BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
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WORKERS' COMPENSATION

MERLIN UTHOFF, Claimant, vs. GENERAL MILLS, Employer, and LIBERTY MUTUAL INSURANCE, Insurance Carrier, Defendants.	File No. 5039569 ARBITRATION DECISION Head Note Nos.: 1402.30, 1402.40, 1402.60, 1701, 1801, 2907

STATEMENT OF THE CASE

Merlin Uthoff, claimant, filed two petitions in arbitration seeking workers' compensation benefits from General Mills, as his employer, and Liberty Mutual Insurance Company, as the insurance carrier. This case proceeded to an arbitration hearing on May 15, 2015, in Des Moines, Iowa.

Claimant testified on his own behalf and defendants called Jeffrey Walshire and James Shell to testify. Claimant offered exhibits 1 through 13. Defendants offered exhibits A through I. All exhibits were received into the evidentiary record without objection.

The parties also submitted a hearing report, which contains stipulations. The parties' stipulations are accepted and relied upon in entering this decision. No findings or conclusions will be entered with respect to the parties' stipulations, and the parties are bound by those agreements. The evidentiary record closed at the end of the arbitration hearing, but this case was not considered fully submitted until service of the parties' post-hearing briefs on June 15, 2015.

ISSUES

In File No. 5039569, claimant asserts a claim for March 31, 2011 injuries to his right knee and rip hip. The parties submitted the following disputed issues for resolution:

1. The extent of claimant's entitlement to temporary disability benefits.

2. Whether claimant's partial right knee replacement, including his current right knee condition, are causally related to the March 31, 2011 work injury.

3. Whether claimant's right hip condition and treatment are causally related to, or sequela of, the March 31, 2011 work injury.

4. Whether claimant has proven entitlement to permanent partial disability benefits and, if so, the nature and extent of the permanent partial disability.

5. Whether defendants are entitled to a credit for payment of disability benefits pursuant to Iowa Code section 85.38(2).

6. Whether claimant is entitled to payment, reimbursement, or other satisfaction of past medical expenses itemized at claimant's Exhibit 10.

7. Whether claimant is entitled to reimbursement for an independent medical evaluation pursuant to Iowa Code section 85.39.

8. Whether costs should be assessed against either party.

In File No. 5046800, claimant asserts a hearing loss claim under an alleged date of injury of July 12, 2012. The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained a hearing loss injury on July 12, 2012, which arose out of and in the course of his employment with General Mills.

2. The proper injury date for claimant's alleged occupational hearing loss.

3. Whether defendants have proven that this hearing loss claim is barred for lack of timely notice pursuant to Iowa Code section 85.23.

4. Whether the alleged injury is the cause of a permanent disability and, if so, the extent of claimant's entitlement to permanent disability benefits.

5. The claimant's representative gross average weekly earnings prior to the alleged July 12, 2012 date of injury and the corresponding weekly workers' compensation rate.

6. Whether claimant is entitled to payment, reimbursement, or other satisfaction of past medical expenses related to treatment of claimant's alleged hearing loss.

7. Whether costs should be assessed against either party.

FINDINGS OF FACT

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

Merlin Uthoff worked as a maintenance mechanic for General Mills in Cedar Rapids, Iowa for approximately 21 years. On March 31, 2011, he sustained a right knee injury. He was operating a cherry picker that got stuck. As he attempted to dislodge the cherry picker, he twisted his knee and sustained an injury. Defendants admit that claimant sustained a right knee injury on March 31, 2011. However, defendants dispute the extent of that injury as well as claimant's entitlement to temporary disability, permanent disability, and medical benefits as a result of the March 31, 2011 work injury.

Mr. Uthoff asserts that he sustained a significant right knee injury that substantially aggravated, or lit up, underlying osteoarthritis in his right knee. Mr. Uthoff asserts that the March 31, 2011 injury accelerated his need for a partial right knee replacement and; therefore, the entirety of the injury and subsequent right knee treatment should be compensable.

In addition, claimant asserts that he sustained an altered gait as a result of the March 31, 2011 work injury that resulted in the development of right hip bursitis. Mr. Uthoff claims he is entitled to permanent total disability benefits for the results of both the partial right knee replacement as well as his right hip bursitis. Defendants contend that the March 31, 2011 work injury neither caused nor accelerated the need for the right knee replacement nor the right hip bursitis.

