

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

<p>Jesse Keidel,</p> <p>Appellant,</p> <p>vs.</p> <p>North Dakota Workforce Safety and Insurance,</p> <p>Appellee,</p> <p>and</p> <p>Kolling & Kolling, Inc.,</p> <p>Respondent.</p>	<p>Supreme Court No.: 20220229 Stark County District Court Civil No.: 45-2022-CV-00068</p> <p>ORAL ARGUMENT REQUESTED</p>
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**BRIEF OF APPELLEE NORTH DAKOTA
WORKFORCE SAFETY AND INSURANCE**

**APPEAL FROM JUDGMENT DATED JUNE 10, 2022
STARK COUNTY DISTRICT COURT
SOUTHWEST JUDICIAL DISTRICT
THE HONORABLE WILLIAM HERAUF**

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STATEMENT OF THE ISSUES

[1] Whether the District Court erred in affirming the ALJ's decision that the apportionment of permanent impairment for Appellant Jesse Keidel's ("Keidel") left knee condition was **not** barred by administrative res judicata.

REQUEST FOR ORAL ARGUMENT

[2] Pursuant to Rule 28(h) of the North Dakota Rules of Appellate Procedure, Appellee Workforce Safety and Insurance ("WSI") requests oral argument. This appeal involves an issue of whether administrative res judicata applies to prior determinations of permanent impairment when there has been a significant change in the medical condition and the evaluation is conducted under a different edition of the AMA Guides to the Evaluation of Permanent Impairment. Oral argument will assist the Court in understanding the prior and subsequent determination of permanent impairment by WSI, and why administrative res judicata does not and cannot apply in this situation.

STATEMENT OF THE CASE

[3] On July 2, 1996, Keidel filed a claim with WSI for benefits relating to an injury to his left knee sustained May 21, 1996. (R10) WSI accepted the claim for the left knee injury on July 19, 1996. (R12, R13)

[4] On August 20, 1999, WSI issued an Administrative Order denying permanent impairment benefits for the left knee because the impairment did not reach the 16 percent whole body threshold for an award. (R.16) An administrative hearing was held regarding that Order on September 27, 2000. (R17:17) The administrative law judge ("ALJ") issued Recommended Findings of Fact, Conclusions of Law, and Order on October 16, 2000, in which he affirmed WSI's Order. (R.17:17-26) WSI adopted that decision. (R17:16)

[5] On January 17, 2020, WSI issued a Notice of Decision Denying Permanent Partial Impairment Evaluation. (R:21) Keidel requested reconsideration. (R:22:34-35) WSI issued an Order denying a permanent impairment evaluation. (R:27) During the DRO process related to that Order, a decision was made to reverse the denial and refer Keidel for an evaluation for permanent impairment. (R:28:46)

[6] An evaluation of permanent impairment was conducted by Dr. Dean Redington on June 24, 2020. (R:52:111-141) After audit (R:52:142-148), WSI issued a Notice of Decision Denying Permanent Impairment Benefits on August 18, 2020, because the impairment did not exceed 14% whole body for an award. (R.38) Keidel requested reconsideration. (R.43)

[7] On November 19, 2020, WSI issued an Administrative Order denying liability for lumbar spine, thoracic spine and left hip and denying permanent impairment benefits on the claim. (R.49) Keidel requested rehearing. (R.50)

[8] An administrative hearing was held on August 24, 2021, and October 6, 2021, before Administrative Law Judge Hope L. Hogan (“ALJ Hogan”) relating both to the issue of permanent impairment benefits and compensability of the lumbar spine, thoracic spine and left hip conditions. (R51, R72, R73) Written post-hearing briefing was conducted. (R64, R65, R66) On November 23, 2021, ALJ Hogan issued Findings of Fact, Conclusions of Law, and Final Order, affirming WSI’s Administrative Order. (R68)

[9] On December 20, 2021, Keidel submitted a Petition for Reconsideration and Rehearing. (R69) WSI submitted its Response to the Petition for Reconsideration. (R70) On January 11, 2021, ALJ Hogan issued her Order on Petition for Reconsideration and Rehearing, denying the same. (R71)

[10] Keidel appeal to the District Court only as to the issues pertaining to the ALJ's affirmance of WSI's Order pertaining to permanent partial impairment. (R1) Following submission of Briefs (R90, R92, R95) and oral argument before the District Court, on June 8, 2022, the District Court, the Honorable William Herauf, issued a Memorandum Decision and Order Affirming ALJ's Decision. (R97) This appeal followed.

STATEMENT OF FACTS

[11] Keidel filed a claim in July of 1996, for an injury to his left knee that occurred on May 2, 1996. (R10) Keidel did not seek any medical treatment for the injury until July 5, 1996, at which time it was noted he had sustained the injury five weeks earlier. (R53:150) The documentation reflected that the injury was a twisting type injury, and it was uncertain if it also involved hyperextension and hyperflexion. (Id.) The initial evaluation reflected Keidel walked with a slight limp, but alignment was normal, and spine and hips were normal. (Id.) The doctor documented Keidel had suffered a grade 1 medial collateral sprain. (R53:151, 152) Keidel was placed in a knee immobilizer and prescribed physical therapy. (Id.) If that did not "settle the problem" a meniscectomy would be considered. (Id.) Keidel continued to work. (R72:598)

[12] The medical records documented Keidel did well with therapy. (R53:153) On September 5, 1996, Keidel reported that he recently felt a pop when he squatted and had some more difficulties. (Id.) Dr. Gattey believed Keidel had a "large and disorganized tear of the medial meniscus" which "is going to trouble him in the future." (Id.) Keidel wished to wait to perform surgery and Dr. Gattey noted that "[n]o damage is being done while we wait." (Id.) In a follow-up visit on December 5, 1996, Dr. Gattey

noted that the “knee is not normal but good enough to work on. Sometime in the future I am sure he will need an arthroscopic meniscectomy, but he doesn’t need to rush into it now.” (R53:155) However, on December 12, 1996, Dr. Gattey saw Keidel again and scheduled surgery. (R53:156)

[13] On December 23, 1996, Keidel underwent surgery for the medial meniscus tear in his left knee. (R53:157) In the operative report Dr. Gattey documented the following:

Visualization shows arthritic changes down to the bone, in the region of the patellofemoral joint and grade 3 chondromalacic changes on the tibial and the femoral articular surfaces medially with a large disorganized complex tear of the medial meniscus, including all portions. Almost all of the medial meniscus was removed, including the middle, posterior, and most of the anterior chord. He shows an enlarged anterior tibial spine and osteoarthritic changes with osteophytes are seen rimming the intercondylar notch. The anterior cruciate ligament looks the way the structure does in an osteoarthritic knee. . . . **This man has an arthritic knee, not just a meniscus tear.** He will need further conservative treatment. In the remote future he may need further joint reconstruction or an osteotomy.

