BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
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WORKERS' COMPENSATION

ROXANNE FISHER, Claimant, vs. OZARK AUTOMOTIVE DISTRIBUTORS, INC., Employer, and SAFETY NATIONAL CASUALTY CORP., Insurance Carrier, Defendants.	File Nos. 5047012, 5047013 APPEAL DECISION Head Note No: 1100

Defendants Ozark Automotive Distributors, Inc., employer, and its insurer, Safety National Casualty Corporation, appeal from an arbitration decision filed on August 10, 2015. Claimant Roxanne Fisher responds to the appeal. The case was heard on March 12, 2015, and it was considered fully submitted in front of the deputy workers' compensation commissioner on April 3, 2015.

In File No. 5047012, alleged injury date of April 25, 2013, the deputy commissioner found claimant carried her burden of proof that she sustained an injury to her left knee which arose out of and in the course of her employment with defendant-employer. The deputy commissioner awarded claimant scheduled member permanent impairment of two percent of the left lower extremity, which entitles claimant to 4.4 weeks of permanent partial disability (PPD) benefits, commencing on February 24, 2014. The deputy commissioner ordered defendants to pay the providers, or reimburse claimant, for requested past medical expenses itemized in Exhibit 12, which the deputy commissioner found were for treatment necessitated by this injury.

In File No. 5047013, alleged injury date of October 3, 2013, the deputy commissioner found claimant carried her burden of proof that she sustained an injury to her right knee which arose out of and in the course of her employment with defendant-employer. The deputy commissioner awarded claimant healing period benefits for this injury from October 3, 2013, through January 30, 2014. The deputy commissioner awarded claimant scheduled member permanent impairment of two percent of the right lower extremity, which entitles claimant to 4.4 weeks of PPD benefits, commencing on

January 30, 2014. The deputy commissioner ordered defendants to pay the providers, or reimburse claimant, for requested past medical expenses itemized in Exhibit 12, which the deputy commissioner found were for treatment necessitated by this injury.

In both files, the deputy commissioner ordered defendants to reimburse claimant for the cost of the independent medical evaluation (IME) performed by Sunil Bansal, M.D., on January 9, 2015.

In File No. 5047012, defendants assert on appeal that the deputy commissioner erred in finding claimant carried her burden of proof that she sustained a work-related injury to her left knee on April 25, 2013. Defendants assert the deputy commissioner erred in awarding claimant scheduled member permanent impairment of two percent of the left lower extremity. Defendants assert the deputy commissioner erred in ordering defendants to pay the providers, or reimburse claimant, for requested past medical expenses itemized in Exhibit 12.

In File No. 5047013, defendants assert on appeal that the deputy commissioner erred in finding claimant carried her burden of proof that she sustained a work-related injury to her right knee on October 3, 2013. Defendants assert the deputy commissioner erred in awarding claimant healing period benefits from March 10, 2014, through August 14, 2014. Defendant asserts the deputy commissioner erred in awarding claimant scheduled member permanent impairment of two percent of the right lower extremity. Defendants assert the deputy commissioner erred in ordering defendants to pay the providers, or reimburse claimant, for requested past medical expenses itemized in Exhibit 12.

In both files, defendants assert on appeal that the deputy commissioner erred in ordering defendants to reimburse claimant for the cost of Dr. Bansal's IME.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, pursuant to Iowa Code sections 86.24 and 17A.15, I respectfully disagree with the deputy commissioner's findings and analysis and I reverse the arbitration decision in its entirety.

ISSUES ON APPEAL

I. Whether claimant sustained injuries to her left knee on April 25, 2013, and to her right knee on October 3, 2013, arising out of and in the course of her employment

II. The extent of claimant's entitlement, if any, to weekly temporary total/healing period benefits and permanent disability benefits.

III. Whether claimant is entitled to reimbursement for the cost of Dr. Bansal's IME.

FINDINGS OF FACT

Claimant, Roxanne Fisher, age 50 years old at the time of the arbitration hearing, worked for defendant-employer from June 12, 2000, until September 15, 2014, when she was taken off work due to restrictions for a shoulder injury which is not the subject of these proceedings. (Transcript page 18; Exhibit L, page 1) Claimant's job title was outboard material handler. This job required her to walk extensively and stand continually during work hours filling orders for auto parts, which items were heavy at times. (Tr. pp. 18-19; Ex. 10) Claimant asserts a cumulative trauma injury to her left knee on April 25, 2013, and another cumulative trauma injury to her right knee on October 3, 2013.

Arthroscopic surgery was performed on claimant's right knee by Mark Fish, D.O., an orthopedic surgeon, on December 18, 2013. (Ex. 6, p. 39) Arthroscopic surgery was performed on the left knee by William Jacobson, M.D., orthopedic surgeon and one of Dr. Fish's partners, on January 16, 2014. (Ex. F, p. 1) Claimant was released to return to work without restrictions for the right knee by Dr. Fish as of January 30, 2014. (Ex. E, p. 21) Claimant was released to return to work without restrictions for her left knee by Dr. Jacobson as of February 24, 2014. (Ex. E., p. 23) Defendants denied both claims for the knee injuries.

