BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BARBARA ERNSTER, Claimant, vs. SECOND INJURY FUND OF IOWA, Defendant.	File No. 19003583.01 ARBITRATION DECISION Head Note Nos: 1108, 1402.40, 1803, 3200

STATEMENT OF THE CASE

Claimant, Barbara Ernster, filed a petition in arbitration seeking workers' compensation benefits from the Second Injury Fund of Iowa (Fund) as defendant, as a result of a stipulated injury sustained on March 5, 2019. This matter came on for hearing before Deputy Workers' Compensation Commissioner Erica J. Fitch on March 2, 2022 using videoconferencing platform, CourtCall. The record in this case consists of joint exhibits 1 through 10, claimant's exhibits 1 through 2 and 4 through 5, defendant's exhibits AA through GG, and the testimony of the claimant. The parties submitted post-hearing briefs, the matter being fully submitted on April 8, 2022.

ISSUES

The parties submitted the following issues for determination:

1. Applicability of the Second Injury Compensation Act and claimant's entitlement to benefits from the Fund; specifically,

2. Whether claimant sustained a first qualifying loss to the right arm in 1998;[1]

3. Whether claimant sustained a second qualifying loss to the left leg on March 5, 2019; and

4. If both qualifying losses are established, the extent of industrial disability benefits owed from the Fund.

[1] By post-hearing brief, the Fund elected to stipulate that claimant's 1998 right arm injury qualified as a first qualifying injury for purposes of claimant's claim against the Fund. The Fund also stipulated claimant sustained a 7 percent impairment to the right arm as a result of the 1998 injury.

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.

FINDINGS OF FACT

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

Claimant was 67 years of age at the time of hearing. (Transcript page 10) Claimant's relevant medical history includes a congenital heart condition which was treated via aortic valve replacement in 1964, hypertension, hyperlipidemia, and insulin-dependent diabetes. (Tr. pp. 15-16; Defendant's Exhibit FF, p. 12) In 1998, claimant fell on ice and injured her right arm. (Tr. p. 44) On January 29, 1998, claimant underwent right arm surgery performed by Arnold Delbridge, M.D. The procedure consisted of decompression of the first dorsal compartment, right carpal tunnel release, and injection of the right elbow for lateral epicondylitis. (Joint Exhibit 1) On February 24, 2010, claimant underwent a left knee MRI at the orders of Marilyn Lies, M.D.[2] The record notes a history of trauma on ice, with pain behind the left kneecap. The radiologist read the report as revealing a tear of the posterior horn and body of the medial meniscus, which is medially subluxed with MCL compression. (JE2) Claimant testified she does not recall undergoing this procedure or the reasoning behind its necessity. (Tr. p. 13)

Claimant has been diagnosed with dyslexia; she has adapted to her condition. She graduated high school in 1975. Thereafter, she attended 2 years of college. During this time, she pursued coursework regarding children and general education, although she obtained no degree. Claimant owns a home computer, but does not use it. She can use search engines and previously entered time in a computer program at work. Claimant's typing skills are limited to use of two fingers. (Tr. pp. 11-13; Claimant's Exhibit 5, p. 15)

Claimant's work history generally includes store clerk, waitress, bartender, and sales positions. (CE5, pp. 15-17; DEAA, p. 2) For 11 years, claimant owned and operated three video stores. Thereafter, she also owned and operated a bar, which closed after approximately 6 months. (Tr. pp. 81-82; CE5, p. 16) Following these entrepreneurial endeavors, claimant reentered the labor market performing sales of radio products and then traveling liquor sales. (CE5, p. 17; DEAA, p. 2) For approximately 17 years, claimant worked part time as a bartender at the Waterloo Convention Center. She ceased this work following her reported left knee injury on March 5, 2019. (CE5, p. 17; DEAA, p. 2)

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[2] Dr. Lies has served as claimant's primary care physician for a number of years. (See Tr. p. 60)

