BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

NGA NGUYEN, Claimant, vs. HY-VEE, INC., Employer, UNION INSURANCE COMPANY OF PROVIDENCE, Insurance Carrier, Defendants.	File No. 21003118.03 ARBITRATION DECISION Headnote: 1803

I. STATEMENT OF THE CASE.

Claimant Nga Nguyen seeks workers' compensation benefits from the defendants, employer Hy-Vee, Inc. (Hy-Vee) and insurance carrier Union Insurance Company of Providence (Union). The undersigned presided over an arbitration hearing on April 28, 2023. Nguyen participated personally and through attorney Robert C. Gainer. The defendants participated by and through attorney Lindsey E. Mills.

II. ISSUES.

Under Iowa Administrative Code rule 876—4.19(3)(*f*), the parties jointly submitted a hearing report defining the claims, defenses, and issues submitted to the presiding deputy commissioner. The hearing report was approved and entered into the record via an order because it is a correct representation of the disputed issues and stipulations in this case. The parties identified the following disputed issues in the hearing report:

1) Did Nguyen sustain sequela to her back related to the stipulated work injury to her knee of November 16, 2020?

2) Is Nguyen entitled to temporary partial disability (TPD) benefits from January 16, 2023, through March 3, 2023?

3) What is the nature and extent of permanent disability, if any, caused by the stipulated injury?

4) What is the commencement date for permanent partial disability benefits, if any are awarded?

5) Is Nguyen entitled to alternate care?

6) Is Nguyen entitled to taxation of the costs against the defendants?

III. STIPULATIONS.

In the hearing report, the parties entered into the following stipulations:

1) An employer-employee relationship existed between Nguyen and Hy-Vee at the time of the alleged injury.

2) Nguyen sustained an injury to her left knee on November 16, 2020, which arose out of and in the course of her employment with Hy-Vee.

3) At the time of the stipulated injury:

   a) Nguyen's gross earnings were $1,452.47 per week.

   b) Nguyen was married.

   c) Nguyen was entitled to 3 exemptions.

4) Prior to hearing, the defendants paid to Nguyen 16 weeks of compensation at the rate of $928.69 per week.

The parties' stipulations in the hearing report are accepted and incorporated into this arbitration decision. The parties are bound by their stipulations. This decision contains no discussion of any factual or legal issues relative to the parties' stipulations except as necessary for clarity with respect to disputed factual and legal issues.

IV. FINDINGS OF FACT.

The evidentiary record in this case consists of the following:

- Joint Exhibits JE-1 through JE-6;
- Claimant's Exhibits 1 through 7;
- Defendants' Exhibits A through H; and
- Hearing testimony by Nguyen.

After careful consideration of the evidence and the parties' post-hearing briefs, the undersigned enters the following findings of fact.

Nguyen was 60 years of age at the time of hearing. She was born in Vietnam. Nguyen could not understand written or spoken English when she immigrated to the United States. While at the time of hearing she could understand some English, she does not understand enough to participate in a legal proceeding, so a Vietnamese-English interpreter provided services during the hearing. (Testimony)

In or around the year 2000, Hy-Vee hired Nguyen. She has worked for Hy-Vee since then. At all times material hereto, she worked in the Chinese food department as the manager. She cooks and performs whatever other duties are asked of her. (Testimony)

Nguyen had left knee issues before the stipulated work injury at the center of this case. She reported to the Iowa Clinic with complaints of regularly recurring dislocation of her left patella that typically occurred multiple times per week and sometimes occurred multiple times in a day. (Ex. JE-3, p. 63) Robert Lee, M.D., recommended conservative care in the form of over-the-counter pain relief medication and home exercises and stretches. (Ex. JE-3, p. 65) There is an insufficient basis in the record from which to conclude it is more likely than not that, before the stipulated work injury to Nguyen's left knee, her complaints resulted in a referral to an orthopedic surgeon who determined she had osteoarthritis with symptoms severe enough to require a knee brace, anti-inflammatories, injections, or consideration of arthroplasty.

