ELECTRONICALLY FILED 2020-Apr-22 11:17:00 DIVISION OF WORKERS' COMPENSATION

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CYNTHIA WHEELER,	:	
Claimant,	:	
vs.	:	File No. 5066144
M & T INVESTMENTS,	:	A R B I T R A T I O N
Employer,	:	D E C I S I O N
and	:	
GRINNELL MUTUAL REINSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	Head Note No.: 1803

STATEMENT OF THE CASE

Cynthia Wheeler, claimant, filed a petition in arbitration seeking workers' compensation benefits from M & T Investments and Grinnell Mutual Reinsurance Company, insurance carrier, as a result of an alleged injury she sustained on May 10, 2016 that allegedly arose out of and in the course of her employment. This case was heard in Des Moines, Iowa on January 23, 2020 and fully submitted on April 7, 2020. The evidence in this case consists of the testimony of claimant, John Danneman, Joint Exhibits 1-8, Defendants' Exhibits A-J and Claimant's Exhibits 1-10. Both parties submitted briefs.

The claimant was working at a restaurant owned by M & T Investments called McOtto's at the time of her alleged injury. The employer will be referred to as McOtto's or employer in this decision.

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.

ISSUES

1. Whether claimant sustained an injury on May 10, 2016 which arose out of and in the course of employment;

2. Whether the alleged injury is a cause of temporary disability and, if so, the extent;

3. Whether the alleged injury is a cause of permanent disability and, if so, the extent of claimant's permanent disability.

4. Whether claimant is entitled to one or two exemptions.

5. The claimant's workers' compensation rate.

6. Whether claimant provided timely notice of an injury to the defendants.

7. Whether claimant is entitled to payment of certain medical expenses.

8. Whether claimant is entitled to the medical care recommended by Dr. Pape.

9. Assessment of costs.

FINDINGS OF FACT

The deputy workers' compensation commissioner having heard the testimony and considered the evidence in the record finds that:

Cynthia Wheeler was 58 years old at the time of the hearing. Claimant graduated from high school and has taken some continuing education courses at a community college. Claimant was married on May 10, 2016. Claimant and her spouse have been separated for five years as of the arbitration decision. (Transcript page 62) Claimant and her spouse have not filed for a legal separation. (Tr. p. 70)

Claimant started working for McOtto's in October 2015. (Tr. p. 72) Claimant worked as a prep cook at McOtto's in May 2016. Claimant testified that prior to May 2016 she never had any problems with her right knee[1]. Claimant said that before the May 10, 2016 injury she had never worn a knee brace, and claimant testified she was wearing a brace at the hearing, which was prescribed by James Pape, M.D. (Tr. p. 34) Claimant testified the cane she started using in June 2019 was prescribed by Dr. Pape.

Claimant said that on May 10, 2016 she was working as a prep cook. Claimant went into the walk-in cooler to return some onions. (Tr. p. 42) Claimant said she fell and landed on her right knee and hands. (Tr. p. 44) Claimant said that her hands felt wet after she fell. (Tr. p. 46) Claimant then went to the door of the cooler, opened it and yelled for Lauri Gersdorf, the day manager, for help. (Tr. p. 47) According to

[1] The parties have stipulated that the alleged work injury concerns her right lower extremity and is an injury to a scheduled member.

claimant Ms. Gersdorf requested someone get her a chair to sit in. (Tr. p. 48) Ms. Gersdorf then took claimant to the emergency room in Ms. Gersdorf's vehicle. (Tr. p. 48)

In the emergency room claimant was provided an immobilizer for her right leg and was referred to the Jones Regional Work Well Clinic (Work Well). (Tr. p. 49) Claimant said she was off work for a couple days and was returned to work by Work Well with restrictions. (Tr. p. 50) Claimant was referred to physical therapy by Work Well. Claimant testified it did not help her. (Tr. p. 51)

