After a brief period of recuperation, Mr. Kane was again returned to full-duty work at ADM in October 2011. (Jt. Ex. 1, p. 33) Unfortunately, in January 2012, Mr. Kane reinjured his right knee again while wheeling feed up a ramp at ADM. (Tr., pp. 39-40) He again returned to Dr. Scherb who referred him on for another opinion with Richard Naylor, D.O., in February 2012.

Dr. Naylor evaluated Mr. Kane on February 22, 2012. He determined it was necessary to review the two prior surgeries. In April 2012, he released Mr. Kane to full-duty, recommending the use of a knee brace and medication to control his symptoms. In August and September 2012, he attempted Synvisc injections.

On September 12, 2012, Mr. Kane reported bilateral knee pain for the first time to Dr. Naylor. Mr. Kane's primary purpose in visiting Dr. Naylor on this date was to review how the injections had worked. "BILAT. KNEE PAIN FINISHED R KNEE ORTHOVISC WITH NO RELIEF, NOW HAVING L KNEE PAIN," (Jt. Ex. 1, p. 47) Unfortunately, Dr. Naylor did not set forth more details than this in his contemporaneous medical

notes. He did state, "I would consider this more of a new injury than exacerbated by his right leg injury." (Jt. Ex. 1, p. 49) Again, unfortunately, he did not document how the new injury occurred. Mr. Kane testified that he suffered an injury on September 12, 2012. He testified that while he was working he was squatting down palletizing feed, he felt a sharp pain in his left knee. (Tr., p. 41) I find this testimony credible. I believe the claimant that this occurred. Consequently, I find that the claimant sustained an injury on September 12, 2012, which arose out of and in the course of his employment.

The defendants point out that the occurrence of this injury is not well-documented in the medical or non-medical records which are in evidence. I agree. I have considered this factor. In fact, in his sworn testimony, Mr. Kane could not even recall the precise date the injury occurred.[1] (Tr., pp. 41-42) This would be a much easier case if the contemporaneous medical notes clearly documented the injury or even if the claimant had filled out a contemporaneous incident report, as he did with the right knee injury. I find nevertheless, that claimant's testimony is believable and ultimately consistent with the remainder of the record. It is noteworthy that none of the records prior to September 12, 2012, even mention or hint at any left knee problems prior to that date. This is significant because Mr. Kane had injections in his right knee on August 22, 2012; August 29, 2012; and September 6, 2012, and there is no mention of a left knee injury or symptoms on any of those dates. (Jt. Ex. 1, pp. 43-46) The Fund did not raise any notice defense under section 85.23.[2]

Mr. Kane was placed on medical restrictions for a few weeks following the September 12, 2012, appointment, and prescribed medications and a brace. (Jt. Ex. 1, p. 49) He returned to Dr. Naylor on October 2, 2012. Dr. Naylor recommended a right total knee arthroplasty (replacement). He also ordered an MRI for the left knee. (Jt. Ex. 1, p. 51) On October 17, 2012, following the left knee MRI, Dr. Naylor noted that Mr. Kane had "good range of motion, good strength and good stability," and stated the MRI was "otherwise negative." (Jt. Ex. 1, p. 53) He released Mr. Kane to full duty status for the left knee, allowing him to wean himself from the brace as tolerated. (Jt. Ex. 1, p. 54)

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[1] This does make it difficult to find that the injury occurred exactly on September 12, 2012. It is very possible that the injury occurred sometime prior to that date. Dr. Naylor's office note documents that claimant visited his office at 11:56 a.m. on September 12, 2012. (Jt. Ex. 1, p. 47) Having reviewed all of the evidence in this record, I find by a preponderance of evidence that the injury occurred on September 12, 2012, or just prior to that date.

[2] The claimant did submit Claimant's Exhibit 1, which included the First Report of Injury for both alleged injury dates. (Cl. Ex. 1, pp. 1-2) Under Iowa Code section 86.11, these reports should not have been accepted as evidence. "The report to the workers' compensation commissioner of injury shall be without prejudice to the employer or insurance carrier and shall not be admitted in evidence or used in any trial or hearing before any . . . deputy workers' compensation commissioner except as to the notice under section 85.23." These documents slipped into evidence unnoticed. (Tr., pp. 7-8) Neither party objected. After discovering they were in evidence, I did not review these reports and, as such, I did not rely on these reports in any way in making this decision.