The record shows that Nguyen's hours varied at Hy-Vee. Sometimes she worked no hours because she had time off and other pay periods she worked over 60 hours during a pay period. (Ex. H, pp. 22–23) Typically, however, in the year before the work injury, Nguyen worked between 44 and 47 hours. (Ex. H, pp. 22–23) This is also the case in the weeks leading up to the work injury of November 16, 2020. (Ex. H, p. 23) At the time, she earned $27.85 per hour.

Nguyen argues in her brief that the parties' stipulation that her average weekly wage was $1,452.47 and her hourly rate of $27.85 means she averaged 50.52 hours per week. But the math in Nguyen's brief is unavailing because we have the records reflecting her actual hours worked and the division excludes her overtime time-and-a-half pay rate. (Compare Ex. H, p. 23, with Cl. Brief, § II) The weight of the evidence shows Nguyen commonly worked between 44 and 47 hours at Hy-Vee, and occasionally worked no hours as well as over 60 hours.

On November 16, 2020, Nguyen slipped and injured her left knee while at work. She returned to work the following day, reported her injury, and Hy-Vee directed her to urgent care. (Testimony; Ex. JE-6, p. 79) Initially, Nguyen received conservative care. (Ex. JE-6, pp. 80–81) However, Nguyen's symptoms did not lessen and magnetic resonance imaging (MRI) on January 5, 2021, showed a complete tear of her anterior cruciate ligament (ACL), moderate medial collateral ligament (MCL) sprain, tricompartment degenerative changes most prominent in the medial tibiofemoral compartment, complex tear/maceration in the posterior horn of the medial meniscus, large horizontal tear of the lateral meniscus, mild quadriceps tendinitis, and mild to moderate popliteus tendinitis. (Ex. JE-1, p. 2)

On February 4, 2021, Nguyen saw Jason Sullivan, M.D., at Des Moines Orthopaedic Surgeons (DMOS), who diagnosed her with acute exacerbation of left knee osteoarthritis. (JE-2, p. 3) He felt her knee was ligamentously stable and felt an ACL reconstruction procedure would have limited benefit. (Ex. JE-2, p. 3) Nguyen received a cortisone injection in her injured knee and a medial unloader brace. (Ex. JE-2, p. 3) Dr. Sullivan released her to return to full-duty work. (Ex. JE-2, p. 3)

In apparent response to an inquiry from Renae Martin, a representative of the defendants in Nguyen's workers' compensation claim, Dr. Sullivan opined in a letter dated March 25, 2021, as follows:

> Though [Nguyen's] ACL tear, MCL injury and meniscus injury may all be related to her fall, she has moderate-to-severe osteoarthritis and [is] very unlikely [to] benefit from arthroscopic surgery to reconstruct her ACL and perform meniscectomy. I think her best option at this point in time is to treat conservatively; however, if she has persistent problems, a total knee arthroplasty would take care of her issues in regard to the left knee. Due to her preexisting arthritis, it would not be considered work-related.

(Ex. A, p. 1)

In response to a letter from claimant's counsel dated June 10, 2021, Dr. Sullivan agreed that the stipulated work injury more likely than not exacerbated Nguyen's underlying osteoarthritis. (Ex. JE-2, p. 7) Dr. Sullivan further opined the injury moved up the timing of Nguyen's need for a total left knee replacement and that such a procedure would most likely alleviate her complaints. (Ex. JE-2, p. 8) Dr. Sullivan referred Nguyen to Nicholas Honkamp, M.D., another surgeon at DMOS, for a consultation regarding a left knee arthroplasty. (Ex. JE-2, p. 9)

During a September 28, 2021 examination, Dr. Honkamp noted Nguyen reported intermittent pain that had improved since the work injury. (Ex. JE-2, p. 9) Dr. Honkamp concurred with Dr. Sullivan's belief that most of Nguyen's symptoms were related to her arthritis. (Ex. JE-2, p. 12) He believed it best to see if the knee brace, injections, and pain medication were effective before deciding whether to perform the arthroplasty. (Ex. JE-2, p. 12) In a letter to defense counsel dated October 6, 2021, Dr. Honkamp affirmed his diagnoses with respect to Nguyen's injured left knee and stated he believed the MCL and meniscal injuries were caused by her fall at Hy-Vee but he could not state whether the ACL tear was acute or chronic. (Ex. B, p. 2) He also reiterated his belief that they needed to try conservative care and if that did not help, arthroplasty may be her best option. (Ex. B, p. 2)