Ms. Gersdorf testified that on May 10, 2016 she was at work and claimant was coming out of the cooler and saw claimant holding onto a rack for support. (Exhibit 7, p. 20) Claimant told Ms. Gersdorf she had fallen on her knee. Ms. Gersdorf got a chair for the claimant to sit on. (Ex. 7, p. 21) Claimant informed Ms. Gersdorf she needed to go to the emergency room, and Ms. Gersdorf went to get her truck to take claimant to the emergency room. (Ex. 7, p. 25) Ms. Gersdorf said claimant was favoring one leg and was able to get into her truck without help. (Ex. 7, p. 40) Ms. Gersdorf dropped claimant off and went back to work. Ms. Gersdorf said she looked in the cooler after she returned from the hospital, did not see any standing water and commented that sometimes it is damp. (Ex. 7, p. 44) Ms. Gersdorf said that she spoke to Jones Regional Medical Center that afternoon when they called about performing a drug test on claimant, and she told them not to perform drug testing. (Ex. 7, p. 29) Ms. Gersdorf testified that Mr. Danneman received a call after the accident requesting payment for her refill of prescription pain killers. (Ex. 7, p. 32)

Claimant had an MRI of her right knee on June 24, 2016. (Tr. p. 52) Claimant was then seen by Dr. Pape. Claimant testified that a nurse case manager made the appointment for her to be seen by Dr. Pape. (Tr. p. 52)

Claimant testified Dr. Pape told her she would not be able to work for a time after the May 1, 2017 surgery and released claimant from care on July 18, 2017. (Tr. p. 61) Claimant's primary care physician also provided injections to claimant's right knee. (Tr. p. 81)

Claimant said that Dr. Pape recommended a total right knee replacement. (Tr. p. 54) Claimant testified that Dr. Pape told her he would not perform the surgery until she had her dental problems fixed and that she had stopped smoking. (JE 9, p. 105) Claimant has had some, but not all of her dental work done and had not started any smoking cessation program at the time of the hearing. (Tr. p. 55)

Claimant's last day of work at McOtto's was July 31, 2016. (Tr. p. 76) Claimant filed for unemployment benefits and was denied. Claimant also filed a civil rights complaint which was dismissed. (Ex. D) At the time of the hearing claimant was receiving Social Security Disability benefits. Claimant testified that she was receiving Social Security Disability primarily due to her mental conditions. (Tr. p. 63; Ex. I, deposition p. 7) The Social Security determination showed that claimant has had significant medical health issues including borderline personality disorder, PTSD and

major depressive disorder that have led to terminations, a restraining order and had a significant inability to interact with coworkers. (Ex. C, p. 20)

Claimant agreed that on April 5, 2016 she went to her physician, Brian Meeker, D.O. concerning her upper body symptoms. (Tr. pp. 36, 89) On April 5, 2016 Dr. Meeker noted claimant was evaluated for pain that claimant reported when claimant started her job as a prep cook and became worse over the last three weeks. (Joint Exhibit 6, p. 51) Dr. Meeker's impression was,

1. Minimal anterolisthesis of C4 on C5.
2. Mild degenerative changes as described above.

(JE 6, p. 53) Claimant said that she told Amber Curby (Amber was a day manager. Tr. p. 93) that she wanted to go and see her doctor, as she did not know if something had happened at work. (Tr. p. 37) Claimant denied she told Amber she thought she had gotten hurt at work. (Tr. p. 90) Claimant said she returned to work after seeing Dr. Meeker, and Amber, John Danneman and Todd Danneman were present. Claimant said that she was presented with a document in the meeting and did not agree with the contents and that she crossed off portions of the document and then signed the document. (Tr. pp. 38, 39)

Claimant said she saw Joseph Chen, M.D. only once and that was before her right knee arthroscopic surgery. Claimant said she has never seen or been treated by Mark Kirkland, D.O. (Tr. p. 57)

