BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KATHY IRWIN,

Claimant,

vs.

CATHOLIC HEALTH INITIATIVES d/b/a MERCY MEDICAL CENTER DES MOINES,

Employer,

and

INDEMNITY INSURANCE CO. OF NORTH AMERICA,

Insurance Carrier,
Defendants.

FILED

DEC 20 2016

WORKERS COMPENSATION

File No. 5052646

ARBITRATION DECISION

Head Note Nos.: 1402.30; 1403.30

Claimant Kathy Irwin ("Irwin") filed a petition in arbitration on June 9, 2015, alleging she sustained an injury to her bilateral knees and lower extremities while working for the defendant, Catholic Health Initiatives, d/b/a Mercy Medical Center Des Moines ("CHI"). CHI and its insurer, the defendant, Indemnity Insurance Company of North America ("Indemnity Insurance") filed an answer on July 15, 2015. CHI and Indemnity Insurance filed an amended answer on March 22, 2016.

An arbitration hearing was held on August 16, 2016, at the Division of Workers' Compensation in Des Moines, Iowa. Attorney Steve Hamilton represented Irwin. Irwin appeared and testified. Attorney Kent Smith represented CHI and Indemnity Insurance. Exhibits A through O and 3 were admitted into the record. The record was left open through October 6, 2016, for the receipt of Exhibit P, which was admitted into the record, and post-hearing briefs. At that time the record was closed.

Before the hearing the parties prepared a hearing report listing stipulations and issues to be decided.

STIPULATIONS

1. An employer-employee relationship existed at the time of the alleged injury.

2. If CHI and Indemnity Insurance are liable for the alleged injury, Irwin is entitled to temporary benefits from August 20, 2012 through February 4, 2013.

3. Although entitlement cannot be stipulated, Irwin was off work from August 20, 2012 through February 4, 2013.

4. If Irwin has sustained a permanent disability, the disability is a scheduled member disability to Irwin's bilateral knees.

5. If Irwin has sustained a permanent disability, the commencement date for permanent partial disability benefits is February 5, 2013.

6. At the time of the alleged injury Irwin's gross earnings were $735.54 per week, she was married and entitled to two exemptions, and her weekly rate is $491.46.

7. Medical benefits are no longer in dispute.

8. CHI and Indemnity Insurance have agreed to pay for the cost of Sunil Bansal, M.D.'s independent medical examination.

ISSUES

1. Whether Irwin sustained an injury on February 1, 2012, which arose out of and in the course of employment.

2. If Irwin sustained an injury on February 1, 2012, which arose out of and in the course of her employment, did Irwin provide timely notice of her injury to CHI under Iowa Code section 85.23?

3. If Irwin sustained an injury on February 1, 2012, which arose out of and in the course of her employment, is Irwin's claim timely under Iowa Code section 85.26?

4. If Irwin provided timely notice and she timely commenced her claim, is the alleged injury a cause of temporary disability during a period of recovery?

5. If Irwin provided timely notice and she timely commenced her claim, what is Irwin's extent of disability?

6. Are CHI and Indemnity Insurance entitled to a credit for short-term disability payments made to Irwin?

FINDINGS OF FACT

Irwin was born and raised in the Des Moines area. (Transcript, page 11) Irwin graduated from East High School in 1963. (Tr., p. 11; Exhibit L, p. 1) After graduating

from high school Irwin attended and graduated from the Des Moines School of Practical Nursing, and she became a licensed practical nurse ("LPN") in 1964. (Tr., p. 12; Ex. L, p. 1) At the time of the hearing Irwin was seventy-two. (Tr., p. 79)

During nursing school Irwin worked for CHI as a nurse's aide in neurology, at the main hospital in Des Moines. (Tr., pp. 13-14) After graduating from nursing school, Irwin transitioned to a full-time LPN position at CHI in neurology. Irwin was responsible for passing medication to patients, turning patients, lifting patients, walking patients, giving patients baths, and providing tracheotomy care. (Tr., pp. 14-15) Irwin worked in neurology through 1969. (Tr., p. 14) Irwin worked eight hour shifts with regular overtime. (Tr., p. 15) Irwin testified she would stand between seven and eight hours during each shift, and she would complete her charting after her shift ended. (Tr., pp. 15-16)

After the birth of her second child, Irwin had to take off more time than she expected. (Tr., p. 17) Irwin testified she had to quit working for CHI and CHI rehired her in February 1970, as a circulating nurse where she was assigned to fill-in for other nurses. (Tr., p. 17) Irwin worked in neurology, orthopedics, pediatrics, labor and delivery, pre-open heart, and the intensive care unit. (Tr., p. 18) Irwin testified she would stand, stoop, and walk approximately seven to eight hours per day, and reported, "I was on my feet almost all the time." (Tr., pp. 18-19) CHI eliminated the circulating nurse position, and Irwin moved into a position in the neonatal intensive care unit ("NICU") in 1975. (Tr., pp. 17-19)

