BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TEODORA MONTIEL, Claimant, vs. SMITHFIELD FOODS, INC. f/k/a FARMLAND FOODS, Employer, and SAFETY NATIONAL, Insurance Carrier, Defendants.	File No. 5063256 A R B I T R A T I O N D E C I S I O N Head Note Nos. 1100, 1108, 1803.1

STATEMENT OF THE CASE

Teodora Montiel filed a petition for arbitration seeking workers' compensation benefits from Smithfield Foods, Inc. f/k/a Farmland Foods and Safety National.

The matter came on for hearing on March 22, 2018, before Deputy Workers' Compensation Commissioner Joseph L. Walsh in Sioux City, Iowa. The record in the case consists of Claimant's Exhibits 1 through 4 and 6 through 23; Defense Exhibits A through D and Joint Exhibits 1 through 6; as well the sworn testimony of claimant, Teodora Montiel, and her son Eduardo Morales Montiel. Todd Woollen, M.D., testified via deposition on March 14, 2018. Teri Lee Autry was appointed the official reporter for this proceeding. Frank Gonzalez was the Spanish language interpreter. The parties briefed this case and the matter was fully submitted on May 21, 2018.

ISSUES & STIPULATIONS

Through the hearing report, the parties stipulated that there was an employer-employee relationship between the parties. The defendants dispute whether an injury, which arose out of and in the course of her employment, occurred on or about July 3, 2015. If there was an injury which occurred which arose out of and in the course of employment, the defendants dispute that such injury caused any permanent disability.

Claimant alleges entitlement to temporary disability benefits from September 11, 2015, the date she first lost work, through October 3, 2016. Defendants dispute this. The claimant is seeking permanent partial disability benefits for 38 percent of the loss of use of her left leg. The defendants dispute claimant's entitlement to any permanency, however, they do stipulate that any disability is to the left leg and that the commencement date for permanency, if any, is October 4, 2016.

The parties have stipulated to the elements comprising the rate of compensation and have submitted a rate of $489.38 per week. Affirmative defenses have been waived. Claimant is seeking medical expenses outlined in Claimant's Exhibit 23. Defendants dispute these expenses on the basis of causal connection and authorization. Claimant seeks payment of her independent medical examination (IME) either under section 85.39 or as a case expense. The parties have also stipulated to the existence of a credit under Iowa Code section 85.38(2) as set forth in Defendants' Exhibit C.

FINDINGS OF FACT

Teodora Montiel was 61 years old as of the date of hearing. She testified live and under oath at hearing through an interpreter. I find her hearing testimony to be highly credible. Her hearing testimony closely matches her deposition testimony. (*See* Defendants' Exhibit B; Transcript, pages 17-54) Her testimony also corresponds with the medical records in evidence. She is found to be a reliable historian. There was nothing about her testimony which caused the undersigned any concern about her truthfulness as a witness.

Ms. Montiel was born in Mexico in 1961. Spanish is her primary language. Her English is minimal. She attended school there from age 6 to age 12. She came to the United States in approximately 1985. She first went to California and later moved to Nebraska. In January 2005, she moved to Denison, Iowa, and secured work as a production worker at Farmland Foods. Farmland Foods has a pork slaughter and processing plant in Denison. At the start of her work she had no serious medical issues and was found to be eligible for heavy labor employment. (Claimant's Exhibit 2, page 8) Ms. Montiel testified credibly that she worked various production jobs in the plant. I find Ms. Montiel was a hard worker and was highly motivated to maintain employment.

In 2007, Ms. Montiel was diagnosed with left knee osteoarthritis. (Jt. Ex. 1, pp. 1-5) She did not claim this condition was work-connected at that time and never made a claim for benefits. She was initially treated by Scott Hoffman, M.D., who noted there was no injury. Over time, Ms. Montiel underwent two surgeries for this condition, the first was October 2011 (left partial medial meniscectomy), and the second in March 2013 (left knee total replacement). (Jt. Ex. 2, pp. 80, 99-100) The first surgery was performed by Christopher Nelson, D.O. The second surgery was performed by Thomas Dulaney, M.D.