John Danneman, was the owner of McOtto's in May 2016. (Tr. p. 93) He was in the kitchen on May 10, 2016. Mr. Danneman testified that he thought Ms. Gersdorf provided a chair for claimant when claimant came out of the cooler. Mr. Danneman said that Ms. Gersdorf told him she was getting her truck for claimant. Mr. Danneman said claimant jumped up from the chair and followed Ms. Gersdorf out the door. (Tr. p. 96) Mr. Danneman said that Ms. Gersdorf took claimant to Jones Regional Medical Center. Mr. Danneman said claimant had no trouble getting into Ms. Gersdorf's pick-up truck. After claimant left, Mr. Danneman went to look at the cooler. Mr. Danneman said there was no water on the floor near the entrance or where you would turn right, but there was some about 10-feet to the left. (Tr. p. 97) Mr. Danneman did not observe that claimant's pants were wet or that claimant was wet. (Tr. p. 101) Mr. Danneman said he examined the cooler after claimant went to the hospital and did not observe any wet spot near where claimant said she fell. (Ex. 6, p. 30) Mr. Danneman said he received a call from a doctor in the emergency room asking why the claimant was there, and he told the doctor it was policy to have workers examined whenever they have any type of injury. (Tr. p. 102)

Mr. Danneman testified that a week before May 11, 2016 claimant contacted Amber, and Amber contacted him about claimant wanting to get pain medication. Mr. Danneman said claimant asked him to go over to Jones Regional Medical Center and tell them she had a work injury. Mr. Danneman said he asked claimant if she was hurt at work and claimant said she was not hurt at work. Mr. Danneman said he told

claimant he was not going to lie so she could get pain medication. (Tr. p. 102; Ex. 6, p. 14)

Mr. Danneman testified that he was unaware the records showed swelling in the area of claimant's knee when called by the Jones Regional Medical Center Emergency Room doctor or that the records from Work Well showed bruising six days after the incident. (Tr. p. 104)

Claimant was seen on May 10, 2016 by Blaine Houmes, M.D. at the Jones Regional Medical Center Emergency Department. Claimant reported she slipped in a cooler and dropped hard on her right knee and hands. (JE 1, p. 11) Dr. Houmes recorded that claimant was carrying some onions to a cooler when claimant slipped. Claimant reported she heard a pop in her right knee with pain as well as numbness and tingling in her palms. (JE 1, p. 3) An x-ray of the knee showed, "No acute bony abnormality Identified." (JE 1, p. 6) Claimant was provided a right knee immobilizer. Claimant was assessed with, "Sprain of collateral ligament of right knee, initial encounter" and advised to follow up at Work Well. (JE 1, p. 7)

On May 16, 2016 claimant was seen by Jenny Butler, M.D. at Work Well. Claimant reported to Work Well she slipped walking in the cooler with a bag of onions and fell and landed on her outstretched hands and right knee. (JE 2, p. 21) During claimant's examination Dr. Butler wrote, "The right knee has a small joint effusion compared to the left knee. There is no warmth or redness. She does have a small yellow discoloration bruise at the medial distal right knee" and her assessment was, "Right knee contusion and effusion." (JE 2, p. 22) Dr. Butler recommended claimant return to work with the ability to sit and elevate her leg. Dr. Butler recommended only anti-inflammatories as treatment for pain. (JE 2, p. 22)

Claimant saw Dr. Meeker on May 17, 2016 due to her knee pain. Dr. Meeker noted he was not going to provide her hydrocodone. Dr. Meeker noted claimant has for sure an MCL sprain and has signs or symptoms of a torn medial meniscus. (JE 6, p. 55)

Dr. Butler saw claimant on May 23, 2016. Claimant reported no improvement. Claimant informed Dr. Butler that Mr. Danneman saw her fall at work. Dr. Butler called Mr. Danneman who told her he did not see her fall. (JE 2, p. 23) Dr. Butler recommended physical therapy. On May 31, 2016 claimant had not been approved for physical therapy by the defendants. Dr. Butler requested claimant have physical therapy twice a week for four weeks and claimant's restriction were lessened so that claimant could carry 20 pounds with sit-down breaks for 15 minutes every two hours. (JE 2, p. 24) On June 21, 2016 claimant continued to complain of knee pain that restricted the activities at work and home when she went to Work Well. On that date Angela Greif, M.D. noted a concern that claimant may have a medial meniscal tear and recommended an MRI. (JE 2, p. 26) The defendants authorized claimant to have an MRI on June 21, 2016. (JE 1, p. 12) Dr. Greif's assessment on June 28, 2016 after the results of the MRI were reviewed was, "Right knee contusion with suprapatellar fat pad impingement syndrome." (JE 2, p. 27) Dr. Greif recommended a continuation of

