

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TERRY WATSON,

Claimant,

vs.

GENERAL MILLS,

Employer,

and

OLD REPUBLIC INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 21006278.02

ARBITRATION DECISION

Head Notes: 1108, 1801, 2206

Terry Watson, claimant, filed a petition in arbitration seeking workers' compensation benefits from General Mills, employer, and Old Republic Insurance Co., insurance carrier, as defendants. A hearing was held on April 20, 2023. Pursuant to an order from the Iowa Workers' Compensation Commissioner, this case was heard via videoconference using Zoom with all parties and the court reporter appearing remotely.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. Those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

Terry Watson and Melissa Reilly testified live at the trial. The evidentiary record also includes joint exhibits 1-5, claimant's exhibits 1-7, and defendants' exhibits A-E. All exhibits were received into the record without objection. The parties submitted post-hearing briefs; at which time the case was fully submitted to the undersigned.

ISSUES

The parties identified the following disputed issues on the hearing report:

1. Whether claimant sustained an injury that arose out of and in the course of his employment with General Mills on May 7, 2021.

2. Whether the claimant is entitled to temporary disability or healing periods benefits because of the alleged injury.
3. Whether the alleged injury resulted in any permanent disability; and if so,
4. The extent of claimant's entitlement to permanent disability benefits.
5. The commencement date for permanent partial disability benefits, if any are awarded.
6. Whether claimant is entitled to payment of the medical expenses in claimant's exhibits 5 and 6.
7. Whether claimant is entitled to recover the cost of an independent medical examination pursuant to Iowa Code section 85.39.
8. Assessment of costs.

FINDINGS OF FACT

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

At the time of the hearing the claimant, Terry Watson (hereinafter "Watson") was 61 years old. (Hearing Transcript, p. 14). Watson resides in Cedar Rapids, Iowa. (Id.). He obtained his GED in 1982. (CI Ex. 3, p. 27). After obtaining his GED, Watson worked as a cook at several different restaurants, including Red Lobster and the House of Pancakes. (Id.). He also worked for numerous temporary staffing agencies, such as Sedona, Randstand, Remedy, People Ready/Labor Ready, and CW. (Id. at 27-28). Watson testified that he worked for General Mills several times through different temporary staffing agencies. (Id. at 28). At the hearing he indicated his first placement at General Mills was in 1982. (Tr., p. 15).

In the summer of 2020, General Mills hired Watson as a direct employee. (CI Ex. 3, p. 28; Tr., p. 15). At that time, he was placed in the cereal department, packing, stacking, palletizing, and placing cartons on the line, as well as completing slip sheets. (CI Ex. 3, p. 28; Tr., p. 15; see also Ex. D, p. 18). About a year later, Watson was transferred to the fruit department. (Tr., p. 17). In the fruit department, he performed several jobs including class C trash operator, class C gusher operator, and class C shapes operator. (Ex. D, pp. 19-21). In the fruit department, Watson weighed, packaged, and palletized Fruit Roll-Ups and Gushers. (Tr., p. 17-18, 26-27).

Watson received treatment for injuries to his left shoulder and right hip prior to the alleged injury date in this claim. According to the hearing testimony, Watson injured his left shoulder in November 2020. (Tr., pp. 49-50). From November 2020 through January 2021, he received treatment from David Swope, D.C., at Chiropractor Healthcare Associates. (Id. at 48-50). Dr. Swope's treatment included work restrictions, muscle relaxers, and tramadol. (Id. at 50-52; JE 4, p. 90). During this time, Watson

worked light-duty in the fruit department. (Id. at 50). Those restrictions were eventually lifted. (Id. at 52).