(R53:157, emphasis supplied) The post-operative diagnosis included the medial meniscus tear along with osteoarthritis. (Id.) Dr. Gattey commented in a follow-up visit on January 2, 1997, that Keidel had “a significant degree of osteoarthritis which was a surprise”

(R53:158) On January 21, 1997, Dr. Gattey documented that Keidel had “patellofemoral osteoarthritis” and suggested that Keidel undergo a “high tibial osteotomy” which would “allow him to weight bear with comfort and has a 70-80% chance of making him functional for 7-10 years.” (R53:160)

[14] On February 13, 1997, Keidel was seen by G. Kovacs, D.O. for a second opinion on the osteotomy procedure. (R55:207-208) The reported history at that visit was Keidel had “osteoarthritis as well as a complex tear of the medial meniscus and severe

narrowing of the patellofemoral joint down to the level of the bone.” (Id.) X-rays revealed “spur formation over the superior and inferior poles of the patella as well as over the medial and lateral femoral condyles.” (R55:207-209) There was also “narrowing of the medial joint space greater than the lateral joint” and “spurring noted in the intercondylar region.” (R55:207) Dr. Kovacs diagnosed Keidel with degenerative disease of the right knee. (Id.) He stated: “it appears that Mr. Keidel has degenerative changes that involves more than just his medial joint compartment, and this makes me less optimistic that a proximal tibial osteotomy will be of any benefit to him. I am most impressed at the current time that a lot of his symptoms is in the patellofemoral joint and suggested that he maintain a quality aggressive quads rehab program with attention directed towards the vastus medialis obliquus musculature and strengthening of that particular structure.” (R55:208, emphasis supplied) After that consultation, Keidel continued to be followed by Dr. Gattey periodically for his “arthritic left knee.” (R53:167-170)

[15] On September 6, 1997, Keidel underwent bone length x-rays. (R53:172-173) Those x-rays demonstrated “marked degenerative changes in the right knee with significant narrowing of the medial compartment” of the right knee and “medial compartment narrowing of the left knee.” (Id.) Keidel then underwent a high tibial osteotomy on October 20, 1997. (R53:181) The operative report identified the pre and post operative diagnosis as “medial compartment osteoarthritis, left knee.” (Id.) After surgery, Keidel continued to receive injections in his left knee by Dr. Kovacs for his degenerative joint disease. (R55:210-214)

[16] In September of 1998, WSI inquired of Dr. Gattey as to MMI status. (R53:193) Dr. Gattey responded he anticipated MMI status in October of 1998. (Id.) There were no further treatment records from Dr. Gattey. WSI inquired and Dr. Kovacs confirmed MMI status as of March 30, 1999. (R55:221)

[17] On June 9, 1999, Keidel underwent a permanent impairment evaluation by Dr. Gary Dilla for his left knee. (R52:95-101) The evaluation was conducted under the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition. (R55:93, R55:95) Dr. Dilla explained in his report that under the AMA Guides, Fourth Edition, he was to rate the proximal tibial osteotomy. (R55:97) Dr. Dilla documented for a “good result” Keidel was to receive a 10% whole person impairment, but for a poor result the AMA Guides noted he was to “estimate impairment according to examination and arthritic degeneration.” (R55:97) Dr. Dilla’s analysis based on the criteria in the AMA Guides, Fourth Edition, was that Keidel had a poor or fair result, but not a good result. Thus the 10% impairment was not applicable. (R55:97) Therefore, according to the AMA Guides, Fourth Edition, Dr. Dilla was required to assume a poor result and “estimate impairment according to ‘examination and arthritic degeneration’.” (R55:98) Dr. Dilla then followed the protocol in the AMA Guides, Fourth Edition, considering range of motion, radiographic studies, thigh circumference, and motor and sensory examination. (R55:98) Dr. Dilla specifically noted that Keidel had a 10% impairment due to medial knee compartment arthritis. (R55:99) Combining all these considerations Dr. Dilla arrived at a 15% whole person impairment “strictly utilizing the American Medical Association Guide to the Evaluation of Permanent Impairment, 4th edition, 3rd printing.” (R55:99)

[18] The impairment determination by Dr. Dilla was the subject of an administrative hearing. (R17:17) The ALJ's decision from that administrative hearing referenced that the impairment issue "generated considerable correspondence between the bureau and the claimant concerning Dr. Dilla's permanent impairment rating." (R17:20) In one of those pieces of correspondence, Dr. Dilla responded to an inquiry about his approach to determining the impairment and stated there were "multiple categories from which we can choose to provide impairment" and he was to "decide which estimate best describes the situation and should use only one approach for each anatomic part." (R52:106; R52:107) Dr. Dilla decided to determine the impairment rating using the "proximal tibial osteotomy," giving him impairment for a "poor result" which requires the doctor "to estimate impairment according to examination findings and arthritic degeneration." (R52:106)

[19] In that prior litigation, Dr. Kovacs also weighed in on the issue of permanent impairment in a note dated November 11, 1999. (R55:223) In discussing the various evaluations and opinions relating to impairment, Dr. Kovacs confirmed that Keidel did have an underling degenerative condition that was exacerbated and accelerated by the work injury. (Id.) Dr. Kovacs also explained that there was "significant arthritis in the patellofemoral joint as well as the medial joint compartment [i.e., location of injury] at the time of the initial arthroscopy . . ." (Id.) An IME performed by Dr. Stern opined that the left knee status was a "combination of his significant preexisting left knee degenerative joint disease and the work-related permanent aggravation . . ." (R56:238) The ALJ in that prior administrative proceeding affirmed WSI's denial of permanent impairment benefits to Keidel because he "failed to sustain his burden of proof" because

‘Dr. Dilla was deposed and he adequately explained the basis for his impairment rating.’”
(R17:22)

[20] On August 3, 2000, Keidel was seen by Dr. Jeffrey Johnson on referral from Dr. Kovacs. (R57:240) Dr. Johnson believed Keidel had “post traumatic chondromalacia as well as stiffness in the knee following his osteotomy.” (Id.) Keidel infrequently sought consultations after the PPI litigation was concluded. He was seen by Dr. Kovacs on July 27, 2004, January 24, 2008, and July 22, 2010, for what was described as **progressing arthritis** in the left knee. (R55:228-232) Keidel then was followed periodically by Dr. Ronald Isackson in Dickinson for injections from 2010 through May of 2013. (R58:241-253) In October of 2013 Keidel had two chiropractic visits which confirmed Keidel had bilateral knee pain and needed knee replacements in both knees, but he was “putting it off.” (R59:254)

[21] In February of 2017, Keidel began treatment at Sanford with Dr. Carpenter regarding his left knee. (R60:255) Dr. Carpenter’s history reflects that after the osteotomy **he went on to “develop osteoarthritis.”** (Id., emphasis supplied) The x-rays reviewed by Dr. Carpenter showed “significant osteoarthritis with narrowing **tricompartamentally.**” (R60:256, emphasis supplied) Dr. Carpenter’s impression was “significant end-stage osteoarthritis” of the left knee. (Id.) Keidel’s next visit with Dr. Carpenter on December 19, 2018. (R60:258) Keidel “definitely has end-stage osteoarthritis.” (Id.) Dr. Carpenter noted Keidel was “getting to the point that his symptoms and change in quality of life are significant enough to consider total knee arthroplasty.” (Id.) In a pre-op history and physical, it was documented that Keidel previously also had right knee surgery. (R60:261) Keidel had a right knee replacement

three years earlier and it was documented to be “significantly stiff.” (R:60264) Keidel underwent the left total knee replacement on January 28, 2019. (R60:276-277)

[22] After his left total knee replacement, Keidel began physical therapy. (R60:284) In his first visit, Keidel reported that following his right total knee surgery, he only had about a month of physical therapy and no follow-ups with the surgery until one year post-surgery. (R60:284) The therapist documented that Keidel had been “fighting issues with the right knee having decreased range of motion and increased pain from this lack of follow up and never achieving full function or mobility with the right knee.” (R60:284) Therapy notes documented improvement with the left knee. (R60:287-299) On March 25, 2019, Keidel was released to light duty work with no kneeling or climbing. (R60:311)