restrictions and physical therapy. (JE 2, p. 28) On August 8, 2016 Dr. Greif noted claimant had been receiving physical therapy without improvement of her pain. Dr. Greif made a referral for an orthopedic evaluation. (JE 2, p. 30) Claimant testified that the referral was facilitated by a nurse case manager of the defendants. (Ex. I, depo pp. 42, 43)

Claimant was evaluated at physical therapy on June 7, 2016 by Jenna Stelken, PT. Ms. Stelken performed specific knee testing. Ms. Stelken's clinical impression was,

> City is a 54 y.o. female presenting with R knee sprain. Unable to rule out meniscal or LCL/MCL involvement via special testing at this time. Impairments include R knee and hip weakness, painful ROM, decreased activity tolerance, and impaired functional mobility. Her functional outcome measures indicate moderate levels of limitation. She is appropriate for skilled physical therapy to address the above impairments and decrease pain to allow return to PLOF including full work activities.

(JE 3, p. 35) On October 10, 2016 Ms. Stelken noted claimant had 11 sessions. Ms. Stelken noted improvements in gait, strength and activity tolerance; claimant's pain had made very minimal progress. (JE 3, p. 39)

On September 1, 2016 Dr. Pape examined claimant. Dr. Pape noted claimant's right knee complaints were consistent with an anterior knee contusion with ongoing patellofemoral dysfunction. (JE 8, p. 78) On that date he provided a cortisone injection in the right knee. (JE 8, p. 79) The notes of this visit show that it was considered a workers' compensation case and that Jane Collins was the case manager. (Ex 8, p. 78) On October 12, 2016 Dr. Pape spoke to claimant about treatment options including pain management or diagnostic arthroscopy. (JE 8, p. 80) On April 18, 2017 claimant and Dr. Pape agreed to proceed with an operation on her knee. (JE 8, p. 82) On May 1, 2017 Dr. Pape performed surgery on claimant's ring knee. Dr. Pape's postoperative diagnoses was,

> 1. Grade 2-4 chondral fissure of undersurface of right patella.
> 2. Right knee posterior horn medial meniscus tear, leading edge.
> 3. Right grade 2-4 chondral fragmentation of medial femoral condyle.

(JE 7, p. 70)

Claimant was unable to work from May 1, 2017, the day of her surgery until released by Dr. Pape on July18, 2017 to return for care on an as-needed basis. (JE.8, p. 84)

On October 12, 2017 Dr. Meeker provided a right knee injection after diagnosing claimant with pes anserine bursitis of right knee. (JE 6, p. 68)

On December 6, 2017 claimant returned to Dr. Pape complaining of her knee condition worsening. Dr. Pape wrote,

> It is my impression the patient's right knee complaints are consistent likely with underlying chondral irritation of primarily the medial compartment. I've discussed with the patient further options for care and I think that it would be reasonable to proceed with Synvisc as she has had limited improvement with the use of cortisone. The potential for further care including knee arthroplasty in the future was discussed. Questions were invited and answered. Patient would like to proceed in this manner.

(JE 8, p. 86) On May 3, 2018 Dr. Pape wrote claimant's attorney stating that it would be reasonable for claimant to have a right total knee arthroplasty. (JE 8, p. 89) Dr. Pape also wrote that claimant's work injury accelerated the need for a knee arthroplasty. (JE 8, p. 89) On June 19, 2018 Dr. Pape noted claimant had considerable discomfort about the medial aspect of her knee and recommended claimant be fitted with a short hinged knee brace. (JE 8, p. 90)

On December 12, 2016 Joseph Chen, M.D. performed an independent medical examination (IME) of claimant. (Ex. A, pp. 1–8) Dr. Chen wrote,

> She most likely had a right knee contusion but this condition should have resolved but unfortunately now has developed into a chronic pain condition. Records from UIHC and outside records indicate that she has a history of PTSD, anxiety, depression, headache, alcohol use which indicate that she was at high risk for developing chronic pain.