Ms. Montiel returned to regular production work without restrictions in August 2013. She continued, however, to have significant difficulties receiving treatment for symptoms in her left knee in 2014 and 2015. In January 2015, Thomas Dulaney, M.D., discussed further surgery with her, but advised against it. Instead, she had an injection from Todd Woollen, M.D., in March 2015.[1] She followed up with Dr. Woollen on June 10, 2015 and he documented that her "osteoarthritis shows fair control with naproxen." (Jt. Ex. 1, p. 29) He offered no further treatment for her left knee at that time.

In early July 2015, Ms. Montiel was working 48 to 50 hours per week. (Tr., p. 27) On July 2 and 3, 2015, she was performing the job of "bagging." She testified that the bags were jamming frequently during this time. Whenever a jam occurred, she would climb to reach the rolls of plastic bags by stepping up on a grate, or step. This was confirmed by the testimony of her son, Eduardo Morales Montiel. (Def. Ex. B, Montiel Depo, p. 6; Tr., pp. 32-35, 59) Over the course of the two days, she testified she performed this task approximately 15 times per day, always coming down on her left leg once the task was completed. She developed "strong" pain in her left leg. She testified that after she got home, her leg swelled up and she could not walk.

She reported to the Farmland nurse on July 6, 2015. That visit is well-documented.

> EE contact nursing office by phone that they hurt their left knee last Friday 7/3/15. EE had call in for today. EE instructed to come to nursing office to fill out incident report. EE walked into nursing office using a 3 prong cane and wrap around their left knee. Martha Navarro contacted and was interpreter. EE stated that on Friday was working on the Cryvac line, bagging. EE stated the machine is very high and the stand EE was standing on was high and they had to jump from the stand and landed on their left knee that has had surgery previously. EE stated left knee started hurting. EE stated that they through [sic] the pain was normal. [sic] EE stated that they [sic] next day and all weekend was unable to walk on left leg. Swelling present to front/sides/back of knee. Tenderness with palpation of knee around the patella. Pain with full weight bearing and EE unable to bend knee without pain. EE walks with a limp with the cane that they [sic] are using. Ice to area while filling out report. EE stated took Naproxen before coming to nursing office. Contact safety, EE's supervisor. EE filled out medical release forms, drug/alcohol test completed. EE has appointment on 7/7/45 [sic] @ 1745 with Dr. Woollen. EE [sic] daughter took EE home.

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[1] Dr. Woollen works at the Clinic, Crawford County Medical Clinic in Denison, which is the workers' compensation medical provider for injured Farmland employees. He is also the medical director at the Farmland plant in Denison.

(Cl. Ex. 11, p. 25) Ms. Montiel filled out an accident report which mirrored the nurse's records. (Cl. Ex. 7, pp. 19-20) All of this was consistent with her sworn testimony about her development of pain and swelling.

Farmland initially accepted this claim as a work injury and directed Ms. Montiel's treatment. This fact, of course, is not binding or preclusive upon the employer. The employer, however, clearly directed Ms. Montiel to see Dr. Woollen, their workers' compensation physician. Dr. Woollen had just evaluated Ms. Montiel in June 2015, wherein he assessed her non-work related left knee condition. On July 7, 2015, he documented the following.

> Left knee is hurting her a lot per patient. She was at a job at work on Thursday and Friday where she had to jump up on a stool and be on her toes, and then jump back down per patient. It hurts to walk per patient. She has a lot of swelling. It is diffusely tender to palpation. She has limited range of motion with flexion and extension.
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> X-ray shows the hardware in place. I recommended aspiration given the significant discomfort with the effusion. After informed consent, including the risk for bleeding, infection and damage to underlying tissues, aseptic technique was used to attempt to aspirate using a lateral anterior approach. Procedure had to be abandoned because unfortunately no fluid was obtained. Patient tolerated the procedure attempt well with no complications. EBL 3 cc.

(Jt. Ex. 1, pp. 34) In his physical exam, he documented "[s]ignificant swelling of the left knee is noted, presumably an effusion initially, but given the difficulty with aspiration, this may just be synovitis." (Jt. Ex. 1, p. 35) He restricted Ms. Montiel to "no weightbearing for 1 week. Consider referral to orthopedic surgeon for aspiration attempt with ultrasound guidance depending how she does over the next week." (Jt. Ex. 1, p. 35) He prescribed a wheelchair and crutches. "Farmland can make arrangements for these durable goods." (Jt. Ex. 1 p. 35) She was placed on light duty and assigned sedentary work.