There is no dispute claimant had bilateral knee problems prior to the alleged injury dates. However, these prior problems before 2013 primarily involved the right knee. A clinical note for a medical evaluation on October 14, 1991, stated claimant had problems with her knees off and on for years, but only a diagnosis of chondromalacia of the patella for the right knee was made at that time. (Ex. H, p. 1) A clinical note for an evaluation on January 7, 1992, indicated another diagnosis of right knee chondromalacia with patella bursitis and effusion. (Ex. H, p. 2) Right knee pain was again noted on March 9, 1993. (Ex. H, p. 3) Medical records of Joshua Kimelman, D.O., orthopedic surgeon, show he provided extensive treatment from 2003 through 2011 for claimant's right knee, including several surgeries and eventually a total right knee replacement in 2008 with a revision of the knee replacement in 2011. (Ex. J) Narcotic medications were commonly prescribed during this treatment. (Id.)

Despite the medical history concerning her knees, claimant had no permanent restrictions limiting the use of her knees prior to her alleged injuries in this case.

Left Knee - Alleged Injury of April 25, 2013:

The first record in evidence of any significant treatment for claimant's left knee prior to the asserted left knee injury date is an office visit with claimant's family doctor, Ernesto Vazquez, M.D. on January 4, 2013. At that time, claimant received treatment for left knee pain, swelling, stiffness, locking, clicking and limping without instability and worsening symptoms. The assessment was osteoarthritis and the doctor injected the knee. Dr. Vazquez also prescribed pain and anti-inflammatory medications, but no work restrictions were given. (Ex. H, p. 4)

The next appointment for claimant's left knee was a follow-up visit with Dr. Vazquez on April 26, 2013, the day after the alleged injury date. The doctor noted knee pain, stiffness and locking, but no swelling or redness. Again, claimant reported her symptoms were worsening. Dr. Vazquez injected the knee again. (Ex. H, p. 13)

Dr. Vazquez evaluated claimant again on June 5, 2013, with complaints of increased pain and swelling in her left knee. Claimant reported a "torque injury while dancing." The assessment at that time also included hydrarthrosis of the knee. Dr. Vazquez ordered claimant to return in July for another injection. (Ex. H, p. 16)

Claimant returned to Dr. Vazquez on June 18, 2013, complaining of a gradual onset of moderate bilateral knee pain, described as dull and aching, non-radiating years ago and currently experiencing knee pain. (Ex. H, p. 17)

According to Exhibit R, which defendants assert is a summary of treatment for the left knee, claimant's left knee was evaluated by her prior orthopedist, Dr. Kimelman, on July 1, 2013. There is no record of this in evidence.

On July 10, 2013, claimant applied to defendant-employer for an intermittent or reduced schedule medical leave from July 10, 2013, to July 10, 2014, due to degenerative arthritis of her left knee. (Ex L, pp. 1-3) This request was supported by Dr. Vazquez stating claimant needed to be seen every three months and should not work more than eight hours per day or more than 40 hours per week, with no weekend work which is needed to allow claimant to rest, ice and elevate the left leg. (Ex. L, pp.4-5) Claimant testified Dr. Vazquez wanted to try this approach to see whether it would improve her symptoms.

Claimant returned to Dr. Vazquez on July 18, 2013, and complained of worsening left knee pain. Claimant reported she was not able to tolerate standing, and work activity was making her knee worse. Dr. Vazquez noted claimant's left knee pain began at least two years ago, but truly began worsening approximately one year ago, especially after the Fall of 2012. (Ex. H, p. 20) Dr. Vazquez noted the following in pertinent part:

> Pt's knee problem is worsening. Given the the [sic] toll that her work activity is taking on the knee. I feel it is appropriate that she pursue an evaluation through her workman compensation policy. I will defer further evaluation to them.

(Ex. H, p. 21)

Claimant then reported a work injury for her left knee and requested treatment pursuant to the advice of Dr. Vazquez. Claimant testified her injury claim and her request for treatment were denied by defendants because her knee condition was pre-existing. (Tr. pp. 24-25) Defendants did not challenge that testimony. Claimant then returned to Dr. Vazquez on August 28, 2013, reporting continued left knee pain and

requesting a referral to an orthopedic surgeon. (Ex. H, p. 22) Claimant also provided a letter from defendants denying her claim because her condition was pre-existing. Dr. Vazquez noted the following in pertinent part in his clinical note:

> That said, pt symptoms became acute worse approx [sic] April 2013 due to work activity.

(Id.)