Dr. Honkamp recommended a viscosupplementation injection in Nguyen's knee, which he performed on December 21, 2021. (Ex. JE-2, pp. 13, 16) She reported the injection did not reduce her pain at a follow-up appointment on February 1, 2022. (Ex. JE-2, p. 19) In fact, Nguyen complained of pain from her left knee to her left buttock. (Ex. JE-2, p. 19) Dr. Honkamp recommended x-rays of the lumbar spine. (Ex. JE-2, p. 20)

On February 22, 2022, Nguyen underwent x-rays of her lumbar spine. (Ex. JE-2, p. 22) They showed spondylolisthesis at L2-3 and L3-4. (Ex. JE-2, p. 22) There was no indication on the x-rays of arthritis in her left hip. (Ex. JE-2, p. 22) Dr. Honkamp referred Nguyen to the DMOS spine clinic to determine if an epidural injection could provide symptom relief. (Ex. JE-2, p. 23) Dr. Honkamp noted that if her spine were deemed normal, they would discuss surgery on her knee. (Ex. JE-2, p. 23)

A lumbar MRI on March 30, 2022, showed diffuse lower thoracic and lumbar spondylosis. (Ex. JE-2, pp. 28–29) Paula Stageman, ARNP, noted that some of Nguyen's leg symptoms could be related to her spondylosis despite the lack of back pain that day. (Ex. JE-2, p. 32) Stageman noted, "She is extremely adamant today that her pain is not coming from her back and is pretty argumentative about it. . . . She is insistent on getting her knee 'fixed' with Dr. Honkamp and would like to follow-up with him as soon as possible." (Ex. JE-2, p. 32) Stageman spent 25 minutes attempting to explain to Nguyen the spinal nerves, dermatomal pattern, and how they could be related to her leg complaints. (Ex. JE-2, p. 32) Nguyen maintained her knee pain was her biggest complaint and Stageman directed her to follow up as needed. (Ex. JE-2, p. 32)

Nguyen returned to DMOS April 19, 2023, for an appointment with Dr. Honkamp, who noted she had "some known arthritis in the knee mostly on the medial compartment" and that "[m]ost of her symptoms . . . have remained on the anterior and lateral portion of the knee and the thigh." (Ex. JE-2, p. 34) Dr. Honkamp observed, "On examination today of her left knee she walked with a somewhat stiff leg and antalgic gait." (Ex. JE-2, p. 34) Because Nguyen had "some findings in her lumbar spine which may explain her pain as well," Dr. Honkamp recommended an epidural injection in her back prior to knee surgery to see if that offered any symptom relief because he did not want to perform knee surgery if her symptoms were originating from her back. (Ex. JE-2, p. 35)

Nguyen reported to Stageman on May 24, 2022, that the injection provided no relief for any amount of time. (Ex. JE-2, pp. 37–38) Nguyen complained of pain in her left knee only. (Ex. JE-2, p. 37) Because Nguyen also denied any complaints in her thigh, Stageman suspected Nguyen had "some relief with her epidural as her other lower extremity symptoms are resolved." (Ex. JE-2, p. 38) Stageman opined that she believed Nguyen had two separate issues, one in her left knee and one in her lower back. (Ex. JE-2, p. 38) Stageman noted that a nerve block may offer relief from her non-left-knee-related symptoms and, "If Dr. Honkamp feels strongly that her pain is not related to her knee this is something we would have her see Dr. Ries for consideration of ordering." (Ex. JE-2, p. 38)

On June 22, 2022, Nguyen saw Dr. Honkamp to discuss definitive treatment options for her left knee. (Ex. JE-2, p. 29) Dr. Honkamp noted on examination that Nguyen "walks with a stifflegged gait because of the left knee pain." (Ex. JE-2, p. 39) Dr. Honkamp opined, "Her symptoms have been pretty persistent involving the left knee despite all of our treatment options. I was concerned there may be some pain coming from the back but given her response to treatment so far that seems less likely." (Ex.

