

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

MICHELLE CLINE,)
)
 Employee,)
)
 v.) Hearing No. 1509418
)
 THE NEMOURS FOUNDATION,)
)
 Employer.)

DECISION ON PETITION FOR ADDITIONAL COMPENSATION

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board (“Board”) on September 21, 2022, in a hearing room of the Board in New Castle County, Delaware.

PRESENT:

ROBERT MITCHELL

VINCENT D’ANNA

Julie Pezzner, Workers’ Compensation Hearing Officer, for the Board

APPEARANCES:

Jessica Welch, Attorney for the Employee

Keri Morris-Johnston, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

On March 15, 2021, Ms. Michelle Cline (“Claimant”) injured her right knee during the course and scope of her employment at A.I. DuPont/Nemours Foundation (“Employer”) when a pediatric patient kicked her in the right knee and punched her in the face. On May 17, 2021, Dr. James Rubano performed a total knee replacement surgery to treat her right knee injury. On January 31, 2022, Claimant filed a Petition for Additional Compensation in which she seeks acknowledgement of the compensability of the total knee replacement surgery. Employer disputes the reasonableness, the necessity, and the causal relationship of the surgery to the work accident.

A hearing was held on Claimant’s petition on September 23, 2022. This is the Board’s decision on the merits.

SUMMARY OF THE EVIDENCE

Dr. James Rubano, who is board certified in orthopaedic surgery with a subspecialty in hip and knee replacement surgeries testified by deposition to a reasonable degree of medical probability on behalf of Claimant. He is a certified provider under the Delaware Workers’ Compensation Healthcare System. He commenced treating Claimant on April 9, 2021. He performed the total knee replacement surgery on May 17, 2021. Dr. Rubano opined that proceeding with total knee replacement surgery was reasonable and necessary. Claimant had a medial meniscus tear and arthritis. Dr. Rubano opined that while the meniscal tear could have been contributing to Claimant’s pain, the arthritis was the primary pain generator. But for the work accident, Claimant’s arthritis would not have become symptomatic.

Dr. Rubano reviewed the reports and films from the X-rays and the MRI. Dr. Rubano represented that both reports downplayed the extent of Claimant’s arthritis. The X-ray report

indicated that Claimant's knee was normal – it looked fine. However, Dr. Rubano believed the X-rays demonstrated arthritis in the patella femoral joint.

Dr. Rubano also did not agree with the MRI report with respect to the arthritis. Claimant's arthritis was worse than the report stated. From his review of the MRI films, Dr. Rubano represented the MRI demonstrated moderate to severe arthritis, particularly underneath the kneecap, under the patella femoral joint. She had a meniscal tear and medial and lateral arthritic changes that were advanced underneath the kneecap.

Dr. Rubano added that the MRI report was confusing because it contained inconsistencies. The report identified a normal lateral femoral tibial joint and a normal medial femoral tibial joint but also identified diffuse fifty percent cartilage loss. The MRI report identified a complex tear - a fold slap tear in the body of the medial meniscus - and a secondary radial tear on the posterior horn.

Dr. Rubano testified that women are more prone to arthritis in the knee, particularly under the kneecap. Claimant's job as a nurse requires her to be on her feet. She has worked as a nurse for many years. A direct trauma or blow to the knee, can cause the kneecap to impact against the femur or the thigh bone and can exacerbate or accelerate arthritis or post traumatic arthritis. The injury accelerated her preexisting asymptomatic arthritis resulting in the treatment performed.

By the time Dr. Rubano saw Claimant, Claimant was having significant symptoms with significant difficulty performing her activities of daily living. Claimant had tried to return to light duty work after the work accident, but her knee gave out causing Claimant to nearly collapse. Dr. Rubano's April 9, 2021, medical notes indicated that Claimant had tried treating with conservative interventions. He testified she had taken time off work and had taken anti-inflammatories.

Dr. Rubano discussed with Claimant the various treatment options to include conservative care and surgery. Dr. Rubano testified that while it would not be inappropriate to initially proceed with conservative treatment such as injections, anti-inflammatories, and physical therapy, conservative care would not provide a long-term solution, if any solution. Conservative care would not address the arthritic pain, Claimant's primary pain generator.