Dr. Vazquez added the following:

> In review of pt's history, certainly she does have pre-existing knee arthritis however given the time line and the fact that a new injury can occur and be superimposed on her baseline condition. In light of this fact we will request orthopedic evaluation.

(Ex. H, p. 23)

On September 10, 2013, claimant was evaluated by William Jacobson, M.D., the treating orthopedic surgeon for her left knee. Claimant reported chronic knee pain and she reported she had been receiving cortisone injections for about three years. The evidence in this case only shows two injections by Dr. Vazquez since January 2013. Claimant also reported she had increased, but different, pain since April 2013 when she started working more hours. (Ex. E, pp. 1-3) Dr. Jacobson's assessment was osteoarthritis and an MRI was ordered.

Claimant returned on October 1, 2013, following the MRI, which Dr. Jacobson felt indicated underlying osteoarthritis. Dr. Jacobson suspected a medial meniscus tear. Treatment options were given and claimant chose to try more injections before any surgery. (Ex. E, p. 4)

On October 4, 2013, claimant returned to Dr. Jacobson reporting pain now in both knees, and stating her right knee "blew up" a few days before and she was having difficulty at work. (Ex. E, p. 6) Dr. Jacobson imposed a restriction limiting claimant to sedentary work. On the restriction form, Dr. Jacobson indicated "no" in the section concerning work-relatedness of the condition causing the restriction. (Ex. E, p. 8)

The first injection recommended by Dr. Jacobson was done on November 6, 2013. (Ex. E, p. 9) It is unclear whether claimant had any further injections for the left knee.

Dr. Jacobson's treatment for claimant's left knee condition continued on January 15, 2014, (Ex. E, p. 17) following claimant's right knee surgery by Dr. Fish on December 18, 2013. (Ex. 6, p. 39) At the January 15, 2014, evaluation, Dr. Jacobson noted the injection was not successful in relieving claimant's left knee symptoms. Claimant then agreed to undergo surgery on her left knee. (Ex. E, p. 17)

Arthroscopic surgery was performed on claimant's left knee by Dr. Jacobson on January 16, 2014. (Ex. F) Dr. Jacobson described this as a left knee arthroscopy with partial medial meniscectomy and chondroplasty of the medial femoral condyle. (Ex. F, p. 1)

Claimant followed up with Dr. Jacobson on January 28, 2014, and it was noted claimant's left knee was doing quite well with no numbness or tingling and only minimal pain complaints. (Ex. E, p. 19)

On February 18, 2014, claimant returned to Dr. Jacobson complaining of further left knee symptoms from her work activity. (Ex. 5, p. 35) Dr. Jacobson provided restrictions limiting standing, along with no bending, squatting, twisting and stair climbing. (Ex. 5, p. 37) Dr. Jacobson again indicated on the restriction form "no" as to work-relatedness of the condition. (Id.)

Another release form from Dr. Jacobson dated February 21, 2014, stated claimant was released to return to work without restrictions as of February 24, 2014. (Ex. 5, p. 38; Ex. E, p. 23) That release form also indicated claimant's left knee condition was not work-related. (Id.)

The last record from Dr. Jacobson is an office note dated April 8, 2014, in which he reported claimant was very happy with the results of the surgery, with only a little start-up pain which resolves quickly. Dr. Jacobson released claimant PRN for her left knee. (Ex. E, p. 24)

At the request of her attorney, claimant had an IME on January 9, 2015, with Sunil Bansal, M.D., occupational medicine physician. Regarding claimant's left knee, Dr. Bansal opined claimant suffered a work injury on April 25, 2013, coinciding with increased work activity. Dr. Bansal stated 14 years of work for defendant-employer cumulatively caused a considerable amount of stress on claimant's knees. (Ex. 7, p. 55) Dr. Bansal went on to state that pursuant to the AMA Guides, Fifth Edition, claimant sustained 21 percent permanent impairment of her left lower extremity due to the meniscectomy and an aggravation of her degenerative joint disease. (Ex. 7, pp. 57-58) Dr. Bansal also recommended restrictions on the use of claimant's knees consisting of no lifting over 20 pounds occasionally, and 10 pounds frequently, no frequent bending, squatting, climbing, twisting, no standing more than 30 minutes, and no walking more than 20 minutes at a time. (Ex. 7, pp. 58-59)

At the request of defendants, claimant had an IME with Charles Clark, M.D., an orthopedic surgeon and tenured professor at the University of Iowa College of Medicine on January 15, 2015. (Ex. C & D) In his report, Dr. Clark stated claimant's left knee problems are not the result of her employment, but Dr. Clark conceded the employment may have temporarily aggravated claimant's significant degenerative arthritis. Dr. Clark did not believe this aggravation caused any additional permanent impairment. (Ex. C, pp. 4-5) In his IME report, Dr. Clark stated the following, in pertinent part, regarding claimant's left knee condition:

GENERAL COMMENTS

As is evident from my Clinic Note and the balance of this letter, Ms. Fisher suffers from significant/severe degenerative changes throughout a number of major joints in her body. All of us, to one extent or another, experience degenerative changes as we age. Degenerative changes and their age of onset are also a product of genetics, our work, our activities outside of work and other factors not fully understood in medicine. Unfortunately, Ms. Fisher's degenerative changes are advanced, significant and widespread. Those changes are somewhat atypical for a person of her age. The degenerative changes and related symptoms at issue here are Ms. Fisher's left knee and right knee. She also has significant degenerative changes affecting her left shoulder.