JE-2, p. 40) Nguyen opted to move forward with a total left knee arthroplasty. (Ex. JE-2, p. 40) On August 15, 2022, Dr. Honkamp performed the surgery. (Ex. JE-4, p. 71)

Nguyen had a follow-up appointment with Dr. Honkamp six weeks after the surgery. (Ex. JE-2, p. 42) She reported "significant improvement" and that she was "happy with her result thus far." (Ex. JE-2, p. 42) Dr. Honkamp opined her range of motion was very good and that she was doing well enough to continue to just do home exercises. (Ex. JE-2, p. 42) He released her to return to work on a part-time basis in two weeks and gradually work her way up to a full-time schedule. (Ex. JE-2, pp. 42–43)

Nguyen saw Dr. Honkamp again on October 25, 2022. (Ex. JE-2, p. 45) He noted she was doing "okay" overall but was struggling with a little of bit of swelling and range of motion. (Ex. JE-2, p. 45) Nguyen was working 4 hours per day under her work restrictions and reported that by the end of her shift, her knee was "really stiff" and her quad was fatigued. (Ex. JE-2, p. 45) Dr. Honkamp maintained her work restrictions and gave her advice on at-home exercises to improve her range of motion and quad strength. (Ex. JE-2, pp. 45–46)

On January 3, 2023, Nguyen returned to Dr. Honkamp for another follow-up appointment. (Ex. JE-2, p. 47) He described her recovery as "slow" because of pain and stiffness, but also noted that she was "doing much better," with improved mobility and sleep. (Ex. JE-2, p. 47) Dr. Honkamp also noted with respect to Nguyen's back:

> She has been having a lot of issues with her low back and stiffness around her neck. She is stiff with rotational planes of her cervical spine as well as some with extension and flexion. In her low back her pain is primarily straight across her waistline with no significant radiculopathy.

(Ex. JE-2, p. 47)

Dr. Honkamp advised Nguyen to (*sic*) "request with Workmen's Comp. to see Dr. Aceby for evaluation and treatment." (Ex. JE-2, p. 48) He also advised Nguyen that she could work 8-hour days 5 days per week for 2 more weeks before increasing her hours to 9 daily for 5 days per week. (Ex. JE-2, p. 49)

Nguyen saw Stageman for her back issues on February 8, 2023. (Ex. JE-2, p. 50) Nguyen rated her back pain as 8 out of 10 and worse with activity such as walking, bending, and standing. (Ex. JE-2, p. 50) Sitting and lying down reduced her back pain. (Ex. JE-2, p. 50) Stageman noted:

> [Nguyen] is here with her husband for left greater than right low back pain that started after her knee replacement. When I evaluated her in May 2022 she denied any back pain. I discussed that her antalgic gait is likely causing her increase in back pain. She denies any radiation of pain or symptoms.

(Ex. JE-2, p. 51)

Stageman recommended physical therapy and medication or trialing joint injection. (Ex. JE-2, p. 51) They opted for physical therapy and anti-inflammatory medication. (Ex. JE-2, p. 51)

Defense counsel sent Dr. Honkamp a letter dated February 14, 2023, to which he responded in a letter dated March 3, 2023. (Ex. B, p. 3) He stated Nguyen had reached maximum medical improvement for her left knee on January 3, 2023. (Ex. B, p. 3) Dr. Honkamp then assessed permanent impairment, opining, "Using the [*Guides*], page 547, table 17-33, she had a left total knee replacement with a good result, which is a 15% whole person, 37% lower extremity impairment." (Ex. B, p. 3) With respect to Nguyen's lower back condition, Dr. Honkamp opined, "I do not believe her back complaints are related to her left knee condition. I do believe they are a separate medical condition." (Ex. B, p. 3)

Nguyen saw Daitin Turner, P.T., for physical therapy on March 6, 2023. (Ex. JE-2, p. 54) Turner noted Nguyen had been working 8-to-9-hour days and that she had good and bad days with respect to her back soreness depending on how much walking she did. (Ex. JE-2, p. 54) Turner noted Nguyen tolerated the exercises she performed well, with good mechanics and no discomfort of lumbar spine. (Ex. JE-2, p. 54)

