BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BRYAN THURM, Claimant, vs. HOLY FAMILY CATHOLIC SCHOOLS, Employer, and DUBUQUE ARCHDIOCESAN PROTECTION PROGRAM, Insurance Carrier, Defendants.	File No. 5066807 ARBITRATION DECISION Head Note Nos.: 2500, 1108, 1803

STATEMENT OF THE CASE

Bryan Thurm filed a petition for arbitration seeking workers' compensation benefits from, the employer, Holy Family Catholic Schools, employer, and Dubuque Archdiocesian Protection Program, the insurance carrier.

The matter came on for hearing on January 22, 2020, before Deputy Workers' Compensation Commissioner Joseph L. Walsh in Des Moines, Iowa. The record in the case consists of joint exhibits 1 through 10; claimant's exhibits 1 through 9; and defense exhibits A through D; as well the sworn testimony of claimant. In addition, claimant called Douglas Jansen as a witness, while the defendants called Jeff Rusch. Sydney Lundberg served as the court reporter. The parties argued this case and the matter was fully submitted on February 21, 2020.

ISSUES AND STIPULATIONS

Many of the issues have been stipulated by the parties through the hearing report and order. The stipulations submitted by the parties in that order are hereby accepted and are deemed binding upon the parties at this time.

Mr. Thurm sustained an injury which arose out of and in the course of his employment on April 25, 2017. The defendants stipulate that this injury occurred and was a cause of temporary disability during a period of recovery. The defendants however, dispute whether this injury is a cause of any permanent disability. Claimant seeks industrial disability benefits and defendants argue he is entitled to no such benefits. The parties have stipulated that the commencement date for any benefits, if owed, is May 3, 2018. The parties have stipulated that claimant was single and entitled to two exemptions at the time of injury, however, gross wages are disputed. Affirmative

defenses were waived. Medical expenses are not in dispute although claimant seeks additional medical care through alternate care. Prior to hearing, defendants paid 9 weeks of benefits.

FINDINGS OF FACT

Bryan Thurm was 50 years old on the date of hearing. He testified live and under oath. His testimony is credible. His testimony was generally consistent with the other evidence in the record, including medical reports. There was nothing about his demeanor which caused the undersigned any concern for his truthfulness.

Mr. Thurm graduated from high school in Dubuque, Iowa in 1989. He has no further formal education. After high school, he worked a number of manual labor jobs, such as loading packages for UPS, working in a hog confinement, railroad work and assembly work. He worked for 18 years at Mi-T-M, as an assembler, lead man, and then foreman. He was laid off and performed some work cutting grass and working as a part-time custodian at Western Dubuque High School. Mr. Thurm was hired by Holy Family Catholic Schools in October 2016, and continued to work there through the date of hearing. The record reflects that Mr. Thurm is a motivated worker with a consistent work history.

At Holy Family, Mr. Thurm worked as a maintenance worker in October 2016. His job description is in the record. (Claimant's Exhibit 5) The work included a variety of manual labor tasks, repair work and problem solving. When Mr. Thurm began working at Holy Family, he was generally healthy. He had undergone low back surgery (right sided L4-5 laminectomy discectomy) in February 2007. (Jt. Ex. 2, p. 23) The record is absent any treatment or evidence of ongoing disability after November 2011 when he was treated for thoracic spine pain. (Jt. Ex. 1, p. 16) When Mr. Thurm began at Holy Family, the evidence reflects that he was able to perform all aspects of his job without discomfort, restrictions or accommodation.

Mr. Thurm's earnings are in the record as well. He earned $18.02 per hour and was paid bi-weekly. (Cl. Ex. 7) He averaged $779.00 per week, including his benefit dollars which was an additional cash payment to workers in lieu of health insurance benefits. (Tr., p. 79) Based upon the testimony of the witnesses, the "benefit" money was additional cash compensation included in his regular paycheck to cover any additional benefits an employee may need. This money was paid to Mr. Thurm to use however he saw fit. I find that this compensation should, in fact, be included in his average weekly earnings. The best reflection of claimant's gross average weekly earnings is set forth in Claimant's Exhibit 7, page 31.

On April 25, 2017, Mr. Thurm removed a heavy air conditioner from a window. He attempted to set the unit on a 4-wheel cart, which moved suddenly causing it to strike his kneecap. Mr. Thurm fell backwards and the air conditioning unit fell on top of him. (Transcript, pages 33-35) He felt immediate pain in his right knee. The injury was reported and the employer directed medical care the following day. Mr. Thurm was sent to Finley Occupational Health (Finley).