Sometime in January 2021, Watson fell at a bus stop and landed on his right hip. (See, e.g., CI Ex. 3, pp. 28-29; Tr., pp. 19-20, 53). He fell and landed on his right hip again a couple of days later while getting into the shower. (Tr., pp. 20, 53-54). Watson, however, did not seek medical treatment until February 5, 2021. (JE 4, p. 92). On that date, he presented to Stephanie Robinson, ARNP, his primary provider, complaining of right hip pain that had been present for two weeks. (Id.). Nurse Robinson diagnosed him with right hip pain and prescribed Flexeril and a Medrol Dosepak.¹ (Id. at 94). She also ordered x-rays of his right hip. (Id.). They showed mild to moderate osteoarthritis of the right hip joint with no evidence of acute or subacute bony injury. (JE 1, p.1). Robinson provided Watson with light duty restrictions. (JE 4, p. 94).

On February 18, 2021, Watson went to the Emergency Room at Mercy Medical Center. (JE 3, p. 73). He told Katherine Peraud, D.O., that he slipped in the shower about a month ago and landed hard on his right hip. (Id.). He complained of ongoing hip pain and trouble bearing weight on his right leg. (Id.). Dr. Peraud ordered a CT scan of Watson's right hip. (Id.). The CT showed moderate osteoarthritis in both his hip and SI joints, as well as severe degenerative disc disease at L5-S1, but no acute fractures. (JE 1, p. 2). Dr. Peraud's note indicates she suspected a bony contusion. (JE 3, p. 76). She diagnosed Watson with a contusion of multiple sites on his right lower extremity, gave him an intramuscular injection for pain, provided crutches, and a referral to physical therapy. (Id. at 75-76). At hearing, Watson testified that Dr. Peraud also took him completely off work after this appointment. (Tr., p. 54).

On March 9, 2021, Watson saw Jeffrey Nassif, M.D., at Physicians' Clinic of Iowa (PCI) for right hip pain. (JE 2, p. 9). Dr. Nassif's treatment note indicates the pain was in Watson's groin and anterior lateral hip region and was severe at times. (Id.). Dr. Nassif diagnosed him with moderate osteoarthritis of the right hip and iliotibial band syndrome. (Id. at 10). He prescribed Meloxicam and referred him to physical therapy. (Id.). Dr. Nassif indicated Watson could return to unrestricted work at General Mills on March 24, 2021. (Id. at 11-13). On March 15, 2021, Watson's wife called Dr. Nassif's office. (Id. at 14). The message stated that the Meloxicam was not bringing Watson's pain levels down, and due to pain, he was using a cane and unsure if he wanted to start physical therapy. (Id. at 14). She asked if Dr. Nassif would consider giving him a cortisone shot. (Id.). After the call, Watson's medication was changed from Meloxicam to Celebrex, Tylenol Arthritis, and Tramadol as needed. (Id.). On March 22, 2021, Watson's wife called again and stated he was not improving and needed to be taken off work for another two weeks. (Id. at 15). An updated work note was faxed to General Mills, taking Watson off work until April 7, 2021. (Id. at 16). On March 26, 2023, Watson called Dr. Nassif's office. (Id. at 17). He indicated his hip pain had not improved with physical therapy. (Id.). He made a return appointment for April 22, 2021. (Id.). Watson stated he had a very physical job at General Mills. (Id.). He asked Dr. Nassif to keep him off work until after his appointment on April 22, 2021. (Id.). Dr. Nassif told Watson there was nothing further he could do for him and referred him to James Huber, D.O.,

¹ According to Watson's hearing testimony, Nurse Robinson also proscribed him Tramadol. (Tr., p. 53).

for further treatment. (Id.). On March 29, 2023, Watson called Dr. Nassif's office again and asked for light-duty work restrictions. (Id. at 18). On March 30, 2021, Dr. Nassif faxed General Mills work restrictions of no lifting more than 40 pounds. (Id. at 19).

On April 2, 2021, Justin Gilbert, M.D., evaluated Watson. (JE 2, p. 21). Dr. Gilbert is a physical medicine and rehabilitation specialist at PCI. (Id.). Dr. Gilbert had previously provided Watson with left shoulder injections. (Id.). Watson complained of severe pain in the lateral aspect of his right hip. (Id.). Dr. Gilbert diagnosed trochanteric bursitis of the right hip. (Id. at 22). He injected Watson's right hip with Kenalog and lidocaine. (Id.). Watson reported the injection relieved his hip pain. (Id. at 23). However, on April 6, 2021, Watson again called Dr. Nassif's office, stating he could not go back to work without restrictions. (Id. at 24). He asked to have his light-duty work restrictions extended. (Id.). Dr. Nassif refused, stating Watson needed to have further work restrictions addressed by his primary care provider. (Id.).