Dr. Naylor performed a right knee total arthroplasty on November 9, 2012. (Jt. Ex. 1, p. 55) Dr. Naylor then released him to full work activity and placed him at maximum medical improvement on February 13, 2013. (Jt. Ex. 1, pp. 60-62) Mr. Kane returned to full-duty at ADM shortly thereafter and had an incident wherein he was unable to push a cart up a ramp. (Tr., pp. 44-46; see also Tr., pp. 105-06) Following this incident, ADM terminated his employment for inability to perform the work. (Tr., pp. 83-84) He did not, however, apparently have restrictions at the time. The employer's records concerning the termination are not in the file.

Mr. Kane followed up with Dr. Naylor in April 2013 with continued symptoms in both knees. Dr. Naylor recommended another MRI. (Jt. Ex. 1, p. 65) The following month, May 2013, Dr. Naylor documented that the MRI was essentially negative, other than some degenerate findings. (Jt. Ex. 1, p. 67) He did, however, inject the left knee. (Jt. Ex. 1, p. 68) Mr. Kane returned again in June 2013, again complaining of symptoms in both knees. (Jt. Ex. 1, pp. 69-71) Dr. Naylor ordered a functional capacity evaluation (FCE).

Mr. Kane underwent an FCE sometime prior to July 25, 2013. The FCE is not in the record although Dr. Naylor reviewed it and commented on it on July 25, 2013. (Jt. Ex. 1, p. 72; Cl. Ex. 2b)

> The recommendations were, a little bit more aggressive than I would normally expect for a total knee arthroplasty to do on a permanent basis. Considering the FCE and his physical exam findings, I would say that he could lift from waist to floor, lifting 10-15 pounds frequently. From waist to floor 15-25 pounds occasionally and 20-45 pounds rarely. Lifting above the level of the knees, he can lift 10-15 pounds frequently, 15-25 pounds occasionally and 25-45 pounds rarely. Lifting from waist to crown, he can lift 10-25 pounds. Bilateral carry he can lift 25-35 pounds, standing unlimited, walking unlimited and squatting rarely, kneeling rarely and stair climbing to be completed on occasional basis. These are permanent restrictions regarding his right knee.

(Cl. Ex. 2b) On July 31, 2013, Dr. Naylor released claimant with no restrictions and no impairment for his left knee. (Fund Ex. E) In August 2013, Dr. Naylor opined claimant suffered a 37 percent functional impairment rating on the right side, due to the total knee replacement. (Cl. Ex. 2b, p. 2)

In May 2014, Mr. Kane also returned to Dr. Naylor for continued right knee pain. Physical therapy was provided and Dr. Naylor recommended a bone scan to make certain the artificial knee was fully intact. (Jt. Ex. 1, p. 78) The employer directed Mr. Kane to a second opinion evaluation with Eric Potthoff, M.D., on July 25, 2014. Dr. Potthoff confirmed a bone scan was necessary. Following the bone scan, Dr. Potthoff attempted to aspirate the knee, which Mr. Kane could not tolerate. (Jt. Ex. 1, pp. 83-84)

At the employer's direction, Mr. Kane was next evaluated by David Field, M.D., on November 11, 2014, for both knees. (Cl. Ex. 2c) Dr. Field performed a full independent evaluation and concluded that claimant had suffered a permanent impairment of 50 percent related to the right knee. (Cl. Ex. 2c, p. 3) He further concluded that claimant had no specific impairment of the left knee and no further need for treatment. He did state, however, that it "appeared to me that he did have some clinical tenderness over the medial joint line. If the MRI at this point is considered negative, then a diagnostic arthroscopy or additional treatment does not seem recommended at this time." (Cl. Ex. 2c, p. 3) He did not recommend any treatment other than "continuing to work on knee strengthening exercise programs" on the left. (Cl. Ex. 2c, p. 3) He recommended no lifting over 40-50 pounds, no kneeling on the right knee and avoiding stairs on a repetitive basis. (Cl. Ex. 2c, p. 1)

Shortly after the evaluation with Dr. Field, Mr. Kane returned to Dr. Naylor. Dr. Naylor acknowledged that the prosthesis had loosened and referred him for evaluation at the University of Iowa for a possible revision surgery. (Jt. Ex. 1, p. 80) Nicolas Noiseux, M.D., evaluated Mr. Kane's right knee only on December 2, 2014. After evaluation and workup, he recommended a revision of the knee replacement. (Jt. Ex. 1, p. 88) The revision surgery was performed on January 20, 2015.