(JE 4, p. 45; Ex. A, p.4) Dr. Chen said claimant was at maximum medical improvement (MMI) and claimant had no ratable impairment according to the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition. (JE 4, p. 45; Ex. A, p. 4) On October 31, 2018, Dr. Chen wrote that he disagreed with Dr. Pape's opinion that claimant's work injury accelerated claimant's need for total knee arthroplasty. (Ex. A, p. 7) Dr. Chen said that his experience in seeing patients with predominantly chronic patellofemoral knee pain without severe changes of grade 4 knee osteoarthritis on x-ray, who subsequently undergo total knee replacement, have poor outcomes. Dr. Chen did not consider the total knee replacement as medically necessary treatment for claimant's May 10, 2016 work injury. (Ex. A, p. 8) On March 18, 2019 Dr. Chen authored another letter. Dr. Chen acknowledged Dr. Pape's operative note indicated Dr. Pape saw grade 2-4 chondral fissuring. Dr. Chen wrote,

> My opinion is that while her articular cartilage may have grade 2-4 changes, Ms. Wheeler's bony architecture has sufficiently deteriorated with osteophyte formation or subchondral sclerosis that would make total knee arthroplasty a reliable procedure in helping her patellofemoral or medial knee pain.

(Ex. A, p. 10) Dr. Chen's opinion is that claimant's work injury may have led to a simple knee contusion, but did not aggravate any underlying condition. (Ex. A, p. 10)

In a response to a November 5, 2018 letter from claimant's attorney, Dr. Pape commented on the report of Dr. Chen. Dr. Pape did not agree with Dr. Chen's conclusions. Dr. Pape noted claimant had severe medial joint space loss or findings of grade 4 osteoarthritis. Dr. Pape wrote that it was his opinion that claimant's work injury of May 10, 2016 exacerbated her underlying knee conditions. (JE 8, p. 94) On January 8, 2020 Dr. Pape provided claimant with a 5 percent lower extremity rating for her right knee. (JE 8, p. 98)

On October 17, 2019 Dr. Kirkland completed a "check-box" report at the request of the defendants. Dr. Kirkland reviewed medical records but did not examine clamant. (Ex. B, p. 13) Dr. Kirkland agreed that claimant's fall at work would have resulted in a contusion of the knee that would cause temporary pain. (Ex. B, p. 14) Dr. Kirkland agreed that the fall at work would not have materially aggravated claimant's underlying knee condition and that claimant's knee condition was the result of the progression of her pre-existing knee condition. (Ex. B, p. 15) Dr. Kirkland did not believe claimant was a good candidate for a total knee replacement due to multiple comorbidities, including mental problems, emotional status (mental) and pain tolerance. (Ex. B, p. 16)

Claimant has requested payment of medical expenses that she has incurred. (Ex. 3, p. 4) The claimant is requesting payment for care at Vinton Family Medical Center, Physicians' Clinic of Iowa, P.C. (Dr. Pape), Mercy Medical Center and Gentle Dental.

Claimant has requested costs of $100.00 filing fee, $515.50 for three depositions transcripts, $33.50 for costs for service of subpoena, $75.00 for the report by Dr. Pape and $1,000.00 for a medical report and evaluation by Dr. Pape. (Ex. 4, p. 18)

Having found Dr. Pape's medical causation opinion most accurate and convincing and having found claimant's testimony as to her fall in the cooler credible I find claimant has shown she has an injury that arose out of and in the course of her employment.

RATIONALE AND CONCLUSIONS OF LAW

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.

The convincing medical evidence in this case is consistent that the fall on May 10, 2016 materially aggravated claimant's underlying knee condition.