Six physicians have offered medical opinions on the cause of claimant's need for right partial knee replacement and right hip bursitis. Mr. Uthoff offers and relies upon the opinions of Robin Sassman, M.D., an independent medical evaluator. Claimant also offers and relies upon the opinions of the surgeon that performed his partial right knee replacement, C. Michael Kelly, M.D.

In her initial August 14, 2014 report, Dr. Sassman opines:

> It is my opinion that the incident that occurred on or about March 31, 2011, acted as a substantial aggravating factor in bringing about the need for the knee replacement at the time it was needed. On the MRI, Mr. Uthoff was noted to have tricompartmental osteoarthritis and while he may have needed the right knee replacement at some point in the future, the twisting injury brought about the need for the knee replacement at that point in time and accelerated the need for the knee replacement at that point in time.

(Exhibit 1, page 7)

With respect to claimant's right hip complaints, Dr. Sassman opines:

> [I]t is my opinion that the gait change that came about as a result of the right knee injury acted as an aggravating factor in the right hip bursitis and brought this about as a sequela of the initial injury. This opinion is supported by the fact that he denies any right hip symptoms prior to this injury occurring and there is no evidence in the currently available record that he sought care for right knee symptoms prior to this injury occurring. Mr. Uthoff has had documented symptoms of right hip pain since February 17, 2012, when he discussed this with Dr. Fabiano. In fact, on this date Dr. Fabiano did a right hip injection. This is evidence that this has been an ongoing issue since the initial injury and was likely aggravated by the initial injury.

(Ex. 1, p. 7)

Dr. Kelly opines:

> Mr. Ulthoff [sic] had degenerative arthritis in his knee that pre-exited [sic] his March 31, 2011 work injury. However, the arthritis in his right knee was asymptomatic before the work injury....
>
> I believe that Mr. Ulthoff's [sic] pre-existing arthritis was both lit up and accelerated as a result of the March 31, 2011 work injury....
>
> I believe that Mr. Ulthoff's [sic] work injury was a substantial contributing factor in causing the need for his partial right knee replacement.

(Ex. 3, p. 18)

Defendants rely upon the opinions of four physicians to challenge causal connection. The initial treating occupational medicine physician, Andrew Patterson, M.D., opines on the causation issue twice. In a report dated May 24, 2012, Dr. Patterson opines, "Mr. Uthoff reached a maximum medical improvement regarding his March 31, 2011, injury as of November 17, 2011. Further treatments seem clearly to be focused on the osteoarthritis and not the tear." (Ex. A, p. 8) Similarly, in a report dated September 20, 2012, Dr. Patterson opines:

> I had not seen Mr. Uthoff for any hip pain complaints, but it seems clear given the clinical course that the hip pain of which he now complains of is most likely a direct result of the osteoarthritis pain that he has in his knee which causes him to walk with a pronounced limp. It is far less likely, in fact, not at all likely, to within a reasonable degree of medical certainty

> that this hip pain has anything to do with the twisting injury that he suffered in March 2011.

(Ex. A, p. 10)

The initial treating orthopaedic surgeon, Daniel C. Fabiano, M.D., indicated that claimant's total knee replacement would not be directly caused by the meniscus tear he sustained in March 2011. (Ex. B, p. 16) However, Dr. Fabiano did not expound upon or explain his opinion. He was not specifically asked and did not opine regarding whether he believed the meniscus tear materially aggravated, lit up, or accelerated the underlying osteoarthritis causing or accelerating the need for claimant's right knee replacement.

Defendants also asked occupational medicine physician, Ignatius Brady, M.D. to evaluate claimant and provide an analysis and opinion of the causation issue. Dr. Brady opines:

> My assessment is that his symptoms are due to osteoarthritis. The thinning of the articular cartilage to the degree that knee replacement is contemplated is not related to the twisting injury of March, 2011. The medial meniscal tear could be related to that more acute event but it does not seem to be the cause of his current symptoms. Meniscal tears do not cause the duration of symptoms and ongoing poor weight bearing suggested by the use of the crutch, but arthritis can. My understanding from the notes is that two specialists agree that the meniscal tear is not the primary cause of his pain, which is why both recommend against arthroscopy. Both have suggested that ultimately the cause of the pain and the treatment is replacing the arthritic components of the joint.