Watson returned to Dr. Nassif on April 22, 2023. (JE 2, p. 25). His hip pain had returned after the April 2, 2021 injection. (Id.). It was really bothering him. (Id.). Dr. Nassif diagnosed him with trochanteric bursitis of the right hip. (Id.). He prescribed Nabumetone and referred him to Dr. Huber for consideration of a Tenex procedure. (Id. at 25-26). Dr. Huber's next available appointment was on May 27, 2021. (Id. at 27).

Watson's petition alleges he suffered a work-related injury to his right hip while working at General Mills on May 7, 2021. (See Petition). At the hearing, Watson testified his supervisor asked him to work at the dump station in the fruit department that day. (Tr., p. 29). Prior to this, while under Dr. Nassif's light-duty restrictions, Watson worked in the flex 2 position, weighing boxes of fruit roll-ups. (Id. at 25-27; see also CI Ex. 2, p. 23). Watson testified he told his supervisor that he was still on light-duty restrictions and could not work in the dump station.² (Id.). According to Watson, the supervisor told him "this is your job today." (Tr., p. 29). Watson then went to work at the dump station, which required him to take empty boxes off the line, break them down, and then squat down to place the deconstructed box on a pallet on the ground. (Id. at 30-34). Watson testified he was crouching down, putting a deconstructed box on the pallet, when he heard a popping sound in his right hip and felt immediate pain. (Id. at 34-35). Watson then went on break. (Id. at 35). When he returned, he was still in so much pain that he "couldn't even walk." (Id.). He informed his team leader about the incident. (Id.). Watson was taken to Mercy Medical Center, where he was evaluated by Tami Feickert, PAC. (JE 4, p. 98). Feickert took x-rays of his right hip. (Id. at 99-100). They showed moderate degenerative changes in his right hip, but no acute injuries. (Id. at 99). She diagnosed him with right hip pain, most likely caused by a muscle strain and prescribed Tramadol as needed. (Id. at 100). Feickert advised Watson to follow-up with orthopedics or his primary care physician if the symptoms did not improve. (Id.).

On May 10, 2021, Watson called Dr. Nassif's office and informed him about the work incident on May 7, 2021, and his ongoing right hip symptoms. (JE 2, p. 28). Dr. Nassif indicated he had no further treatment to offer Watson, and he should keep his upcoming appointment with Dr. Huber. (Id.). The next day, May 11, 2021, Watson was

² Watson admitted the boxes did not weigh over 40 pounds. (Tr., p. 32).

evaluated by Jeffrey Westpheling, M.D., at the request of defendants. (JE 5, p. 115). Dr. Westpheling diagnosed him with right hip pain. (Id. at 116). He indicated Watson's right hip issues predated the work incident on May 7, 2021, however, he opined that the work incident temporary exacerbated Watson's underlying condition. (Id.). Dr. Westpheling updated Watson's work restrictions and recommended he keep his upcoming appointment with Dr. Huber. (Id.). The same day, May 11, 2021, Watson produced a note from Ms. Robinson, his primary provider, taking him completely off work until after his appointment with Dr. Huber. (Id. at 118).

On May 17, 2021, Dr. Westpheling sent defendants a report. (JE 5, p. 119). It stated that Watson was already experiencing right lateral hip pain prior to the work incident on May 7, 2021; he was previously evaluated by orthopedics, underwent injections, and had discussions about the need for surgery on his right hip. (Id.). Dr. Westpheling wrote,

For these reasons, I do not feel his ongoing need for treatment of the right hip condition is related to the work incident of May 7, 2021. When I evaluated him, he was already under work restrictions for the right hip and therefore, I simply continued his work restrictions. It is my opinion that any need for continued work restrictions are the result of his personal right hip condition and not the work incident of May 7, 2021. Any further care and evaluation should be through his primary care provider and orthopedist. He has reached maximum medical improvement from the work incident as of May 15, 2021. . . .