Similarly, arthroscopic surgery would only address any pain that may be coming from the meniscal tear. On the other hand, a total knee replacement surgery would address the arthritis and the meniscal tear. A total knee replacement surgery may be a bigger surgery than arthroscopic surgery with a longer recovery, a total knee replacement surgery would provide Claimant with the best chance of having full pain relief and would return Claimant to work in a timely fashion. After having the surgery, Claimant returned to her job as a nurse without restrictions.

Dr. Rubano acknowledged that his medical notes indicated Claimant had exhausted all conservative treatment yet, Dr. Rubano did not administer any conservative treatment. Dr. Rubano also acknowledged that at this visit he was not able to determine whether the meniscal tear or the arthritis was the cause of her pain.

Dr. Rubano did not review the actual medical bills. He did not dispute that Employer paid for bills relating to his treatment on May 14, 2021, on June 25, 2021, and on September 24, 2021. The did not dispute the stated diagnosis was osteoarthritis.

Dr. Rubano also did not dispute Dr. Schwartz's opinion that the mechanism of injury would not have produced a fold slap tear of the medial meniscus. Dr. Rubano explained that the fold slap tear could not be dated. Therefore, it could have preexisted the work accident.

Dr. Rubano testified that Claimant had not had any prior right knee issues.

Claimant testified on her behalf. She is fifty-one years old and works as a pediatric nurse in the Pediatric Intensive Care Unit at Employer. She has been a nurse for almost thirty-one years. She has worked for Employer for fourteen years. Her shifts are typically twelve hours, and she mostly is on her feet. Her job can be strenuous and requires lifting. Employer has no light duty jobs available. Claimant teaches nursing as a second job. She also watches her two-year old granddaughter.

Claimant has a high pain tolerance. Claimant has not had any prior right knee issues or has not required work restrictions relating to the right knee prior to the work accident. Claimant testified about how she got injured. She believes the patient who punched her face and kicked her right knee was thirteen or fourteen years old.

Claimant treated at Med Express for right knee pain. She tried to continue working but eventually, her knee started to collapse, preventing her from being able to work.

Between March 2021, and April 9, 2021, Claimant was placed on total disability. She self-treated her knee with ice, Motrin, and rest. She tried to do light therapeutic home exercises, but they increased her pain. Prior to the surgery, Claimant was unable to stand for prolonged durations. She sat in a chair to cook and wash dishes. She relied on a seat when showering. Driving more than thirty minutes was too painful. She resided on the first floor of her home because she was unable to navigate stairs.

Claimant testified that when she first saw Dr. Rubano on April 9, 2021, Dr. Rubano discussed her treatment options to include: exercises, injections (several types), physical therapy, arthroscopic surgery and total knee replacement surgery. Dr. Rubano explained to her the pros and cons. In summary, the conservative treatment would not help. Arthroscopic surgery would

not address the arthritis. Claimant testified that she needed to return to full duty work. Employer would replace her job after being out four to six months.

Claimant discussed the treatment options with her husband and conducted online research. It did not make sense to proceed with nonsurgical conservative treatment because it would not help. The arthroscopic surgery could likely enable her to return to work but with restrictions so that was not a viable option. Even if she proceeded with arthroscopic surgery, she would ultimately require total knee replacement surgery. Proceeding with total knee replacement surgery would provide the greatest chance of timely returning to work without restrictions. Claimant remarked she felt guilty not working especially when Employer had nurse shortages due to COVID-19. Claimant made the decision to proceed with total knee replacement surgery. While Dr. Rubano made that recommendation, he left the decision up to Claimant.

Claimant did return to her full duty job in August 2021, after having undergone surgery. She is very happy she proceeded with that option. Her knee feels amazing. She has returned to nearly all her activities of daily living, including navigating stairs, and running. Kneeling continues to be problematic. Otherwise, she essentially does not have knee pain.

Claimant testified that she underwent a pre-surgical injection. According to Dr. Rubano's May 3, 2021, medical notes, Claimant reported experiencing immediate pain relief from the injections. Claimant disputed the veracity of such notation. Claimant did not recall experiencing any relief from the injection.