[23] In a progress note of May 7, 2019, Dr. Carpenter documented Keidel was “having a difficult time getting range of motion back.” (R60:334) Dr. Carpenter recommended a manipulation to obtain more knee flexion. (Id.) Keidel underwent a manipulation under anesthesia on May 21, 2019. (R60:341-342) That procedure was followed by some additional physical therapy. (R60:343-359) Keidel was discharged from therapy on July 12, 2019, and noted to be “pleased with his progress.” (R60:359) Dr. Carpenter reported to WSI that Keidel was at MMI as of June 18, 2019. (R60:360)

[24] On October 8, 2019, Keidel’s claim was routed to Jolene Rohde, WSI’s PPI auditor, to review as to whether it was reasonably likely Keidel would have an impairment of at least 14% whole body for an impairment award. (R18:27, R72:608) Rohde’s review noted that it was unlikely he would reach that level of impairment. (R18:28) Rohde reviewed the claim again in January of 2020 and came to the same

conclusion as she believed he would likely fall within the range of 8-10% whole person. (R20) WSI issued a Notice of Decision denying the evaluation. (R21) Keidel requested reconsideration. (R22)

[25] After WSI issued an Administrative Order denying an additional impairment evaluation (R27:40-45), the matter was reviewed with the Decision Review Office. (R28) During that process recent documentation of a visit with Dr. Carpenter on April 7, 2020, was considered and Rohde documented that “it is possible that the IE would reach the 14% WP threshold for a monetary impairment award and could be scheduled for an impairment evaluation.” (R28) It was determined that the Order denying an evaluation be reversed, and Keidel referred for an evaluation of permanent impairment. (R28, R29)

[26] Keidel underwent a permanent impairment evaluation on June 24, 2020, by Dr. Dean Redington. (R52:111-141) Dr. Redington applied the 6th Edition of the AMA Guides to the Evaluation of Permanent Impairment to his determination of impairment. (R52:110-111) Dr. Redington rated Keidel for a left total knee replacement. (R52:129) Dr. Redington determined Keidel had a 24% whole person impairment for the left total knee replacement. (R52:131) Dr. Redington then discussed apportionment. (R52:131-132) Dr. Redington quoted from several medical records and then stated that the “preponderance of evidence that he probably had some preexisting arthritis, the degree of which cannot be determined, but it was asymptomatic. Unless more information becomes available, I cannot apportion any of the derived impairment to preexisting problems.” (R52:132)

[27] As part WSI's impairment auditing process, Jolene Rohde wrote to Dr. Redington regarding the apportionment issue. (R52:136-139) Ms. Rohde outlined information relating to range of motion measurements, and in particular range of motion measurements as it pertains to the uninjured right knee on which Keidel had also undergone a total knee replacement. (R52:138) Rohde then asked: "Given this information, would apportionment not be appropriate, since Mr. Keidel's uninjured right knee actually has a worse impairment than that of his injured left knee, even if the arthritic changes of the left knee were accelerated by the 7-month timeframe between injury and the meniscectomy procedure?" (R:138) Rohde testified the reason for writing to Dr. Redington was that she "was concerned, given documentation of some of the prior treating physicians early on in the claim, namely the surgeon that had performed his initial procedure along with the diagnostic findings, and I just wanted to be sure that Dr. Redington had noted this, and so I asked him if he could take a look at this information and whether he felt that this, in any way, would affect apportionment" (R71:609) Rohde further testified that this is part of what she agreed was a collaborative process to determine the correct impairment rating and she in no way is trying to force the evaluator to agree with her or change the opinion when she writes for clarification such as she did in this case. (R71:610)

[28] Dr. Redington responded to Rohde's letter that he had "missed the fact that the surgical narrative [of Dr. Gattey] described the patellofemoral joint as bone on bone, which would not be from a meniscal injury, but of a long-standing osteoarthritic process, greatly preceding the injury of 7 months prior." (R52:140) Dr. Redington acknowledged he "did not really give an opinion as more information was needed" as to

apportionment in his first report. (R52:141) He then took a “closer look” at the historical documentation and noted that there were “likely substantial degenerative changes in the knee at the time of the injury.” (R52:141) He further noted that “an argument could be made that the left knee replacement would have eventually been necessary in the absence of the work injury, but the work injury likely accelerated the need for the same.” (R52:141) Dr. Redington went on to note that giving the claimant the benefit of the doubt, he would apportion 50% of the impairment of the left knee to pre-existing conditions. (R52:141) In terms of comparing the impairment previously determined for the osteotomy procedure by Dr. Dilla under the 4th edition of the AMA Guides, and the current impairment for arthroplasty under the 6th edition, as it pertains to the issue of arthritis, Dr. Redington testified that it would not be appropriate to do so, because “they’re two different editions and two different protocols.” (R72:632)

[29] On the issue of permanent impairment, Keidel called no witnesses to testify at the hearing. Keidel did submit a report letter from Dr. Carpenter dated July 22, 2021, stating “I do not believe apportionment to be appropriate looking at his history, I think that his stiff total knee would translate to a 59% lower extremity impairment given table 16-3. (R63:470) No explanation was provided as to how Dr. Carpenter arrived at that opinion. (Id.)

[30] Following post-hearing briefing on factual and legal issues (R64, R64, R66), on November 23, 2021, ALJ Hogan issued Findings of Fact, Conclusions of Law, and Final Order. (R68) On the issue of permanent impairment, ALJ Hogan concluded as follows:

[56] A doctor evaluating permanent impairment must include a clinical report and sufficient detail to support the percentage rating assigned and

follow the 6th Edition of the American Medical Association's Guide to the Evaluation of Permanent Impairment. N.D.C.C. § 65-05-12.2(5). Thereafter, the award is determined based on the percentage of whole-body impairment in accordance with the schedule set forth in N.D.C.C. § 65-05-12.2(10).

[57] A claimant can receive compensation for a permanent impairment if the impairment is permanent and caused by a compensable injury. N.D.C.C. § 65-05-12.2(3). WSI "may not issue an impairment award for impairment findings due to unrelated, noncompensable, or pre-existing conditions, even if these conditions were made symptomatic by the compensable work injury, and regardless of whether 65-05-15 applies to the claim. Id.

[58] Redington complied with the above statute and provided a detailed clinical report supporting the percentage rating he assigned to Keidel.

[59] There is a statutory procedure in the event there is "medical dispute regarding the percentage of an injured employee's permanent impairment . . ." N.D.C.C. § 65-05-12.2(12); *see also* N.D.A.C. § 92-01-02-25. Keidel did not provide an independent medical analysis. Redington's report is not disputed by any other medical provider.

[60] Keidel does not dispute Redington's rating of the knee condition at 24 percent whole person rating. *Claimant's Post Hearing Reply Brief*, ¶ 13. Keidel's dispute is with Redington's apportionment for a preexisting substantial degenerative change. Keidel argues that because the first PPI rating in 1999 did not apportion any percentage of the rating to a preexisting condition, WSI is prevented by res judicata from re-litigating that issue. Keidel argues that the apportionment determination is not related to "the seriousness of the physical condition that may change over time (disability or impairment)" but is a "causal determination which is subject to finality." *Id.* at ¶ 1. WSI argues that administrative res judicata does not apply because the PPI evaluations address different procedures and use different version of the AMA guides.

