BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JUDITH ANN NABER, Claimant, vs. T & D HORIZONS, INC. d/b/a COUNTRY JUNCTION RESTAURANT, Employer, and ILLINOIS CASUALTY COMPANY, Insurance Carrier, and SECOND INJURY FUND OF IOWA, Defendants.	File No. 5060433 ARBITRATION DECISION Head Note Nos.: 1108.50, 1402.40, 1803, 2501, 2907

STATEMENT OF THE CASE

Judith Ann Naber, claimant, filed a petition in arbitration seeking workers' compensation benefits from T & D Horizons, Inc., employer and Illinois Casualty Company, insurance carrier as defendants. Hearing was held on September 23, 2020. This case was scheduled to be an in-person hearing occurring in Des Moines. However, due to the outbreak of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via video means, using CourtCall. Accordingly, this case proceeded to a live video hearing via CourtCall with all parties, and the court report 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. All of 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.

Judith Naber was the only witness to testify live at trial. The evidentiary record also includes Joint Exhibit JE1, pages 8-52, Claimant's Exhibits 1-17; and Defendants'

Exhibits A-F. JE1, pages 1-7 were removed because the claim against the Second Injury Fund of Iowa was settled. All exhibits were received without objection. The evidentiary record closed at the conclusion of the arbitration hearing.

The parties submitted post-hearing briefs on October 23, 2020, at which time the case was fully submitted to the undersigned.

ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant's need for right knee replacement was necessitated by the stipulated April 23, 2016 work injury.

2. The nature and extent of permanent disability claimant sustained as the result of the work injury.

3. Whether claimant is entitled to reimbursement for an independent medical evaluation (IME).

4. Assessment of costs.

FINDINGS OF FACT

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

Ms. Naber fell and injured her right knee on April 23, 2016 while working at the Country Junction Restaurant. Ms. Naber was hired by the restaurant in June of 2011 and worked as a prep lady making pies, cakes, and salad dressing. She would also help with other tasks as needed, such as takeout/carryout, or reservations. At the time of the hearing Mr. Naber was 76 years old and was still employed with the restaurant. She loves her job. (Testimony; Defendants' Exhibit D, page 14)

The parties agree that Ms. Naber sustained a right knee injury which arose out of and in the course of her employment on April 23, 2016. Additionally, the parties agree that arthroscopic knee surgery that Ms. Naber underwent on October 25, 2016 is the responsibility of the defendants. The parties also agree that Ms. Naber has sustained permanent partial disability as the result of the work injury. The central dispute in this case is whether the defendants are also responsible for the November 20, 2018 knee replacement surgery and any disability that resulted from the knee replacement surgery.

Following the injury, Ms. Naber received conservative treatment for her knee. She was then referred to Judson W. Ott, M.D., an orthopedic surgeon.

Ms. Naber first saw Dr. Ott on August 8, 2016. He noted that she had medial right knee pain for the past couple months that started around the time of a minor fall. Since then she had a couple injections without improvement. He reviewed x-rays that

showed mild medial joint space narrowing. He also reviewed the May 31, 2016 MRI. The MRI showed medial and lateral meniscal tear, suspected mild medial collateral strain, and right knee osteoarthritis. An ultrasound showed medial and lateral meniscal tears initially a nondisplaced plateau subchondral Eichler [*sic*] fracture osteonecrosis or edema possibly related to the fall versus related to an underlying arthritic condition. He continued to modify her weightbearing and recommended Medrol Dosepak. She was instructed to return in one month. If she had not improved by then he would try additional modalities. He explained to Ms. Naber that over the long run this could get to the point of a total knee replacement. (JE1, pp. 13-16)

Ms. Naber continued to treat with Dr. Ott. On September 7, 2017, Ms. Naber reported continued significant right knee pain. Dr. Ott felt that a significant component of her symptoms was arthritic in nature and he noted that she does have meniscus pathology that could also be contributing. Ultimately, Ms. Naber elected to proceed with surgery. (JE1, pp. 21)

On October 25, 2016, Dr. Ott performed partial medial and lateral meniscectomy on her right knee. (JE1, p. 23) The post-operative diagnoses included, posterior horn medical meniscus tear, mild anterior horn lateral meniscus tear, and tricompartmental osteoarthritic changes, most significantly involving the medial tibial plateau with isolated grade 4 changes. Ms. Naber testified that the surgery helped, but she never returned to her preinjury status.