(Ex. C, p. 9)

Finally, defendants offer the medical opinions of board-certified orthopaedic surgeon, Michael P. Nogalski, M.D. Dr. Nogalski performed only a record review and did not personally evaluate claimant. However, he provides a relatively thorough evaluation of claimant's past medical history and the causation issues. Dr. Nogalski explains:

> [I]t appears that Mr. Uthoff has started to experience symptoms of osteoarthritis. It does not appear though that a twist event would be the causal factor in his knee condition, nor would it be a specific permanently aggravating event. It is reasonable to state that his twisting event would be a manifestation of symptoms from osteoarthritis and corresponding degenerative meniscal abnormalities.

(Ex. D, p. 8)

In a supplemental report dated December 5, 2013, Dr. Nogalski further explained:

> His objective findings strongly supported osteoarthritis as the cause of his knee condition. His height and weight combination of 6'1", 290 pounds, strongly supports obesity as an underlying feature of his osteoarthritic symptoms. The innocent event as described by Mr. Uthoff certainly does not meet a litmus test for a significant event which would permanent [sic] aggravate or "light up" an osteoarthritic condition in an obese male who has significant articular cartilage disease that clearly pre-existed the claimed 4/1/11 event. I do not believe, in sum total, that the need for Mr. Uthoff's total knee replacement nor treatment of his osteoarthritic condition, is related to the claimed 3/31/11 work injury.

(Ex. D, p. 15)

Following claimant's partial right knee replacement, Dr. Nogalski offered additional opinions, stating:

> Description of the knee joint at the time of surgery showed Grade III to IV chondromalacia of the medial femoral condyle, Grade IV changes at the tibial condyle and the medial edge. The lateral compartment was normal. The trochlea showed Grade IV changes, The [sic] medial facet was Grade IV as well. (He had essentially bone on bone findings in the patellofemoral compartment and near bone on bone in the medial compartment.) Resurface of the medial and patellofemoral compartments was performed.
>
> It appears Mr. Uthoff essentially had a replacement of his patellofemoral joint and the medial compartment. The lateral compartment was not resurfaced.
>
> This approach appears to be somewhat unreasonable given the fairly large size of Mr. Uthoff. I suspect that this could indeed fail over the short term given his large weight and BMI. It has been noted that this type of patient's body habitus is a relative contraindication to doing unicompartmental replacements.
>
> With respect to the actual pathology as described by Dr. Kelly, there does not appear to be anything that validates a specific aggravation or acute exacerbation of his osteoarthritic knee which would clearly have pre-existed his 3/31/11 event.
>
> In sum total, I believe Mr. Uthoff selected a doctor who gave him the answer he wanted with respect to causation and also gave him the answer that he wanted with respect to what Mr. Uthoff perceived to be the best

> possible surgical solution. I frankly disagree with both the conclusions arrived at with respect to both causation and choice of implants in this matter.

(Ex. D, p. 17)

Given the plethora of differing opinions, this is a difficult case to determine the causation issue. In addition to the causation opinions of Dr. Sassman and Dr. Kelly, there is a temporal relationship between the beginning of claimant's right knee symptoms and development of the need for a partial right knee replacement. Similarly, there is a temporal relationship between the development of an antalgic gait due to the right knee condition and claimant's development of right hip bursitis. Mr. Uthoff had no documented right knee treatment before March 31, 2011. Therefore, the opinions offered by Dr. Sassman and Dr. Kelly certainly are reasonable from a temporal relationship.

Dr. Kelly was a treating orthopaedic surgeon and ultimately performed the partial right knee replacement on claimant. He had the advantage of inspecting claimant's right knee joint intra-operatively. This places Dr. Kelly in a position of having seen the inside of claimant's right knee first hand, something no other physician in this case has had the opportunity to do.

On the other hand, the surgery recommended and performed by Dr. Kelly has not really been successful or made claimant more functional. Claimant now uses a cane to ambulate. He did not require the use of a cane prior to his right partial knee replacement surgery. (Tr., p. 79)

Both Dr. Fabiano and Dr. Nogalski recommended against the surgery performed by Dr. Kelly. (Ex. B, pp. 11, 14, 16, 20; Ex. D, p. 8) Both Dr. Fabiano and Dr. Nogalski felt the partial knee replacement recommended and performed by Dr. Kelly would not provide the needed relief of symptoms. In hindsight, it appears that Dr. Fabiano and Dr. Nogalski offered accurate medical opinions in this respect. In this sense, the opinions of Dr. Fabiano and Dr. Nogalski carry significant weight.