At physical therapy on March 16, 2023, Nguyen reported she felt better to Nathan Kleckner, P.T. (Ex. JE-2, p. 57) Kleckner noted it would be best if Nguyen could get help lifting the 50-pound bags of rice at work because doing so "puts a lot of excessive torque through her low back as she does not have the knee mobility to use her legs to lift from the ground." (Ex. JE-2, p. 57) He spent time with Nguyen on different types of lifting mechanics given her knee mobility being a "large limiting factor" when lifting. (Ex. JE-2, p. 57)

The next day Nguyen saw Stageman for a follow-up appointment after 10 physical therapy sessions. (Ex. JE-2, p. 60) Nguyen rated her back pain as a 3 out of 10, but worse with walking, standing, or lifting. (Ex. JE-2, p. 60) Stageman recommended a back brace to help Nguyen with lifting and released her to return to work with no restrictions. (Ex. JE-2, pp. 61–62)

Claimant's counsel arranged for Nguyen to undergo an independent medical examination (IME) with Sunil Bansal, M.D., an occupational medicine specialist, on February 28, 2023. (Ex. 1, p. 1) As part of Dr. Bansal's evaluation, he examined Nguyen and reviewed her medical history via pertinent medical records and discussion with her. (Ex. 1, pp. 1–14)

The undersigned finds it is more likely than not Dr. Bansal followed the process set forth in the *Guides* for evaluating permanent impairment in an attempt to comply with section 85.34(2). See *Guides*, pp. 17–24. Dr. Bansal's report closely adheres to the sample report provided in the *Guides* with sections containing: information about the examination, an introduction about the purpose and procedures, narrative history, medical review consisting of a chronology of medical evaluation, diagnostic studies, and treatment for the injury or illness, physical examination, diagnoses and impairments,

impairment rating criteria, recommendations, and work restrictions. Compare *Guides*, pp. 17–24, with Ex. 1, pp. 1–17.

Based on this work, Dr. Bansal described the mechanism of Nguyen's injury as follows:

> As [Nguyen] was carrying [sushi] in her hands, she was unaware of a small plaque sign on the floor. She tripped over this and fell, landing directly onto her left knee. She was unable to stand up, and her co-workers helped her up and onto a chair. She was uncomfortable, but after resting for a few minutes she was able to continue working.

(Ex 1, p. 16)

On the question of causation with respect to Nguyen's left-knee injury, Dr. Bansal opined, "This mechanism involving slipping and falling with torsion to her left knee caused both the medial and lateral meniscal tears, as well as the anterior cruciate ligament tear, and set in motion a series of biomechanical events that led to the aggravation of her degenerative joint disease." (Ex. 1, p. 16) He further concluded, "In turn, the aggravation of her left knee degenerative joint disease accelerated her need for a total knee replacement." (Ex. 1, p. 16)

With respect to Nguyen's back complaints, Dr. Bansal diagnosed her with multi-level disc bulging, aggravation of lumbar facet arthropathy, and sacroiliitis. (Ex. 1, p. 15) Dr. Bansal noted:

> As a result of her limping, she developed back pain that radiates into her left hip more than her right hip. She has significant low back pain at times, which also causes pain in her bilateral hips. Medication does help with this, but the pain returns. She is able to sit without difficulty, but bending over to lift objects causes significant low back pain. She continues to limp, particularly after walking all day.

(Ex. 1, p. 13)

On the question of causation, he opined that "Nguyen aggravated her lumbar spondylosis from the altered gait secondary to her significant left knee pathology with prolonged convalescence" and the "[r]esultant low back pain after lower extremity pathology is a known complication if there is an altered gait accompanying the lower extremity pathology." (Ex. 1, p. 16)

During the examination, Dr. Bansal performed measurements of the range of motion in Nguyen's left knee, which showed:

- Flexion, 80 degrees;
- Extension, 26 degrees;

- Left lateral flexion, 34 degrees; and
- Right lateral flexion, 28 degrees.