GENERAL COMMENTS CONCERNING HEALTHCARE RECORDS

The healthcare records I reviewed began with a Mercy Clinic note of 10-14-91. They continue through an 11-19-14 note of Dr. Schulte in which he rates Ms. Fisher's shoulder impairment.

PERTINENT HEALTHCARE RECORDS RELATING TO LEFT KNEE

Important records to consider in this regard are detailed in my IME/Clinic note from the WRIC at the UIHC. Included in these records are those related to the arthroscopic surgery on Ms. Fisher's left knee by Dr. William Jacobson on 01-16-14. During that surgery Dr. Jacobson performed a partial medial meniscectomy and a chondroplasty of the medial femoral condyle. In his operative note he describes the degenerative changes also noted on a preoperative MRI of that knee. *It is important to point out that Dr. Jacobson's note of 2-21-14 contains his opinion that the left knee injury is not work related.* Further it is interesting to point out that in his report of January 9, 2015 Dr. Sunil Bansal does not appear to mention the comment above from Dr. Jacobson's note of February 21.

. . .

INJURY TO LEFT KNEE AND TO RIGHT KNEE

Ms. Fisher reported to me, and her interrogatory answers affirm that she is of the belief that her work at Ozark Automotive (O'Reilly) was the cause of or precipitated her knee symptoms

. . .

<u>4-25-13 Left Knee</u>: Ms. Fisher is of the belief that due to increased hours at work, repetitive walking, kneeling and stooping caused her left knee pain to increase.

REVIEW OF RADIOGRAPHIC STUDIES

I reviewed the radiographic studies identified including images of the left shoulder and both knees. These studies reflect the significant presence of degenerative changes consistent with an advancement of the normal degenerative processes without any evidence of acute traumatic injury. The degenerative findings in her left knee and the left shoulder as well as the total knee replacement radiographs are described in further detail in my IME report from the WIRC at the UIHC. Note that all of the operative procedures on her right knee, including the total knee replacement were necessitated due to and a result of her significant/severe degeneration of this knee.

. . .

ANALYSIS AND ASSESSMENT

On the basis of my review of Ms. Fisher's records relating to her right knee and left knee, the radiographs relating to those areas, and the IME I performed, I am of the opinion, within a reasonable degree of medical certainty, that Ms. Fisher's left knee problems and subsequent treatment did not occur as a result of her employment and, likewise her right knee problems and subsequent treatment did not occur because of her employment at Ozark. I believe the alleged injuries *may* have resulted in a self-limited and temporary aggravation of her significant degenerative disease in her left knee and, likewise, *may* have resulted in a self-limited and temporary aggravation of the right knee which had had a total knee replacement and multiple other procedures which were ultimately the result of her severe degenerative disease in that knee.

Ms. Fisher suffers from early degenerative arthritic changes in the left knee, much more advanced degenerative disease in her left shoulder and severe degenerative arthritic changes in her right knee which had necessitated two arthroplasties (i.e. the unicompartmental replacement and the total knee replacement). These changes are *unrelated to her employment* and are the product of non-work factors described in the introductory portions of this letter. Ms. Fisher's employment activities as she described them to me and as I understand them, were not a substantial factor in the development of symptoms in the left knee or right knee, and the surgical care was not necessitated by her work activities. Rather the symptomatic as well as surgical treatment were performed as a result of her significant degenerative disease. Ms. Fisher's surgeon, Dr. Jacobson, reached the same conclusion in his note of 2-21-14 in regard to her right knee.

Work activities of the type described by Ms. Fisher can, under the right circumstances, aggravate an underlying degenerative condition such as that of Ms. Fisher. However, aggravations of this type are quite transient and temporary and subside with activity modification pursuant to physician orders. Under that circumstance, the patient usually rather quickly returns to his or her normal baseline condition. As a result, it is my opinion that even if work activities did in some fashion aggravate her underlying degenerative conditions described in the right knee and/or left knee – that period of aggravation would be temporary and of a short duration. Certainly the invasive surgical care which Ms. Fisher has received in these areas is not related to any theoretical temporary aggravation associated with her work at Ozark.