Claimant also developed severe left knee arthritis and required a partial left knee replacement only a few months after this work injury. None of the medical providers discuss the left knee replacement in any great detail, and there are no significant medical records describing that procedure, the symptoms that lead to the left knee replacement, or any gait disturbance that occurred either before or after the left partial knee replacement. However, claimant presumably had significant left knee symptoms of a sufficient duration for him to desire to search out a physician in Texas and ultimately travel to Texas to have his left partial knee replacement.

Mr. Uthoff was clearly prone to the development of osteoarthritis in his knees. In fact, it appears that all physicians in this case concur he had pre-existing osteoarthritis in his right knee. The fighting question in this case is whether the March 31, 2011 right

knee injury at work materially aggravated claimant's pre-existing osteoarthritis, or need for his right partial knee replacement.

I find that claimant did not prove a material aggravation of his pre-existing right knee osteoarthritis as a result of his March 31, 2011 work injury. Similarly, I find that claimant did not prove his March 31, 2011 work injury accelerated his need for a right knee replacement. In making these findings, I accept and rely upon the medical opinions of Dr. Patterson, Dr. Fabiano, Dr. Brady, and Dr. Nogalski as the most convincing medical records in this case.

Ultimately, I accepted the opinions of these physicians over those of Dr. Sassman and Dr. Kelly. As noted, both Dr. Fabiano and Dr. Nogalski recommended against performing the partial knee replacement ultimately performed by Dr. Kelly. Mr. Uthoff has not had a good result from the partial knee replacement performed by Dr. Kelly. Given that Dr. Fabiano and Dr. Nogalski appear to have predicted the poor outcome, I find their opinions to be convincing.

I also find Dr. Nogalski's explanation and medical analysis of the pre-existing arthritis and the potential effect (or non-effect) of the twisting injury that occurred on March 31, 2011 to be more convincing than the analyses offered by either Dr. Sassman or Dr. Kelly. Having found the medical opinions of Dr. Nogalski to be the most convincing medical opinion in this record and noting that his opinions are supported by three other physicians, I find that claimant failed to prove a causal connection between his March 31, 2011 right knee injury and his later treatment for right knee osteoarthritis, including his partial right knee replacement.

With respect to the right hip injury claim, I find that claimant's right hip bursitis diagnosis is related to his altered gait. However, the altered gait is related to his right knee osteoarthritis and not the result of the March 31, 2011 work injury at General Mills. (Ex. A, p. 9; Ex. D, p. 20) Therefore, I find that claimant failed to prove a causal connection between his right hip condition and the March 31, 2011 work injury.

I accept Dr. Patterson's assessment that claimant reached maximum medical improvement for his March 31, 2011 right knee injury on November 17, 2011. (Ex. A, p. 8) I also accept Dr. Brady's assessment that claimant sustained a zero percent impairment due specifically to the twisting injury at work on March 31, 2011. (Ex. C, p. 9) Given these findings, I find that claimant failed to prove he sustained any permanent disability as a direct result of the March 31, 2011 work injury.

Mr. Uthoff claims entitlement to temporary total disability, or healing period, benefits from July 16, 2012 to July 14, 2014. (Hearing Report) Having found that Mr. Uthoff achieved maximum medical improvement in November 2011, I find that the missed time from work during the claimed temporary period of disability is related to claimant's pre-existing right knee osteoarthritis and necessary treatment for that condition. However, the claimed temporary disability benefits are not related to the work injury occurring on March 31, 2011.

General Mills paid claimant some non-occupational disability benefits during his absence from work. (Hearing Report) However, all payments and pertinent times off work during which these benefits were paid to claimant occurred after November 2011 and are not related to or caused by the March 31, 2011 work injury.

I similarly find that claimant failed to prove his past medical expenses claimed and itemized in Exhibit 10 are causally related to the March 31, 2011 work injury. Those medical expenses are related to treatment of claimant's right knee osteoarthritis and/or his right hip. Since neither of those conditions was proven to be related to the March 31, 2011 work injury, none of those medical expenses are related.

Mr. Uthoff asserts that he sustained occupationally-related hearing loss as a result of his work activities and exposure to noise at General Mills. There really is no dispute between the parties about whether claimant was exposed to loud work environments. Nor is there a dispute between the parties about whether claimant has hearing loss. He clearly does.