Dr. Chen and Dr. Kirkland opined that the claimant's knee condition was not as a result of her fall on May 10, 2016. I do not find their opinions convincing. Dr. Chen's IME took place before claimant's surgery. Dr. Chen stated in his IME claimant had

developed chronic pain, but did not mention find that in his later reports. Dr. Chen wrote that he would recommend the total knee replacement unless there was grade 4 knee osteoarthritis. When Dr. Pape's surgical records showed grade 2–4 osteoarthritis Dr. Chen still would not recommend the total knee replacement.

Dr. Kirkland's check-box evaluation is not very comprehensive. He did not examine claimant. There is no explanation in this check-box exhibit as to why he disagreed with Dr. Pape. I did not find the evaluation convincing.

I do find the opinions of Dr. Pape to be convincing. Dr. Pape was originally selected by defendants to provide claimant treatment. Dr. Pape has provided extensive treatment to claimant. He performed surgery and saw the claimant's anterior knee. Dr. Pape clearly explained why he disagreed with Dr. Chen. The physical therapy treatment claimant received is consistent with an injury on May 10, 2016. (JE 3, p. 35)

The defendants question whether claimant actually fell in the cooler on May 10, 2016. Defendants attack claimant's credibility and assert that she has attempted to file a false workers' compensation claim and have Mr. Danneman aid her in this false claim.

I find the claimant was credible in her testimony about how she fell on May 10, 2016 while at work. The claimant's testimony was consistent with the hearing and with her deposition. Importantly, claimant was consistent in reporting her fall to various medical providers. The medical reports are all very consistent in how the fall was described. Ms. Gersdorf saw claimant using a rack to support herself when claimant came out of the cooler. Ms. Gersdorf helped claimant into a chair and saw claimant favoring her leg. Ms. Gersdorf then took claimant to the emergency room. The report from the emergency room found swelling and the report from Work Well showed bruising. The medical providers found that claimant had a contusion to her right knee. I find that claimant has proven that she had an injury that arose out of and in the course of her employment. The only questionable issue concerning the fall is whether there was water on the floor at the spot where claimant fell. Mr. Danneman said there was water in the cooler, but not in the area were claimant fell. Ms. Gersdorf said there was no standing water, but the cooler was sometimes damp. Claimant said that it was wet where she fell. Claimant was doing prep work when she went into the cooler and fell. Most likely the floor was damp. Regardless of whether or how wet the floor was, claimant fell while carrying a partial bag of onions in the cooler.

The fact that no one noticed the partial bag of onions in the cooler is not very significant. No one was looking for them after the incident. Claimant did not testify the onions were spilled when she fell. Ms. Gersdorf saw claimant favoring her leg. As to claimant's conduct of being able to walk out of the building and into the truck, her conduct is consistent with claimant falling and having a contusion on her knee.

As to the assertion that the claimant wanted to pursue a false workers' compensation claim, I do not find evidence convincing. No evidence was presented by any medical provider that claimant came in and requested false coverage of a workers' compensation claim. Claimant went to Dr. Meeker on April 5, 2016 and told Dr. Meeker

that her pain began when she started her job as a prep cook and was worse over the last three weeks. (JE 6, p. 51) There is nothing inappropriate in claimant reporting her symptoms to her doctor or in claimant supposing that her work caused her increased symptoms, even if there was no work accident. Assuming arguendo that that is when claimant called Mr. Danneman regarding getting her prescription covered by workers' compensation, the claim was not a false workers' compensation claim. The only report of a call to Mr. Danneman from the Jones Regional Medical Center is on May 23, 2016. The notes of that call reflect that Dr. Butler asked Mr. Danneman if he saw the claimant fall. (JE 2, p. 23) Ms. Gersdorf testified the call concerning a prescription occurred after claimant's May 10, 2016 injury. As stated above, the medical records are all consistent with a fall on her knee on May 10, 2016.

Dr. Chen reported that claimant at the time of his IME developed a chronic pain condition as a result of her knee injury. A chronic pain condition that developed due to the knee injury is causally related to her work injury. This is true if even if claimant's psychological conditions made claimant at high risk for developing chronic pain.