At Finley, the injury was documented and swelling was noted in the right knee. He was sent for an x-ray and provided temporary work restrictions of no lifting or carrying over 20 pounds, and limit walking, standing or climbing stairs. (Jt. Ex. 4, p. 28) He was advised to rest, ice, compress, and elevate his knee. The x-rays did not demonstrate any fracture, but noted a "small joint effusion." (Jt. Ex. 4, p. 29)

A few days later on April 28, 2017, he returned to Finley. The following is documented.

> The area was swollen. He thought it would go down and improve, but it is not. He presented for evaluation and care. He is still struggling, still doing too much at work, even though he has restrictions. At rest, he reports the pain at a 5; with movement, he reports it as a 10. He has got good movement of his foot. I saw him walk in. He is really favoring it and limping. I did talk to him about being advocate for himself with his restrictions at work. He is getting pressure from work to go down and do things. He was asked to go down and check the boiler, which required going down several steps and being going [sic] in crawl space, which he could not do. He was told to move a cart and a young girl pulled out of the space really quickly and he had reacted really quickly and went to break with his right foot and it hurt. He is not sleeping well. He is pretty frustrated.

(Jt. Ex. 4, p. 30) Physical therapy was ordered and he was continued on his restrictions.

Mr. Thurm returned to Finley on May 5, 2017. The medical note documents the following:

> Evidently, his employer does not understand the restrictions and is telling the employee that we are to take him off work even though I have explained to him on several occasions Iowa is an employer based Workmen's Comp State and that they are to follow the restrictions and if they do not have work for him, they are to send him home, seems to be a misunderstanding. He is angry.

(Jt. Ex. 4, p. 33)

His restrictions were changed to four hours per day. On his restrictions sheet she wrote, "If Holy Family doesn't have work [comp] in these restrictions they are to send him home." (Jt. Ex. 4, p. 35) He was referred for an orthopedic evaluation. A few days later, he returned with high blood pressure and intense frustration at work due to being pressured to perform tasks outside his restrictions and abilities. (Jt. Ex. 4, p. 36)

On May 17, 2017, Christopher Palmer, M.D., evaluated Mr. Thurm. He documented the injury, read the films and performed a physical examination. Dr. Palmer diagnosed right knee contusion/possible sprain. Dr. Palmer recommended he continue with physical therapy, wrapping the knee (compression), ice and medications. (Jt. Ex. 6, p. 76) Mr. Thurm returned to Dr. Palmer on July 10, 2017. There was little

improvement. Dr. Palmer ordered an MRI, which showed a small effusion, a small subchondral cyst on the tibial surface and some thinning of the articular surface, particularly of the lateral facet of the patella. (Jt. Ex. 7 p. 88) On July 20, 2017, Dr. Palmer diagnosed patellofemoral syndrome, provided an injection and released Mr. Thurm from his care. (Jt. Ex. 6, pp. 80-82)

Mr. Thurm was not reevaluated by Dr. Palmer until November 1, 2017. The insurance carrier initially denied his efforts to be seen. (Jt. Ex. 6, p. 83) Dr. Palmer opined the following.

> [Mr. Thurm], has probably aggravated to some extent a chronic degenerative condition in his knee. I think it would be reasonable to stay with his increased work load, that this is work related, but from a standpoint of ongoing treatments I think any substantial knee treatments other than these type of intermittent flare-ups would be more related to the degenerative nature of his knee than to his work related conditions.

(Jt. Ex. 6, p. 84) Mr. Thurm returned to Dr. Palmer on December 20, 2017. An injection of some type had been performed as Dr. Palmer noted that he had seen "significant improvement" from the injection. (Jt. Ex. 6, p. 87) Dr. Palmer released him, again. (Jt. Ex. 6, p. 87)

On January 17, 2018, Mr. Thurm was evaluated by Stephen Pierotti, M.D. "Approximately 2 months ago he had a cortisone injection which again helped somewhat but he is still getting pain in the anterior knee in the distal thigh and quad area." (Jt. Ex. 8, p. 89) Dr. Pierotti recommended a repeat MRI. (Jt. Ex. 8, p. 90) The MRI was deemed "normal" and Dr. Pierotti offered no further care. (Jt. Ex. 8, p. 91; see also Jt. Ex. 9)

In March 2018, Mr. Thurm was referred back to Finley Occupational Health where he saw Jill Hunt, M.D. Mr. Thurm's symptoms had increased while carrying a ladder at work although Dr. Hunt did not consider this a new injury. (Jt. Ex. 4, p. 38) Dr. Hunt noted mild swelling in the right knee, assigned temporary restrictions and recommended referral to an orthopedist. Mr. Thurm was not allowed to return to work as a result of the restrictions. (Tr., pp. 86-87) He returned to Dr. Hunt on March 15, 2018. Dr. Hunt recommended physical therapy. He continued to follow up with Dr. Hunt through May 2018. On May 3, 2018, Dr. Hunt provided the following analysis.