Irwin testified in the NICU she cared for preterm babies who had breathing problems, aspiration problems, and heart problems. (Tr., p. 19) Four to six nurses would care for twenty infants during a regular shift. (Tr., pp. 19-20) Irwin testified while working in the NICU she would spend approximately six hours per shift standing. (Tr., p. 20) Irwin reported she stood on hard floors and carpet at work. (Tr., pp. 20-21) Irwin worked in the NICU from 1975 through 1998 or 1999. (Tr., p. 20)

In 1991, Irwin experienced a work injury at CHI when a monitor fell forward and hit her shoulder. (Ex. A, pp. 8-9) Irwin underwent a left rotator cuff repair, a carpal tunnel release, and an ulnar tunnel release. (Ex. A, pp. 8-9) Irwin retained an attorney and received she workers' compensation benefits. (Tr., pp. 74-75)

In September 1995, Irwin complained of bilateral knee pain after kneeling while performing CPR. (Ex. F, p. 1) James Blessman, M.D., a physician with Mercy Iowa Occupational Medicine Clinic, examined Irwin on September 15, 1995. (Exs. F, p. 1; G, p. 1) Irwin reported she had received a cortisone injection into her knee from William Boulden, M.D., the day before and it helped her. (Ex. F, p. 1) Dr. Blessman noted, "[w]e returned her back to work on restrictions." (Ex. F, p. 1)

During her next visit with Dr. Blessman on September 26, 1995, Irwin requested a referral to Iowa Ortho. (Ex. F, p. 2) Dr. Blessman documented Dr. Boulden had performed an arthroscopy in the spring for a condition that was not work-related and her problem "flared up her knees when she was down on her knees doing CPR training last

month or earlier in September, this current month." (Ex. F, p. 2) Dr. Blessman noted Employee Health had authorized one visit with Dr. Boulden, "to see if he could help us with this temporary flare-up, but obviously her primary problem is preexisting prior to the CPR incident." (Ex. F, p. 2)

On October 3, 1995, Dr. Boulden sent a letter to Dr. Blessman and a copy to John Fell, D.O., which provided,

> When I last saw Kathy Irwin, she had aggravated her arthritis in the knee, and we treated her with another shot of cortisone. She says the knee has not responded as well this time because she has had to be a lot more active and on her feet more often.
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> We discussed this with her. I told her standing and being on her feet more, gives her more of a chance to have problems with her knee. I have told her if there are ways for her to stay away from weight bearing, then this will be [*sic*] probably be to her advantage. I have told her to watch the progressive squatting, kneeling, stairs, and prolonged standing. If they can find her a different type of nursing that will alleviate some of this, then she probably will be better off on a long-term basis.
>
> I have recommended to see her back as clinically indicated. I have also discussed the fact that she will need a total knee replacement someday in the future but not at this point.

(Ex. G, p. 1) Dr. Boulden listed a diagnosis of status post partial meniscectomy with patellofemoral chondromalacia changes and advanced medial femoral chondromalacia changes. (Ex. G, p. 1)

At hearing Irwin denied speaking with Dr. Blessman about her knees and stated she did not know why Dr. Boulden wrote Dr. Blessman. (Tr., p. 38) Irwin denied Dr. Boulden spoke with her about changing her job. (Tr., p. 39) Irwin reported she did not recall Dr. Boulden informed her "to stay away from weight bearing" and to "watch the progressive squatting, kneeling, stairs, and prolonged standing." (Tr., pp. 39-40) Irwin further denied that Dr. Boulden told her, "[i]f they can find her a different type of nursing that will alleviate some of this, then she'd probably be better off on a long-term basis." (Tr., p. 40) Irwin testified, "Dr. Boulden had a recorder with him and he kept coming in and going back out again, and he did that throughout the whole time that I was there, if I remember right. And somebody was always coming to get him out of the room because of somebody else or a phone call or something. So I don't remember him saying that." (Tr., p. 40) Irwin reported her work was not altered. (Tr., p. 40) Irwin testified at hearing that Drs. Blessman and Berg were "Mercy's workman's [*sic*] comp and took care of all their injuries." (Tr., p. 74)

Irwin's testimony raises an issue of credibility. When assessing witness credibility, the trier of fact "may consider whether the testimony is reasonable and consistent with other evidence, whether a witness has made inconsistent statements,

the witness's appearance, conduct, memory and knowledge of the facts, and the witness's interest in the [matter]." State v. Frake, 450 N.W.2d 817, 819 (Iowa 1990). I do not find Irwin's testimony concerning Drs. Blessman and Boulden reasonable and consistent with the other evidence I believe. Certainly Irwin has an interest in the outcome of this case.

