BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RANDY GURWELL, Claimant, vs. ANDERSON ERICKSON DAIRY, Employer, and TRAVELERS INDEMNITY COMPANY OF CT. Insurance Carrier, Defendants.	FILED NOV 17 2015 WORKERS' COMPENSATION File No. 5051907 ARBITRATION DECISION Head Note Nos.: 1803, 2907

STATEMENT OF THE CASE

Randy Gurwell, claimant, filed a petition in arbitration seeking workers' compensation benefits against Anderson Erickson Diary, employer, and Travelers Indemnity Company of Ct., insurer, for a work injury date of May 17, 2014.

This case was heard on October 7, 2015, in Des Moines, Iowa, and considered fully submitted the same day.

The record consists of claimant's exhibits 1-8, defendants' exhibits A-D, and the testimony of claimant.

ISSUES

1. The extent of claimant's scheduled member disability;

2. The reasonableness of IME fees under 85.39;

3. Whether the claimant is entitled to assessment of the filing fee and deposition fee as costs.

STIPULATED FACTS

The parties agree claimant sustained an injury to his right lower extremity on May 17, 2014. At the time of his injury, claimant's gross weekly wages were $804.00. He was married with one minor child and therefore entitled to three exemptions. Based on those foregoing numbers the weekly benefit rate is $529.97.

The commencement date of permanent partial disability benefits would be July 14, 2014.

FINDINGS OF FACTS

At the time of the hearing, claimant was a 44-year-old male. Prior to his injury, the claimant worked as a warehouse worker, first for Bolt Supply, Inc., and then at defendant employer beginning in 1996. He has worked for the defendant employer since 1996 and continues at the present time.

At the time of his injury, claimant was working in the cooler where he would load 20 trucks a night with pallets weighing up to 2600 pounds. On May 17, 2014, he stepped into a gap between the pallets and suffered an injury to his knee.

He finished his shift and then reported the injury to his supervisor. Initially he did not believe he needed medical care but after a couple days he was unable to return to work. He was seen by Richard S. Bratkiewicz, M.D., on May 19, 2014. (Exhibit 1, page 1) Dr. Bratkiewicz treated the injury conservatively, initially believing that it was a strain. X-rays were negative and claimant was given a neoprene sleeve and placed on restrictions. (Ex. 1, p. 1) After two weeks, Dr. Bratkiewicz ordered an MRI which revealed a complex tear of the medial miniscus and a small tear of the lateral meniscus, a ruptured small Baker's cyst and a joint effusion. (Ex. 1, p. 4) Claimant was referred for orthopedic consult.

June 24, 2014, client was seen by Jason Sullivan, M.D., at Des Moines Orthopedic Surgeons. (Ex. 1, p 7) In the intake notes, claimant reported swelling of his knee as well as walking with a limp and an inability to complete work duties. He had pain on a daily basis and was unable to perform a squat or bend his knee past 90 degrees due to pain. (Ex. 1, p. 7)

During this visit, claimant's right knee was examined extensively. (Ex. 1, p. 8) There was no mention of claimants left knee in comparison with the right. This is consistent with the testimony of the claimant that Dr. Sullivan was focused on the right knee.

At some point prior to the surgery, a co-worker commented to the claimant that his right calf was substantially smaller than his left. There is no medical note indicating that Dr. Sullivan knew or was aware that there was a discrepancy.

Dr. Sullivan recommended the claimant undergo a surgical repair. (Ex 1, p. 9) The surgery took place on July 2, 2014. (Ex. 1, p. 14) Dr. Sullivan deemed the surgery was successful. It was recommended that the claimant continue to do quad sets, working on his range of motion as well as elevating to help with the swelling. (Ex. 1, p. 11) No physical therapy was ordered as Dr. Sullivan believed it would not be useful. Again, Dr. Sullivan's records were devoid of any comparison between the right knee and calf and the left knee and calf.

Claimant was seen twice more by Dr. Sullivan, once in August and again in October. During his August 19, 2014, visit, Jillian April Klosack, PA-C, noted the claimant was ambulating normally and without difficulty and that he had no complaints. (Ex. 1, p. 12) On October 21, 2014, claimant was seen by Dr. Sullivan for his final visit.

> On physical examination, Randy has range of motion from 0 to 140 degrees of flexion. Stable to varus and valgus stress. Negative Lackman's. Portals are well healed. There is no effusion. His patella is mobile. He has 5/5 hamstring and quadriceps strength. He is distally neurovascularly intact.

(Ex. 1, p. 13)

Claimant was released to return to full duty work without restrictions on this date.

Claimant went on light duty until he was able to obtain a job making cottage cheese. He felt strongly that he could not return to his job in the cooler which required him to push and pull up to 2600 pounds on a pallet. He testified credibly at hearing that there were several things that he could no longer do as a result of his knee injury. He has daily pain and weakness which limits the activities that he can do at home and at work. He testified that he doesn't do yard work, he is unable to help his neighbor who is a World War II veteran mow the yard, and he no longer walks with his family. He does still hunt which the claimant characterized as mostly sitting and waiting.