> Both MRIs only showed grade 2-3 chondromalacia patella with cysts in his posterior tibia. All ligaments are intact. Dr. Palmer felt that the work-related injury had resolved and his pain was due to patellofemoral syndrome. Dr. Pierotti evaluated him as well and felt that the cause of his pain was patellofemoral syndrome. Dr. Field felt there was nothing to do for him except a conservative strengthening program and a possible injection of Synvisc for his arthritis on his private insurance. This was discussed with the employee as well as doubts that he would improve with four further therapy sessions since he had not improved after 8 sessions. He describes his pain today as between 5 and 7. He states he is taking the naproxen twice a day. The case was discussed with his physical

> therapist who felt that he was not improving because he was limited by his complaints of pain. The employee was informed that at this point it appeared that the work-related injury had resolved and that his current pain was secondary to his patellofemoral syndrome. Current weakness in his thigh was secondary to excessive use of the brace and the need for increased home exercises. His physical therapist has given him a program to use to strengthen the thigh and the knee at home. He was informed he will be placed at MMI without impairment for the work-related injury and that he will be returned to full duty.

(Jt. Ex. 4, p. 45)

After he was released without restrictions, Mr. Thurm continued to work for the employer. He continued to have a noticeable limp. He used a knee brace and a crutch much of the time at work. Mr. Thurm testified that his employer allowed him to use the crutch, not work on ladders and not lift or carry heavy items while using his crutch.

In September 2018, John Kuhnlein, D.O., evaluated Mr. Thurm for an Iowa Code section 85.39 independent medical evaluation (IME). Dr. Kuhnlein reviewed the appropriate medical records, performed a thorough analysis of relevant medical records and examined Mr. Thurm. (Cl. Ex. 1, pp. 1-8) Dr. Kuhnlein documented Mr. Thurm's condition at that time describing his intermittent low back pain, as well as his right knee pain.

> Mr. Thurm describes intermittent superior, lateral and posterior right knee pain, stating that the knee is painful to the touch. The knee has been giving way, and so he uses a crutch for stability. . . . He says that he feels out of balance and so the left leg is starting to become painful now as well.

(Cl. Ex. 1, p. 5) He diagnosed right knee contusion with subsequent patellofemoral syndrome, right trochanteric bursitis, mild right quadriceps atrophy related to bracing and low back pain. He provided the following expert medical opinions related to medical causation.

> Mr. Thurm may have had pre-existing osteoarthritis in the right knee, but he denies any prior right knee symptoms before the April 25, 2017, work-related injury and the records shows that he has had waxing and waning right knee pain since that time associated with pain, at least intermittent swelling, and a sense of giving way, per his report. This led to intervening incidents where the right knee has buckled, causing him to fall on at least three occasions noted in the currently available record. As the pre-existing chondromalacia patella was asymptomatic and became symptomatic after the work injury, this injury served to "light up" and makes symptomatic the right knee chondromalacia patella producing the clinical right knee patellofemoral syndrome.

> The gait asymmetry has produced complaints of low back pain and what appears to be right trochanteric bursitis. He has mild right quadriceps atrophy that is more likely than not related to excessive brace use. These would all be sequelae to the original injury.

(Cl. Ex. 1, p. 9)

Dr. Kuhnlein essentially opined that all of Mr. Thurm's medical conditions set forth were causally connected to his work injury. I find his opinion convincing. He assigned impairment to each of the conditions. He assigned a 10 percent functional impairment to the lower extremity for the knee condition. He assigned a separate rating for the atrophy, however, opined that the ratings could not be combined. (Cl. Ex. 1, p. 10) He also assigned a 2 percent whole body rating for the low back. (Cl. Ex. 1, p. 10) I find the ratings to be credible and the best assessment of claimant's functional losses in the record. Dr. Kuhnlein recommended significant permanent restrictions associated with the work-related conditions.