[61] Res Judicata prohibits:

Relitigation of claims that were raised or could have been raised in a prior proceeding between the same parties or their privies, and which were resolved by final judgment in a court of competent jurisdiction. The applicability of the doctrine of res judicata is a question of law.

Ziesch v. Workforce Safety & Ins., 2006 ND 99, ¶ 17, 713 N.W.2d 525. Administrative res judicata is the doctrine that applies to administrative

proceedings. *Id.* Administrative res judicata is to be applied more cautiously than judicial res judicata with the purposing being to preserve scarce resources and avoid expense and delay. *Id.* Factors to consider when applying administrative res judicata are, “(1) the subject matter decided by the administrative agency, (2) the purpose of the administrative proceeding, and (3) the reasons for the later proceeding.” *Id.*

[62] The 1999 impairment evaluation performed by Dr. Dilla rated the left knee with the following diagnosis – medial meniscus tear, apparent posttraumatic degenerative arthritis, status-post total meniscectomy, and post high/proximal left tibial osteotomy secondary to degenerative arthritis. According to the statute in effect at the time, Dilla applied the Fourth Edition. While Dilla indicated a total knee replacement may be necessary in the future, his evaluation was performed with the assumption that no further surgeries were planned. Under the Fourth Edition, Dilla rated medial knee compartment arthritis at 10 percent, mild thigh circumference abnormality at 1 percent, and 4 percent for mild range of motion deficits around the knee. Combining he arrived at 15% whole person. Dilla opined that the medial meniscectomy procedure led to the degenerative arthritis and felt that “providing an impairment for both the procedure and the result of the procedure in my mind would be a form of ‘double dipping’ and would lead to an over-estimation of impairment.” Ex. 49, pl. 107.

[63] The 2020 impairment evaluation was performed by Redington. At the conclusion of his evaluation, Redington rated the left knee with the following diagnosis: post left total medial meniscectomy, post left high tibial osteotomy, post left knee arthroplasty, and history of osteoarthritis. Redington originally arrived at a whole person rating of 24 percent. Redington noted that there was preexisting arthritis but that with the information available to him he was unable to determine the degree of arthritis and therefore could not arrive at a value for apportionment of the preexisting condition. Rohde asked Redington to reevaluate the apportionment issue. When looking at the record again, Redington saw information in the 1996 operative reports addressing the preexisting arthritis that he previously missed. Based on that information, Redington apportioned 50% of the impairment to the preexisting condition.

[64] The issue raised by Keidel regarding apportionment is a legal issue – whether WSI is prevented from apportioning any of the PPI rating to the preexisting condition because Dilla opined that the degenerative arthritis was caused by the first surgical procedure. Based upon the facts and circumstances in this case, administrative res judicata does not apply. The current PPI evaluation was done 11 years following the first evaluation and since that time Keidel has had a total knee replacement and manipulation along with significant additional conservative treatment. His

current knee condition is not the same as when the first PPI evaluation was completed. The two evaluations did not rate the same condition of the knee. Additionally, the two evaluations rated the knee under different editions of the guides. According to the materials Keidel submitted into the record:

Each of the last 3 editions of the *AMA Guides* address the concept of apportionment for prior illness, injury, or disease somewhat differently. The Fourth Edition states:

Apportionment is an estimate of the degree to which each of various occupational or nonoccupational factors may have caused or contributed to a particular impairment. For each alleged factor, two criteria must be met:

- a. The alleged factor *could have caused* or contributed to the impairment which is a medical determination.
- b. In the case in question, the factor *did cause* or contribute to the impairment, which usually is a nonmedical determination. The physician's analysis and explanation of cause is significant.

...

The Sixth Edition states:

Apportionment is an allocation of causation among multiple factors that caused or significantly contributed to the injury or disease and resulting impairment. Apportionment requires a determination of percentage of impairment directly attributable to preexisting as compared with resulting conditions and directly contributing to the total impairment rating derived.

Ex. 201, P. 457. All the medical records indicate that Keidel had preexisting arthritis in his knee. The issues struggled with by the medical providers in this case was the level of preexisting arthritis and how that arthritis developed after the injury. Further evaluation, imagining and examination could not inform the progression of Keidel's knee condition. There was both substantial additional new evidence and a change in the condition of Keidel's knee.

[65] Keidel also argues that Redington is biased because he does a significant amount of consulting work for WSI, is paid by WSI, and particular to this case was asked to review the medical records and his assessment after issuing his report. Keidel implies that Redington conducts

his assessment and evaluations to arrive at a rating under the statutory minimum rating for a monetary award. Outside of payment from services from WSI, there is no evidence to support Keidel's presuppositions that Redington is biased or that he pre-determined this case. The Supreme Court has stated that payment alone is insufficient to show bias. *Spangler v. N.D. Workers Comp. Bureau*, 519 N.W.2d 576 (N.D. 1994). Further, Keidel has offered no evidence, medical or otherwise, to contradict Redington's findings and opinion.

(R68:569-572) ALJ Hogan affirmed WSI's Order denying Keidel permanent impairment benefits because his impairment was less than the statutory amount for an award of 14% whole person. (R68:574)

[31] Keidel submitted a Petition for Reconsideration and Re-Hearing to ALJ Hogan. (R69:576-581) Keidel argued that because WSI also paid the full cost of Keidel's knee replacement surgery, the matter could not be relitigated. (Id.) WSI submitted its response to that Petition for Reconsideration, noting that the requirements for rehearing had not been met under N.D. Admin. R. 98-02-04-07 and responding to Keidel's other arguments to the ALJ to reverse her decision. (R70:582-584) On January 11, 2022, ALJ Hogan issued her Order on Petition for Reconsideration and Rehearing, denying the same, stating as follows: (R71:585-587)

[5] Keidel does not allege any error with the findings of fact but disagrees with the ALJ's application of the law regarding administrative res judicata. Prior to issuing the Decision on November 23, 2021, the law and record were extensively reviewed. After Keidel's Petition was submitted, further consideration of the Decision, in light of the issues raised in the Petition, was given. The ALJ finds that Keidel's arguments do not support further reconsideration of the Decision and the petition for reconsideration should be denied.

[6] Keidel requests the ALJ reconsider Dr. Dilla's conclusion that Keidel's medial meniscectomy procedure led to the degenerative arthritis condition. Dr. Dilla used this conclusion during the first partial permanent impairment (PPI) rating evaluation to determine that apportionment for preexisting condition was not warranted. Keidel argues that this is a causal determination which was entitled to finality.

[7] This is not a new argument but one of the arguments Keidel made in his post-hearing briefs. The ALJ rejected this argument and concluded that the knee condition rated by the two evaluations was not the same; the two evaluations, by law, were performed under different sets of the Guides which addressed apportionment differently; and the second evaluation was performed with 11 years' worth of additional medical records including physical evaluations and examinations, imagining, and further surgery. Keidel's Petition states these conclusions are irrelevant. Keidel is arguing that apportionment must be treated the same under both evaluations which is impossible given that the evaluations were performed under different editions of the Guides and address apportionment differently. The holding in *Lass v. N.D. Worker's Comp. Bureau*, limits res judicata of WSI decisions to decisions adjudicable at the time of the decision. 415 N.W.2d 796 (N.D. 1987). The Supreme Court found that res judicata does not apply to future medical conditions. The medical condition rated by Dr. Redington was not the same condition rated by Dr. Dilla. Upon additional consideration, Keidel's argument does not warrant any amendment to the Decision or further consideration.