Ms. Montiel returned to Dr. Woollen a week later on July 14, 2015. The following is documented.

> They had her park by the door where she was working, rather than use a wheelchair which is fine with me. She has been using her crutches and resting the knee. The swelling is improved a little bit and she is able to touch her knee without causing some [sic] much discomfort. Progress is present but slow. She [sic] still having some limited range of motion with flexion. I am pleased with her progress, however a little disappointed that we aren't going more quickly. She had her left knee replaced by Dr. Dulaney, and it would be reasonable to have him see her in follow-up. I am going to recommend orthopedic surgery referral. Continue current

restrictions until seen by the orthopedic referral.

(Jt. Ex. 1, p. 39) While Dr. Woollen recommended an orthopedic referral to Dr. Dulaney, he deferred to Farmland regarding who the orthopedist should be.

Farmland, however, did not send her to an orthopedist for treatment. Instead, Farmland arranged an independent medical evaluation (IME) with Douglas Martin, M.D. (Cl. Ex. 11, p. 26) Dr. Martin is an occupational medicine physician, not an orthopedist. This appointment was arranged for August 27, 2015. Farmland provided no explanation at hearing as to why it stopped providing treatment. Based upon the record before the agency, it appears that Farmland decided to investigate whether the claimant truly suffered a work-related accident before providing any additional treatment. Ms. Montiel testified credibly that it was her understanding that her care was to be directed through workers' compensation. At hearing, she was asked why she did not seek other treatment during this period of time. She testified that she was told by Farmland's interpreter, this was not advised. (Tr., p. 44) Because of all this, Ms. Montiel received no treatment between July 14, 2015, and August 27, 2015.

For his part, Dr. Martin produced an IME report which was unhelpful. He did not provide an opinion about diagnosis. In response to a direct question regarding the diagnosis he responded: "To be quite honest with you, I am not sure." (Jt. Ex. 5, p. 169) Instead of addressing the diagnosis, Dr. Martin speculated about all the reasons her condition was probably not work-related. Most of his ruminations do not appear to be medical opinions, but rather investigatory conclusions where he evaluates her alleged inconsistencies. "I am wondering if there is some other underlying condition that might be associated with her implant arthroplasty, or perhaps some other injury that has occurred here above and beyond that." (Jt. Ex. 5, p. 170) He reviewed photographs sent by the employer of the work area. (Jt. Ex. 4, pp. 162-64) It is apparent that he did not understand her explanation of the task she was performing. He believed she was complaining about stepping off of a 4-inch platform, which was not the case. (Jt. Ex. 5, p. 168; *compare* Tr., pp. 59-60) In spite of all of this, Dr. Martin still concluded that she had some type of exacerbation of her left knee condition, "meaning a temporary worsening of an underlying condition that would return to baseline, and should hopefully not lead to any type of aggravation, which is defined as a permanent worsening of an underlying condition." (Jt. Ex. 5, p. 170)

Based upon Ms. Montiel's credible testimony, her son's credible testimony, Dr. Woollen's notes, Dr. Martin's opinion, and the nurse's notes, I have no doubt that claimant suffered an injury to her left knee which arose out of and in the course of her employment. It is difficult from this record to tell precisely how severe this injury was because there is not even a firm diagnosis during this period of time. It may have been a minor, temporary aggravation of her non-work related knee condition. Or it may have been pain caused by an already present infection. Since the aspiration was unsuccessful, it is difficult to say. Nevertheless, the fact of the injury itself is quite compelling that she suffered pain and somewhat significant symptoms from repeatedly stepping back off of a grate onto her left leg several times over a two-day period.

On September 10, 2015, Farmland's third-party administrator denied the claim. "If you feel that you are in need of further care it needs to be directed to your personal health insurance." (Cl. Ex. 15, p. 34) Once this occurred, Ms. Montiel quickly arranged an appointment with the orthopedic surgeon, Dr. Dulaney. Dr. Dulaney arranged an appointment on September 11, 2015.