Irwin attended appointments with Dr. Blessman with Mercy Iowa Occupational Medicine Clinic on September 15, 1995, and September 26, 1995 and she was placed on work restrictions. (Ex. F, pp. 1-2) Dr. Blessman documented he spoke with "Sandy of Employee Health & they were authorizing 1 visit with Dr. Boulden to see if he could help us with this temporary flare-up, but obviously her primary problem is preexisting prior to the CPR incident." (Ex. F, p. 2) Dr. Boulden then issued a follow-up letter to Dr. Blessman with Mercy Iowa Occupational Medicine Clinic with a copy to Dr. Fell, whose office was located on Hubbell Avenue, and not in the hospital. (Ex. G, p. 1)

Irwin attended a follow-up appointment with Mercy Iowa Occupational Medicine Clinic on November 7, 1995. (Ex. F, p. 4) The nurse noted that Irwin "[l]ikes Dr. Berg." (Ex. F, p. 4) Dr. Berg documented he observed Irwin "really has exquisite tenderness over the anterior aspect of the medial meniscus with palpation and has a palpable click with McMurray's that is quite painful." (Ex. F, p. 4) Dr. Berg noted he believed she had a medial meniscus tear and scheduled magnetic resonance imaging of her knee and prescribed Vicodin for pain. (Ex. F, p. 4) During her next appointment on November 15, 1995, Dr. Berg noted, the magnetic resonance imaging "shows a large tear in the medial meniscus" that may be from the previous surgery or something new, and he referred her to Joshua Kimelman, D.O., for a second opinion. (Ex. F, p. 5)

Irwin attended an appointment with Kyle Galles, M.D., on November 29, 1995. (Ex. H) Dr. Galles sent a letter to Glenna Bradshaw with Mercy Hospital that day, documenting Irwin was having pain with weight bearing activities, and noted climbing stairs and squatting are quite uncomfortable for her. (Ex. H, pp. 2-3) Dr. Galles performed a physical exam, finding Irwin demonstrated "a mild varus deformity to the right knee, some slight pseudolaxity with valgus stress" with full range of motion. (Ex. H, p. 2) Dr. Galles provided samples of Oruvail and Cataflam, and suggested a referral to Dr. Kimelman for consideration of a high tibial osteotomy or a valgus brace. (Ex. H, p. 2)

Mercy Iowa Occupational Medicine issued a note on December 1, 1995, stating Dr. Kimelman had scheduled Irwin for surgery, but "it has to be cleared through workers' compensation." (Ex. F, p. 6) The note provided that Irwin needed to be on light duty, standing "about 50 percent of the time," but also provided she "basically does her regular duty at work." (Ex. F, p. 6)

On January 19, 1996, Dr. Kimelman documented he spoke with Bradshaw on and he told Bradshaw Irwin was "having the high tibial osteotomy for medial compartment arthritis and that that's the diagnosis from the previous surgery that she's had as opposed to recent fall." (Ex. H, p. 3) Irwin testified that Dr. Kimelman administered Synvisc injections and the injections would help for a while with her right

and left knee pain. (Tr., pp 76-77) Irwin reported that during that time she was having trouble climbing stairs, walking, bending, and squatting. (Tr., p. 77)

Based on the record evidence I believe Irwin attended appointments with Dr. Blessman and that Dr. Boulden discussed his concerns with her. I do not find her testimony concerning Drs. Blessman and Boulden credible.

Irwin testified she was interested in leaving the hospital to work in a CHI clinic. (Tr., p. 23) Irwin applied for a position working with adults and children and she was hired at Hilltop Clinic, operated by CHI, in 1998 or 1999. (Tr., pp. 23-24) When Irwin left the hospital, her wage decreased by $5.00 per hour, and her hours were 8:00 a.m. to 4:30 p.m. (Tr., p. 24) While working at Hilltop Clinic Irwin administered shots, referred patients to specialists, assisted with emergencies, roomed patients, assisted other nurses, and performed charting. (Tr., pp. 24-25) Irwin was unable to complete her charting during her regular work hours, and often worked until 6:00 p.m. (Tr., pp. 26-27)

In 2004, CHI closed Hilltop Clinic and another clinic and transferred the staff from both clinics to a new clinic, Mercy East, in Pleasant Hill. (Tr., p. 28; Ex. A, p. 7) CHI moved Irwin to Mercy East and into a triage nurse position. (Tr., pp. 28-29; Ex. A, p. 7) Irwin's boss was Barb Fremming. (Ex. A, p. 4)

As a triage nurse Irwin took calls for the physicians and physicians' assistants at Mercy East and addressed each call with the physician or physician assistant. (Ex. A, p. 3) Irwin would also pull charts, and take charts to the physicians. (Tr., p. 33; Ex. A, p. 4) Irwin reported she would have to retrieve medical charts that were often misplaced, which required her to squat down to find the correct charts. (Tr., p. 29) Irwin testified she would work four, ten hour shifts. (Tr., p. 34; Ex. A, p. 4) Irwin would work from 5:00 p.m. to 7:00 p.m., after most of the staff had left, and she would cover the whole urgent care area. (Ex. A, p. 4) A year or two before her position ended, Irwin reported she was assigned to work with one physician, Casey Clor, M.D., and one physician's assistant, Sally Bennett, P.A. (Ex. A, p. 4) The facility was carpeted. (Tr., pp. 34-35) Irwin testified that as a triage nurse she would stand, walk, bend, and stoop at least six hours per day. (Tr., p. 29)

In 2011, CHI transitioned to computerized medical charting. (Ex. A, p. 4) Irwin testified the computerized charting was supposed to make her position easier, "but that didn't always work. Sometimes you needed an actual chart. And you still had to get up and go, you know, talk to the doctor a lot." (Ex. A, p. 5) Irwin reported, "I would generally either make a copy of what I needed and take it back to them to show them what was, you know – what we had to do or just give a call back and ask them to look on the computer. And with the doctor I worked with, Dr. Clor, he more or less – I did most of the walking." (Ex. A, p. 5) Irwin noted that she worked in a "pod" with Dr. Clor and his office was approximately six feet from her work area. (Ex. A, p. 5)