[8] Keidel requests rehearing to offer document of WSI's payment on the claim. Keidel offers this proof to demonstrate that WSI paid the full cost of Keidel's knee replacement surgery. Keidel fails to offer any explanation of why this evidence was not, or could not, have been provided at the hearing. As such, the ALJ will not permit rehearing for this purpose.

(R71:586-587)

[32] Keidel filed an appeal to the District Court, Stark County. (R1, R2) After briefing (R90, R92, R95) and oral argument, the District Court entered its Memorandum Decision and Order Affirming ALJ's Decision on June 8, 2022. (R97) Order for Judgment and Judgment were entered on June 10, 2022. (R101, R102) Keidel filed the appeal to this Court on August 16, 2022. (R105)

LAW AND ARGUMENT

I. SCOPE OF REVIEW ON APPEAL.

[33] On appeal, this Court reviews the decision of the administrative agency, not the decision of the District Court. Workforce Safety and Insurance v. Avila, 2020 ND

90 ¶ 6, 942 N.W.2d 811. “When an independent ALJ issues final findings of fact, conclusions of law and order under N.D.C.C. § 65-02-22.1, courts apply the same deferential standard of review to the ALJ's factual findings as used for agency decisions.” Bishop v. North Dakota Workforce Safety and Insurance, 2012 ND 217 ¶ 5, 823 N.W.2d 257 (citing Sloan v. N.D. Workforce Safety and Ins., 2011 ND 194 ¶ 5, 804 N.W.2d 184; Workforce Safety and Insurance v. Auck, 2010 ND 126 ¶ 9, 785 N.W.2d 186). However, no deference is given to an ALJ’s legal conclusions, and questions of law are fully reviewable on appeal. Id. at ¶ 6; Sloan, at ¶ 5.

[34] Keidel’s Brief to this Court references one issue that being the issue of res judicata, which is a question of law. Oden v. Minot Builders Supply, 2021 ND 30 ¶ 17, 955 N.W.2d 102. However, Keidel’s arguments infer errors relating to the findings of fact made by the ALJ. In considering those arguments, this Court must exercise restraint in determining whether the ALJ’s decision is supported by a preponderance of the evidence and should not make independent findings of fact or substitute its judgment for that of the ALJ. Bruder v. Workforce Safety and Insurance, 2009 ND 23 ¶ 7, 761 N.W.2d 588. Hopfauf v. North Dakota Workers Compensation Bureau, 1998 ND 40, 575 N.W.2d 436; Lucier v. North Dakota Workers Compensation Bureau, 556 N.W.2d 56, 69 (N.D. 1996). The Court must decide only whether a reasoning mind reasonably could have decided that the findings were proven by the weight of the evidence from the entire record. Industrial Contractors, Inc. v. Workforce Safety and Insurance, 2009 ND 157 ¶ 5, 722 N.W.2d 582. See also Stewart v. North Dakota Workers Compensation Bureau, 1999 ND 174 ¶ 40, 599 N.W.2d 280 (noting even though court may have a different view of the evidence, it must only consider whether WSI’s decision is supported by the

evidence). Quite simply, “[i]t is within [the ALJ’s] province to weigh the credibility of the evidence presented.” Latraille v. North Dakota Workers Compensation Bureau, 481 N.W.2d 446, 450 (N.D. 1992). The Court cannot substitute its judgment for that of the agency. S & S Landscaping Co. v. North Dakota Workers Compensation Bureau, 541 N.W.2d 80, 82 (N.D. 1995).

II. THE ALJ CORRECTLY CONCLUDED THAT RES JUDICATA DID NOT BAR THE APPORTIONMENT OF PERMANENT IMPAIRMENT FOR KEIDEL’S LEFT KNEE ARTHROPLASTY.

[35] Under North Dakota law, evaluations of permanent impairment must be conducted pursuant to the sixth edition of the AMA Guides to the Evaluation of Permanent Impairment. N.D.C.C. § 65-05-12.2(5) and (8); N.D. Admin. R. 92-01-02-25(2); Workforce Safety and Insurance v. Beaulieu, 2018 ND 213 ¶15, 917 N.W.2d 211. North Dakota law is clear that “an award may not be issued unless specifically identified and quantified within the sixth edition of the American medical association’s “Guides to the Evaluation of Permanent Impairment.” N.D.C.C. § 65-05-12.2(8).

[36] As ALJ Hogan concluded, Keidel did not dispute the 24 percent whole person rating determined by Dr. Redington for the left total knee arthroplasty. (R59:570; see R66:542) “Keidel is not objecting to the new PPI rating of Class 4, grade A, yielding 24% of the whole person for his knee replacement.”) Keidel Brief reviews the factual background as it pertains to the prior determination of impairment for the high tibial osteotomy, and then argues that the issue of causation of Keidel’s arthritis in his left knee was an issue for the prior administrative hearing held in 2000. (R17:17-26). Such was not the case. The ALJ’s decision in the record clearly states that the issue on appeal “as agreed upon by the parties, are whether the permanent partial impairment evaluation and

rating was correctly determined by Dr. Gary Dilla and whether the claimant is entitled to permanent partial impairment benefits related to his left knee condition.” (R17:17) There was no specified issue relating to causation or compensability of *arthritis*. Rather, the focus of the hearing was on the extent of permanent impairment for Keidel’s left knee osteotomy and whether that permanent impairment was sufficient for an award of benefits based on the threshold for an award. In fact, the word “arthritis” does not even appear in the ALJ decision. (R17:17-26) What was determined in that 2000 administrative proceeding was that for a left knee osteotomy procedure, as determined under the AMA Guides, Fourth Edition, Keidel had a 15% whole person impairment, a portion of which was attributable to arthritis.

[37] ALJ Hogan’s conclusions on the issue of permanent impairment for the left knee replacement as fully outlined above, set forth the basis of her decision as to why administrative res judicata did not bar apportionment of Keidel’s permanent impairment for his left knee. The permanent impairment issue before ALJ Hogan was the impairment to Keidel’s left knee, 21 years¹ after he was evaluated for permanent impairment for the osteotomy by Dr. Dilla, after his condition had worsened, and after he underwent a left total knee arthroplasty. The evaluation therefore considered an entirely different medical condition under an entirely different version of the AMA Guides. ALJ Hogan correctly concluded res judicata did not apply the permanent impairment determination, and this Court should affirm her decision.

¹ ALJ Hogan incorrectly stated the impairment evaluations were 11 years apart, when in fact they were 21 years apart – Dr. Dilla’s in 1999 and Dr. Redington’s in 2020.