The General Mills production areas where Mr. Uthoff worked have large machinery and loud noises. The dispute between the parties is whether the claimant's exposure to such noises, given his non-occupational exposures and given his use of hearing protection at General Mills, was the cause of his hearing loss.

In support of his claim, Mr. Uthoff offers the expert opinions of licensed audiologist, Richard S. Tyler, Ph.D. Dr. Tyler is a well-qualified specialist, whose credentials include serving as a professor and director of audiology at the University of Iowa Hospitals and Clinics' Department of Otolaryngology. (Ex. 6)

Dr. Tyler evaluated Mr. Uthoff on February 20, 2014. Dr. Tyler opines that Mr. Uthoff suffers from a 16 percent binaural hearing loss. He also opines that claimant's hearing loss "was probably a result of his work at General Mills." (Ex. 5, p. 30) Dr. Tyler further considers other possible causes of hearing loss and opines, "It is very unlikely that his hearing loss is due to aging, recreational noise, or is hereditary." (Ex. 5, p. 29)

General Mills offers the analysis and opinions of another highly qualified specialist, Bruce L. Plakke, Ph.D. Dr. Plakke served 25 years as a professor at the University of Northern Iowa teaching a graduate course in industrial hearing conservation. He has practical experience consulting with employers and interested business partners regarding hearing conservation programs. (Ex. E, p. 31)

Dr. Plakke identified a mixed hearing loss in claimant's audiological examination results. According to Dr. Plakke:

> A mixed hearing loss means there are two types of hearing loss present in the same ear. The only type of hearing loss that we can consider in this case is the kind of hearing loss that could possibly be

> caused by excessive noise exposure, which is sensorineural hearing loss. The sensorineural portion of his hearing loss in [sic] determined by the bone conduction testing because the bone conduction thresholds show the amount of hearing at the cochlea. The portion of hearing loss caused by damage to the cochlea, or inner ear, is the sensorineural portion. Mr. Uthoff shows both sensorineural hearing loss and conductive hearing loss. The conductive component is due to a middle ear issue and is not related to any kind of noise exposure. The conductive component however is the major contributor to the changes in Mr. Uthoff's hearing thresholds while working at General Mills. This is especially true in his left ear.

(Ex. E, pp. 33, 34)

Ultimately, Dr. Plakke reviews claimant's past noise exposures, including his use of firearms, as well as his industrial exposures at General Mills. Dr. Plakke obtained noise exposure readings from the plant, as experienced by a person in a similar position to that worked by claimant. Ultimately, Dr. Plakke opines:

> [C]areful examination of his total hearing loss shows a very large component of his hearing loss to be conductive in nature. When the hearing for bone conduction is considered, Mr. Uthoff shows no percent of binaural hearing impairment for his right ear. The right ear results show the changes in time over his working career at General Mills and it shows 0% of hearing impairment on the Wolfe Clinic 2012 audiogram. If industrial noise exposure were the only factor, it would not result in any percentage of binaural hearing impairment.
>
> Plant noise data and dosimetry data on employees show the jobs done by Mr. Uthoff would not have resulted in any percentage of binaural hearing impairment.
>
> It is my opinion that, within a reasonable audiological certainty, Mr. Uthoff did not suffered [sic] any noise-induced hearing loss from working at General Mills. It is my opinion that General Mills did not expose Mr. Uthoff to noise levels for long enough durations and intensities to have been a significant contributing factor to his hearing loss nor to have caused any percent of occupational hearing loss as defined by Iowa Code Chapter 85B.

(Ex. E, p. 37)

Dr. Plakke was critical of the analyses and opinions offered by Dr. Tyler because Dr. Tyler's opinions did not consider (or at least did not apportion any part of the hearing loss) the documented middle ear hearing loss. Dr. Plakke was also critical of Dr. Tyler's

analysis because it erroneously assumed that Mr. Uthoff was exposed to impulsive noise at General Mills. (Ex. G, pp. 3-4)