COMMENT ON FUNCTIONAL IMPAIRMENT

I use the AMA 5TH Edition Guides to Evaluation of Permanent Impairment for impairment rating purposes. However, in the case of Ms. Fisher, I believe that all of her current impairment is related to her underlying degenerative disease and not due to the self-limited, temporary symptoms in her knees following the above-described injuries to them. Hence, any impairment rating is secondary to her underlying degenerative disease and not these described work-related injuries and therefore, I have assigned no impairment ratings due to these injuries.

DR. BANSAL REPORT

I disagree with many aspects of Dr. Bansal's report, including the conclusions, concerning Ms. Fisher's knees. As a surgeon with extensive experience treating patients with virtually identical presentations and degenerative knees for over 30 years I am very familiar with the details and findings of Ms. Fisher's treating physicians. Her knees, because of advanced degenerative changes, were progressively aging over time. This is true of both knees, but especially the right knee which ultimately failed necessitating the total knee replacement, of which I have performed several thousand in my career and continue to regularly perform, including this past week. She noted, for example, to Dr. Moore, on 3-15-14 that she had had 7 surgeries on her right knee. The ongoing degeneration within her knee(s) is the cause of her problems – not her work activities. With or without her work at Ozark and simply as a product of the activities of daily living and the other described factors related to her degenerative arthritis, Ms. Fisher would have and did develop the left and right knee symptoms and would have required the care she received as shown in her healthcare records.

If in some hypothetical fashion there was a work or non-work flare up of either or both knees – I would expect it to be of short duration. Her

> surgeries were to correct the underlying degenerative condition, not relieve temporary/short term symptoms from a flare up.
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> Therefore, I disagree with Dr. Bansal's assignment of impairment related to these described work related injuries.
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> Dr. Bansal seems to imply that his biomechanical analysis is unique to Ms. Fisher's knees. Indeed, the majority of loads, including body weight, are transmitted through the medial compartment of the knee, but this is universally true of most patients. Such loads include much more than the activities performed at work including the activities of daily living over a lifetime. Further, genetic factors greatly influence degeneration of the knee as do a person's weight and many factors which are poorly understood.
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> Lastly, Dr. Bansal commented that because of her young age Ms. Fisher would likely require a revision of her total knee. This may be true, but would be unrelated to the described injuries.
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> CONCLUSION
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> In conclusion, I found Ms. Fisher to be cooperative and pleasant during my examination of her. Her complaints as described in this letter and in her medical records are related to and are a product of the degenerative changes in these three affected joints. Her present impairment(s) are not related to her employment and the need for care for these joints is not related to her employment. The surgical and other care Ms. Fisher has received was required as a result of the non-work-related degenerative changes she has experienced in these joints. Any symptomatic treatment in relation to these injuries was temporary and self-limited.

(Ex. C, pp. 2-6)

Relying on the views of Dr. Bansal, claimant attributes her work injury to the onset of overtime work beginning at the end of April 2013. Indeed, the records of defendant-employer show that this overtime began at that time and did not end until Dr. Vazquez limited claimant's work to 40 hours a week on July 10, 2013. (Ex. 0, as summarized in defendants appeal brief on page 9)

Based on the causation opinion indicated by Dr. Jacobson in his treatment records, and based on the detailed analysis of Dr. Clark contained in his IME report, I reverse the deputy commissioner's finding of a work-related left knee injury and I reverse the deputy commissioner's award of PPD benefits for the left knee.

Claimant certainly had significant left knee problems, but they began before January 2013, not with the increase in work activities beginning in April 2013. Dr. Jacobson repeatedly stated that the condition was not work related in reports to

defendant-employer. Admittedly, there is a brief reference to a work injury in Dr. Jacobson' October 4, 2013, office note. (Ex. E, p. 6) However, this was a one-time reference with no further elaboration and every time Dr. Jacobson addressed causation after October 4, 2013, he indicated the condition was not work-related.

Claimant testified she talked to both Dr. Jacobson and Dr. Fish about their denial of the work-relatedness of her knee conditions in their reports to defendant-employer. (Tr. pp. 66-67) Claimant testified she was told this is automatically done when the employer denies the work injury claim. (Tr. Id.) I am unable to rely on claimant's testimony in this regard for two reasons. First, there is no other evidence in the record to back up this claim. Also, claimant testified that after April 25, 2013, Dr. Vazquez increased her prescription for hydrocodone. (Tr. p, 28) However, review of Dr. Vazquez's records shows claimant's pain prescriptions for hydrocodone-acetaminophen and ibruprofen, began on January 4, 2013, and remained unchanged on April 25, 2013, and at all of the following visits during the remainder of 2013 and into 2014. (Ex. H, pp. 4-31; Ex. 2)

I am also unable to rely on the views of Dr. Vazquez, claimant's primary care physician, who clearly felt there was a work injury superimposed upon claimant's pre-existing degenerative arthritis, and who encouraged claimant to pursue this workers' compensation claim. Dr. Vazquez stated in his office note of July 18, 2013, that claimant had left knee problems which "began at least 2 years ago, but truly began worsening approx. approx (sic) 1 year ago and especially after Fall 2012." (Ex. H, p. 20) Dr. Vazquez did not explain why the "torque injury while dancing" reported by claimant on June 5, 2013, (Ex. H, p. 14) was not the cause of a significant aggravation of claimant's left knee condition.