No impairment per AMA Guides, 5th Ed.

(Id.).

Dr. Huber evaluated Watson on May 19, 2021. (JE 2 at 29). Dr. Huber reviewed the CT scan that was taken of Watson's right hip in February 2021. (Id.). He noted it showed an area of hypodensity around the gluteus minimus, gluteus medius, and the greater trochanter, as well as some asymmetry of the muscle mass. (Id.). Dr. Huber performed an ultrasound on Watson's hip. (Id. at 30). It revealed the same hypoechoic area on the right hip. (Id.). Dr. Huber's note indicates it likely corresponded with a large tear and bursitis. (Id.). Dr. Huber diagnosed Watson with tendinopathy of the gluteus medius, suspect large tear. (Id.). Dr. Huber ordered an MRI to determine if it was best to proceed with a Tenex procedure or a surgical referral. (Id.). He also provided Watson with light-duty work restrictions of no lifting, bending, or squatting. (Id. at 30-31).

The MRI was taken on June 22, 2021. (JE 1, p. 3). It showed moderate right hip joint effusion with some internal debris or loose bodies, severe degenerative changes with severe joint space narrowing, a complex tear of the lateral and anterolateral right hip labrum, and disc space narrowing and suspected reactive edema in the lower lumbar spine. (Id. at 3-5). Watson follow-up with Dr. Huber on June 24, 2021. (JE 2, p. 33). Dr. Huber reviewed the MRI. (Id.). He thought Watson's pain complaints were likely coming from his hip joint because "when he fell he suffered a bone contusion on top of his severe osteoarthritis." (Id. at 34). He thought the loose bodies were also likely causing pain. (Id.). Dr. Huber recommended a cortisone injection and physical therapy.

(Id.). He also provided light-duty work restrictions of no bending, lifting, or twisting—only sedentary work. (Id. at 35).

On July 2, 2021, Dr. Gilbert performed an intra-articular cortisone injection to Watson's right hip. (JE 2, p. 36-38). Dr. Gilbert's treatment note indicates Watson was also "complaining of some newer onset left-sided pains that are worse with lying down." (Id. at 36). Watson followed up with Dr. Huber on July 20, 2021. (Id. at 39). Watson reported a 25 percent improvement in his hip pain and functional ability. (Id.). Dr. Huber opined the majority of his pain was coming from severe degenerative changes in the right hip joint. (Id. at 40). He referred Watson back to Dr. Nassif to evaluate for a total hip arthroplasty. (Id.). Dr. Huber also changed Watson's light-duty work restrictions to no lifting, pushing, or pulling more than 25 pounds. (Id. at 41).

Dr. Nassif saw Watson on August 3, 2021. (JE 2, p. 43). Watson stated the intra-articular injection had relieved his pain for one week. (Id.). Dr. Nassif diagnosed osteoarthritis of the right hip. (Id. at 44). He agreed to proceed with a total hip arthroplasty. (Id.). Due to FMLA issues, Dr. Nassif did not perform the surgery until December 13, 2021. (Id. at 48-53). Watson received follow-up care from Dr. Nassif. (See id. at 57-60). On January 24, 2022, Dr. Nassif returned Watson to work with restrictions of no running, jumping, or lifting over 60 pounds repetitively and no bending his right hip past 90 degrees for the next four weeks. (Id. at 61). On March 14, 2022, Dr. Nassif revised Watson's restrictions and provided permanent restrictions of no running, jumping, or lifting over 60 pounds. (Id. at 64-65).