In August 2014, claimant began work at Waterloo Community School District (WCSD) as a paraeducator. (CE5, p. 17; DEAA, p. 2) The job description sets forth responsibility for assisting a teacher, including with educational programming, student monitoring and supervision, and various clerical duties. (DEAA, p. 8) Physical demands included: frequent standing, walking, and sitting; and occasional bending/stooping, pushing/pulling, reaching, climbing/stairs, driving, and lifting/carrying up to 25 pounds. (DEDD, p. 10) Claimant testified the physical demands of her job included: escorting children around the school; "chasing" after young children, as needed; working in the coat closet to ensure children were dressed in winter clothes, which involved lifting and maneuvering boxes of items weighing an estimated 25 to 50 pounds; and general standing, walking, squatting, and kneeling. (Tr. pp. 19, 21-22)

Shortly following her hire, claimant tripped at school while directing traffic and struck her knees. She reported the injury to her employer. While she scraped her knee, she did not require medical attention and symptoms resolved within one week. (Tr. pp. 13-15)

On October 29, 2014, Dr. Lies completed a physical examination and determined claimant capable of performing the duties for which she was hired at the Waterloo Community School District. (JE3)

On March 5, 2019, claimant suffered a fall at work when she was accidentally tripped by a small child. Claimant fell onto her knees and experienced immediate pain. A student alerted the school nurse and claimant was transported to the nurse's office via wheelchair. While there, claimant called a friend, who transported her for medical attention. (Tr. pp. 23-24) Claimant presented to urgent care and was evaluated by Marjorie Easter, ARNP. On examination, Nurse Easter noted left knee swelling, bruising, and pain to palpation. No signs of dislocation or fracture were noted. X-ray was negative. A left knee contusion was assessed and conservative treatment recommended. (JE4, pp. 4-5)

On March 11, 2019, claimant presented to UnityPoint Occupational Health for evaluation by Dr. Kenneth McMains. Claimant complained of left knee pain and swelling. (JE6, p. 16) Dr. McMains diagnosed chronic left bicompartmental disease with acute aggravation. He recommended a left knee MRI. (JE6, p. 17) In the interim, Dr. McMains ordered naproxen and a knee brace. Claimant was released to light duty work, under restrictions of seated only work, with no prolonged standing or walking. (JE6, p. 18)

Claimant underwent a left lower extremity MRI on March 19, 2019. The clinical history of the note cites a history of left knee pain with swelling after a fall on March 7, 2019. Left knee swelling and catching were also identified. The note describes no improvement with physical therapy, that claimant had not undergone surgery, and claimant had "no prior" history. (JE7, p. 23) The radiologist read the results as revealing:

> 1. Tear of the medial meniscus posterior root allowing the meniscus to partially sublux out of the joint space.

2. Extensive grade IV (out of IV) full-thickness cartilage loss involving the medial joint compartment, consistent with severe primary osteoarthritis.

3. Anterior cruciate ligament cysts, which can be symptomatic.

4. Grade III (out of IV) high-grade partial-thickness cartilage loss of the patellofemoral joint.

5. Large knee joint effusion.

(JE7, p. 24)

Claimant returned to Dr. McMains on March 19, 2019 with reports of improving pain, but continued decreased range of motion. (JE6, p. 19) Dr. McMains reviewed claimant's MRI and noted diagnoses consistent with the radiologist's impression. Dr. McMains referred claimant for orthopedic evaluation and noted claimant likely needed total joint replacement if cleared by cardiology. (JE6, p. 21) He left claimant's restrictions in place, including use of a knee brace with ambulation. (JE6, p. 22)

On March 20, 2019, claimant presented to Dr. Lies with complaints of left knee pain. Examination revealed very little heat and good range of motion, but some swelling. Dr. Lies reviewed claimant's MRI and recommended claimant undergo orthopedic evaluation for consideration of physical therapy. Dr. Lies described surgery as a last resort. (JE5, p. 6)

Pursuant to Dr. McMain's recommendation, claimant presented to Matthew Bollier, M.D. on April 11, 2019. Dr. Bollier noted claimant fell directly onto her left knee on March 5, 2019. Dr. Bollier also noted claimant reported falling on uneven ground and landing upon her left knee five years prior. Claimant indicated she had been diagnosed with a meniscal tear and treated conservatively. Conservative care resolved her complaints and claimant indicated she did not experience any pain or limitations prior to the March 2019 fall. Since the March 2019 fall, claimant reported continued but improved pain, worse with prolonged walking and stairs. Claimant also reported knee fatigue, but no instability. Finally, claimant reported one incident when her knee "locked," but she otherwise denied any catching or locking. (JE8, p. 25)