Claimant verified that Employer's insurance carrier paid most of Dr. Rubano's medical bills.

Dr. Eric Schwartz, who is board certified in orthopaedic surgery, testified by deposition to a reasonable degree of medical probability on behalf of Employer. He had not performed a knee

replacement surgery in ten or fifteen years. Dr. Schwartz examined Claimant on September 21, 2021. Dr. Schwartz questioned the causal relationship of the right total knee replacement surgery to the work injury. He explained that it would be unusual for a kick in the knee by a pediatric patient to result in a significant meniscal tear. Such a tear would require significant force for the knee to be twisted and rotated. Furthermore, the mechanism of injury would not aggravate arthritis to cause it to become symptomatic.

Regardless of causation, Dr. Schwartz additionally opined that the right total knee replacement surgery was not reasonable or necessary. Such a rush to surgery (whether total knee replacement surgery or arthroscopic surgery) would not be compliant with the Delaware Healthcare Practice Guidelines¹ (and specifically Section 7 addressing knee arthritis), with the Medicare Guidelines or with the Highmark of Delaware Guidelines. All three guidelines call for exhaustion of conservative treatment and documented limitations. Dr. Schwartz acknowledged that the May 17, 2021, surgical report documented significant, limiting, right knee pain secondary to arthritis and having exhausted conservative treatment. However, there was no evidence Claimant had significant long-term pain. There was no documentation of how Claimant's quality of life was being limited. Dr. Schwartz testified that a mere statement in the medical notes of failed conservative treatment is not sufficient. Merely discussing conservative options is not sufficient to comply with the Practice Guidelines.

Conservative treatment includes: nonsteroidal anti-inflammatories; therapeutic injections such as Cortisone injections; supervised physical therapy; muscle strength exercises; use of assistive devices; and weight reduction. Claimant did not undergo any of the stated conservative treatment. Dr. Schwartz added that it is very likely that conservative treatment could return a

¹ ("Practice Guidelines").

person to pre-loss level of function and activity. Before proceeding with surgery, give the person time to get better.

Dr. Schwartz continued that the extent of Claimant's condition did not warrant total knee replacement surgery. The X-rays were essentially normal – relatively benign for a fifty-year-old person. The April 2, 2021, MRI report identified: a medial meniscal tear; mild degenerative changes (that were not appreciated on the X-rays); a mild lateral patella tilt; and diffused left and fifty percent thickness loss. None of the findings were significant.

Total knee replacement requires severe degenerative joint disease. There was not grade four, bone on bone degeneration present on either diagnostic test. Dr. Schwartz remarked that even if Claimant had severe bone on bone degenerative arthritis in all three compartments of the knee, it would not be reasonable or necessary to proceed with total knee replacement surgery two months post-accident. On April 9, 2021, Dr. Rubano in his medical notes stated he did not know whether the pain source was from the meniscal tear or from the arthritis.

Dr. Schwartz acknowledged that Claimant's arthritis predated the work event and that it had been asymptomatic leading up to the work event. Severe degenerative joint disease could be asymptomatic. He acknowledged that a trauma could cause an asymptomatic degenerative condition to become symptomatic. He was not aware the knee was accepted as compensable, and that Employer paid Claimant's disability benefits until she returned to full duty work in August 2021. Dr. Schwartz remarked that Claimant may be doing fine now but he questioned how she will be in five or ten years.

On cross-examination, Dr. Schwartz acknowledged that he did not review the films from the X-rays or the MRI. He only reviewed the reports. He acknowledged he did not know the age or build of the patient who kicked Claimant. He was not aware there was a strict timeframe for

Claimant to return to full-duty work to maintain her job. He admitted the Practice Guidelines are merely guidelines and that the treatment must be tailored to the individual patient and not rendered to fit general scenarios. Dr. Schwartz was not aware Claimant attempted to return to work prior to her surgery but was unable because her knee gave out.