> Teodora Montiel is a 58-year-old who is two-and-a-half years status post a left total knee replacement. She has always had some stiffness in the knee but has been ambulatory and working and states that in July, she stepped down from a step at work and says felt pain in her left knee. Says since then she has had progressive increasing discomfort. Says she had an aspiration attempted by her primary care physician shortly after the injury but apparently could not get any fluid out. Since then she has needed crutches to ambulate with continued pain.

(Jt. Ex. 2, p. 112) He diagnosed a likely infection, aspirated the knee and recommended she proceed with a two-stage revision if it proved to be an infection. (Jt. Ex. 2, p. 112) The parties have stipulated claimant went off work on September 11, 2015.

Ms. Montiel followed up with Dr. Nelson a few days later. He also recorded the history of the work injury. With the lab results back, he diagnosed a "septic left total knee." (Jt. Ex. 2, p. 117) "Her infection has been going on since July. She is beyond our typical two to three-week window where we can salvage the knee with a Stage I resection." (Jt. Ex. 2, p. 117)

Dr. Nelson performed the first of the two-staged surgeries on September 21, 2015. (Jt. Ex. 2, p. 126) The second surgery was delayed when claimant developed diverticulitis. (Jt. Ex. 2, p. 130) A second surgery was performed on April 18, 2016. (Jt. Ex. 2, p. 135) Ms. Montiel underwent a great deal of physical therapy during her recovery. (Jt. Ex. 4) The claimant is seeking healing period benefits from the date she went off work, September 11, 2015, through October 3, 2016, when she initially recuperated from her second knee surgery. Dr. Nelson released claimant from care on April 4, 2017. (Jt. Ex. 2, p. 142) Dr. Nelson indicated claimant would need restrictions but did not elaborate in detail. Farmland terminated Ms. Montiel in April 2017 due to the expiration of her leave of absence. While she was off, claimant received benefits through a non-occupational disability insurance plan. The parties have stipulated to a credit for these payments. At the time of hearing, she had qualified for Social Security Disability benefits.

Claimant has continued to have difficulties with her left knee since being released, including an evaluation with another specialist in July 2017. (Jt. Ex. 6) It appears likely that she will need future treatment.

Dr. Nelson provided expert medical opinions via check box reports drafted by the attorneys in this case. (Jt. Ex. 2, pp. 143-147) I do not find these reports very helpful in

understanding his medical opinions. The key medical causation issue in the case is how the claimant's knee became infected. He did check "Agree" to the following statement:

> 7. The left knee condition that presented itself in July of 2015 and the resulting surgeries on September 11, 2015 and April 18, 2016 were related to a chronically staphylococcus infected left knee total arthroplasty performed on March 26, 2013. Such infections are a common and well known risk with joint replacement procedures.

(Jt. Ex. 2, p. 144) This opinion is a conclusion with very little foundation. It is unclear how Dr. Nelson is certain as to how the infection developed, particularly given Dr. Woollen's deposition testimony in March 2018 (discussed below). In other places he provided his conclusion that the condition of claimant's left knee is not related to her employment at Farmland. Unfortunately, he never specifically addressed whether the treatment she was receiving for her July 2015 work injury was a likely or probable cause of her infection. Finally, while he clearly opined that the infection began in July 2015, he provided no explanation for why or how the infection from a 2013 or 2011 surgery manifested in July 2015.

In response to a letter from claimant's counsel, Dr. Nelson opined that by the time he saw her in September 2015, she was beyond the two-to-three-week window where he could have salvaged her arthroplasty with a Stage one revision procedure. (Jt. Ex. 2, p. 146) He further opined that because Ms. Montiel required a two-stage revision surgery, she now had a greater risk for more significant disability and greater long-term functional disabilities.

Sunil Bansal, M.D., evaluated Ms. Montiel under Iowa Code section 85.39 on December 28, 2017. He prepared an expert opinion report on February 20, 2018. Dr. Bansal examined the relevant medical file, took a detailed history from the claimant, and performed a thorough evaluation. He focused in on the infection and provided the following expert opinions.