Dr. Bollier examined claimant and reviewed the March 5, 2019 left knee x-rays and March 19, 2019 left knee MRI. He opined the x-ray revealed osteoarthritis with medial compartment narrowing and the MRI revealed degenerative changes, without acute meniscus or ligamentous tear. Dr. Bollier opined claimant presented with improving left knee pain following "a flare of pain in the setting of osteoarthritis, subsequent to a fall." He further opined claimant's fall at work aggravated the underlying arthritis. (JE8, p. 28)

Dr. Bollier opined surgery was not indicated and ordered a course of physical therapy. Claimant declined an intra-articular corticosteroid injection. Dr. Bollier advised claimant to follow up in one month, at which time he anticipated claimant would have

achieved maximum medical improvement (MMI). (JE8, p. 27) He imposed activity restrictions of no kneeling or squatting, as well as the ability to alternate between sitting and standing as needed. (JE8, p. 28)

Claimant testified she believed Dr. Bollier entered this appointment without reviewing her medical records. (Tr. p. 26) She continued:

> He just looked at me and said, we are not paying for this knee replacement. Knee replacement? He said, you need to get that knee replaced. He said, it needs to be replaced, and we're not buy- -- we're not paying for it.
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> . . .
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> He told me that my parts – my body parts were already worn out and that I was old. He told me I was old. And I said, I already know that.

(Tr. pp. 26-27)

Claimant provided a recorded statement to United Heartland, the insurance carrier for WCSD, on April 12, 2019. Claimant stated she had seen Dr. Bollier the prior day, at which time Dr. Bollier indicated claimant was 64 years old and her "body was wearing out." (CE2, p. 11) She continued:

> He said when your body parts are already worn out that Workers' Comp should not have to pay. And I said I understand that, I said, but that's not what the doctor in Waterloo said when he sent me down here... He told me that the problems were triggered by the fall.

(CE2, p. 11)

On May 8, 2019, claimant was discharged from physical therapy. The therapist noted some minimal swelling and range of motion of 8 to 105 degrees, consistently limited into terminal knee extension and without much improvement. The therapist recommended a home exercise program to maintain available range of motion and strength. (JE10, p. 59)

Claimant returned to Dr. Bollier on May 10, 2019. At the time, claimant reported improved pain, but continued pain on the medial aspect of the knee with twisting. Claimant reported relief with therapy and use of the knee brace; she denied interest in knee injections. Claimant described a pain level of 4 on a 10-point scale. (JE8, p. 33) Following examination, Dr. Bollier assessed left knee pain, exacerbation of underlying osteoarthritis, improved with conservative care. He recommended continued lower extremity strengthening and bracing, as needed. Dr. Bollier also noted claimant could utilize other conservative care such as injections, over-the-counter and topical pain relievers, heat, and ice. (JE8, p. 34)

Dr. Bollier placed claimant at MMI and released claimant to return to work without restrictions. He opined claimant could require injections and knee replacement in the future, but opined the need for these treatments was not related to the March 2019 work injury. Based upon full and normal range of motion, no neurologic dysfunction, no instability, and the lack of another diagnosis-based basis, Dr. Bollier opined claimant sustained no ratable impairment to the lower extremity by the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition. (JE8, p. 35)

Claimant testified Dr. Bollier informed her that she should be able to walk without issue. Claimant indicated she protested and reported her kneecap was visibly out of place; she maintains Dr. Bollier then looked at her x-rays and admitted she was correct. She expressed belief that Dr. Bollier had not reviewed any of her records. (Tr. p. 29) Regarding the conclusion of this appointment, claimant testified:

> He was very angry when he left my office – their office. And his nurse came in – I know I didn't talk about this before, but the nurse came in and said, are you – are you familiar with Google? And I said yes. And she said, I think you need to Google this. And I said, Google what? She said, what your rights are and what they're not. She said, because you need to have that knee fixed, and he didn't even look at your records. His own nurse. I don't know if she's still there anymore.