Ms. Naber continued to treat with Dr. Ott. In January of 2017 she reported some improvement but still had discomfort when she stood or is on her leg for an extended period of time. The doctor noted that she had known arthritic changes which seem to be an exacerbation of a pre-existing condition that is related to her work injury. Dr. Ott gave Ms. Naber a Synvisc injection. (JE1, p. 29)

In February 2017, Ms. Naber reported that the injection helped, but she still had pain and tenderness. On March 13, 2017, Dr. Ott placed her at maximum medical improvement (MMI). Pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, he assigned ten percent impairment of her right lower extremity. (JE1, pp. 31-32)

Ms. Naber returned to see Dr. Ott on July 24, 2017. She did not receive much relief with the Synvisc injection in January. (JE1, p. 34)

Ms. Naber returned to see Dr. Ott one year later. On January 24, 2018, she reported that her symptoms had gradually progressed over the past year. Dr. Ott referred her to a joint replacement specialist in his office, Brian A. Silvia, M.D. (JE1, pp. 35-36)

Dr. Silvia saw Ms. Naber on March 9, 2018. Dr. Silvia recommended a right total knee replacement. Ms. Naber opted to wait until November 20, 2018 to have the surgery because her husband has a seasonal job and would be able to help her more during her recovery. (JE1, pp. 37-38; testimony)

We now turn to the central issue in this case. Is Ms. Naber's total knee replacement causally connected to the work injury? Several experts have provided their opinion on this issue. Dr. Silvia did not provide a formal opinion regarding causation.

On April 12, 2017 Dr. Ott responded to a question from the insurance carrier. The carrier asked, "What, if any, future medical care do you think would be required as a result of the work injury only – not pre-existing, still existing, or worsening arthritis or osteoarthritis?" Dr. Ott replied, "[h]er preexisting osteoarthritis is likely to worsen over time and may result in need for TKA." (JE1, p. 33; Def. Ex. B, p. 7)

At the request of the defendants, William C. Jacobson, M.D. performed an independent medical examination. As the result of the examination, Dr. Jacobson issued a report on August 31, 2018. He opined that Ms. Naber's need for a right total knee arthroplasty is not a direct result of the April 23, 2016 work injury. He further opined that the injury likely caused the menisci tears and aggravated her underlying arthritis. Dr. Jacobson stated that the aggravation of the arthritis from the work incident would have resolved within several months after the injury. Dr. Jacobson does not explain why Ms. Naber was symptom-free prior to the injury and why her symptoms did not go away after the first operation. (Def. Ex. A, p. 3)

At the request of her attorney, Ms. Naber saw Robin L. Sassman, M.D. for an IME. As the result of the IME, Dr. Sassman issued a report on June 19, 2018. Dr. Sassman opined that the April 23, 2016 work incident was a "substantial aggravating factor in the arthritic changes of the right knee necessitating the need for the right knee replacement at this time. Supporting this conclusion is the fact that Ms. Naber had no limitations and no ongoing knee symptoms prior to this injury. Additionally, the mechanism is consistent with the injury." (Cl. Ex. 2, p. 13)

Prior to the April 23, 2016 work injury, Ms. Naber did not have any problem with her right knee and she was physically active. After the injury and after her first surgery, she walked with an altered gait. She was able to walk with a normal gait after her knee replacement surgery and physical therapy. Ms. Naber has consistently had right knee symptoms since the work injury. (Testimony) I find the opinions of Dr. Sassman to be the most consistent with the record as a whole and to be well-reasoned. With regard to whether the work injury necessitated the right knee replacement, I find the opinions of Dr. Sassman to be the most persuasive. Thus, I find that Ms. Naber's right knee replacement surgery is casually connected to the April 23, 2016 work injury.

Because Ms. Naber's knee replacement surgery was necessitated by the work injury, I find that the defendants are responsible for the reasonable and necessary medical expenses associated with the knee replacement. Claimant is seeking payment of the expenses as set forth in her Exhibits 10, 11, and 12. Additionally, there were some medical expenses related to the first surgery which were paid for by Medicare and claimant's Medicare supplemental insurance; these are set forth in Claimant's Exhibit 17. Based upon a review of the listed expenses it appears that these expenses should be the responsibility of the defendants. In their brief defendants do not provide an argument as to why these expenses should not be their responsibility. I find that the

expenses submitted by the claimant in Claimant's Exhibit numbers 10, 11, 12, and 17 are defendants' responsibility.