Irwin testified her knee condition became worse to the point where she was in pain all of the time while standing. (Tr., pp. 41-42) Irwin testified she would sit and

stand for long periods and the triage desk where she worked would continually hit her knee, and it got the point where she could not walk anymore or tolerate the pain. (Tr., p. 42) Irwin struggled to get in and out of the car, she would hold onto objects to get inside the clinic at work and to get up from her chair at the clinic. (Tr., p. 42)

Irwin made an appointment with Mark Matthes, M.D., an orthopedic surgeon, on her own. (Ex. A, p. 9) On July 31, 2012, Irwin attended an appointment with Dr. Matthes, complaining of bilateral knee pain. (Ex. H, p. 4) Dr. Matthes documented the onset of the pain was ten years ago, "[i]t occurs occasionally and is worsening" and is aggravated by climbing and descending stairs, walking, and standing. (Ex. H, p. 4) Dr. Matthes noted that Irwin saw Dr. Kimelman in 2009 for bilateral knee pain and she received injections. (Ex. H, p. 4) Dr. Matthes examined Irwin, reviewed x-rays, and assessed Irwin with osteoarthritis. (Ex H, pp. 5-6)

Irwin continued to work as a triage nurse until August 2012. (Tr., p. 35) Irwin testified, "I couldn't take the pain in my knees any more. I would have to hold on to the wall to walk because of the pain. And I went to my family doctor and she sent me to Dr. Matthes, set up an appointment, and the x-rays show I was bone-on-bone with bone spurs in my knees." (Tr., p. 35)

In late July 2012 Joni Stuart was the clinic manager at Mercy East and Barb Fremming was Irwin's direct supervisor. (Ex. A, p. 9) Irwin testified she did not report her knee condition to Fremming or Stuart because

> I don't [*sic*] think I had to tell them because when I had to walk, I was in so much pain that I would have to hold onto the wall. And they both knew that. But I don't think I told them. They noticed it on their own.
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> And then when I saw Dr. Matthes – saw my doctor and then saw Dr. Matthes, he took X-rays. And I took the X-rays in with me and showed Joni Stewart [*sic*]. And I had like seven pieces of bone that had broke off in the knee and I needed to have that one done right away.

(Ex. A, pp. 9-10) Irwin stated that she showed the x-rays to Stuart a week or two before she had surgery, sometime in August 2012. (Ex. A, p. 10)

Irwin testified that during her employment Fremming and Stuart would come to her and ask if she was okay because they knew her knees hurt. (Ex. A, p. 10) Irwin reported she could not recall exactly how she responded, but she would respond that her knees hurt and it took her "forever to make it from the parking lot into the clinic walking." (Ex. A, p. 10) Irwin recalled mentioning she had hurt her knees while working in urgent care. (Ex. A, p. 10)

Fremming, a registered nurse and nursing supervisor, began working with Irwin after Irwin transitioned from the hospital to Hilltop Clinic. (Ex. B, pp. 1-2) Fremming supervised Irwin at Hilltop Clinic and Mercy East. (Ex. B, p. 2) Fremming is responsible for work injuries that nurses develop at the clinic. (Ex. B, p. 3) If a nurse reported an

injury Fremming would complete an incident report. (Ex. B, p. 3) Fremming reported she did not recall Irwin ever reporting a work injury, that her work caused knee pain, or that she had knee pain. (Ex. B, pp. 3-4) Irwin did not request treatment from Fremming for her right or left knee. (Ex. B, p. 5)

During her recorded statement Fremming was asked if she had seen Irwin limping. (Ex. B, p. 4) Fremming responded, "[n]ot a limp, but from day-to-day when I first met her she had a, I don't want to call it an unsteady gait, but her walk was not like a normal walk." (Ex. B, p. 4) Fremming reported she observed Irwin's unsteady gait when Irwin first started working with her at Hilltop Clinic, and she did not notice Irwin's gait become more unsteady or worse during her employment. (Ex. B, p. 4)

Kathy Stiner, a laboratory x-ray supervisor, has worked in the CHI clinics for thirty-one years, and worked with Irwin at Hilltop Clinic and Mercy East. (Ex. B, pp. 6-7) Stiner reported that she worked with and observed Irwin answer phone calls, work on prescription refills, and interact with physicians. (Ex. B, p. 7) Stiner reported Irwin did not complain that she had experienced right or left knee pain because of her work for CHI. (Ex. B, p. 8) Stiner observed that Irwin walked with a limp, "a back-and-forth motion like a penguin, per se" that was present the first time she recalled seeing Irwin. (Ex. B, p. 9)