Finally, although the opinions of Dr. Bansal were considered, I give greater weight to the causation opinions of Dr. Clark, who is a highly-experienced orthopedic surgeon who has treated hundreds of patients with conditions similar to claimant's and whose opinions (Ex. C) I find to be better reasoned, more logical, and more consistent with all of the medical evidence, than Dr. Bansal's opinions.

Consequently, I reverse the deputy commissioner's finding of a work-related left knee injury and I reverse the deputy commissioner's award of PPD benefits for claimant's left knee condition. I also reverse the deputy commissioner's order that defendants pay the providers, or reimburse claimant, for requested past medical expenses itemized in Exhibit 12, which the deputy commissioner found were for treatment necessitated by claimant's left knee condition.

Right Knee – Alleged Injury of October 3, 2013:

The first medical record of any significant treatment for claimant's right knee condition after her last visit with Dr. Kimelman in 2011 was on October 2, 2013, when claimant went to the emergency room at Mercy Hospital complaining of severe right knee pain. (Ex. 3, pp. 25-26)

When claimant was evaluated by Dr. Jacobson on October 4, 2013, claimant reported her right knee "blew up" at work. Dr. Jacobson recommended to claimant that she return to Dr. Kimelman at that time. (Ex. E, pp. 6-7) Claimant filed an injury report with defendant-employer on October 4, 2013, asserting an injury to her right knee on October 2, 2013, from working 16 hours on the grated floor mezzanine from September 30 through October 2, 2013. Claimant had been assigned to work in that area to accommodate physician-imposed work restrictions for her shoulder injury, which is not the subject of these proceedings. As discussed above, claimant's left knee injury claim was also denied by defendants.

After her claim for her right knee was denied, claimant sought treatment for that condition initially with Dr. Vazquez on October 7, 2013. (Ex. H, pp. 24-26) Dr. Vazquez noted severe right knee pain from an injury at work and, in a letter to defendants dated October 16, 2013, Dr. Vazquez stated claimant injured herself at work walking on uneven surfaces. Dr. Vazquez stated it was medically necessary for claimant to remain off work due to this injury until November 4, 2013. (Ex. 2, p. 12) Dr. Vazquez extended the off-work period to December 2, 2013, in another letter dated October 31, 2013. (Ex. 2, p. 13)

In an opinion form prepared by claimant's counsel, Dr. Jacobsen agreed on October 24, 2013, with the proposition that claimant's prior right knee condition was materially and substantially aggravated by her work at defendant-employer and he stated claimant was off work due to that aggravation. However, Dr. Jacobson indicated the aggravation would be temporary and it would not accelerate the degenerative condition. (Ex. 5, p. 30)

On November 25, 2013, claimant began treating with Mark Fish, D.O., Dr. Jacobson's partner, for her right knee complaints. Claimant stated to Dr. Fish that she did well for two years after her second knee replacement surgery until she was working on an incline at defendant-employer's place of business. (Ex. E, p. 11) Dr. Fish was unsure of the cause of claimant's pain and ordered diagnostic testing. (Ex. E, p. 13) However, Dr. Fish took claimant off work until her next appointment. As did Dr. Jacobson regarding claimant's left knee condition, Dr. Fish in the report to the employer said "no" in the section concerning work-relatedness of claimant's right knee condition. (Ex. E, p. 10)

On December 18, 2013, Dr. Fish performed a right knee arthroscopy with synovectomy. (Ex. 6, p. 39) Drs. Bansal and Clark report that during this surgery, Dr. Fish removed scar tissue from inside the knee compartment and claimant agrees. (Tr. p. 42) On December 30, 2013, claimant was seen by a physician's assistant in Dr. Fish's office and claimant was found to be doing well. (Ex. E, p. 15)

Claimant was seen by Dr. Fish on January 30, 2014, and the doctor noted claimant was happy with the surgery and her pain was completely resolved. Dr. Fish noted claimant's right knee pain was resolved. Dr. Fish discharged claimant from care and he released claimant to return to work without restrictions. (Ex. E, p. 21) There is

no evidence in the record that claimant returned to Dr. Fish at any time after January 30, 2014.