Claimant is seeking reimbursement for the IME performed by Dr. Sassman. Dr. Sassman's bill is contained in Claimant's Exhibit 4 and the total is $3,556.50 for service date of April 18, 2018. Prior to hearing, defendants paid for one-half of the IME. Defendants' rationale was that Dr. Sassman's IME's dealt with two body parts, Ms. Naber's right knee and her carpal tunnel syndrome. Ms. Naber had a claim against the Second Injury Fund of Iowa which involved carpal tunnel syndrome and defendants contend that they should not have to pay for that portion of the IME that is not related to the claim against them. I find that defendants are only responsible for the portion of the IME related to the claim against them. Unfortunately, Dr. Sassman's invoice does not specify how much of her time was spent on the knee versus the carpal tunnel claim. I find that claimant has failed to show entitlement to reimbursement for anything above what the defendants have already paid.

We now turn to the issue of permanent partial disability. There are two physicians who have rendered their opinions regarding permanent partial disability in this case.

In March of 2017 Dr. Ott placed assigned 10 percent right lower extremity permanent partial disability. Dr. Ott mentions the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, but does not indicate what method or table he utilized to reach that rating. (JE1, p. 32) Dr. Sassman assigned 16 percent impairment for the right lower extremity. In her report, Dr. Sassman set forth her detailed basis, including the tables she used in the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, for her rating. Because Dr. Sassman provided her methodology for assigning permanent impairment, I find that her rating should be given greater weight. Thus, I find that Ms. Naber sustained 16 percent impairment for the right lower extremity.

Finally, claimant is seeking an assessment of costs as set forth in Claimant's Exhibits 4 and 9. Claimant's Exhibit 4 is the IME from Dr. Sassman. Claimant seeks to have the remainder paid for by defendants as a cost. However, as previously noted, Dr. Sassman's invoice does not show what portion may be attributed to the knee versus the carpal tunnel. Thus, I find claimant has failed to show entitlement to reimbursement as a cost either. Claimant's Exhibit 9 is an invoice from Dr. Sassman's office for the supplemental report. The supplemental report also addressed the carpal tunnel syndrome and the knee injury. Once again, Dr. Sassman's bill does not break down the amount of time spent on the carpal tunnel versus the knee. I am not willing to speculate as to how much time was spent on each body part. I find claimant has failed to demonstrate that the expenses set forth in Exhibit 9 are related to the knee injury. I exercise my discretion and do not assess the expenses set forth in Exhibits 4 and 9 as costs.

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 Rule of Appellate Procedure 6.14(6).

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).

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).

The central dispute in this case is whether claimant's right total knee replacement was necessary because of the work injury. Before the April 23, 2016 work injury, Ms. Naber did not have any problem with her right knee and she was physically active. Since the knee injury Ms. Naber has consistently had right knee symptoms. Based on the above findings of fact, I conclude that Ms. Naber's right knee replacement surgery is casually connected to the April 23, 2016 work injury.

Claimant is seeking payment of past medical expenses. The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also

allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Based on the above findings of fact, I conclude that defendants are responsible for the expenses related to the total knee replacement. Additionally, I conclude that defendants are responsible for all expenses related to the first surgery, including the expenses that were inadvertently paid by Medicare and a supplemental medical policy. Thus, defendants are responsible for the medical expenses set forth in Claimant's Exhibits 10, 11, 12, and 17.

Claimant is seeking additional permanent partial disability benefits. 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).

The parties have stipulated that Ms. Naber sustained a scheduled member disability to her right leg. As such, she shall be compensated pursuant to 85.34(2)(o) which provides that permanent impairment for a lower extremity is based on 220 weeks. Based on the above findings of fact, I conclude Ms. Naber sustained 16 percent permanent partial disability to her right lower extremity. Thus, Ms. Naber has demonstrated entitlement to 35.2 weeks of permanent partial disability.

Finally, claimant is seeking an assessment of costs. Costs are to be assessed at the discretion of the Iowa Workers' Compensation Commissioner or the deputy hearing the case. 876 IAC 4.33. Based on the above findings of fact, I exercise my discretion and do not award costs in this case.

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the stipulated rate of two hundred six and 75/100 dollars ($206.75).

Defendants shall pay thirty-five point two (35.2) weeks of permanent partial disability benefits commencing on the stipulated commencement date of March 29, 2017.

Defendants shall be entitled to credit for all weekly benefits paid to date.

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

Defendants shall be responsible for the medical expenses contained in Claimant's Exhibits 10, 11, 12, and 17.

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 16th day of December, 2020.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Dirk Hamel (via WCES)

Mark A. Woollums (via WCES)
Lori N. Scardina Utsinger (via WCES)

Amanda R. Rutherford (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.