On June 23, 2022, Watson returned to see Jenny Botsford, ARNP, at PCI, complaining of an achy pain in the lateral aspect of his right leg while working. (JE 2, p. 66). Nurse Botsford restricted him from working on shapes or the dump station for 90 days, due to its required repetitive bending and stooping. (Id. at 67-68). She also changed his permanent restrictions to no running, jumping, or lifting over 50 pounds repetitively. (Id. at 68). However, on July 18, 2022, Watson called PCI, stating he was doing much better at work. (Id. at 71). He asked to have his work restrictions lifted. (Id.). Nurse Botsford then faxed new restrictions to General Mills changing Watson's permanent work restrictions back to no running, jumping, or lifting over 60 pounds repetitively. (Id. at 72). He was allowed to resume work in the shapes and dump stations on September 21, 2022. (Id.).

At the behest of his attorney, Watson attended an independent medical examination (IME) with Mark Taylor, M.D., on December 5, 2022. (CI Ex. 1, p. 8). Dr. Taylor reviewed Watson's past treatment records and performed an evaluation. (Id. at 9-12). Dr. Taylor diagnosed Watson with right hip arthralgia with osteoarthritis and labral damage post right total hip arthroplasty, and prior right hip pain diagnosed as bursitis with full, but temporary improvements with greater trochanteric bursa injection. (Id. at 14). He opined that,

Mr. Watsons' work activities on May 7, 2021, represented a significant contributing factor to a change in his status and [hip] symptoms, which ultimately required surgical intervention. Because the radiographic arthritic changes were pre-existing, this could be viewed as an aggravating event, or even as an accelerating factor.

(Id. at 15). Dr. Taylor based his causation opinion off a new effusion seen in the June 2021 MRI of Watson's right hip. (Id.). He placed Watson at maximum medical improvement (MMI) for his work injury on June 23, 2022, and assigned 50 percent permanent impairment to the right lower extremity or 20 percent permanent impairment to the whole body, citing to Tables 17-33 and 17-34 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Id. at 15-16). Dr. Taylor agreed that the permanent restrictions provided by Dr. Nassif were medically reasonable. (Id. at 16).

At the request of defendants, Watson underwent a second IME with Ryan Pokorney, D.O., on January 19, 2023. (Ex. A, p. 3). Dr. Pokorney's report indicates he also reviewed Watson's treatment records and performed an evaluation. (Id. at 3-6). Dr. Pokorney diagnosed Watson with pre-existing osteoarthritis and associated trochanteric bursitis and abductor tendinopathy, status post right total hip arthroplasty without complication. (Id. at 7). He opined,

[I]t is less likely that the alleged work injury was the cause for his ongoing right hip pain and ultimate right total hip arthroplasty. It is my medical opinion and within a reasonable degree of medical certainty, the alleged work injury was only a short-term acute exacerbation of an underlying moderate/severe osteoarthritis with associated trochanteric bursitis and abductor tendinopathy.

(Id.). Dr. Pokorney agreed with Dr. Westpheling that Watson reached MMI for this aggravation on May 15, 2021. (Id.). He did not assign any permanent impairment for the May 7, 2021 date of injury, nor did he assign any permanent work restrictions for the alleged injury date. (Id.).

At the hearing, Watson testified he was still working as an associate operator in the fruit department at General Mills. (Tr., pp. 41, 75). He testified he is physically capable of performing his job. (Id. at 75). It requires some crouching down, which he is able to accomplish with modifications. (Id. at 43-44). He makes \$20.97 per hour, and he works full time, 3:00 p.m. to 11:00 p.m., forty hours per week with occasional overtime. (Id. at 75-76, 93). Watson still has some hip pain when he bends down or stoops. (Id. at 44). He takes arthritis pills for the pain. (Id.). Watson testified that he likes his job at General Mills, and he is good at it. (Id. at 76).