Jacqueline M. Stoken, D.O., examined the claimant on June 24, 2015. (Ex. 2) In the history, claimant reported ongoing pain and atrophy of the right leg by putting more weight on the left lower extremity and not using the right lower extremity. Claimant's employment requires him to be on his feet seven hours a day wearing boots. He regularly lifts weights of 70 to 80 pounds on a daily basis. During the examination Dr. Stoken noted there was atrophy of the right lower extremity muscles and that muscle tone and bulk were within normal limits. (Ex. 2, p. 4)

Dr. Stoken's restrictions were to avoid prolonged walking, walking on uneven ground, repetitive kneeling and crouching on the right knee. (Ex. 2, p. 6) She also assigned a 8-13% impairment to the lower extremity for thigh muscle atrophy and 13% impairment for the severe calf atrophy (Ex. 2, p. 6) She assigned nothing for impairment for pain or weakness in the knee. (Ex. 2, p. 6)

Dr. Sullivan gave a zero percent impairment on December 8, 2014. (Ex. A) He reviewed Dr. Stoken's report on August 5, 2015, and wrote this follow up:

> At your request, I reviewed Dr. Stoken's report and her conclusions as well as opinion on a permanent impairment for Randy Gurwell. The recommended AMA Guides based upon the fifth edition for a permanent impairment suggests 1% to 2% impairment for a partial meniscectomy. My opinion on December 8, 2014, after he had reached maximal medical improvement was that he had 0% permanent impairment going forward. I reached this conclusion based on a successful surgery and objective and subjective measures. Typically my physical exams comment on the pertinent positives and negatives and if he had a noticeable atrophy, this would have been commented on. There is no obvious logical medical explanation for Mr. Gurwell developing moderate to severe leg atrophy from this injury or from the surgery. Even if this did develop, it would likely only be a transient finding and not a permanent one. Based upon my examination and follow-up of the patient, I would not be able to come up with 26% combined lower extremity impairment, and he is still working at Anderson Erickson full duty with a successful result.

(Ex. B, p. 1)

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

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 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).

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

Defendants assert that based on Dr. Sullivan's 0% impairment rating and claimant's return to full duty work without restrictions, that he has sustained no permanent disability.

Claimant credibly testified that he moved to a different job—one making cottage cheese—which did not require as much force and labor to conduct. The claimant's right calf is noticeably smaller than the left. Even without the measurements taken by Dr. Stoken, the difference is noticeable. Defendants argue that the right calf atrophy is either temporary or not related to the work injury. They offer no plausible alternative explanation as to the left calf atrophy.

Defendants point out that none of Dr. Sullivan's records make note of any difference between the right and left calf. However, Dr. Sullivan's records are solely devoted to the right lower extremity. If he did any examination of the left lower extremity, it was not mentioned or recorded in the medical notes. While he disclaimed any knowledge regarding the left calf, it is unmistakable and the fact that Dr. Sullivan did

not observe it nor did he make note of it, signals that his medical opinions should not be given as much weight as other experts in the case.

Further, the claimant's testimony, buttressed by his injury, is the most plausible explanation. Because of pain and weakness in the right lower extremity, claimant compensated by using his left lower extremity more. Claimant was observed to walk with an antalgic gait, a sign of pain upon weight-bearing.

Claimant testified that he continues to have pain and weakness in his right knee. While Dr. Stoken did not give an impairment rating for claimant's right knee, she did give a rating for the atrophy. On the conservative side, claimant's impairment according to Dr. Stoken was 21%.

Dr. Sullivan was critical of this, particularly given that claimant has returned to work with no restrictions. However, claimant testified that he would not be able to perform the job in the cooler because of the force it required to move those 2,600 pound pallets. Further, he is limited in his ability to walk and perform tasks that require him to use his right lower extremity extensively.

While the atrophy in the claimant's right lower extremity may subside over time, it hasn't for a significant period of time. The measurement for MMI in the case law is whether the worker no longer has any reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (1981).

Claimant was a credible, no-nonsense witness. He answered all the questions asked of him with straightforward and consistent answers.

It is determined that claimant has sustained a 20% impairment as a result of his work-related injury.

The next issue is the reasonableness of Dr. Stoken's IME fees under 85.39. In support of their argument that Dr. Stoken's fees are not reasonable, defendants provided billings and a report of a similar meniscus tear case wherein Dr. Stoken charged only $1,800.00 on July 14, 2015.

There is no other evidence regarding the reasonableness of Dr. Stoken's fees other than her cursory statement at the end of her report. The medical records in this case are not voluminous and claimant had a fairly uncomplicated past medical history. While the undersigned is reluctant to dictate to the medical community what is reasonable and not reasonable, the defendants have provided evidence that indicates Dr. Stoken charged only $1,800.00 for a similar case and within the same period of time.

Therefore it is found that Dr. Stoken's fees charged in the present case are not reasonable and the claimant is entitled to $1,800.00 as reimbursement.

ORDER

THEREFORE, IT IS ORDERED:

That defendants are to pay unto claimant forty-four (44) weeks of permanent partial disability benefits at the rate of five hundred twenty-nine and 97/100 dollars ($529.97) per week from July 14, 2014.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants are to be given credit for benefits previously paid.

That defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

That defendants shall pay one thousand eight hundred and no/100 dollars ($1,800.00) as reimbursement for Dr. Stoken's IME pursuant to Iowa Code Section 85.39.

That defendant shall pay the costs of this matter pursuant to rule 876 IAC 4.33 including the deposition fees and filing fees.

Signed and filed this 17th day of November, 2015.

JENNIFER GERRISH-LAMPE
DEPUTY WORKERS' COMPENSATION
COMMISSIONER

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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.