After a period of recovery, Dr. Noiseux placed Mr. Kane at maximum medical improvement on May 28, 2015. He assigned a 50 percent impairment rating to the right leg, as well as restrictions of no kneeling. (Cl. Ex. 2d, p. 1) He recommended another FCE.

On December 4, 2015, this agency approved an Agreement for Settlement (AFS) between Mr. Kane and ADM. The claimant and employer represented that Mr. Kane had suffered an injury to his right knee on September 12, 2012. Mr. Kane was compensated for a 10 percent functional disability in his right leg resulting from that injury. (Cl. Ex. 4) The only medical documentation attached to the AFS was the report of Dr. Field which is Claimant's Exhibit 2c. Medical care for the left knee was to remain open. At the same time, Mr. Kane and ADM settled the right leg claim as well on an AFS. (Fund Ex. F) The right leg was settled for 56.44 percent (124.449.82 weeks of compensation). (Fund Ex. F, p. 1) There is evidence in the file that the parties agreed to settle the case on a full and final basis after the case against the Fund is complete. (Fund Ex. G)

Mr. Kane sought treatment for his left knee on his own in January 2017. He was evaluated by Fred Pilcher, M.D., in Cedar Rapids, Iowa on January 10, 2017. Dr. Pilcher recommended an MRI. There is no MRI in the record, however, it appears one was performed on January 16, 2017. On January 26, 2017, Dr. Pilcher stated that he did not recommend surgery. Rather, he recommended an exercise program and the use of a knee brace. (Jt. Ex. 1, p. 100) Mr. Kane began physical therapy in February 2017. (Jt. Ex. 1, p. 104) The physical therapist recorded a history of the onset of symptoms and a detailed account of his current symptoms at that time.

Subjective: Michael presents examination today with complaints of pain in the left medial knee. He relates this pain started approximately 6-7 years ago shortly after injuring his right knee. He states after he injured the right knee he began favoring the right knee and increasing strain on the left knee and this is when the symptoms started. Recently they have been significantly worse. He notes the symptoms to be present when sleeping, when sitting for prolonged periods with a flexed knee, when walking long distances, or when negotiating up or downstairs. He also reports difficulty sleeping at night. He has found nothing to really relieve the symptoms. He was relieved from previous employment due to recurring knee problems on the right side including 2 total knee arthroplasties. He wishes to relieve the L knee symptoms so that he can seek gainful employment and return to basic normal daily activities without exacerbation of pain. He denies any giving way but he does note occasional catching and clicking within the knee. Most of the pain is located on the medial aspect of the knee but sometimes in the parapatellar region as well.

Objective: On observation there are no remarkable areas of deformity, swelling, atrophy, or bruising. He does present with mild to moderate genu varus [bowing of the leg] on the left. Range of motion into extension is full and flexion is to approximately 95-100° stopping secondary to pain along the medial joint region. . . . Meniscal tests including McMurray's and Apley's compression tests were reproductive of symptoms. He demonstrates tenderness along the left medial joint line. He also presents with crepitus in the patellofemoral joint with pain in both the medial and lateral retropatellar area and the lateral femoraly condyle. He ambulates with a stiff leg gait. He has elevation of pain with both single leg and double leg squatting. He is unable to rise from sitting position to standing position without the use of his hands due to pain in both knees left worse than right. He demonstrates tightness of the hamstring and gastroc muscles on the left. His general loss of strength in the left quadricep as well as the gluteal muscles on the left.

Assessment: this patient presents with symptoms that are suggestive of possible meniscal derangement along the medial aspect of the left knee resulting in reduction in functional strength as well as functional range of motion. He also presents with parapatellar pain and crepitus. Findings may also be suggestive of osteoarthritic degeneration as well given his history.

(Jt. Ex. 1, pp. 104-105) He was assigned physical therapy 3 times per week for a month with a goal to improve his functioning. I find this to be a credible assessment of claimant's left knee condition as of that date.