[38] Under North Dakota law, “[a]n injured employee is entitled to compensation for permanent impairment under this section only for those findings of impairment that are permanent and which were caused by the compensable injury. The organization may not issue an impairment award for impairment findings due to unrelated, noncompensable, or pre-existing conditions, even if these conditions were made symptomatic by the compensable work injury, and regardless of whether section 65-05-15 applies to the claim.” N.D.C.C. § 65-05-12.2(3). Thus, as to permanent impairment, even in a case such as Keidel’s where he did not have any prior knee complaints or problems due to arthritis and was completely asymptomatic, under N.D.C.C. § 65-05-12.2(3) an award of permanent impairment is made only for the findings caused by the work injury. Dr. Redington made clear in his testimony that he believed there was preexisting arthritis and that it was accelerated because of the work injury. (R72:634) In determining the extent of impairment due to the work injury, Dr. Redington testified and explained his analysis in arriving at 50% of the impairment due to the work injury. (R72:621-634) As to the factual basis for the apportionment of impairment, Keidel did not present a “clinical report in sufficient detail to support the percentage ratings assigned.” N.D.C.C. § 65-05-12.2(5). Dr. Carpenter’s report provided no analysis or explanation. (R63:470) Therefore, such report cannot form the basis of an impairment determination. See Beaulieu, 2018 ND 213, 917 N.W.2d 211 (affirming reversal of ALJ decision where doctor’s opinion relied upon by ALJ did not comport with statutory requirements).

[39] Because Keidel did not present any factual evidence to support a claim that apportionment of his impairment for his left knee arthroplasty as determined by Dr.

Redington was incorrect, Keidel asserted apportionment was precluded by administrative res judicata. Keidel argued that this case is similar to Cridland v. North Dakota Workers Compensation Bureau, 1997 ND 223, 571 N.W.2d 351. Those arguments, however, are misplaced.

[40] In Cridland, an administrative hearing was held before an ALJ on the issue of entitlement to further disability benefits. Id. ¶¶ 7-8. The ALJ issued an Order based on that hearing in July of 1995 and concluded that the claimant remained disabled and was entitled to additional medical and disability benefits. ¶ 8. No appeal was taken from that decision.

[41] Subsequently, WSI asked for an independent medical evaluation of the claimant, following which WSI issued a decision awarding benefits on an aggravation basis and asking the claimant to repay medical and disability benefits. Id. ¶ 9. The aggravation of the claim was based on medical information relating to a fall that had occurred after the work injury in question, which was known at the time the prior administrative hearing was held. This Court's opinion in Cridland emphasized that the "dispositive issue" involved the preclusive effect of the July 17, 1995, Order which awarded full medical and disability benefits with full knowledge of the fall that had occurred after the work injury. Id. ¶ 12.

[42] In Cridland, the claims of both collateral estoppel and res judicata were addressed by this Court. As to collateral estoppel, this Court distinguished these principles noting that collateral estoppel requires actual litigation of the issue in prior proceedings while res judicata does not. Id. ¶ 15. In Cridland, this Court confirmed that the issue of aggravation and apportionment between the work injury and bathroom fall

were not actually decided in the prior proceeding. Thus, collateral estoppel did not apply. Id. ¶ 16.

[43] In terms of res judicata, this Court in Cridland noted that it “prohibits relitigation of claims that were raised or could have been raised in a prior proceeding.” Id. ¶ 17. However, this Court went on to discuss that as to administrative proceedings, administrative res judicata applies “more circumspectly than res judicata, taking into account (1) the subject matter decided by the administrative agency, (2) the purpose of the administrative action, and (3) the reasons for the later proceeding.” Id. ¶ 18. This Court went on to conclude that the aggravation and apportionment issue “could have been resolved in the previous formal adjudicative proceeding.” Id. ¶ 22.

[44] Significantly, however, this Court recognized that the legislature “may modify the doctrine of administrative res judicata. Id. ¶ 24, citing Astoria Fed. Sav. & Loan Ass’n v. Solimino, 501 U.S. 104, 111 S. Ct. 2166, 2169-2170, 115 L. Ed. 2d 96 (1991) and II Davis and Pierce, Administrative Law Treatise, § 13.3 at 256. See also Restatement (Second) of Judgments § 83(4)(1982)(“adjudicative determination of an issue by an administrative tribunal does not preclude relitigation of that issue in another tribunal if according preclusive effect to determination of the issue would be incompatible with a legislative policy”). This Court also recognized the legislature provided WSI with continuing jurisdiction to review prior awards, end benefits and recoup benefits. See N.D.C.C. §§ 65-05-04 and 65-05-29(3); Johnson v. North Dakota Workers Compensation Bureau, 484 N.W.2d 292 (N.D. 1992). Ultimately, this Court confirmed that although WSI may not have unlimited authority to relitigate issues that should have been raised in a prior formal hearing, Johnson and N.D.C.C. § 65-05-04 and

65-05-29(3) considered in the light of administrative res judicata means that WSI is precluded from relitigating claims “**in the absence of new evidence or a change in medical condition.**” Id. ¶ 29 (emphasis supplied). This Court did not in Cridland hold that any type of independent medical examination that is conducted after a formal hearing on compensability cannot constitute new evidence. Instead, as outlined above, an examination of the evidence reviewed, the context and under what process the examination was conducted, and what WSI did with the results of that examination are important distinguishing facts.

[45] Contrary to what occurred in Cridland, in the November 19, 2020, Order WSI did not readjudicate the issue of whether Keidel had post-traumatic arthritis and whether he could receive an impairment award for findings relating to arthritis. That was not part of the issues specified for hearing in the prior administrative proceeding. What was decided in the prior proceeding was Keidel’s permanent impairment for his left knee based on the high tibial osteotomy condition under the 4th Edition of the AMA Guides. WSI did not relitigate entitlement to permanent impairment benefits based on the prior osteotomy procedure. The impairment determination made by Dr. Dilla in 1999 related to a **completely different procedure** and was under a **completely different version of the AMA Guides**. Thus, collateral estoppel does not apply.

[46] Instead, what occurred here was Keidel was granted another permanent impairment evaluation because he had a significant change in his compensable left knee condition which resulted in the need for a total left knee arthroplasty. Under Cridland, this is one of the exceptions to administrative res judicata. Dr. Redington was asked to evaluate the left knee in 2020, based on the condition at that time. See Cridland, 1997 ND

223 ¶ 30 (stating “in the absence of new evidence or a change in medical condition,” WSI is precluded from claims which were or should have been decided in a prior proceeding).

[47] The facts demonstrate that WSI is not relitigating the issue of impairment due to arthritis as decided in the prior proceeding. Dr. Redington was not evaluating the left knee for the osteotomy that was performed to provide a new rating for that impairment; he was asked to perform a rating based on entirely new medical condition – left total knee arthroplasty. Even though it was alluded to that at some point in the future Keidel *may* need a total knee replacement, the future cannot be predicted and thus whether Keidel would have to undergo that further procedure and the outcome of that procedure was unknown in 1999. Dr. Dilla so noted in that evaluation. (R55:97) Thus, the degree of impairment for the knee condition in 2020, how the arthritic condition in Keidel’s knee progressed or would progress cannot be subject to administrative res judicata. That decision is based on new medical evidence (21 years’ worth), a new operative procedure, a new ratable medical condition, and a new evaluation on the extent of permanent impairment for the left knee replacement, including the extent to which the pre-existing arthritic condition cause that impairment. If res judicata applied, would not Keidel’s impairment for his arthritic condition have to be what was determined in 1999-2000 regardless of any change in condition?