> Even with the full-duty release on May 3, 2018, Mr. Thurm relates that Holy Family has accommodated for this problem by limiting his work on ladders, and his material handling functions. If this is accurate, then he is not really working without restrictions at this time. Given today's examination, work restrictions would appear to be appropriate, at least on a temporary basis until he is able to undergo further orthopedic and/or physical medicine evaluation [of] this problem. If no further evaluation is undertaken, these should be considered permanent restrictions.
>
> Mr. Thurm cannot perform material handling functions when using the crutch. He is able to perform some activities at work per his report. Material handling restrictions would include lifting 20 pounds occasionally from floor to waist, 30 pounds occasionally from waist to shoulder, and 20 pounds occasionally over the shoulder.
>
> Nonmaterial handling restrictions would include constantly sitting, and occasionally standing or walking with the ability to change positions for comfort. Mr. Thurm can stoop or squat rarely. He can occasionally bend, or crawl rarely. He can knee rarely. At this time, he cannot work on ladders or at height because of inability to maintain a three-point safety stance but only because of the right knee, but also because of the old left ankle injury. He can occasionally climb stairs. He can work at or above shoulder height frequently the material handling restrictions outlined above. Mr. Thurm can grip or grasp without restrictions. Mr. Thurm should not operate footed operated industrial machinery such as delayed or press, but he can drive.

(Jt. Ex. 1, pp. 10-11)

In May 2019, Mr. Thurm was evaluated by Suleman Hussain, M.D., at ORA Orthopedics. Dr. Hussain reviewed appropriate medical records and examined Mr. Thurm, including documenting the weakness in his right leg and significant atrophy. He opined that claimant's conditions resulted from his 2007 low back surgery.

> However, when taking into account his lower back findings and significant atrophy and hyperreflexia exhibited by likely a spinal issue which would be an obvious culprit in his current condition, that is where I think most of his evaluation and treatment we need to focus on, which would be related to a preexisting condition and not the work based injury.

(Jt. Ex. 10, p. 101)

During the Summer of 2019, Mr. Thurm took a new position with Holy Family as a janitor. He testified that this position was less strenuous and more stable. (Tr., pp. 72-74) He testified that he thought janitors made $12.00 to $14.00 per hour but, thus far, he has been allowed to maintain his higher maintenance salary, approximately $18.00 per hour. He testified that he was unable to perform many of the heavier tasks in maintenance, such as replacing toilets. Mr. Thurm testified that his supervisor, Jeff Rusch, is waiting for an opportunity to "get rid" of him. (Tr., p. 75) The week of the hearing, Mr. Rusch wrote him up for failing to report for mandatory snow duty. Mr. Thurm testified that he was unable to make it due to the roads being too bad.

A former co-worker of Mr. Thurm, Doug Jansen, also testified. Mr. Jansen presented as a highly credible and disinterested witness. He had worked at Holy Family for over 11 years and was acquainted with Mr. Thurm through work. He testified Mr. Thurm was a good worker and highly motivated. Mr. Jansen retired in 2019. He testified that Mr. Thurm had no limp and no difficulties performing his work prior to his work injury. Following the work injury, he developed a noticeable limp and regularly complained about his right knee. He personally observed Mr. Thurm have difficulties with certain work tasks including using a ladder, stairs and shoveling.

Jeff Rusch testified as well. He acknowledged he observed Mr. Thurm limping. He denied that there was any tension regarding Mr. Thurm's work injury or that Mr. Thurm had been treated poorly in any way. He testified that the employer always followed the doctor's medical restrictions.

At the time of hearing, Mr. Thurm is still employed with the employer, earning the same wages or better than he did at the time of injury. I find that the most credible medical opinions are those of Dr. Kuhnlein, whose opinions are consistent with Mr. Thurm's credible testimony, as well as the other facts in evidence. Dr. Kuhnlein has provided the most plausible medical explanation for what has occurred. Mr. Thurm's left knee injury aggravated or lit up his preexisting arthritis in his right knee, causing gate derangement which eventually lit up or aggravated his preexisting low back condition which was asymptomatic prior to the work injury.

CONCLUSIONS OF LAW

The first question is whether either of claimant's admitted injuries is a cause of any permanent disability, and if so, the nature and extent of such disability. By a preponderance of evidence, I find that claimant's April 25, 2017, work injury is a cause of permanent disability in his right knee and low back.