Sandra Hubbs has worked for Mercy East since 2004. (Ex. B, p. 10) Hubbs reported Irwin worked for Dr. Ruhe only. (Ex. B, p. 11) Hubbs stated Irwin's job was "primarily a sitting job, you sit and you answer the phone. You may get up three to four times a day to walk back to where the doctors are then come back and sit down. I mean you're not on your feet all day long." (Ex. B, p. 11) Hubbs noted Irwin "complained of knee pain, but she never related it to her job or anything. Sometimes it was the weather; sometimes it was, you know, she walked too much the night before or something. But never complained about her job causing her knees to hurt. She always talked about a knee replacement." (Ex. B, p. 11) Hubbs reported since the first time she worked with Irwin, "[s]he always walked kind of like, I don't want to call it a penguin walk, but I don't know she just kind of walked from side to side. She never walked in a straight line. It was always just kind of side to side like a penguin." (Ex. B, p. 12)

Stuart worked with Irwin at Hilltop Clinic and Mercy East. (Ex. B, p. 13) Stuart reported Irwin became a triage nurse in 2005 or 2006 and the triage nurses

> take all the calls for all of the doctors and they do refills. They write any kind of a note that the patients would need. They give out medical advice or they advise the patients when they need to come in or go to E.R. or if they can happen to treat them over the phone and tell them what they need to do and they answer any other medical question that might be needed answered.

(Ex. B, pp. 13-14) Stuart relayed that Irwin's job was stationary, "you sit all day but you're on the phone all day long pretty much." (Ex. B, pp. 13-14)

Stuart denied Irwin informed her that her job was causing right or left knee pain. (Ex. B, p. 14) Irwin requested leave under the Family Medical Leave Act for her feet and knees. (Ex. B, p. 15) Stuart reported Irwin did not indicate the conditions in her knees and feet were the result of her work for Mercy East. (Ex. B, p. 15)

Irwin underwent a left total knee replacement with Dr. Matthes on August 20, 2012, and a right total knee replacement with Dr. Matthes on October 8, 2012. (Exs. H, p. 7; K, pp. 1, 4) Dr. Matthes listed preoperative and postoperative diagnoses of degenerative arthritis left knee, and degenerative arthritis right knee. (Ex. K, pp. 1, 4) Following the second procedure Irwin complained of some catching and pain around the patella. (Ex. H, p. 7)

During her appointment on January 8, 2013, Irwin noted she would like to return to work the end of January 2013. (Ex. H, p. 8) Dr. Matthes documented she could return to work without restrictions on February 4, 2013. (Ex. H, pp. 8-10) While she was off work, Irwin used leave under the Family Medical Leave Act, until her leave expired. (Ex. A, p. 6) Irwin testified she called Stuart and told Stuart she could return to work, and Stuart responded, "I don't have a job for you." (Tr., p. 45) Irwin reported she was devastated. (Tr., p. 45; Ex. A, pp. 5-6)

Irwin testified that following her surgery she was able to perform her household duties to a degree. (Tr., pp. 75-76) Irwin reported, "[s]tairs even to this day are hard for me to go up and down." (Tr., p. 76)

When Irwin left for surgery she was earning $18.00 per hour. (Tr., p. 46) Irwin began receiving Social Security retirement benefits in 2013 and she received a lump sum pension from CHI. (Tr., pp. 47-48)

Irwin has not applied for any jobs since she was released by Dr. Matthes. (Tr., p. 76) Irwin reported she does not know what she could do "because I have to – you know, I can't walk very far, things like that, and it's been a while since I've been in the hospital setting." (Tr., p. 76)

On May 4, 2016, Irwin attended an independent medical examination with Charles Mooney, M.D. (Ex. C) Dr. Mooney reviewed Irwin's medical records and examined her. (Ex. C, p. 1) Dr. Mooney noted Irwin had been evaluated and treated by Robert Breedlove, M.D., for a work injury to her left shoulder in January 1991, and received an eighteen percent upper extremity impairment, which was converted to an eleven percent permanent partial impairment on April 15, 1992. (Ex. C, p. 1)

Dr. Mooney diagnosed Irwin with long-standing degenerative arthropathy of the bilateral knees. (Ex. C, p. 5) Dr. Mooney noted Irwin's position of more than forty years required walking, standing, lifting, and other activities associated with patient care. (Ex. C, p. 5) Dr. Mooney opined Irwin's work activities as a nurse for Mercy Medical Center "would not be considered causal to her development of degenerative arthropathy or degenerative arthritis of the bilateral knees." (Ex. C, p. 6)

In reaching his conclusion, Dr. Mooney used the AMA Guides to the Evaluation of Disease and Injury Causation, 2nd edition, finding:

> Evaluated occupational risk factors to establish a causal relationship include:
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> 1. jumping, for which there is insufficient evidence;
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> 2. kneeling, for which there is some evidence;
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> 3. lifting, for which there is insufficient evidence;
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> 4. squatting and knee bending, for which there is some evidence;
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> 5. sitting, for which there is insufficient evidence as a protective effect;
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> 6. standing and walking, for which there is insufficient evidence.
>
> Combination of factors including kneeling and squatting with heavy lifting, squatting, kneeling, climbing, knee bending, and heavy physical demand does demonstrate some evidence, and low to moderate levels of physical exertion; insufficient evidence.
>
> There are accepted non-occupational risk factors including:
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> 1. age, for which there is very strong evidence;
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> 2. overweight or obese, which is an accepted risk factor for which there is very strong evidence;
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> 3. previous trauma, for which there is strong evidence;
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> 4. previous surgery, including meniscectomy or meniscal injury, for which there is strong evidence;
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> 5. family history, for which there is strong evidence;
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> 6. female gender, for which there is some evidence;
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> 7. physical exercise, for which there is insufficient evidence for protective effect;
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> 8. cigarette smoking, for which there is insufficient evidence;
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> 9. knee alignment, for which there is some evidence.