When Dr. Bansal evaluated claimant's left knee, he also evaluated claimant's right knee. Dr. Bansal opined claimant's work on grated flooring over a three-day period caused hydrarthrosis, necessitating a synovectomy. (Ex. 7, p. 57) Although Dr. Bansal admitted the AMA Guides, Fifth Edition, do not provide a rating for a synovectomy, he believed such a surgery is similar to a meniscectomy and he provided a two percent impairment rating for claimant's right lower extremity. (Ex. 7, p. 58)

Dr. Clark also evaluated claimant's right knee in addition to her left knee on January 15, 2015. As discussed above at pages 7-11, Dr. Clark stated claimant's right and left knee conditions were not caused by claimant's employment with defendant-employer and Dr. Clark stated while claimant's work may have aggravated both knees, such aggravations would only have been temporary. (see, e.g., discussion above at pp. 7-11)

With regard to the right knee only, Dr. Clark stated the following in his report, in pertinent part:

> PERTINENT HEALTHCARE RECORDS RELATING TO RIGHT KNEE
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> Ms. Fisher has a complex history of problems related to her right knee. She had received multiple intra-articular injections in this knee. In 2003 Dr. Kimelman performed a right knee arthroscopy. On October 20, 2008 she had uni-compartmental knee replacement by Dr. Kimelman. On November 19, 2008 she had an arthroscopy of the right knee and on December 29, 2008, she had manipulation under anesthesia of the right knee; both procedures were performed by Dr. Kimelman. Because of continued problems with her right knee she underwent a revision procedure converting her right uni-compartment knee to a total knee replacement on June 13, 2011 by Dr. Kimelman. During this procedure Dr. Kimelman performed a synovectomy in addition to the knee replacement. In his operative note for that procedure he noted a brownish discoloration and thickening of the synovium. Such findings are typical in a knee with prior surgery. Ms. Fisher was seen by Dr. Mark Fish on 11-25-13. In his note he commented that he was not completely sure of the source of her pain. He further pointed out that it was not uncommon to have some residual pain after knee replacement surgery. He subsequently performed an arthroscopic debridement of her right knee. As previously mentioned it is common to see scarring in a previously operated knee and in this instance Ms. Fisher had had two previous arthroscopies and two previous open surgical procedures on that knee. Hence, it is expected that one would have a substantial amount of scarring in that knee. Dr. Bansal describes in his report the significant scar tissue found during the right knee surgery in December 2013 and further commented that this was

> determined to be *cause* of the problem; I agree! As previously mentioned such scar tissue is expected to be present in the knee, especially considering all of the previous surgery which Ms. Fisher had had. The scar tissue is *not related* to her alleged injury in October 2013.
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> . . .
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> INJURY TO LEFT KNEE AND TO RIGHT KNEE
>
> Ms. Fisher reported to me and her interrogatory answers affirm that she is of the belief that her work at Ozark Automotive (O'Reilly) was the cause of or precipitated her knee symptoms
>
> 10-3-13 Right Knee: She reported in interrogatory answers and to me that on October 3, 2013 she was walking up and down stairs at work which resulting in increased right knee pain. She is of the belief that repetitive walking, kneeling and stooping caused her knee pain to increase. She also commented that her work on a grated floor surface for three consecutive days brought on symptoms.

(Ex. C, p. 3)

Based on the excerpt from Dr. Clark's report immediately above, also based on the excerpts from Dr. Clark's report at pages 7-11 above, and also based on the causation opinion indicated by Dr. Fish in his treatment records (Ex. E, pp. 10, 14; Ex. 5, p. 32), I reverse the deputy commissioner' finding of a work-related right knee injury and I reverse the deputy commissioner's award of PPD benefits for claimant's right knee.

For the same reasons stated above at page 12, I am unable to accept claimant's testimony regarding the alleged reasons for Dr. Fish's denial of the work-relatedness of claimant's right knee condition contained in his reports to defendant-employer.

Also, the causation views of Dr. Vazquez and Dr. Bansal are clearly less convincing than those of Dr. Clark. As stated above, Dr. Clark, is a highly-experienced orthopedic surgeon who has treated hundreds of patients with conditions similar to claimant's condition, and I find his report (Ex. C) to be better reasoned, more logical and more consistent with all of the medical evidence than Dr. Bansal's report or Dr. Vazquez's causation opinions.

Consequently, I reverse the deputy commissioner's finding of a work-related right knee injury and I reverse the deputy commissioner's award of PPD benefits for claimant's right knee condition. I also reverse the deputy commissioner's order that defendants pay the providers, or reimburse claimant, for requested past medical expenses itemized in Exhibit 12, which the deputy commissioner found were for treatment necessitated by claimant's right knee condition.

Finally, I also reverse the deputy commissioner's order that defendants pay the cost of Dr. Bansal's IME.

Iowa Code section 85.39 states the following, in pertinent part:

> 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, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination.