Dr. Pape has the most extensive knowledge of claimant's condition. I found his medical opinion concerning causation to be convincing. I found claimant has proven by a preponderance of the evidence that her knee condition was materially aggravated by her fall on May 10, 2016.

Where an injury is limited to scheduled member the loss is measured functionally, not industrially. Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983).

Claimant has an injury to her right knee. Dr. Pape provided a 5 percent lower extremity (leg) rating. I find claimant has a 5 percent impairment to her right leg. This entitles claimant to 11 weeks of permanent partial disability [220 x 5% = 11].

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

I find claimant is entitled to healing period benefits from May 1, 2017 through July 18, 2017.

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).

Where medical payments are made from a plan to which the employer did not contribute, the claimant is entitled to a direct payment. Midwest Ambulance Service v. Ruud, 754 N.W.2d 860, 867-68 (Iowa 2008) ("We therefore hold that the commissioner did not err in ordering direct payment to the claimant for past medical expenses paid through insurance coverage obtained by the claimant independent of any employer contribution.") Claimant has the burden to show the costs were reasonable.

Evidence in administrative proceedings is governed by section 17A.14. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence. The rules of evidence followed in the courts are not controlling. Findings are to be based upon the kind of evidence on which reasonably prudent persons customarily rely in the conduct of serious affairs. Healthcare is a serious affair.

Prudent persons customarily rely upon their physician's recommendation for medical care without expressly asking the physician if that care is reasonable. Proof of reasonableness and necessity of the treatment can be based on the injured person's testimony. Sister M. Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963).

It is said that "actions speak louder than words." When a licensed physician prescribes and actually provides a course of treatment, doing so manifests the physician's opinion that the treatment being provided is reasonable. A physician practices medicine under standards of professional competence and ethics. Knowingly providing unreasonable care would likely violate those standards. Actually providing care is a nonverbal manifestation that the physician considers the care actually provided to be reasonable. A verbal expression of that professional opinion is not legally mandated in a workers' compensation proceeding to support a finding that the care provided was reasonable. The success, or lack thereof, of the care provided is evidence that can be considered when deciding the issue of reasonableness of the care. A treating physician's conduct in actually providing care is a manifestation of the physician's opinion that the care provided is reasonable and creates an inference that can support a finding of reasonableness. Jones v. United Gypsum, File 1254118 (App. May 2002); Kleinman v. BMS Contract Services, Ltd., File No. 1019099 (App. September 1995); McClellon v. Iowa Southern Utilities, File No. 894090 (App. January 1992). This inference also applies to the reasonableness of the fees actually charged for that treatment.

The parties stipulated in the hearing report that the providers of medical care would testify that charges were reasonable. I find the medical expenses in Exhibit 3 to be reasonable.

While I find the expenses to be reasonable I do not award all of the expenses. The May 17, 2016 treatment by Dr. Meeker at Vinton Family Medical Clinic took place

when defendants were providing medical care at that time. It was not authorized by defendants. The claimant has not shown the treatment provided a better outcome than the care being offered by defendants. See Bell Brothers Heating and Air Conditioning v. Gwinn, 779, N.W.2d 193 (Iowa 2010).

I also do not award the medical expenses from Gentle Dental. Claimant stated that she needed the dental work before Dr. Pape would perform a total knee replacement. I did not see in Dr. Pape's medical records that he required this. Claimant has not carried her burden of proof for these medical expenses.

I do award claimant her medical expenses of Physicians' Clinic of Iowa and Mercy Medical Center. (Ex. 3. p. 4) I find these expenses are causally related to claimant's May 10, 2016 work injury.

Under Iowa law, the employer is required to provide care to an injured employee and is permitted to choose the care. Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997).