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.

I find that the medical opinions of Dr. Kuhnlein are the most logical and credible medical opinions in this record. His opinions are consistent with Mr. Thurm's testimony and documented medical history. Mr. Thurm's left knee injury aggravated or lit up his preexisting arthritis in his right knee, causing gate derangement which eventually lit up or aggravated his preexisting low back condition which was also relatively asymptomatic prior to the work injury.

I reject the medical opinion of Dr. Palmer. Dr. Palmer acknowledged that the pain in Mr. Thurm's right knee was most likely caused by arthritis. Dr. Palmer dismissed this as preexisting but never addressed the issue of whether the arthritis was

aggravated or lit up by the work accident. There is really no doubt in this record that Mr. Thurm's arthritis was asymptomatic prior to the work accident. Dr. Palmer even acknowledged that the accident aggravated the arthritis but then stated the following:

> I think it would be reasonable to stay with his increased work load, that this is work related, but from a standpoint of ongoing treatments I think any substantial knee treatments other than these type of intermittent flare-ups would be more related to the degenerative nature of his knee than to his work related conditions.

(Jt. Ex. 6, p. 84) The unrebutted evidence in this record is that Mr. Thurm's knee was asymptomatic. He began having symptoms following the work injury which was a significant, traumatic incident to his right knee. Dr. Palmer simply never addressed whether the work accident itself "lit up" his asymptomatic knee condition. Rather, he simply dismisses it as being "more related to the degenerate nature of his knee". This is simply not the legal standard for medical causation.

Likewise, I reject the opinion of Dr. Hunt. Dr. Hunt provided the following opinion. "The employee was informed that at this point it appeared that the work-related injury had resolved and that his current pain was secondary to his patellofemoral syndrome." (Jt. Ex. 4, p. 45) This opinion does not make sense in light of the facts of this case. Mr. Thurm had an asymptomatic right knee on April 24, 2017. After the work injury on April 25, 2017, he has had continuous and significant symptoms with his right knee. There was no point where his symptoms resolved and he was back to his baseline (which was an asymptomatic right knee). Like Dr. Palmer, Dr. Hunt never addressed the issue directly of whether the accident itself "lit up" the condition in his right knee.

Finally, I reject the opinion of Dr. Hussain. Interestingly, Dr. Hussain addressed some of the foregoing issues more directly. He indicated that Mr. Thurm's complaints of pain to the point of bracing and using a crutch were "red flags" given the lack of objective findings. (Jt. Ex. 10, p. 101) Dr. Hussain though, opined that the symptoms were likely resulting from Mr. Thurm's low back condition.

> However, when taking into account his lower back findings and significant atrophy and hyperreflexia exhibited by likely a spinal issue which would be an obvious culprit in his current condition, that is where I think most of his evaluation and treatment we need to focus on, which would be related to a preexisting condition and not the work based injury.

(Jt. Ex. 10, p. 101)

Interestingly, Dr. Hussain was never asked whether the claimant's low back condition was aggravated or lit up as a result of his work injury. Rather, he seems to have assumed that Mr. Thurm did not suffer a sequela injury to his low back. Dr. Hussain apparently opined that Mr. Thurm had a significant ongoing low back condition prior to his April 25, 2017, work injury. Again, this is not in the record. Mr. Thurm undoubtedly had a low back condition which preexisted his work injury. He underwent low back surgery in February 2007. The record reflects that he last had treatment for his low back in November 2011. In November 2011, his primary problem was not low

back pain, it was thoracic spine pain. (Jt. Ex. 1, p. 17) There is no evidence in the record that Mr. Thurm was having any significant low back symptoms between 2012 and his work injury on April 25, 2017. On the contrary, it appears in this record that he was healthy and relatively asymptomatic. Even following his work injury, he did not complain of low back pain until he saw Dr. Kuhnlein. Based upon the evidence in this record, Dr. Kuhnlein's opinion that Mr. Thurm has suffered a sequela aggravation of his low back condition from his gait derangement makes logical sense. This is actually somewhat supported by the opinion of Dr. Hussain, although Dr. Hussain presupposed that Mr. Thurm had active, ongoing low back symptoms prior to his work injury.