Both audiologists concur that impulsive noise is more damaging to a person's hearing than is simply loud, continuous noise. Dr. Tyler recorded a history from claimant that included industrial exposure to impulsive noise. In fact, Dr. Tyler recorded that "Mr. Uthoff noted that when he was in the gun room, it was like a cannon going off because they used explosions to puff up the cereal." (Ex. 5, p. 40) Dr. Tyler also commented on the fact that the employer called a specific work area the "gun room" to demonstrate that it likely exposed claimant to impulsive noises. Given those assumptions, Dr. Tyler reached his conclusions and opinions about industrial noise exposure at General Mills causing claimant's hearing loss. (Ex. 5, p. 40)

However, Dr. Tyler's history and assumptions regarding impulsive noise exposure at General Mills was inaccurate. The "gun room" at General Mills is the area where oat pellets are "puffed" into Cheerios. Defendants called two witnesses knowledgeable about claimant's work position and the manufacturing process at General Mills. Both witnesses testified that there are not impulsive noises in the gun room and that any noise exposure to which claimant would have been exposed at General Mills was continuous noise. (Tr., pp. 108-109, 120-121)

Claimant offered no testimony at hearing that the noises to which he was exposed at General Mills included impulsive noises. He did not testify at hearing to the sound being like a cannon going off in the gun room. In fact, Mr. Uthoff did not testify at trial that there were significant impulsive noises in the "gun room" or that he had any significant exposure to impulsive noises while working at General Mills. I accept the testimony of General Mills' witnesses on this issue and find that claimant was not exposed to impulsive noises while working at General Mills.

I find that Dr. Tyler was provided (or took) an inaccurate history pertaining to the exposure to impulsive noise. I find that this inaccurate history causes a significant flaw in Dr. Tyler's analysis and ultimate audiological conclusions. Dr. Plakke had an accurate history of the actual noise exposures present at General Mills. His analysis includes and contemplates the continuous noise exposure to which claimant was actually exposed at General Mills. Dr. Plakke also contemplates outside noise exposures, including use of firearms, as well as the middle ear potential cause of hearing loss.

Ultimately, I find Dr. Plakke's analysis and conclusions to be based upon the most accurate information and history. I find his analysis and conclusions to be reasonable, logical and more convincing than Dr. Tyler's analysis in this case. Therefore, I find that claimant has not proven his hearing loss is causally related to any noise exposure he experienced at General Mills.

CONCLUSIONS OF LAW AND REASONING

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

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no

requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

Mr. Uthoff asserts that he sustained both a right knee and right hip injury as a result of the work accident on March 31, 2011. Defendants concede claimant sustained a right knee injury but dispute whether the need for a partial knee replacement or the ongoing condition of claimant's right knee is causally related to the March 31, 2011 work injury. Defendants also dispute whether claimant's right hip injury is causally related to the March 31, 2011 work injury.

In this case, I found that claimant did not prove his right partial knee replacement or his current right knee condition is causally related to, materially aggravated or accelerated by the March 31, 2011 work injury. Similarly, I found that claimant did not prove his right hip condition is causally related to or materially aggravated by the March 31, 2011 work injury. I found that claimant did not prove he sustained any permanent disability that is causally related to the March 31, 2011 work injury. Finally, I found that claimant did not prove his claimed past medical care is causally related to the March 31, 2011 work injury. Having made these factual findings, I now conclude that claimant failed to prove entitlement to satisfaction of his claimed past medical expenses (Exhibit 10) or entitlement to permanent disability benefits as a result of the March 31, 2011 work injury.

Mr. Uthoff also requested an award of temporary disability, or healing period, benefits from July 16, 2012 through July 14, 2014. I found that the treatment rendered to claimant and the need for time off work from July 16, 2012 through July 14, 2014 was related to claimant's need for a right partial knee replacement. However, having found that the need for the right partial knee replacement is not related to the March 31, 2011 work injury, I conclude that claimant did not prove entitlement to an award of temporary total disability, or healing period, benefits for the claimed period of time.

Defendants' request for a credit pursuant to Iowa Code 85.38(2) for disability benefits paid to claimant is rendered moot. All disability benefits paid to claimant were after the date when I found claimant achieved maximum medical improvement from his March 31, 2011 work injury. Since claimant was not entitled to either temporary disability or permanent disability benefits, the disability benefits paid to claimant were actually for a non-occupational leave. Defendants are not entitled to a section 85.38(2) credit for any of the non-occupational disability benefits paid to claimant.