(Tr. p. 29)

Claimant testified that following Dr. Bollier's appointment, she was not provided with further medical care. She testified she personally scheduled an appointment with another physician, but was prevented from meeting this physician when a nurse refused access upon learning an attorney was involved. (Tr. p. 30)

Claimant returned to full duty work at WCSD relative to the left knee for the remainder of the 2018-2019 school year. (Tr. pp. 64-65)

Claimant was admitted to the hospital on May 17, 2019 with complaints of shortness of breath, fatigue, chest pain, and swelling of the legs. Diagnoses included atrial fibrillation, hypertensive emergency, nonrheumatic aortic (valve) stenosis, acute pulmonary edema, abnormal levels of other serum enzymes, essential (primary) hypertension, and type 2 diabetes mellitus without complications. She underwent cardioversion on May 20, 2019 and was discharged on May 21, 2019. (JE9, pp. 38, 41-42)

On May 24, 2019, Dr. Lies authored restrictions limiting claimant to lifting of no greater than 10 pounds through the remainder of the school year. (JE5, p. 8)

Claimant returned to the emergency department on May 31, 2019 with symptoms consistent with possible elevated blood pressure. Symptoms had primarily resolved by the time of her evaluation. (JE9, p. 44)

On June 19, 2019, Dr. Bollier directed correspondence reiterating a diagnosis of left knee arthritis. He opined surgery was not currently indicated, but that claimant would require knee injections and knee replacement in the future. Dr. Bollier opined he did not believe claimant's need "for arthritis treatments" was related to her March 2019 work injury. He suggested claimant follow up with her primary care provider for referral to a joint replacement specialist. (JE8, p. 37)

Claimant returned to work at WCSD for the 2019-2020 school year. (Tr. p. 38) Claimant testified the principal informed her she was not required to lift children, transport them to the nurse, and "a lot of things." She testified they discussed that claimant would be limited to seated work. (Tr. p. 39) However, claimant testified the principal "neglected" to tell the staff of these accommodations and teachers were not pleased with her performance. (Tr. pp. 38-39) Claimant testified the principal approached her on two occasions and inquired when she planned to retire, which claimant testified the principal attributed to her altered gait. Claimant indicated she intended to work as long as possible. (Tr. pp. 39-40)

On September 5, 2019, claimant presented to the emergency department with complaints of increased left knee pain. Claimant reported pain at a level 8 on a 10-point scale, onset the prior day. Claimant reported she sustained a fall four months prior and recently began use of a new knee brace, which she believed worsened her pain. In describing her prior injury, claimant reported she "tore 'everything' in her knee." (JE9, p. 48) On examination, the provider noted no appreciable effusion, swelling, or erythema. Left knee pain was assessed, with muscle spasms treated via rest, ice, elevation, and over-the-counter medication. (JE9, p. 49)

Claimant presented to the emergency department on September 29, 2019 with complaints of chest pain, dizziness, palpitations, and shortness of breath. She was admitted and underwent cardioversion on September 30, 2019. (JE9, p. 50)

In March 2020, WCSD shut down due to the COVID-19 pandemic. While remaining an employee of WCSD, claimant did not perform any duties the remainder of the school year. (Tr. pp. 67-68)

On July 30, 2020, claimant presented to Dr. Lies for evaluation prior to cardioversion scheduled for the following day. Claimant requested a work excuse due to her health problems, noted by Dr. Lies as including heart issues, lung scarring, and diabetes. Combined with claimant's 65-year-old age, Dr. Lies described claimant as high risk for COVID-19 complications. Dr. Lies excused claimant from work through January 31, 2021. (JE5, p. 12)

In August 2020, claimant requested a leave of absence from WCSD due to COVID-19 concerns. Claimant requested time off through January 2021, at which time she would reevaluate her request. (DECC, p. 7)

At the referral of her counsel, on September 25, 2020, claimant presented to physiatrist, Farid Manshadi, M.D., for an independent medical evaluation. Dr. Manshadi

authored a report containing his findings and opinions dated October 12, 2020. Dr. Manshadi performed a records review, interview, and examination. (CE1, pp. 1-3) Claimant informed Dr. Manshadi her left knee gave out without warning, she must use railings to traverse stairs, she was unable to walk on uneven surfaces due to pain, and she utilized a brace for long-distance walking. (CE1, p. 2) Claimant reported constant knee pain, presently at a level 3, and at worst a level 10 on a 10-point scale. (CE1, p. 3) With respect to her right wrist, claimant reported reduced grip strength and reduced active range of motion. (CE1, p. 2)