(Ex. C, pp. 5-6) Dr. Mooney further opined that there is "no evidence in the medical record that any specific activity is responsible for aggravating or accelerating this

progressive and chronic degenerative condition of the bilateral lower extremities." (Ex. C, p. 6)

Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Mooney found Irwin had sustained a thirty-seven percent impairment to the lower right extremity for her right knee, and a fifty percent lower extremity impairment to the left lower extremity for her left knee. (Ex. C, p. 6) Dr. Mooney assigned no rating regarding her bilateral feet. (Ex. C, p. 6) Dr. Mooney found Irwin could perform light duty with a maximal lift of twenty pounds, with "the majority of her work would need to be sedentary with avoidance of repeated stair climbing and continuous walking or standing, limited to 20 minutes per hour." (Ex. C, p. 7)

Sunil Bansal, M.D., performed an independent medical examination of Irwin on June 3, 2016. (Ex. 3) Dr. Bansal reviewed Irwin's medical records and examined her. (Ex. 3) Dr. Bansal diagnosed Irwin with right knee aggravation of osteoarthritis and status post right total knee arthroplasty, and with left knee aggravation of osteoarthritis and status post left total knee arthroplasty. (Ex. 3, p. 9) Dr. Bansal placed Irwin at maximum medical improvement on January 8, 2013, the date of her last appointment with Dr. Matthes. (Ex. 3, p. 10)

With respect to causation, Dr. Bansal opined:

> In my medical opinion, the work that Ms. Irwin performed as a nurse for close to 50 years at Mercy Medical Center was a significant contributory factor for the aggravation of her bilateral knee degenerative joint disease. She was engaged in tasks that would stress the knees, especially the medial compartment. The records prior to the knee replacements indicate marked knee arthritis, mostly in the medial compartment. Careful review of her job duties indicated that she was performing several tasks that would stress the knee, medially greater than laterally.
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> Her job duties over her career at Mercy involved varying capacities of patient care, from the neonatal population to the adult population. Tasks would include lifting and transferring of patients, transporting in a wheelchair, all against the backdrop of continual standing and walking. Cumulatively over 50 years, a considerable amount of stress was placed to the bilateral knees from a mechanical load situation.
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> The selective targeting of the medial compartment versus other knee compartments makes for quite a compelling case that it was her job duties that were a significant contributing for her bilateral knee arthritis.

(Ex. 3, p. 10)

Using the AMA Guides, Dr. Bansal found Irwin sustained a thirty-seven percent impairment to the lower right extremity for her right knee, or a fifteen percent whole

person impairment, and a thirty-seven percent lower extremity impairment to the left lower extremity for her left knee, or a fifteen percent whole person impairment. (Ex. 3, p. 12) Dr. Bansal recommended a lifting restriction of twenty pounds with no frequent kneeling, squatting, climbing, or twisting, and sitting, standing, and walking as tolerated, to avoid sitting for more than sixty minutes, no standing for more than thirty minutes, no walking for more than thirty minutes at a time, and to avoid working on uneven terrain. (Ex. 3, p. 12)

Irwin testified her gait problems were due to her feet. (Tr., p. 52) Irwin stated that her feet were so deformed she could not get shoes on anymore. (Tr., p. 52) Irwin reported her gait problems were caused "[p]robably 75 knee, 25 feet." (Tr., p. 53)

Irwin reported she avoids going to malls because she cannot walk them, and the State Fair. (Tr., p. 53) Before her knee condition Irwin would attend the State Fair. (Tr., p. 54) The last time she attended the State Fair was in 2011. (Tr., p. 54)

Irwin has not received weekly workers' compensation benefits from CHI and Indemnity Insurance for the alleged work injury. Irwin received short-term disability benefits from CHI from September 14, 2012 through February 15, 2013. (Ex. P)

CONCLUSIONS OF LAW

I. Arising Out of and in the Course of Employment

Irwin avers she sustained a cumulative injury, as opposed to an acute or traumatic injury, to her bilateral knees on August February 1, 2012, while working for CHI. CHI and Indemnity Insurance contend Irwin did not sustain an injury arising out of her employment with CHI, and if she did, her claims are barred by Iowa Code sections 85.23 and 85.26.

Under Iowa Code section 85.3(1),

> Every employer, not specifically excepted by the provisions of this chapter, shall provide, secure, and pay compensation according to the provisions of this chapter for any and all personal injuries sustained by an employee arising out of and in the course of the employment, and in such cases, the employer shall be relieved from other liability for recovery of damages or other compensation for such personal injury.

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of an in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment, and not merely incidental to the employment. Koehler Elec. v.