Mr. Kane underwent an independent medical evaluation arranged by his attorney in October 2016 by Arnold Delbridge, M.D. Dr. Delbridge prepared a report responding to a letter from counsel on February 13, 2017. (Cl. Ex. 2e) The letter is in evidence. (Cl. Ex. 7) Dr. Delbridge recounted a detailed history of claimant's injuries and course of treatment. (Cl. Ex. 2e, pp. 1-3) He never mentioned the September 12, 2012, work injury. Dr. Delbridge did opine that claimant had suffered an injury to his left leg which caused permanent impairment. (Cl. Ex. 2e, p. 4) His opinion is premised upon the assumption that the left knee became injured "as a result of the aggravation from overuse when his right knee was compromised." (Cl. Ex. 2e, p. 4) He verified this opinion in his deposition testimony. (Cl. Ex. 6, Delbridge Depo, pp. 28-29) At the deposition, claimant's counsel did recount the history of the September 9, 2012, work injury to Dr. Delbridge. (Cl. Ex. 6, Delbridge Depo, p. 9) Counsel for the Fund objected to claimant's counsel's long soliloquy reciting Mr. Kane's history, however, Dr. Delbridge indicated he was "following along." (Cl. Ex. 6, Delbridge Depo, p. 14) He opined claimant had suffered a six percent left leg impairment. (Cl. Ex. 2e, p. 4) This rating is not based on any specific chart or table in the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Cl. Ex. 7, Delbridge Depo, p. 29) He recommended restrictions and no further treatment.

Mr. Kane last saw Dr. Pilcher on March 30, 2017. Dr. Pilcher noted that physical therapy had not been helpful and that Mr. Kane had been unable to work. (Jt. Ex. 1, p. 102) This was the last physician seen by Mr. Kane.

Mr. Kane has attempted several different jobs since recuperating from his work injuries. His efforts to work are documented in Fund Exhibit D. In December 2013, Mr. Kane began working for an employer called Precision in New Hampton. He operated a metal lathe earning $12.00 per hour. (Fund Ex. D, p. 2) Mr. Kane testified he quit after just a short time due to knee pain because he was on his feet too long. (Tr., p. 50) In January 2014, he attempted working as an assistant manager at Hy-Vee, earning $13.50 per hour. (Fund Ex. D, p. 2) Again, he testified he only lasted a few weeks because he was on his feet too much. (Tr., p. 48) The same thing happened at Trimark in New Hampton, where he ran a plastic mold. (Fund Ex. D, p. 2) In May 2014, he attempted a position as a forklift operator for Seedorff Masonry in Cresco. He lasted approximately two months before leaving due to knee pain. (Fund Ex. D, p. 3) Sometime in 2015 or 2016, he applied for and was denied Social Security Disability.

In March 2017, Mr. Kane began working at Sparboe Foods in the dryer area, earning $12.00 per hour. As a dryer operator, he operates machinery and ensures the company's paperwork is up to USDA requirements. (Tr., pp. 70-71, 104) He earns $13.50 per hour at the time of hearing and works full-time with some overtime. He is able to sit most of the time and perform the work without accommodation.

In addition to the evidence cited above, both parties retained vocational experts. The Fund retained Jeff Johnson, while the claimant retained Kim Rhen, who also testified live via telephone. (See Fund Ex. A and Cl. Ex. 3) Mr. Johnson concluded that

Mr. Kane had suffered a loss of employment opportunity in the range of 28 to 88 percent depending on which restrictions were applied. (Fund Ex. A, p. 7) Ms. Rhen opined that the loss was approximately 70 percent. (Cl. Ex. 3, p. 13) At hearing, she conceded the loss may be slightly less in light of Mr. Kane's pay increase at Sparboe. (Tr., p. 130)

CONCLUSIONS OF LAW

The first question is whether the claimant has proven a second qualifying injury and disability such that Second Injury Fund liability is triggered.

The first unnumbered paragraph of section 85.64 states:

> If 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 this division 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.

Iowa Code section 85.64 governs Second Injury Fund liability. Before liability of the Fund is triggered, three requirements must be met. First, the employee must have lost or lost the use of a hand, arm, foot, leg, or eye. Second, the employee must sustain a loss or loss of use of another specified member or organ through a compensable injury. Third, permanent disability must exist as to both the initial injury and the second injury.