Melissa Reilly also testified at the hearing. (Tr., p. 81). Reilly is a production supervisor, a/k/a, the team leader, for the fruit department at General Mills. (Id.). She has held this position for 21 years. (Id.). Reilly has been Watson's team leader since he was hired by General Mills in 2020. (Id. at 82-83). She also worked with him when he was placed at General Mills by a temporary staffing agency. (Id.). Reilly testified that Watson's job title changed to associate operator when the union signed a new contract. (Id. at 83-84). However, his job duties in the fruit department remain the same as they were prior to May 2021. (Id. at 84). She testified that Watson's job in the fruit department complies with the permanent work restrictions provided by Dr. Nassif. (Id.). She indicated Watson is physically capable of performing all his duties in the fruit department and is good at his job. (Id. at 85).

Watson relies upon the opinion of Dr. Taylor to prove his claim. I do not find Dr. Taylor's opinion persuasive. In his report, Dr. Taylor states that the May 7, 2021 work incident aggravated and accelerated Watson's pre-existing right hip condition, causing the need for his total replacement surgery with Dr. Nassif. (CI Ex. 1, p. 15). As support for this assertion, Dr. Taylor points to an effusion seen on the June MRI. (*Id.*). He also indicates that Watson's hip pain changed after the work incident on May 7, 2021—it became intra-articular for the first time. (*Id.*). His rationale, however, does not have support in the hearing record. According to the treatment notes, Watson complained of groin and anterior lateral hip pain at his first appointment with Dr. Nassif on March 9, 2021. (JE 2, p. 9). Additionally, the MRI referenced by Dr. Taylor is the only MRI in the record. (See JE 1, pp. 3-5). No MRIs were completed prior to the May 7, 2021 work incident, only a CT scan, which was performed on February 18, 2021. (See JE 1, pp. 2-5). Dr. Huber, however, reviewed both the CT scan and the MRI on June 24, 2022. (JE 2, p. 33). After looking at both scans, he determined that when Watson "fell he suffered a bone contusion on top of his severe osteoarthritis. That, on top of the loose bodies, is likely causing his pain." (*Id.* at 34). Dr. Huber opined Watson's right hip pain was caused by "severe hip arthritis with a bone contusion caused by his fall."³ (*Id.* at 35). The "fall" Dr. Huber refers to clearly happened outside of work prior to May 7, 2021.

Dr. Huber's opinion is supported by Watson's general course of treatment. In March 2021, Dr. Nassif diagnosed Watson with osteoarthritis of the right hip after he suffered two non-work-related falls. (JE 2, p. 10). From that date on, Watson continually experienced right hip pain. (See *id.* at 10-23). According to the medical records, Watson and his wife repeatedly called Dr. Nassif's office between March 15, 2021, and April 6, 2021, asking that he be taken off work or assigned additional work restrictions due to right hip pain. (*Id.* at 14-24). In his brief, Watson argues that his need for hip surgery and continuing right hip issues are causally related to the work incident on May 7, 2021, because Dr. Gilbert's bursa injection completely relieved his hip pain. (Claimant's Post-Hearing Brief, p. 10). That statement is not supported by the medical records. While Watson initially reported pain relief on the date of the injection, just four days later, on April 6, 2021, Watson's wife called Dr. Nassif's office and asked him to extend Watson's work restrictions because of hip pain. (JE 2, p. 24). Then, at his next appointment with Dr. Nassif, Watson told the doctor his hip pain had come back and it "bothered him a lot." (*Id.* at 25). Given this evidence, I find the opinions of Dr. Huber, Dr. Westpheling, and Dr. Pokorney the most convincing. According to the evidence, the work incident on May 7, 2021, did not substantially and materially aggravate Watson's pre-existing osteoarthritis condition, causing the need for his hip replacement surgery.

I find Watson failed to carry his burden of proof to show he sustained permanent impairment from his employment at General Mills on May 7, 2021. Because Watson failed to meet his burden of proof, issues concerning extent of permanent disability and the commencement date of permanent benefits are moot; the undersigned will make no fact findings on those issues.

³ This finding is also supported by Dr. Peraud's February 18, 2021, treatment note, which diagnoses Watson with a suspected bony contusion. (JE 3, p. 76).