[48] What occurred here is a substantively and legally different determination than what occurred in Cridland that was prohibited by administrative res judicata. The further medical procedure, the outcome of that procedure and the impairment from that procedure were not in existence at the time of the prior administrative hearing and constitute new evidence. Further, the extent to which the pre-existing arthritis caused that

impairment for that new condition must be considered under N.D.C.C. § 65-05-12.2(3). In addition, the impairment is to be determined under completely different protocols under the AMA Guides, 6th edition. As Dr. Redington and Jolene Rohde testified, there was a complete paradigm shift when the 6th Edition of the AMA Guides was implemented. (R72:612, 631) How impairment is rated and determined in 2020 is therefore completely different. The article that Keidel included in requesting an opinion from Dr. Carpenter also alludes to the fact that these various editions of the AMA Guides are completely different and cannot be compared. (R63:460-462) Therefore, the extent of impairment for Keidel's left knee in 1999, including how arthritis contributed to that impairment, cannot be compared to the extent of impairment in 2020, including how arthritis contributed to the left total knee arthroplasty.

[49] In State ex rel. B.O.C. Group v. Industrial Com'n of Ohio, 58 Ohio St.3d 199, 569 N.E.2d 496, 497 (1991), a claimant sustained a work injury while employed with B.O.C. The claimant continued working after the injury until she was laid off. Id. In 1986, she received total disability benefits for several periods of time, but subsequently requested and received additional disability benefits. Id. In 1987, a hearing officer awarded compensation for total disability benefits from July 30, 1985, to April 10, 1987, and continuing. Id. B.O.C. filed a complaint in mandamus in the Court of Appeals, contending that the claimant's layoff precluded compensation for total disability. Id. In the proceeding, that claimant alleged that because B.O.C. did not raise the layoff issue previously, it was barred by res judicata from doing so. Id. That court disagreed that res judicata applied. In its analysis, the court quotes 3 Larson, Workers' Compensation Law (1989) as follows:

It is almost too obvious for comment that res judicata does not apply if the issue is claimant's physical condition or degree of disability at two entirely different times * * *. A moment's reflection would reveal that otherwise there would be no such thing as reopening for change in condition. The same would be true of any situation in which the facts are altered by a change in the time frame * * *."

Id. at 498 (emphasis supplied).

[50] This Court has also recognized this distinction in Lass v. North Dakota Workmen's Compensation Bureau, 415 N.W.2d 796 (N.D. 1987), when it held that the "res judicata effect of a [WSI] decision is somewhat limited. . . . The res judicata effect of a [WSI] decision extends only to matters adjudicable at the time of that decision. Thus, absent a reopening, an unappealed decision on an employee's present medical condition is final and res judicata of his medical condition at that time. Such a decision, however, is not res judicata on his future medical condition, which is not adjudicable at the time of that decision." Id. at 800, emphasis supplied. Here, while Keidel's extent of permanent impairment was adjudicated in 2000 based on the osteotomy procedure under the AMA Guides 4th Edition, it was not and could not be adjudicable as to the extent of impairment for any future condition of that left knee, including the extent to which arthritis contributed to the left knee condition in the future. Keidel's medical condition ultimately did change, and he underwent a left total knee arthroplasty. The current litigation is about the degree of the impairment attributable to the work injury now that this procedure has been performed. WSI did not at any time after the determination of permanent impairment in the proceeding in 1999-2000 attempt to readjudicate that the pre-existing arthritic condition in the knee was not compensable. That is what occurred in Cridland. Instead, WSI's actions demonstrate it was trying to determine the extent of his current permanent impairment after a further surgical procedure, considering that there is a new

evaluation method (6th Edition) and a new condition being rated. Furthermore, even though the arthritic condition may be compensable, under N.D.C.C. § 65-05-12.2(3), impairment due to a pre-existing arthritic condition is excluded from an impairment award.

[51] Ziesch v. Workforce Safety and Insurance, 713 N.W.2d 525, 2006 ND 99 also supports WSI's position. In Ziesch, an administrative hearing had been held and reversed WSI's decision denying entitlement to further disability benefits. Id. ¶ 4. After that decision became final, WSI reviewed the evidence and determined that the period that the claimant was entitled to benefits was a limited period and issued a Notice of Intention to Discontinue/Reduce Benefits and awarded a lump sum of disability benefits but no benefits beyond that date. Id. ¶ 5. The claimant again requested rehearing, arguing that administrative res judicata precluded WSI from denying further disability benefits.

This Court rejected that argument:

Ziesch argues, in effect, that when a claimant requests a hearing on WSI's initial informal denial of a claim, WSI must conduct a full investigation and make a determination of all aspects of the benefits the claimant would be entitled to if the claim is ultimately determined to be compensable. Ziesch reads Cridland and its progeny too broadly. Those cases do not suggest that, when the only issue raised in WSI's initial order is whether the claimant was entitled to any benefits, WSI must nevertheless conduct a full investigation of all factual and medical issues related to the amount of medical benefits to be allowed, the duration of any disability, and the presence of permanent impairment.

Administrative res judicata must be applied in accordance with its purpose – to conserve scarce administrative resources and avoid wasteful expense and delay. By providing a hearing addressing compensability of the claim and the claimant's entitlement to benefits, and reserving determination of specific amounts of benefits, if necessary, for a later date, WSI has employed a procedure which seeks to ensure a quick determination of a claimant's entitlement to benefits while avoiding unnecessary waste of administrative time, resources and expenses. If WSI is required to immediately investigate, raise, and decide issues relating to the specific

amounts of benefits a claimant may be entitled to if WSI's initial determination of noncompensability is reversed, the ultimate result in many cases will be a great waste of WSI's time and resources, delay of a determination on the fundamental issue of compensability of the claim, and unnecessarily complication of the proceedings. **This is not, as in Cridland and its progeny, a case where WSI has, in effect, held evidentiary ammunition on compensability in reserve, to be brought out if its initial determination denying the claim is reversed.** Rather, WSI has logically attempted to draw a distinction between a claimant's entitlement to benefits and the determination of the amount and duration of benefits if, in fact, any benefits are due.

Id. ¶ 19, emphasis supplied. In this case WSI did not withhold evidentiary ammunition on compensability of arthritis in reserve. Rather, evidence was developed through the course of adjudicating entitlement to permanent impairment benefits after a change in Keidel's medical condition. WSI could not adjudicate entitlement to permanent impairment benefits in the future for a possible left knee arthroplasty that had not been conducted, nor could it determine the extent of progression of arthritis and how much was attributable to pre-existing conditions vs. the condition at the time the new evaluation. This determination is required under N.D.C.C. § 65-05-12.2(3), as an impairment award may not include impairment findings "due to unrelated, noncompensable or pre-existing conditions, even if these conditions were made symptomatic by the compensable work injury"

[52] The preclusive effect of administrative res judicata is not applicable here. Once a permanent partial impairment determination is made, there remains the possibility based on a change in medical condition that a further evaluation may be warranted. As recognized in N.D.C.C. § 65-05-04, based on an evaluation of evidence at a time in the future, WSI may end, diminish, or award further benefits. That is precisely what occurred in this case. A further review of permanent impairment eligibility, based on a change in

medical condition and evaluation of medical evidence at the time, WSI made a determination on eligibility. To state otherwise ignores the fact that this Court specifically recognized in Cridland that medical conditions change and thus administrative res judicata cannot apply, even after an administrative hearing is held, if there is a change in medical condition and new evidence relating to impairment.