The Second Injury Fund Act exists to encourage the hiring of workers with disabilities by making a current employer responsible only for the amount of disability related to an injury occurring while that employer employed the individual as if the individual had had no preexisting disability. See Anderson v. Second Injury Fund, 262 N.W.2d 789 (Iowa 1978).

The Fund is responsible only for the industrial disability present after the second injury that exceeds the disability attributable to the first and second injuries. Section 85.64. Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467 (Iowa 1990); Second Injury Fund v. Neelans, 436 N.W.2d 335 (Iowa 1989); Second Injury Fund v. Mich. Coal Co., 274 N.W.2d 300 (Iowa 1970).

The first issue presented here is whether the claimant suffered a second qualifying loss. Claimant alleges his first loss was suffered in a work injury to his right leg in 2009. The second loss was to his left leg either from an incident of injury on September 9, 2012, or from overuse (i.e., favoring his right leg such that his left leg suffered a permanent impairment over time).

The Fund does not dispute that the 2009 work injury is a first qualifying loss under the Act. The Fund contends, however, that the second alleged injury either did not happen, or at a minimum, the claimant failed to prove it was a cause of permanent disability. The Fund further argues that, even if medical causation is proven, the "second injury" is really a sequela of the first injury, and therefore is really part of the first injury as opposed to a second qualifying loss. Therefore, according to the Fund, the second alleged injury is not a qualifying loss to invoke Second Injury Fund liability. The Fund further argues that the "open" settlement between Mr. Kane and ADM is not binding upon the Fund and, moreover, is not valid in certain respects.

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 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.

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.

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

I find that claimant did suffer an injury on September 12, 2012, which arose out of and in the course of his employment. He testified credibly that he was injured although he could not recall the precise date. While the injury is not well-documented in the medical records, viewing this case as a whole, I have little doubt that Mr. Kane experienced a work injury as he described either on September 12, 2012, or a matter of days before that date for the reasons set forth in the findings of fact. For the reasons set forth below, I find the claimant has not met his burden that he suffered a distinct cumulative trauma injury or "overuse" injury to his left knee.

The more difficult question presented is medical causation. It is the claimant's burden to prove that the work injury is a substantial cause of a permanent disability.

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).

In this case, there is no physician who even references the September 12, 2012, work injury when rendering an opinion on medical causation. Importantly, in his sworn testimony, Mr. Kane described his work injury as a classic incident of injury.

> Q. Okay. Then do you remember if you had any injury to your left knee?
>
> A. I was palletizing some feed in the new warehouse, and I was squatting. I just – we were – I had the wood pallet on the floor. And I squatted down to lay the first bag down, and I went to get back up, and I just, I just felt a sharp pain in my left knee.

(Tr., p. 41) He went on to testify that he had never had any problems in his left knee prior to this date, nor had he ever seen a physician for his left knee. (Tr., pp. 41-42) This is confirmed in the medical records in evidence. He had been seeing Dr. Naylor consistently for pain injections just prior to September 12, 2012, and there is no reference in any of those records of left knee problems at all. The first mention anywhere in this record, of left knee symptoms was on September 12, 2012. Dr. Naylor merely documented that he had begun having left knee pain which he considered "more of a new injury than exacerbated by his right leg injury." (Jt. Ex. 1, pp. 47, 49)

These records therefore weigh heavily in favor of finding that the specific incident of injury around September 12, 2012, caused Mr. Kane's symptoms and sudden need for treatment on his left knee.

The problem for Mr. Kane is that the only physician to find any permanent impairment in his left knee, such as to render it a "second qualifying loss" under the Second Injury Fund Act, utilizes a completely distinct and apparently contrary medical theory to reach his opinion. Dr. Delbridge opined that Mr. Kane developed left knee symptoms "as a result of the aggravation from overuse when his right knee was compromised." (Cl. Ex. 2e, p. 4) This opinion unfortunately raises more questions than it answers. The first question is, if this is true, why did the claimant's left knee symptoms appear suddenly following a specific, classic incident of injury? There are many possible answers to this question, but the answers are not in the record supported by expert medical testimony. It seems possible that the overuse of his left leg caused by his right leg may have manifested suddenly rather than gradually, resulting in a specific episode of injury. While this may be a valid answer to the question it feels speculative and is unsupported in this record by competent medical opinion.