Dr. Schwartz corrected the following statements he made during direct examination. Dr. Rubano saw Claimant multiple times, not one time, before proceeding with surgery. Dr. Schwartz had testified on direct that most sprains and strains resolve in eight to twelve weeks. On cross-examination, he recognized Claimant did not have a strain or sprain.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In order to be compensable, the injury must arise out of or be in the course of employment. 19 *Del. C.* § 2304. As this is the Claimant's Petition, Claimant has the burden to prove by a preponderance of the evidence that the injury was caused by the work accident. *Goicuria v. Kauffman's Furniture*, Del. Super., C.A. No. 97A-03-005, Terry, J., 1997 WL 817889 at *2 (Oct. 30, 1997), *aff'd*, 706 A.2d 26 (Del. 1998). The "but for" definition of proximate cause that is used in the area of tort law is the applicable standard for causation. *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. Supr.1992). Hence, the Claimant must prove that "the injury would not have occurred but for the accident. The accident need not be the sole cause or even a substantial cause of the injury. If the accident provides the 'setting' or 'trigger', causation is satisfied for purposes of compensability." *Reese*, 619 A.2d at 910.

When an employee has suffered a compensable injury, the employer is required to pay for reasonable and necessary medical services/treatment causally related to that injury. 19 *Del. C.* §2322. What constitutes "reasonable medical services" for purposes of Section 2322 is determined by the Board on a case-by-case basis. *See Willey v. State*, Del. Super., C.A. No.

85A-AP-16, Bifferato, J., 1985 WL 189319 at *2 (November 26, 1985). “Whether medical services are necessary and reasonable or whether the expenses are incurred to treat a condition causally related to an industrial accident are purely factual issues within the purview of the Board.” *Bullock v. K-Mart Corporation*, Del. Super., C.A. No. 94A-02-002, 1995 WL 339025 at *3 (May 5, 1995).

Based on the entirety of the evidence incorporated herein, the Board finds that proceeding to total knee replacement surgery without exhausting conservative care was not reasonable or necessary. The Board accepts the medical opinions of Dr. Schwartz over the medical opinions of Dr. Rubano. Dr. Schwartz testified that such a rush to surgery (whether total knee replacement surgery or arthroscopic surgery) would not be compliant with the Practice Guidelines, with the Medicare Guidelines or with the Highmark of Delaware Guidelines. All three guidelines call for exhaustion of conservative treatment and documented limitations. While the Practice Guidelines are merely guidelines, the Board finds that Claimant should have pursued some type of conservative treatment first. It may have helped.

Dr. Rubano did present as rushing to a significant surgery. Both doctors testified the X-rays were relatively normal. The MRI report did not identify significant arthritis. Dr. Rubano disputed the MRI report. He testified that when he reviewed the MRI films, he identified moderate to severe arthritis. It is concerning that the diagnostic reports did not identify significant arthritic findings, yet Dr. Rubano represented that there were. The Board would have been interested to have heard Dr. Schwartz’s interpretation of the MRI films. Dr. Rubano’s incorrect statement in his medical records indicating Claimant had exhausted conservative treatment when she did not, detracted from Dr. Rubano’s credibility. His medical records should have supported his opinion that conservative treatment would not have been beneficial. Dr. Schwartz testified that total knee

replacement requires severe degenerative joint disease – a finding the medical records did not sufficiently support. The Board appreciates Claimant’s need to timely return to full-duty work but under this set of facts, the Board finds that it was not reasonable or necessary to rush to undergo a total knee replacement surgery. The Board denies Claimant’s Petition for Additional Compensation.²

STATEMENT OF THE DETERMINATION

For the reasons set forth above, Claimant’s Petition for Additional Compensation is denied.

IT IS SO ORDERED THIS 13th DAY OF OCTOBER, 2022.

INDUSTRIAL ACCIDENT BOARD

Robert Mitchell/ox
ROBERT MITCHELL

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VINCENT D'ANNA

I, Julie Pezzner, Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.



Mail Date:

OWC Staff

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² Dr. Schwartz challenged the causal relationship of the surgery to the work accident. However, Employer accepted the right knee injury. Such surgery related to an onset of symptoms occurring at the time of the work accident. Dr. Rubano was treating an arthritis diagnosis that he related to the work accident. The Board finds that the surgery was causally related but not reasonable or necessary.