Willis, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs "in the course of employment" when:

> [I]t is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of the employer.

Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979).

The claimant bears the burden of proving the claimant's work-related injury is a proximate cause of the claimant's disability and need for medical care. Ayers v. D & N Fence Co., Inc., 731 N.W.2d 11, 17 (Iowa 2007); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 153 (Iowa 1997). "In order for a cause to be proximate, it must be a 'substantial factor.'" Ayers, 731 N.W.2d at 17. A probability of causation must exist, a mere possibility of causation is insufficient. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997). The cause does not need to be the only cause, "[i]t only needs to be one cause." Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60, 64 (Iowa 1981).

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The deputy commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

Irwin avers she sustained a cumulative injury to her bilateral knees. Cumulative injuries are occupational diseases that develop over time. Baker v. Bridgestone/Firestone, 872 N.W.2d 672, 681 (Iowa 2015). A cumulative injury results from repetitive trauma in the workplace. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842, 851 (Iowa 2009); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368, 372-74 (Iowa 1985). "A cumulative injury is deemed to have occurred when it manifests – and

'manifestation' is that point in time when 'both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person.'" Baker, 872 N.W.2d at 681.

It is well-established in workers' compensation that "if a claimant has a preexisting condition or disability, aggravated, accelerated, worsened, or 'lighted up' by an injury which arose out of and in the course of employment resulting in a disability found to exist," the claimant is entitled to compensation. Iowa Dep't of Transp. v. Van Cannon, 459 N.W.2d 900, 904 (Iowa 1990). The Iowa Supreme Court has held,

> [A] disease which under any rational work is likely to progress so as to finally disable an employee does not become a "personal injury" under our Workmen's Compensation Act merely because it reaches a point of disablement while work for an employer is being pursued. It is only when there is a direct causal connection between exertion of the employment and the injury that a compensation award can be made. The question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause.

Musselman v. Cent. Tel. Co., 261 Iowa 352, 359-60, 154 N.W.2d 128, 132 (1967).

Dr. Mooney diagnosed Irwin with long-standing degenerative arthropathy of the bilateral knees, and assessed Irwin with morbid obesity, cardiac disease, hypothyroidism, hypertension, and sleep apnea. (Ex. C, p. 5) Dr. Mooney opined Irwin's knee condition is not work-related because her non-occupational risk factors outweigh any occupational risk, and concluded there is "no evidence in the medical record that any specific activity is responsible for aggravating or accelerating this progressive and chronic degenerative condition of the bilateral lower extremities." (Ex. C, p. 6)

Dr. Bansal diagnosed Irwin with right knee aggravation of osteoarthritis and status post right total knee arthroplasty, and with left knee aggravation of osteoarthritis and status post left total knee arthroplasty. (Ex. 3, p. 9) Dr. Bansal disagreed with Dr. Mooney and opined Irwin's knee condition is work-related, finding her fifty years of work as a nurse "was a significant contributory factor for the aggravation of her bilateral knee degenerative joint disease. She was engaged in tasks that would stress the knees, especially the medial compartment" noting her job duties included "lifting and transferring of patients, transporting in a wheelchair, all against the backdrop of continual standing and walking. Cumulatively over 50 years, a considerable amount of stress was placed to the bilateral knees from a mechanical load situation." (Ex. 3, p. 10)

I find Dr. Bansal's opinion more persuasive than Dr. Mooney's opinion. It is unclear what information Dr. Mooney received concerning Irwin's job duties and employment in reaching his conclusions. Dr. Mooney noted Irwin's position of more than forty years required walking, standing, lifting, and other activities associated with patient care, yet he found there is insufficient evidence of standing, walking, and lifting from an occupational standpoint. While Irwin has been diagnosed with bilateral

osteoarthritis, the record supports her work activities as a nurse were significant contributory factors that aggravated her degenerative joint disease.

II. The Discovery Rule

CHI and Indemnity Insurance aver Irwin failed to file a timely petition and her claim is barred under Iowa Code section 85.26(1). Irwin alleges her claim is timely because she was not aware her injury was compensable until she met with her attorney.

Under Iowa Code section 85.26(1),

> [a]n original proceeding for benefits under this chapter or chapter 85A, 85B, or 86, shall not be maintained in any contested case unless the proceeding is commenced within two years from the date of the occurrence or injury for which benefits are claimed, or if weekly compensation benefits are paid under section 86.13, within three years from the date of the last payment of weekly compensation benefits.

At the time of the hearing CHI and Indemnity Insurance had not paid any weekly workers' compensation benefits to Irwin. Irwin received paid time off on August 31, 2012, and short-term disability benefits starting on September 14, 2012, while she was recuperating from her surgeries through her termination in February 2013. (Ex. P) Irwin filed the original notice and petition on June 9, 2015, alleging she sustained a work injury on February 1, 2012, more than two years before she filed her petition.