> The mechanism of coming down from the stool with the weight to her left leg on or about July 2 and July 3 at Farmland caused increased left knee pain, prompting a referral to the company physician, Dr. Woolen [sic]. Against the backdrop of a swollen, prosthetic knee, Dr. Woolen [sic] proceeded to perform a knee joint aspiration. The standard of care for this procedure includes a patient consent informing of risks, including knee infection. The risk is especially compounded in the context of a swollen prosthetic knee. Bacteria thrive in an environment of warm, serous fluid, characteristic of a swollen, inflamed knee. A joint aspiration can directly inoculate skin bacteria such as Staph Lugdunensis directly in the joint space, accelerating or directly causing a joint infection (septic arthritis). I agree with Dr. Nelson that the knee infection most likely occurred in the July 2015 timeframe. The significance of the acute nature of this injury is

> reflected in Dr. Woolen's [sic] recommendation for a wheelchair for ambulation at that visit.
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> Unfortunately, while an infection was most likely worsening in Ms. Montiel's left knee, she was delayed in her referral to the orthopedic specialist. There were multiple plant nurse notes indicating continued left knee symptomatology during this two month period. Dr. Nelson ultimately had to perform a two stage revision arthroplasty, pointing out that a one stage revision can only be performed in the initial two to three weeks of an infection, Staph Lugdunensis is highly susceptible to conservative antibiotic treatment, of course, this is only applicable in the incipient stages of an infection, rather than a fulminant situation after two months.

(Cl. Ex. 19, pp. 103-104) He assigned a 75 percent impairment of the left leg, noting that 38 percent of the impairment resulted from the July 2015, work injury. (Jt. Ex. 19, p. 105) He assigned severe permanent restrictions.

Dr. Woollen testified under oath via deposition on March 14, 2018. He testified in detail about his treatment of Ms. Montiel and provided insight about his specific treatment. He testified that in his evaluations of Ms. Montiel prior to July 7, 2015, he had never diagnosed an infection. (Cl. Ex. 16, Woollen Depo, pp. 13-16) He testified that on July 7, 2015, Ms. Montiel was directed to see him through Farmland workers' compensation. (Cl. Ex. 16, Woollen Depo, p. 19) At that time, she had significant swelling in the left knee and much greater pain then she had previously. Dr. Woollen chose to attempt to aspirate the knee, which is reflected in his medical records. He explained in his testimony that the aspiration is both diagnostic and therapeutic. (Cl. Ex. 16, Woollen Depo, p. 20)

> Q. Okay, so infection was the principle thing you were looking for?
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> A. Or effusion, whether it was bloody or not bloody, whether it was traumatic. So, yes, infection, evidence of trauma, and then therapeutic because pulling fluid out of a swollen joint capsule oftentimes relieves pain. And she was having a lot of pain.

(Cl. Ex. 16, Woollen Depo, p. 21) He described why the aspiration was unsuccessful and testified that if the aspiration had been successful, he probably would have known whether an infection was present. Based upon Dr. Woollen's testimony, it appears as though he was also attempting to see if there was blood in the fluid which may have indicated more of a traumatic injury situation. (Cl. Ex. 16, Woollen Depo, p. 33)

Dr. Woollen provided a "differential diagnosis" regarding Ms. Montiel's infection.

> A. And so the question would be, I think that you're asking, is how the bacteria would have gotten into the knee. And certainly one possibility would be entry with the aspiration attempt in July of 2015. There are also

> reports of the same bacteria showing up two years after a total hip arthroplasty and four years after a total knee arthroplasty with no aspiration attempts, no knee interventions. And those are both listed here.
>
> The article describes the different ways that that bacteria can move through the body from the bladder tract, from the heart in case of endocarditis, and other potential sources.

(Cl. Ex. 16, Woollen Depo, p. 39) Interestingly, Dr. Woollen very specifically testified that his medical note of July 14, 2015, documented that there was "no evidence of cellulitis or infection, no erythema or warmth." (Cl. Ex. 16, Woollen Depo, p. 43)

I understand Dr. Woollen's medical opinion to be that there is really no way to know for certain when the infection occurred but that he specifically did not diagnose an infection or specific injury for Ms. Montiel in July 2015 because the aspiration was unsuccessful.