> [T]he employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See Iowa R. App. P. 14(f)(5); Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what care is reasonable under the statute is a question of fact. Id. The employer's obligation turns on the question of reasonable necessity, not desirability. Id.; Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983). In Pirelli-Armstrong Tire Co., 562 N.W.2d at 433, the court approvingly quoted Bowles v. Los Lunas Schools, 109 N.M. 100, 781 P.2d 1178 (App. 1989):

> [T]he words "reasonable" and "adequate" appear to describe the same standard.
>
> [The New Mexico rule] requires the employer to provide a certain standard of care and excuses the employer from any obligation to provide other services only if that standard is met. We construe the terms "reasonable" and "adequate" as describing care that is both appropriate to the injury and sufficient to bring the worker to maximum recovery.

The commissioner is justified in ordering alternate care when employer-authorized care has not been effective and evidence shows that such care is "inferior or less extensive" care than other available care requested by the employee. Long; 528 N.W.2d at 124; Pirelli-Armstrong Tire Co.; 562 N.W.2d at 437.

Claimant has requested that the defendants be ordered to provide a total knee replacement to be performed by Dr. Pape. I have found that the need for the total knee replacement was caused by the May 10, 2016 injury: The injury materially aggravated her preexisting knee condition. Defendants shall authorize Dr. Pape to provide medical care including a total knee replacement and appropriate after care. If Dr. Pape finds it is medically necessary for additional dental work and smoking cession the defendants shall pay these medical expenses.

Claimant's weekly earnings were $175.00 at the time of the hearing. This is below the 35 percent of the statewide weekly average, which was $285.00 as of May 2016. In such cases the law requires using the 35 percent of the statewide weekly earnings as claimant's earning and applying the marital status and number of exemptions to determine the weekly workers' compensation rate. See Iowa Code sections 85.34, 85.37 and 85.61(9).

The number of exemptions used to determine rate are the exemptions an employee could claim on his tax returns. Iowa Code section 85.61(6)(a) provides:

> a. An amount equal to the amount which would be withheld pursuant to withholding tables in effect on July 1 preceding the injury under the Internal Revenue Code, and regulations pursuant thereto, as amended, as though the employee had elected to claim the maximum number of exemptions for actual dependency, blindness and old age to which the employee is entitled on the date on which the employee was injured.

As claimant was legally married at the time of the hearing, not legally separated, she could claim her husband on her taxes. I find claimant is entitled to two exemptions in determining her weekly workers' compensation rate. Using the rate table in effect at the time of her injury claimant is entitled to $206.75.

Iowa Code section 86.40 states:

> **Costs.** All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states in part:

> **Costs.** Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be … (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, …

Using my discretion, I award claimant the $100.00 filing fee, service of subpoena fee of $33.50, $75.00 for a medical report, and deposition transcript costs of $517.50 for a total of $726.00.

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).

I find Dr. Pape's charge for his evaluation of claimant to be reasonable. The evaluation was subsequent to Dr. Chen and Dr. Kirkland's impairment rating. Claimant is entitled to the $1,000.00 charge.

ORDER

Defendants shall pay claimant eleven (11) weeks of permanent partial disability benefits at the weekly rate of two hundred six and 75/100 dollars ($206.75) commencing on May 17, 2016.

Defendants shall pay claimant healing period benefits from May 1, 2017 through July 18, 2017 at the weekly rate of two hundred six and 75/100 dollars ($206.75).

Defendants shall pay medical expenses as outlined in this decision. Those bills which have been paid by claimant's private insurance carrier shall be reimbursed directly to claimant.

Defendants shall pay claimant's IME costs in the amount of one thousand dollars ($1,000.00).

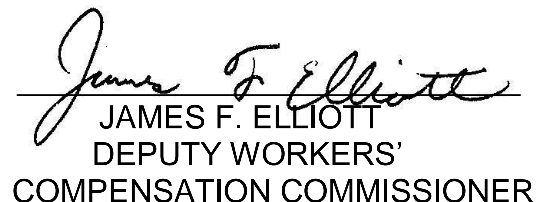
Defendants shall pay claimant costs in the amount of seven hundred twenty-six dollars ($726.00).

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 Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

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

Signed and filed this 22nd day of April, 2020.



JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Thomas Currie (via WCES)

Stephen Spencer (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.