Finally, claimant seeks reimbursement for an independent medical evaluation performed by Dr. Sassman on his right knee and hip on August 14, 2014. (Ex. 1) Defendants had claimant evaluated by Dr. Brady in July 2012 for purposes of obtaining a permanent impairment rating. In his independent medical evaluation report dated July 2, 2012, Dr. Brady opined that claimant sustained zero percent permanent impairment rating as a result of his March 31, 2011 right knee injury. (Ex. C, p. 9) Both Dr. Brady and Dr. Sassman are physicians licensed to practice medicine in Iowa.

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

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

Having found that claimant proved defendants obtained an impairment rating from a physician of their choosing in July 2012, I conclude claimant was entitled to reimbursement of his independent medical evaluation occurring in August 2014. Iowa Code section 85.39. Dr. Sassman's charges totaling $2,780.00 are reasonable. I conclude defendants should be ordered to reimburse claimant in the amount of $2,780.00 pursuant to Iowa Code section 85.39. I do not believe it appropriate to require defendants to pay for Dr. Sassman's second report, or addendum.

Mr. Uthoff also asserts a claim for workers' compensation benefits as a result of hearing loss. Iowa Code chapter 85B provides workers' compensation for occupational hearing loss. To qualify, an injured worker must establish by a preponderance of the evidence that he or she sustained "an occupational hearing loss arising out of and in the course of employment." Iowa Code section 85B.2. "Occupational hearing loss" is defined as:

> [T]hat portion of a permanent sensorineural loss of hearing in one or both ears that exceeds an average hearing level of twenty-five decibels for the frequencies of five hundred, one thousand, two thousand and three thousand Hertz arising out of and in the course of employment caused by excessive noise exposure. "Occupational hearing loss" does not include loss of hearing attributable to age or any other condition or exposure not arising out of and in the course of employment.

Iowa Code section 85B.4(3).

Therefore, the principles outlined above pertaining to an injury arising out of and in the course of employment, as well as the claimant's burden of proof to establish a causal connection between the alleged hearing loss and his work activities also apply to this hearing loss claim. Having found that Mr. Uthoff did not prove by a preponderance of the evidence that his hearing loss was caused by his employment activities at General Mills, I conclude that claimant has not established entitlement to weekly benefits or medical benefits as a result of his hearing loss claim in File No. 5046800.

Mr. Uthoff also seeks award of his independent audiological evaluation fee for the evaluation performed by Dr. Tyler. 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. 6.14(6).

With respect to the audiological evaluation fee, claimant has not established entitlement to reimbursement of this fee pursuant to Iowa Code section 85.39 for at least two reasons. First, Iowa Code section 85.39 provides that the evaluation obtained by the claimant must be performed by a physician. Dr. Tyler is not a physician. He is a licensed audiologist. (Ex. 6)

Second, claimant fails to establish the pre-requisite evaluation occurred by a physician selected by the employer before Dr. Tyler's evaluation occurred. Iowa Code section 85.39 only provides for the employer-paid evaluation "If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low." In this instance, Dr. Tyler performed his evaluation of claimant on February 20, 2014. (Ex. 5) Defendants did not have claimant evaluated by a competing medical professional, Dr. Plakke, until April 15, 2014. (Ex. E) Therefore, claimant has failed to establish the requirements of Iowa Code section 85.39 and is not entitled to reimbursement of Dr. Tyler's evaluation fee pursuant to that statutory section.

All other disputed issues pertaining to claimant's hearing loss claim are rendered moot by the above findings and conclusions.

Mr. Uthoff seeks assessment of his costs in these cases pursuant to 876 IAC 4.33(7). Assessment of costs is a discretionary function of the agency. Iowa Code section 86.40. Claimant has not proven entitlement to benefits in either file.

Defendants have not introduced any specific costs they seek. Therefore, exercising the agency's discretion, I conclude that each party should bear its own costs.

ORDER

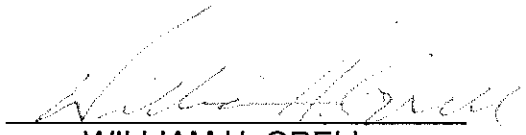
THEREFORE, IT IS ORDERED:

Defendants shall reimburse claimant's independent medical evaluation fee for services rendered by Dr. Sassman in the amount of two thousand seven hundred eighty and 00/100 dollars ($2,780.00).

Claimant shall take nothing further in either litigated file.

Each party shall bear their own costs.

Signed and filed this 19th day of August, 2015.



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