CONCLUSIONS OF LAW

The first question is whether the claimant suffered an injury which arose out of and in the course of her employment which manifested on July 3, 2015.

A personal injury contemplated by the workers' compensation law means courts the impairment of health or a disease resulting from a harm which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995)

There is a difference between an "injury" and a "disability" under Chapter 85. Many of the court cases, unfortunately, have used the terms interchangeably. Some cases purporting to define an injury under Chapter 85, are, in fact, actually addressing causation issues (i.e., whether an injury is a substantial cause of disability). Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Excel Corp. v. Smithart, 654 N.W.2d 891 (Iowa 2002). This is likely because in cumulative trauma cases, the issues sometimes become intertwined. There are, however, injuries under Chapter 85, which never result in any permanent, or even temporary, disability. The terms "hurt" or "harm" are common synonyms of "injury." The finding of a "personal injury" is a de minimis finding that the worker suffered a "hurt" or "harm" which arose out of and in the course of their employment. Iowa Code section 85.3(1) (2015).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or

source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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 alleges she suffered pain and significant symptoms to her left knee from repeatedly stepping up on a grate approximately two feet off the ground to unjam the machine she was working on. Because she had a total knee replacement in her left knee, she would climb up on the stool with her right leg first, pulling herself up in order to perform her work. She then came back down each time on her left leg. She testified credibly that after performing this work for two days, she developed significant pain and symptoms in her left knee by the end of the day on July 3, 2015. After she went home for the holiday weekend, she was unable to walk due to the swelling and symptoms and she reported the injury the following Monday, July 6, 2015.

This is undoubtedly a personal injury under Iowa law. This finding is based upon Ms. Montiel's credible testimony, her son's credible testimony, Dr. Woollen's notes and the nurse's notes. Even Dr. Martin characterized this occurrence as "a temporary worsening of an underlying condition." (Jt. Ex. 5, p. 170)

To be sure, there are significant causal connection questions associated with this claim, however, there is not a true issue about whether the facts described above constitute "an injury" which arose out of and in the course of employment. The

causation issues associated with this claim are complex, in part because of her preexisting, non-work related knee condition, but also because the attempt at aspiration was unsuccessful and then treatment was abandoned prematurely. It could have been that she temporarily aggravated her already symptomatic left knee replacement. Or it could have been that she developed pain and symptoms by aggravating an infection which was already in her knee at that time. Again though, these are causal connection issues regarding the nature of the injury itself.

The fighting issue in this case involves the nature of the claimant's injury. With the benefit of hindsight, everyone now agrees that Ms. Montiel developed a serious infection in her non-work related, surgically-repaired left knee. The question in this case is how that infection developed and whether it is causally connected in some manner to her work injury.

The claimant argues two theories in the alternative. First, she argues that the infection developed while she was treating for her work injury. Second, she argues that the employer eventually abandoned and delayed her medical treatment for the work related injury, thereby causing the infection to be more severe and adding increased medical treatment and disability. The defendants argue first that there was no work-related injury. I already rejected that argument. Second, the employer contends that the infection was likely caused by her original surgeries and there is no way to know with certainty, when the infection actually developed.

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).

When an injury occurs in the course of employment, the employer is liable for all

of the consequences that "naturally and proximately flow from the accident." Iowa Workers' Compensation Law and Practice, Lawyer and Higgs, section 4-4. The Supreme Court has stated the following. "If the employee suffers a compensable injury and thereafter suffers further disability which is the proximate result of the original injury, such further disability is compensable." Oldham v. Scofield & Welch, 222 Iowa 764, 767, 266 N.W. 480, 481 (1936). The Oldham Court opined that a claimant must present sufficient evidence that the disability was naturally and proximately related to the original work injury.

Disability which results from authorized medical care is deemed "proximate to the original injury." Cross v. Hermanson, 16 N.W.2d 616, 617 (Iowa 1944); Yount v. Under Fire & Casaulty Co., 256 Iowa 813, 129 N.W.2d 75 (1964).