(Iowa Code section 85.39)

In this case, before Dr. Bansal's IME took place, both Dr. Jacobson and Dr. Fish expressed the opinion that claimant's right and left knee conditions were not work-related. However, both Dr. Jacobson and Dr. Fish were treating physicians retained by claimant to provide treatment. Dr. Jacobson and Dr. Fish were not physicians retained by defendants. Therefore, the opinions of Dr. Jacobson and Dr. Fish do not trigger claimant's entitlement to have defendants pay for an IME by a physician of claimant's choice.

Also, Dr. Bansal's IME took place on January 9, 2015. (Ex 7, p. 42) Defendants' IME of claimant by Dr. Cook did not take place until January 15, 2015, six days after Dr. Bansal's IME. Therefore, pursuant to DART v. Young, 867 N.W.2d 839 (Iowa 2015), which held that the language of Iowa Code section 85.39 must be strictly applied, claimant cannot recover the cost of Dr. Bansal's IME from defendants because Dr. Cook's IME did not take place until after Dr. Bansal's IME.

CONCLUSIONS OF LAW

The claimant has the burden of proving by of 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.

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W. 2d 368 (Iowa 1985).

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 treating physician's opinions are not to be given more weight than a physician who examines the claimant in anticipation of litigation as a matter of law. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404.408 (Iowa 1994); Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

The extent of claimant's entitlement to permanent disability benefits is determined by one of two methods. If it is found that the permanent physical impairment or loss of use is limited to a body member specifically listed in schedules set forth in one of the subsections of Iowa Code section 85.34(2)(a-t), the disability is considered a scheduled member disability and measured functionally. If it is found that the permanent physical impairment or loss of use is to the body as a whole, the disability is unscheduled and measured industrially under Code subsection 85.34(2)(u). Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. Delong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

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). The courts have repeatedly stated that for those injuries limited to the schedules in Iowa Code section 85.34(2)(a-t), this agency must only consider the functional loss of the particular scheduled member involved and not the other factors which constitute an "industrial disability." Iowa Supreme Court decisions over the years have repeatedly cited favorably the following language in the 66 year old case of Soukup v. Shores Co., 222 Iowa 272, 277; 268 N.W. 598, 601 (1936):

> [t]he legislature has definitely fixed the amount of compensation that shall be paid for specific injuries . . . and that, regardless of the education or qualifications or nature of the particular individual, or of his inability . . . to engage in employment . . . the compensation payable . . . is limited to the amount therein fixed.

Our court has even specifically upheld the constitutionality of the scheduled member compensation scheme. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404 (Iowa 1994). Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Graves, 331 N.W.2d 116; Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C. M. Co., 194 Iowa 819, 184 N.W. 746 (1921). Pursuant to Iowa Code section 85.34(2)(u) the workers' compensation commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Co., 164 N.W.2d 84 (Iowa 1969).

Evidence considered in assessing the loss of use of a particular scheduled member may entail more than a medical rating pursuant to standardized guides for evaluating permanent impairment. A claimant's testimony and demonstration of

difficulties incurred in using the injured member and medical evidence regarding general loss of use may be considered in determining the actual loss of use compensable. Soukup, 222 Iowa 272, 268 N.W. 598. Consideration is not given to what effect the scheduled loss has on claimant's earning capacity. The scheduled loss system created by the legislature is presumed to include compensation for reduced capacity to labor and to earn. Schell v. Central Engineering Co., 232 Iowa 421, 4 N.W.2d 339 (1942).

The right of a worker to receive compensation for injuries sustained which arose out of and in the course of employment is statutory. The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the employee is not entitled to compensation except as provided by statute. Soukup, 222 Iowa 272, 268 N.W. 598.

In this case, claimant failed to carry her burden of proof to establish that she suffered a work-related injury to her left knee arising out of and in the course of her employment on April 25, 2013, as alleged. Claimant also failed to carry her burden of proof to establish that she suffered a work-related injury to her right knee arising out of and in the course of her employment on October 3, 2013, as alleged. As stated above, the awards by the deputy commissioner in both files are reversed.

Claimant also sought reimbursement for the cost of Dr. Bansal's IME. Such a reimbursement is governed by Iowa Code section 85.39 which 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 the initial evaluation to be too low. Pursuant to DART v. Young, 867 N.W.2d 839 (Iowa 2015), because defendants' IME of claimant by Dr. Cook did not take place until six days after Dr. Bansal's IME, claimant cannot recover the cost of Dr. Bansal's IME from defendants.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of August 10, 2015, is reversed.

For File No. 5047012 - alleged injury date of April 25. 2013 – left knee

Claimant shall take nothing from this file.

For File No. 5047013 - alleged injury date of October 3. 2013 – right knee

Claimant shall take nothing from this file.

Regarding both File Numbers:

Pursuant to rule 876 IAC 4.33, the parties shall pay their own costs of the arbitration proceeding, and claimant shall pay the costs of the appeal, including the cost of the hearing transcript.

Signed and filed this 1st day of February, 2017.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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