Both Dr. Westpheling and Dr. Pokorney agree that Watson experienced a temporary aggravation of a pre-existing non-work-related condition on May 7, 2021. (JE 5, p. 119). He returned to his baseline condition or reached MMI from this aggravation on May 15, 2021. (JE 5, p. 119; Ex. A, p. 7). Given this, Watson is entitled to temporary disability benefits.

CONCLUSIONS OF LAW

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

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words “arising out of” refer to the cause or source of the injury. The words “in the course of” refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler 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).

When an expert's opinion is based upon an incomplete or incorrect history, it is not necessarily binding on the commissioner or the court. It is then to be weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the fact. Musselman v. Central Telephone Company, 154 N.W.2d 128 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence, together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey, 526 N.W.2d 845.

Based on the above findings of fact, I conclude Watson failed to meet his burden of proof to show he sustained a permanent injury that arose out of and in the course of his employment with General Mills on May 7, 2021. Watson relied upon the opinion of Dr. Taylor to causally relate his need for a total hip replacement and current hip symptoms to his employment at General Mills. However, Dr. Taylor's opinion is entitled to little weight as it is not supported by the medical evidence. Watson has not proven entitlement to permanent disability benefits in this action.

Watson seeks an award of temporary total or healing period benefits for several different time periods, beginning on the alleged date of injury, May 7, 2021, and ending on January 23, 2022, the date Watson returned to work at General Mills after his hip surgery. (See Hearing Report). Watson did not prove entitlement to permanent disability benefits as a result of the May 7, 2021 date of injury, thus the benefits he seeks are temporary total benefits. See, e.g., Dunlap v. Action Warehouse, 824 N.W.2d 545, 556 (Iowa Ct. App. 2012).

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury. Those benefits are payable until the employee has returned to work or is medically capable of returning to work substantially similar to the work performed at the time of injury. Iowa Code § 85.33(1). In her May 7, 2021 treatment note, PA Feickert indicates that Watson was already working with light duty restrictions when the alleged incident occurred. (JE 4, p. 98). Dr. Westpheling's May 11, 2021 treatment note also indicates that Watson was already working under restrictions when the work incident occurred on May 7, 2021. (JE 5, p. 115; See also CI Ex. 2, p. 23).⁴

In his May 17, 2021 report, Dr. Westpheling clarified that Watson's need for continued work restrictions was caused by his personal right hip condition and not the work incident on May 7, 2021. (JE 5, p. 119). Dr. Westpheling indicated Watson reached MMI or returned to his baseline condition on May 15, 2021. (*Id.*). Thus, according to Dr. Westpheling, on May 15, 2021, Watson was capable of returning to

⁴ Later that same day, Nurse Robinson, Watson's primary care provider, issued a report taking him completely off work until after he was seen by Dr. Huber, his orthopedist. (JE 5, p. 118). Nurse Robinson is not an authorized provider in this case. Additionally, Nurse Robinson does not provide an opinion on whether her work prohibition was necessitated by the alleged work injury.

work that was substantially similar to the light duty job he was performing on May 7, 2021. (Id.). Under the language of Iowa Code section 85.33, Watson is entitled to temporary benefits through May 15, 2021.⁵

However, pursuant to Iowa Code section 85.32, compensation for temporary total disability benefits “shall begin on the fourth day of disability after the injury.” Iowa Code § 85.32(1). The waiting period provided in Iowa Code section 85.32 does not apply if the workers’ incapacity extends beyond fourteen days. Iowa Code § 85.32(2). Watson’s incapacity from the May 7, 2021 incident did not extend beyond fourteen days. Thus, I conclude the three-day waiting period applies to this case. Watson is entitled to five days of temporary total benefits.