Defendants argue that Dr. Kuhnlein did not have a correct or full history of the earlier low back condition when he rendered his opinions. I disagree. (See Cl. Ex. 1, p. 6) As set forth above, I find it was Dr. Hussain who did not have an accurate history. Dr. Hussain essentially blamed Mr. Thurm's ongoing symptoms on his old low back injury, as though it was symptomatic at the time of his work injury. In fact, the evidence strongly suggests that his low back condition was quite stable for a long period of time following his 2007 surgery. It was only after he developed a significant limp, over a period of time following his work injury that the low back condition became significantly symptomatic and disabling for Mr. Thurm. While I agree with Dr. Hussain that a significant portion of Mr. Thurm's current symptoms may be generated by his low back condition, I find that Dr. Kuhnlein's opinions regarding causation related to that condition are more accurate.

For these reasons, I find the claimant has met his burden that the April 25, 2017, work injury is a proximate cause of disability in his right knee and low back.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Ry. Co. of Iowa, 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the Legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

It is important to note, industrial disability is evaluated without respect to accommodations which are (or are not) made by an employer. The Iowa Supreme Court views "loss of earning capacity in terms of the injured worker's present ability to

earn in the competitive job market without regard to the accommodation furnished by one's present employer." Thilges v. Snap-On Tools, 528 N.W.2d 614, 617 (Iowa 1995).

Considering all of the relevant and appropriate factors of industrial disability, I find that the claimant has suffered a 25 percent loss of earning capacity as a result of her April 25, 2017, work injury. Claimant was 50 years old at the time of hearing. He has a high school diploma and a manual labor work history. He has taken a new position as a janitor for the same employer as a result of his disability. While the position would ordinarily pay less, the employer has maintained his pay at his pre-injury levels. The janitor position is less skilled and requires less physical activity than the position in maintenance. The claimant does not feel secure in his employment and believes his employer is looking for an opportunity to terminate him. This factors in very little to this objective analysis of his loss of earning capacity. The reality is, claimant is in a fairly secure position and he is earning the same wages. He is highly motivated and the record reflects he has been a good worker.

Nevertheless, in the objective world of work, Ms. Thurm is undoubtedly a less attractive candidate in the competitive job market. His disability is moderate. He has pain, weakness and instability in his right knee, which is permanent. He has intermittent low back pain as well. Dr. Kuhnlein has assigned permanent impairment and restrictions to these conditions, which, given claimant's age, skills and educational background, would make it much more difficult to attain employment in the competitive job market. Considering all of the relevant factors of industrial disability, I find the claimant has suffered a loss of earning capacity of 25 percent. I conclude this entitles him to 125 weeks of compensation commencing May 3, 2018.

The next issue is the claimant's need for alternate medical care.

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 (2013).

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what care is reasonable under the statute is a question of fact. Id. The employer's obligation turns on the question of reasonable necessity, not desirability. Id.; Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983).

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

For alternate medical care, claimant is seeking a treatment evaluation for his right knee, low back and hip as recommended by Dr. Kuhnlein. (See Cl. Ex. 1, p. 9) At the time of hearing, defendants offered no further care and their physicians had denied that the ongoing condition was work-related. I have found in favor of the claimant on medical causation and defendants are required to provide ongoing treatment for claimant's work-related conditions. Therefore, I conclude the defendants are responsible for the ongoing treatment of these conditions. The defendants shall follow the treatment recommendations set forth by Dr. Kuhnlein at Claimant's Exhibit 1, page 9, and authorize reasonable care.

The final issue is gross wages.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings that fairly represent the employee's customary earnings, however. Section 85.36(6).

I find that the "benefit dollars" compensation that claimant receives in lieu of benefits is compensation which must be included in his average weekly wages. This money is paid to him in his regular paychecks and can be spent any way claimant sees fit. It is part of his average customary wage. As such, I find that claimant's gross earnings prior to his April 25, 2017, work injury was $780.00 per week. Therefore, I find that his appropriate rate of compensation is $497.99 per week.

ORDER

THEREFORE IT IS ORDERED:

All benefits shall be paid at the rate of four hundred ninety-seven and 99/100 ($497.99).

Defendants shall pay the claimant one hundred twenty-five (125) weeks of permanent partial disability benefits at the rate of four hundred ninety-seven and 99/100 ($497.99) per week commencing May 3, 2018.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants are entitled to a credit for all benefits previously paid.

Defendants are responsible for future medical treatment for claimant's right knee, hip and low back. Defendants shall authorize treatment as recommended by Dr. Kuhnlein at Claimant's Exhibit 1, page 9.

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 __26th____ day of October, 2020.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Joanie Grife (via WCES)

Christopher Fry (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.