On examination of the bilateral wrists, Dr. Manshadi found and noted limited right wrist active range of motion. On examination of the bilateral knees, Dr. Manshadi found left-sided moderate edema in comparison to the right side, decreased range of motion of the left knee, positive McMurray's test medially of the left knee, tenderness to palpation of the left medial and lateral joint lines, extremely painful left-sided patellar compression and gliding, antalgic gait on the left, and no heel strike on the left with ambulation. Dr. Manshadi opined claimant demonstrated reduced left knee range of motion and evidence of chondromalacia patella. (CE1, p. 3)

Following records review, interview, and examination, Dr. Manshadi opined claimant sustained a work-related injury to her left knee as a result of the March 5, 2019 work incident. Dr. Manshadi opined claimant's February 2010 left knee MRI revealed a medial meniscus tear, but no issues with respect to a loss of cartilage; he opined the loss of cartilage was documented in the MRI of March 2019 and was "apparently all new." (CE1, p. 3) He further opined claimant's cartilage loss with chondromalacia patella was a direct result of the work incident. Future treatment options were identified as corticosteroid injections, hyaluronic acid injections with therapy, and left knee arthroplasty, although claimant was not a surgical candidate due to heart disease. Dr. Manshadi opined claimant had achieved MMI relative to the work injury and assigned an impairment rating of 5 percent left lower extremity utilizing Table 17-31 of the AMA Guides, 5th Edition. Dr. Manshadi recommended permanent restrictions. For the left knee, Dr. Manshadi recommended: avoidance of kneeling or squatting on the left side; avoidance of repetitious climbing of stairs, crawling, or walking on uneven surfaces; and the ability to sit, stand, and walk as needed. (CE1, p. 4)

Review of the AMA Guides Table 17-31 identifies a rating methodology centered in arthritis impairments based on roentgenographically determined cartilage intervals. In consideration of the cartilage intervals in applicable joints, neither the knee or patellofemoral joint identifies a rating of 5 percent lower extremity corresponding to any cartilage interval. A footnote to the table sets forth a 5 percent lower extremity impairment is ratable under the following conditions:

> In an individual with a history of direct trauma, a complaint of patellofemoral pain, and crepitation on physical examination, but without joint space narrowing on x-rays, a 2% whole person or 5% lower extremity impairment is given.

Dr. Manshadi did not contemporaneously provide an impairment rating or recommend permanent restrictions relative to the right wrist condition. He subsequently did so via a letter dated July 6, 2021. Thereby, Dr. Manshadi opined claimant sustained a 7 percent right upper extremity impairment, utilizing the AMA Guides 5th Edition, Chapter 16, pages 466-469. Dr. Manshadi recommended permanent restrictions of avoidance of sustained gripping with the right hand and avoidance of vibratory tools. (CE1, p. 5)

On November 9, 2020, claimant presented to the emergency department with palpitations, slurred speech, and left-sided facial droop. It was determined claimant suffered an ischemic stroke. (JE9, pp. 53-54) Following emergency care, claimant agreed to discharge to a skilled nursing facility. (JE9, p. 55) Claimant represented she received rehabilitative care in that facility for approximately two months. (DEFF, p. 12) As of the date of hearing, claimant testified she continues to recover from the stroke and experiences eyesight issues and occasional right-sided body tingling. (Tr. p. 17)

In March 2021, claimant underwent a second aortic valve replacement. (Tr. pp. 16-17; DEFF, p. 12)

Shortly prior to hearing, claimant entered into an Agreement for Settlement with WCSD and its insurance carrier. Thereby, the parties to the settlement stipulated claimant sustained a work-related injury to her left knee which resulted in a permanent partial impairment of a 5 percent loss of the left leg, resulting in 11 weeks of compensation under Iowa Code section 85.34(p). Such benefits were stipulated to commence on May 10, 2019. The settlement was approved by the agency on March 3, 2022. (Agency File; DEGG, pp. 13-20)