The second question is, was the overuse of his left knee specifically related to claimant's ongoing work activities at ADM between the date of his first injury and the onset of his leg symptoms? In other words, the claimant still has the burden to prove that his ongoing work activities were a substantial contributing factor to his "new" left knee disability. Dr. Delbridge's opinion is unclear as to whether claimant's ongoing work activities, after his original October 1, 2009, work injury, were a substantial

contributing factor to a new, overuse injury to his left knee. The Fund argues compellingly, that if the claimant has failed to prove that his ongoing work activities were a substantial contributing factor to the development of his left knee condition, then the injury is more of a sequela of his first injury, rather than a distinct, second qualifying loss.[3] Kading v. Second Injury Fund, File Nos. 5044417, 5044418 (Arb. January 22, 2015); Hernandez v. Sioux City Brick & Tile Co., File Nos. 1269488, 1302490 (Arb. June 28, 2002).

When an injury occurs in the course of employment, the employer is liable for all of the consequences that "naturally and proximately flow from the accident." Iowa Workers' Compensation Law and Practice, Lawyer and Higgs, section 4-4. The Supreme Court has stated the following. "If the employee suffers a compensable injury and thereafter suffers further disability which is the proximate result of the original injury, such further disability is compensable." Oldham v. Scofield & Welch, 222 Iowa 764, 767, 266 N.W. 480, 481 (1936). The Oldham Court opined that a claimant must present sufficient evidence that the disability was naturally and proximately related to the original work injury.

In this case, Dr. Delbridge did not explain his expert medical opinion. Rather he merely provided his conclusion that there was "overuse" of the left knee following the right knee injury. It is not clear to me that Dr. Delbridge even knew precisely what type of work Mr. Kane was performing following his October 2009 work injury, or whether his ongoing work had any impact on the overuse. After carefully reading and re-reading Dr. Delbridge's report and testimony, I simply cannot find any evidence that he ever opined that Mr. Kane's ongoing work activities for ADM following his October 1, 2009, work injury, significantly contributed to, aggravated, or otherwise lit up the disability in his left knee. Rather, he merely opines that "overuse" of his left knee after that date aggravated his left knee.

This analysis seems, unfortunately, highly technical to the point where it almost

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[3] I conclude it is perfectly possible for new symptoms to develop both as a result of sequela from a first injury and as a new distinct injury. For example, imagine a meat cutter loses her right index finger in an industrial accident. After being off work for six months, the worker returns to her job and performs her job differently, using her left hand much more aggressively and forcefully in the performance of her duties. Over time, this causes damage and disability to her left hand. This could be both a sequela of her original injury – because it never would have happened but for the first injury – as well as a new, distinct work injury – because it would not have developed but for her strenuous ongoing work activities. To be a proximate cause, the work activities need not be the sole or even most significant cause, it merely needs to be a substantial factor in the development of the disability. Compare this hypothetical with a worker who loses his right big toe in an industrial accident. After the accident, he quits his job and is unemployed for a period of time. Nevertheless he walks differently with an altered gait, increasing the pressure on his left side. Over time, the way in which he walks causes pressure and difficulty on his other foot, causing him to develop physical impairment on the left. This could easily be a sequela of the first injury but there could be no "new" injury in this hypothetical because there no ongoing work activities contributed to the new disability in any way.

seems like a trap for injured workers. For this reason, I have struggled significantly writing this decision. As noted, I have pored over the evidence and the legal authority. There are numerous explanations to the questions posed above which could support a finding of medical causation in favor of the claimant. Those explanations, however, are simply not in the record before me. Ordinarily, the claimant has the burden of proving medical causation through expert medical testimony. The facts set forth above, when combined with the fact that other credible physicians opined that claimant suffered no functional loss to his left leg, renders it impossible to find the claimant's work injury is a cause of permanent disability in his left leg. I conclude the claimant has failed to meet his burden in this case for the reasons set forth above.

ORDER

THEREFORE IT IS ORDERED

The claimant shall take nothing further.

Signed and filed this 3rd day of October, 2018.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JLW/srs

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.