The discovery rule is applicable to workers' compensation claims. Baker, 872 N.W.2d at 680-81. Under the discovery rule, the limitations period "does not begin to run until the claimant knows or in the exercise of reasonable diligence should know 'the nature, seriousness[,] and probable compensable character' of his or her injury." Id. at 684-85. Thus, the claimant must have actual or imputed knowledge of all three elements before the statute begins to run. Swartzendruber v. Schimmel, 613 N.W.2d 646, 650-51 (Iowa 2000). The Iowa Supreme Court has held:

> Under the imputed knowledge prong of the discovery rule, the statute of limitations begins when a claimant gains information sufficient to alert a reasonable person of the need to investigate. Thus, a claimant's knowledge is judged under the test of reasonableness. The need to investigate arises when a reasonable person has knowledge of the *possible* compensability of the condition. This knowledge must include all three characteristics of the condition. As of that date, the duty to investigate begins and the claimant has imputed knowledge of all the facts that would have been disclosed by a reasonable investigation. Thus, a claimant has two years from that time to gather the facts and file a petition.

Id. (internal citations omitted).

The discovery rule does not require "exact knowledge of the seriousness of an injury," nor does it require an expert opinion "to establish knowledge of the characteristics of the injury," rather, the claimant has a duty to investigate when the claimant is aware of the problem. Id. at 650-51. "[I]f it is reasonably possible an injury is seriousness enough to be compensable as a disability, the seriousness of the test is satisfied." Id. at 651.

Irwin testified, "I didn't realize that that could be work-related until I saw Dr. – Mr. Hamilton. I went into a deep depression after I lost my job, and then I had a nephew that had been a client of Hamilton's, and he wrote down his name and said, 'Call him. I think, you know, he can help you.' And then in June I think we filed." (Tr., p. 75)

On July 31, 2012, Irwin attended an appointment with Dr. Matthes, complaining of bilateral knee pain. (Ex. H, p. 4) Irwin reported she went to Dr. Matthes because she had "[e]xcruciating pain in my knees and I couldn't take it anymore." (Tr., p. 73) Irwin testified she continued to work until August 2012 because "I couldn't take the pain in my knees any more. I would have to hold on to the wall to walk because of the pain. And I went to my family doctor and she sent me to Dr. Matthes, set up an appointment, and the x-rays show I was bone-on-bone with bone spurs in my knees." (Tr., p. 35) Irwin's medical condition was serious enough in late July 2012 that she chose to seek medical attention.

During Irwin's July 31, 2012, appointment, Dr. Matthes documented the onset of the pain was ten years ago, "[i]t occurs occasionally and is worsening," and it is aggravated by climbing and descending stairs, walking, and standing. (Ex. H, p. 4) These are activities Irwin performed at work.

Irwin underwent a left total knee replacement with Dr. Matthes on August 20, 2012, and a right total knee replacement with Dr. Matthes on October 8, 2012. (Exs. H, p. 7; K, pp. 1, 4) Irwin did not immediately return to work following her knee replacements. She was off work from August 2012 through February 2013, and received short-term disability benefits.

During Irwin's January 8, 2013, follow-up appointment, Dr. Matthes documented Irwin could return to work without restrictions on February 4, 2013, and he instructed her to follow up with him in one year. (Ex. H, pp. 8-10) When Irwin contacted Stuart in early February 2013, to return to work, Stuart told Irwin, "I don't have a job for you." (Tr., p. 45)

When questioned about providing notice to her employer of her alleged work injury during her deposition Irwin testified she did not report her work-related knee condition to Fremming or Stuart because,

> I don't [*sic*] think I had to tell them because when I had to walk, I was in so much pain that I would have to hold onto the wall. And they both knew that. But I don't think I told them. They noticed on their own.

> And then when I saw Dr. Matthes – saw my doctor and then saw Dr. Matthes, he took X-rays. And I took the X-rays in with me and showed Joni Stewart [*sic*]. And I had like seven pieces of bone that had broke off in my knee and I needed to have that one done right away.

(Ex. A, pp. 9-10) If it was obvious to Irwin's supervisors that she had sustained a work injury, certainly Irwin, a nurse, was aware of the nature, seriousness, and probable compensable character of her injury. Moreover, this is not Irwin's first workers' compensation claim. Irwin previously received workers' compensation benefits for a shoulder injury she sustained in 1991, and she was represented by an attorney. (Tr., p. 75)

Irwin is a nurse who has worked in the medical field for fifty years. Certainly as of the date she received her second total knee replacement, on October 8, 2012, Irwin had received sufficient information to alert a reasonable person of the need to investigate the possible compensability of the condition. Irwin applied for and received short-term disability benefits from CHI. Irwin was released to return to work without restrictions on February 3, 2013. There is no evidence her knee condition was further aggravated after she was released to return to work in February 2013.

Given Irwin knew or should have known, of the nature, seriousness, and probable compensable character of her right and left knee conditions, at the very latest on the date of her second total knee replacement on October 8, 2012, and because CHI and Indemnity Insurance paid no benefits to Irwin for her knee conditions, I find the two year statute of limitations expired on October 8, 2014, more than eight months before Irwin filed her petition. For this reason, Irwin's petition should be dismissed.

ORDER

IT IS THEREFORE ORDERED,

Claimant shall take nothing in this case.

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

Signed and filed this 20th day of December, 2016.

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DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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 in writing and received by the commissioner's office 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 a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.