Claimant has not returned to work at WCSD. Prior to the 2021-2022 school year, WCSD sent claimant a letter offering a position, should she be interested. Claimant has not returned to WCSD; she continued to express concerns regarding COVID-19. (Tr. pp. 70-72) Claimant also believes herself incapable of performing her job duties, particularly in the coat closet, as a result of her knee condition. (Tr. p. 41) She is uncertain if she remains an employee of WCSD; she has not received a discharge notice. (Tr. pp. 72-73) As of April 2021, Waterloo Community School District considered claimant employed as a full-time general education paraeducator, on leave of absence due to COVID-19. (DEBB, pp. 4-5) As of that date, WCSD represented light duty work was available to claimant at the same rate of pay as she earned on the date of her work injury; however, claimant had elected a leave of absence. (DEBB, p. 6)

Claimant did not return to part-time work as a bartender after the knee injury. Prior to the injury, she worked 10 hours per week at a rate of $15.00 per hour. She testified she is unable to return to this work due to lifting, pushing, standing, walking, squatting, and kneeling requirements. Claimant testified her heart and stroke conditions would not have interfered with continued bartending. (Tr. pp. 41-43, 51-52)

Claimant testified she has looked for work in the newspaper, but only located one potential job opportunity that she could perform. The posting involved sitting at the

hospital and distributing masks. She did not pursue the opportunity out of fear that non-compliant visitors would become violent if required to wear a mask. (Tr. pp. 43-44)

At the time of hearing, claimant considered herself to be retired; however, she claimed she would return to work if able to find the correct opportunity. (Tr. p. 77) Claimant receives monthly Social Security retirement benefits. (Tr. p. 74; CE4, p. 13) Claimant testified she applied for Social Security Disability benefits on two occasions. She reapplied after an initial denial, but is uncertain if she ever received such benefits. (Tr. pp. 74-76) From January to April 2021, Social Security benefits amounted to $822.00 monthly. Beginning May 2021, claimant received $970.00 monthly. (CE4, p. 13) At hearing, claimant testified she now receives approximately $1,100.00 monthly. (Tr. p. 76) Additionally, she began drawing her IPERS pension approximately one year prior to hearing. This benefit totals $100.00 monthly. (Tr. pp. 76-77) Claimant also receives food stamps. (Tr. p. 77)

Claimant testified she continues to experience symptoms of her left knee, including pain with walking and standing, aching, swelling, fluid retention, and what she described as a bone protruding from the side. She is able to stand and/or walk for approximately 10 to 15 minutes before needing to sit. She described her daily pain as a level 5, with a highest pain level of 10 on a 10-point scale. (Tr. pp. 31-33) Claimant testified she is unable to squat or kneel; when lifting, the knee "creaks and cracks," with pain on each of the "cracks." (Tr. p. 34) Claimant is not a candidate for knee replacement due to her heart condition. (Tr. pp. 30-31) Claimant testified she also experiences symptoms relative to her right arm, namely pain at the base of her right thumb, swelling, numbness, tingling, decreased motion, and difficulties with right-handed dexterity. (Tr. pp. 46-49) Claimant testified she drops items and was unable to hold new, larger bottles while bartending, stating this inability was "why [she was] not working at the convention center." (Tr. p. 48)

Claimant's demeanor at the time of evidentiary hearing did not independently raise questions about her credibility. However, claimant made a number of inflammatory statements regarding her interactions with and the care provided by Dr. Bollier. She maintained Dr. Bollier did not read or review her medical records and went so far as to testify that Dr. Bollier's own nurse confirmed his lack of attention to claimant's records. Claimant also maintained Dr. Bollier became angry with her during her course of treatment and did not notice a displaced kneecap until claimant prompted his review of x-rays. Nothing in the record corroborates claimant's position regarding Dr. Bollier. Further, the record demonstrates a similar pattern of exaggerated statements by claimant, such as stating the principal "neglected" to inform others of informal accommodations. Additional medical records also raise some question about the veracity of claimant's statements: claimant informed emergency department personnel that she "tore everything" in her knee as a result of the work injury; and claimant denied recollection of a prior knee MRI. When viewed together, these items and the remainder of the record lead me to question the veracity and accuracy of claimant's statements and testimony. Given this question, I am unable to find claimant is a credible witness.

CONCLUSIONS OF LAW

The first issue for determination is whether claimant sustained a second qualifying loss to the left leg on March 5, 2019.