Watson seeks payment of the medical expenses and mileage listed in claimant’s exhibits 5 and 6. For all compensable injuries under Iowa Code chapter 85 or 85A, the employer must “furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies therefor and shall allow reasonably necessary transportation expenses incurred for such services.” Iowa Code § 85.27(1). Above, I determined Watson suffered a temporary aggravation of his pre-existing right hip condition while working on May 7, 2021. He returned to his baseline condition on May 15, 2021. Watson is entitled to reimbursement for authorized medical care during that period. According to the spreadsheet provided, Watson’s reimbursable costs include fees for the care he received on May 7, 2021, at MercyCare South. (Ex. 5, pp. 52-53). It also includes Watson’s mileage to and from the May 7, 2021, visit to MercyCare South and the May 11, 2021 visit to Dr. Westpheling. (Ex. 6, p. 68). Watson is entitled to payment of the above listed medical expenses.

Watson is seeking reimbursement for the IME performed by Dr. Taylor on December 5, 2022. (CI Ex. 1, pp. 8-18; CI Ex. 7, p. 71). Iowa Code section 85.39 permits an employee to be reimbursed for a 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.

Regarding the IME, the Iowa Supreme Court provided a literal interpretation of the plain language of Iowa Code section 85.39, stating that section 85.39 only allows the employee to obtain an IME at the employer’s expense if dissatisfied with the evaluation arranged by the employer. Des Moines Area Reg’l Transit Auth. v. Young, 867 N.W.2d 839, 847 (Iowa 2015). Under the Young decision, an employee can only obtain an IME at the employer’s expense if an evaluation of permanent disability has been made by an employer-retained physician. Iowa Code section 85.39 limits an

⁵ On the hearing report, defendants claim credit for wages paid in lieu of benefits. (See Hearing Report). It appears, however, that these payments were made in December 2021, and therefore would not affect Watson’s entitlement to temporary benefits in May 2021.

injured worker to one IME. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842 (Iowa 2009).

The language of Iowa Code section 85.39(2) states,

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, the employee shall ... be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choiceA determination of the reasonableness of a fee for an examination made pursuant to this subsection, shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is performed.

Id.

In May 2021, Dr. Westpheling, an expert retained by defendants, opined that the May 7, 2021 work incident did not cause Watson's right hip condition or the need for further treatment of the right hip. (JE 5, p. 119). In Kern v. Fenchel, Poster, and Buck, P. L. C., No. 20-1206, slip op. at 10 (Iowa Court of Appeals)(Sept. 1, 2021), the Court of Appeals stated that an "opinion on lack of causation [is] tantamount to a zero impairment rating," which is reimbursable under Iowa Code section 85.39. See also Kern v. Fenchel, Doster & Buck, File No. 5062419 (Remand March 3, 2022). Given this, Watson is entitled to reimbursement for the cost of Dr. Taylor's IME.⁶

Watson seeks an award of the costs outlined in claimant's exhibit 7. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. See 876 Iowa Administrative Rule 4.33; Iowa § Code 86.40. Administrative Rule 4.33(6) provides:

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

876 IAC 4.33(6).

⁶ Defendants' post-hearing brief does not address the reasonableness of Dr. Taylor's fee.

Watson incurred costs of \$100.00 for the filing fee for his petition, and \$14.66 for service of the petition. (CI Ex. 7, pp. 69-70). Watson suffered a temporary aggravation of his pre-existing right hip condition. He is owed some indemnity benefits. Given this, he is due the cost of his filing and service fees.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay Watson five (5) days of temporary total disability benefits at the rate of three hundred eighty-one and 09/100 dollars (\$381.09) for the time period from May 7, 2021, through May 15, 2021.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

Defendants shall pay Watson's medical expenses for the care he received on May 7, 2021, at MercyCare South. Defendants shall also pay Watson's mileage to and from MercyCare South on May 7, 2021, and Dr. Westpheling's office on May 11, 2021.

Defendants shall reimburse claimant for the IME conducted Dr. Taylor in the amount of three thousand five hundred eighty-seven and 50/100 dollars (\$3,587.50).

Defendants shall pay costs of one hundred fourteen and 66/100 dollars (\$114.66).

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

Signed and filed this 12th day of September, 2023.

A handwritten signature in black ink, reading "Amanda Rutherford", written over a horizontal line.

AMANDA R. RUTHERFORD
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Andrew Giller (via WCES)

Peter Thill (via WCES)

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