Having reviewed all of the evidence in the record, I find the greater weight of evidence supports a finding that claimant developed an infection in her left knee in July 2015. There are different ways this infection could have come about and there is no way to know beyond a reasonable doubt. However, the most logical theory based upon the evidence presented is that it developed as the result of Dr. Woollen's aspiration attempt on July 7, 2015. This finding is supported by Dr. Bansal's medical opinions which I adopt in this decision.

The claimant is not required to prove the cause of the infection, beyond a reasonable doubt. She must only prove the likely cause of her injury by a preponderance of evidence. This phrase means it is more likely than not. While there are other possible ways Ms. Montiel could have developed the infection in her knee, the evidence in this case suggests "more likely than not" that she developed it in July 2015, from the attempt to aspirate her knee at Dr. Woollen's office.

In this case, Dr. Bansal's opinion is the most convincing. He provides a well-reasoned explanation, which is consistent with the facts of the case. Dr. Woollen essentially refused to provide an opinion, stating that there was no way to know exactly how the knee became infected. He openly conceded, however, that the knee could have become infected through the aspiration attempt. Dr. Woollen, however, had some motivation not to pinpoint the July 2015, aspiration attempt as the likely culprit of the infection. Dr. Nelson conceded that the infection developed in July 2015. He, however, provided a conclusory and unconvincing opinion that the infection relates back to the original surgery or surgeries. He opined that such infections are "common" although he did not specify whether it is common for such infections to develop years after the original surgeries. While there may be good reasons for his conclusion, those reasons are not in evidence. For these reasons, I find the opinions of Dr. Bansal to be the most compelling.

Having determined that the claimant suffered an injury which arose out of and in the course of her employment and that her infection is causally connected to her treatment for that injury, I must now decide what benefits are owed.

The next issue therefore is medical expenses.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Iowa Code Section 85.27 (2017).

Claimant is entitled to an order of reimbursement only if he has paid treatment costs; otherwise, to an order directing the responsible defendants to make payments directly to the provider. See, Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Defendants should also pay any lawful late payment fees imposed by providers. Laughlin v. IBP, Inc., File No. 1020226 (App., February 27, 1995).

Claimant seeks payment of medical expenses as set forth in Claimant's Exhibit 23. These are medical expenses related to the treatment and surgeries claimant underwent related to the infection in her knee. These are compensable.

The next issue is healing period.

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

The parties have stipulated that claimant was off work and recuperating for her condition from September 11, 2015, through October 3, 2016. Defendants are responsible for healing period during this period of time.

The next issue is the extent of permanent partial disability in claimant's left leg which resulted from the work injury and its sequela.

Where an injury is limited to a 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):

> The 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 Iowa 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).

In this case, the claimant suffered a sequela injury of infection in her left leg. Therefore, she is entitled to compensation as set forth in Iowa Code section 85.34(2)(o) (2015) which caps her disability at 220 weeks. The treatment she received resulted in greater functional impairment in her left leg. I adopt the apportioned disability rating submitted by Dr. Bansal that the infection and subsequent treatment resulted in a 38 percent functional disability in her left lower extremity, which entitles her to 83.6 weeks of benefits commencing on October 4, 2016.

The next issue is claimant's IME expenses.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes

that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

I find that after Dr. Martin opined claimant suffered no disability as a result of her work injury, the claimant was entitled to receive an IME under Iowa Code section 85.39. Dr. Bansal's expenses, including claimant's transportation costs, are set forth in Claimant's Exhibits 21 and 22. Claimant is entitled to reimbursement for these expenses.

ORDER

THEREFORE, IT IS ORDERED

All benefits shall be paid at the rate of four hundred eighty-nine and 38/100 ($489.38) per week.

Defendants shall pay the claimant healing period benefits commencing on September 11, 2015, through October 3, 2016.

Defendants shall pay eighty-three point six (83.6) weeks of permanent partial disability benefits commencing on October 4, 2016.

Defendants shall pay the medical expenses set forth in Claimant's Exhibit 23 consistent with this decision.

Defendants shall pay IME expenses set forth in Claimant's Exhibits 21-22.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

Defendants shall file subsequent reports of injury as required by this agency

pursuant to rule 876 IAC 3.1(2).

Costs are taxed to defendants.

Signed and filed this 30th day of April, 2019.

JOSEPH L. WALSH
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.