[53] Under the AMA Guides, 4th edition, Keidel had a 15% whole person impairment related to his osteotomy, of which a portion was attributed to arthritis in the medial compartment of the knee. Currently, Keidel has a 24% whole person impairment under the 6th edition of the AMA Guides related to his total knee arthroplasty, of which 12% percent is attributable to the work injury. As Dr. Redington testified, he agrees that the work injury and surgical procedures resulted in post-traumatic arthritis. He agreed with Dr. Dilla and Dr. Stern on that issue. He testified that his apportionment of the impairment accounts for the fact that some degree of arthritis was due to the work injury because he did not attribute all the impairment to pre-existing arthritis. Again, under N.D.C.C. § 65-05-12.2(3), any impairment related to pre-existing conditions cannot form the basis of an impairment award. Dr. Redington's opinion is consistent with that provision of the law.

[54] Contrary to Keidel's arguments, the fact the prior impairment determination was under a different version of the AMA Guides is significant. Information supplied by counsel for Keidel to Dr. Carpenter included information about how the various editions of the AMA Guides addressed apportionment. In that information from the AMA Guides Newsletter, it was confirmed: "Each of the last 3 editions of the *AMA Guides* address the concept of apportionment for prior illness, injury, or disease somewhat differently."

(R54:457) The AMA Guides Newsletter article submitted in the record by Keidel discusses the fact that there are problems with application of ratings, as to apportionment, from one edition of the AMA Guides to the next. (R54:460-462) The article specifically refers to the fact that there are problems that arise with “an entirely different set of ‘apples to oranges’ problems” when going to the Sixth Edition of the AMA Guides, which “uses a different methodology to assess impairment.” (R54:462)

[55] In this case, when it comes to permanent impairment, ALJ Hogan correctly concluded that the impairment determined by Dr. Redington was based on a change in medical condition, a different time period, a different medical condition, and a different method for evaluating impairment. Under Cridland, this current determination of entitlement to permanent impairment benefits is not subject to administrative res judicata. Cridland, 1997 ND 223, ¶ 29. ALJ Hogan correctly concluded there is no legal bar to determination of the extent of current impairment, including apportionment of that impairment to pre-existing conditions. See Conclusions of Law 60-64 (R68:570-572) This Court should affirm that decision.

[56] Lastly, Keidel also impliedly argues there should be no apportionment for arthritis based on the opinions of Drs. Dilla and Stern. If you accurately evaluate the opinions that were expressed, they do not support that argument. Dr. Stern specifically opines “Mr. Keidel suffered from a preexisting condition. In my opinion, he had preexisting degenerative joint disease in both his patellofemoral joint and the medial compartment of the left knee.” (R56:237) Dr. Stern went on to opine that the left knee status was “a combination of his significant preexisting left knee degenerative joint disease and the work-related permanent aggravation as described above.” (R56:238) Dr. Stern’s opinion,

therefore, would in fact support apportionment of the current impairment related to the total knee arthroplasty under N.D.C.C. § 65-05-12.2(3). Furthermore, based on the medical records as to the state of Keidel's left knee, those records confirmed that Keidel went on to develop tricompartment degenerative disease of his left knee that Dr. Isackson characterized as "severe." See R58:243, 245, 247, 252. An x-ray taken of the right knee on February 3, 2017, confirmed degenerative findings in the medial joint space, lateral joint space, and patellofemoral changes. (R60:257).

[57] Dr. Dilla explained very "clearly" that under the AMA Guides, 4th Edition, he had to choose "one approach" to evaluate the left knee. (R53:107) Dr. Dilla chose the tibial osteotomy because that provided Keidel with the highest rating. (Id.) In doing so, Dr. Dilla explained that because there was a "poor result" for the osteotomy the AMA Guides 4th Edition required him to "estimate impairment according to 'examination and arthritic degeneration.'" (R52:98) Dr. Dilla was quite clear in his explanation that the impairment he rated for arthritic degeneration was **only** the impairment for the medial compartment even though the degenerative changes were "diffuse throughout the knee." (R52:99) The x-ray that was performed on that date reflected the degenerative changes in each compartment (R52:101), and findings relative to those compartments in terms of impairment were reflected in the PPI Notes/Audit pages thereafter. (R52:102)

[58] Dr. Dilla's impairment rating assigning a percentage of impairment under the 4th edition of the AMA Guides, for the medial compartment arthritis only, is not inconsistent with Dr. Redington's apportionment of impairment for the total knee arthroplasty as a result of the tricompartmental arthritis that Keidel went on to develop, which resulted in the arthroplasty. As Dr. Redington testified and his report confirms, he did

not attribute all the impairment related to arthritis to pre-existing conditions. Although he did not apportion based on compartments, he apportioned the overall impairment 50 percent to pre-existing conditions and 50 percent to the work injury. Thus, Dr. Redington's opinion does in fact account for post-traumatic arthritis that developed and was due to the work injury.

[59] Given the 21 years between impairment evaluations, the change in medical condition, change in extent of arthritis and how it contributed to the condition to be rated in 2020, and the difference in version of the AMA Guides under which the new condition was to be rated, administrative res judicata does not apply to a determination of Keidel's permanent impairment in 2020. ALJ Hogan correctly so concluded. This Court should affirm that decision.

CONCLUSION

[60] For the foregoing reasons, WSI respectfully requests this Court **affirm** the District Court's decision, which in turn affirmed the Findings of Fact, Conclusions of Law and Final Order of ALJ Hogan on the issue of permanent impairment.

DATED this 7th day of October, 2022.

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CERTIFICATE OF COMPLIANCE

[61] The undersigned, as attorney for the Appellee, North Dakota Workforce Safety and Insurance, in this matter, and as the author of the above Brief, hereby certifies, in compliance with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, that the Brief of Appellant was prepared with proportional typeface and the total number of pages in the above Brief totals 38.

DATED this 7th day of October 2022.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

<p>Jesse Keidel,</p> <p style="text-align:right">Appellant,</p> <p style="text-align:center">vs.</p> <p>North Dakota Workforce Safety and Insurance,</p> <p style="text-align:right">Appellee,</p> <p style="text-align:center">and</p> <p>Kolling & Kolling, Inc.,</p> <p style="text-align:right">Respondent.</p>	<p>Supreme Court No.: 20220229 Stark County District Court Civil No.: 45-2022-CV-00068</p>
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CERTIFICATE OF SERVICE

[1] I, Laurie A. Grimm, being duly sworn, deposes and says that I am of legal age and not a party to this action, and that I served the following document(s):

Brief of Appellee North Dakota Workforce Safety and Insurance

[2] On October 7, 2022, by sending a true and correct copy thereof by electronic means only to the following email address, to wit:

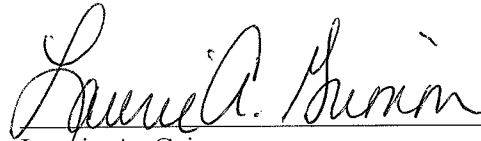
Dean J. Haas
dhaas@bismarcklaw.com

[3] To the best of affiant's knowledge, the email address above given is the actual email address of the party intended to be served. The above document was emailed in accordance with the provision of the Rules of Civil Procedure.

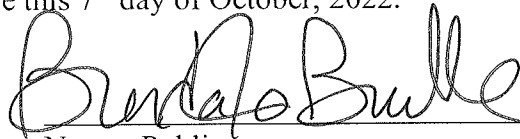
[4] I further certify that a copy of the foregoing document will be mailed first class mail, postage paid, to the following non-E-filing participants:

Kolling & Kolling, Inc.
PO Box 1225
Dickinson, ND 58602

[5] The address of each party served are the last reasonably ascertainable post office address of such party.


Laurie A. Grimm

Subscribed and sworn to before me this 7th day of October, 2022.


Notary Public