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

Section 85.64 governs Second Injury Fund liability. Before liability of the Fund is triggered, three requirements must be met. First, the employee must have lost or lost the use of a hand, arm, foot, leg, or eye. Second, the employee must sustain a loss or loss of use of another specified member or organ through a compensable injury. Third, permanent disability must exist as to both the initial injury and the second injury.

The Second Injury Fund Act exists to encourage the hiring of handicapped persons by making a current employer responsible only for the amount of disability related to an injury occurring while that employer employed the handicapped individual as if the individual had had no preexisting disability. See Anderson v. Second Injury Fund, 262 N.W.2d 789 (Iowa 1978); 15 Iowa Practice, Workers' Compensation, Lawyer, Section 17:1, p. 211 (2014-2015).

The Fund is responsible for the industrial disability present after the second injury that exceeds the disability attributable to the first and second injuries. Section 85.64. Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467 (Iowa 1990); Second Injury Fund v. Neelans, 436 N.W.2d 355 (Iowa 1989); Second Injury Fund v. Mich. Coal Co., 274 N.W.2d 300 (Iowa 1970).

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).

In order to establish a second qualifying loss under the facts of this matter, claimant must establish a loss of use of her left leg as a result of the work injury. The approved agreement for settlement between claimant, WCSD, and its insurance carrier is not an adjudication on the merits of claimant's claim and the only preclusive effect of an approved agreement for settlement is upon the parties who entered into that agreement. The agreement for settlement does not establish the compensability of any injury or the extent of claimant's entitlement to disability benefits in a subsequent claim against the Fund. Grahovic v. Second Injury Fund, File No. 5021995 (App. Dec. Oct. 9, 2009).

To establish the requisite loss, claimant contends the left leg injury of March 5, 2019 resulted in a 5 percent impairment to claimant's left lower extremity. Claimant primarily relies upon the opinion of Dr. Manshadi to support her position. The Fund challenges the rating methodology used by Dr. Manshadi and relies upon the opinion of Dr. Bollier.

Dr. Manshadi referenced Table 17-31 of the AMA Guides as the basis of his impairment rating. Review of Table 17-31 reveals the only applicable method by which to result in a 5 percent rating under the facts of this case is via a method identified within the footnote. The footnote sets forth certain criteria, including a history of direct trauma and a complaint of patellofemoral pain, both of which are consistent with claimant's history of injury and ongoing complaints. However, in order to qualify for impairment rating via the footnote, there must also be the presence of crepitation on physical examination. In review of the entirety of the record, I am unable to locate any medical exhibit which references crepitus on physical examination. Dr. Manshadi's IME report itself does not reference crepitus on examination. While claimant testified she experiences "creaking" and "cracking," no medical record noted such findings as elements of their physical examination.

The Iowa Legislature has stated that in consideration of scheduled member functional disability, the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the AMA Guides, as adopted by the workers' compensation commissioner. Lay testimony or agency expertise shall not be utilized in determining functional loss. Iowa Code section 85.34(x). Administrative rule 876 IAC 2.4 recognizes the AMA Guides, 5th edition, as the basis for impairment ratings.

Dr. Manshadi's permanent impairment rating is based upon a specific methodology as identified in the footnote to Table 17-31 of the AMA Guides, 5th Edition. However, the record is devoid of a physical examination finding of crepitus, a requirement of the methodology. As a result, Dr. Manshadi's permanent impairment is flawed and must be disregarded. Claimant's testimony and its questionable veracity cannot absolve the flawed rating. The evidentiary record is devoid of any other medical opinions that find claimant sustained permanent disability or permanent loss. As a result, claimant cannot bear her burden of establishing a second qualifying loss. As

claimant has failed to establish a second qualifying loss, she is not entitled to benefits from the Fund.

ORDER

THEREFORE, IT IS ORDERED:

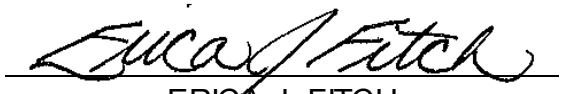
The parties are ordered to comply with all stipulations that have been accepted by this agency.

Claimant shall take nothing from these proceedings.

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

Costs are taxed to claimant pursuant to 876 IAC 4.33.

Signed and filed this __17th___ day of August, 2022.



ERICA J. FITCH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Benjamin Roth (via WCES)

Jonathan Bergman (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.