(Ex. 1, p. 14)

Using a two-point discriminator, Dr. Bansal also found a loss of sensory discrimination over the left lateral leg. (Ex. 1, p. 14)

Dr. Bansal placed Nguyen at MMI on February 28, 2023, the time of his evaluation, without explanation. (Ex. 1, p. 16) On the question of permanent impairment to the left knee under the *Guides*, Dr. Bansal used Table 17-33 and assigned a 37 percent lower extremity impairment or 15 percent whole person impairment. (Ex. 1, p. 17) For the back, Dr. Bansal used Table 15-3 to conclude Nguyen had elements fitting into DRE Lumbar Category II in the form of radicular pain, loss of range of motion, and guarding, and assigned her a 5 percent impairment for her back. (Ex. 1, p. 17) He also assigned permanent work restrictions of no frequent kneeling or squatting, avoiding multiple stairs or climbing, and no frequent bending or twisting. (Ex. 1, p. 17)

The *Guides* have a Combined Values Chart for determining the combined permanent impairment from two or more body parts. *Guides*, pp. 604–06. Dr. Bansal's permanent impairment ratings of 15 percent to the whole person for Nguyen's knee injury and 5 percent to the whole person for her back combine for a value of 18 percent. It is more likely than not Nguyen's work injury to her knee and the sequela to her back caused her to sustain a permanent impairment of 18 percent.

On the question of whether Nguyen's left knee injury at Hy-Vee was a significant contributing factor to her back issues, multiple experts have weighed in. Dr. Honkamp opined in a letter to defense counsel on, March 3, 2023, "I do not believe her back complaints are related to her left knee condition. I do believe they are a separate medical condition." However, on January 3, 2023, he directed Nguyen to ask the workers' compensation insurance carrier to authorize treatment for her back complaints. (Ex. JE-2, p. 48) The record contains no information with respect to why Dr. Honkamp would give Nguyen such advice in January if he believed her complaints were not related to the work injury to her knee or why he changed his mind on the question. The lack of explanation behind his conclusory opinion and his earlier advice to Nguyen undermine the credibility of his causation opinion on her back issues.

The defendants assert that Stageman, a treating nurse in the DMOS spine clinic, opined Nguyen's back condition and knee injury were two separate issues. (Def. Brief, p. 12 (citing Ex. JE-2, pp. 32, 38) But these opinions are in medical records from the care she provided on April 5, 2022, and May 24, 2022. (Ex. JE-2, pp. 32, 38) Thus, Stageman's opinion on the nature of Nguyen's back complaints pre-dated her total left knee replacement on August 15, 2022. (Ex. JE-7, pp. 71–74) Moreover, after the surgery, on February 8, 2023, Stageman opined, "When I evaluated her in May 2022 she denied any back pain. I discussed that her antalgic gait is likely causing her increase in back pain." (Ex. JE-2, p. 51) The weight of the evidence shows that

Stageman attributed Nguyen's post-knee-surgery back issues to the antalgic gait she developed.

Lastly, there is Dr. Bansal's opinion that the altered gait Nguyen had following the left-knee arthroplasty was a significant factor in causing her back issues. His opinion is reinforced by Stageman's February 8, 2023, statement that Nguyen's antalgic gait after knee surgery was the likely cause in her increased back pain. Dr. Honkamp's conclusory assertion that Nguyen's back issues were separate from her knee issues does little to undermine Dr. Bansal's reasoning because Dr. Honkamp provided no reasoning of his own to support this opinion. For these reasons, the evidence establishes it is more likely than not that the work injury to Nguyen's left knee was a contributing factor to causing her post-surgery back issues.

On the issue of the extent of functional impairment, Dr. Bansal's opinion with respect to Nguyen's back stands alone in the evidence. It is therefore more likely than not that Nguyen has sustained a 5 percent functional impairment to her whole body due to the sequela to her back. Dr. Bansal's evaluation of permanent impairment of the knee consisted of physical examination, measurements of functionality, and a more detailed explanation of how he arrived at an impairment rating using the factors identified in the *Guides* rather than Dr. Honkamp's opinion letter. Dr. Bansal's opinion on permanent impairment to the left knee is therefore adopted. The weight of the evidence also supports adoption of Dr. Bansal's work restrictions.

Nguyen was earning $28.00 per hour at the time of hearing. (Testimony; Ex. H, p. 29) Hy-Vee offered her 45 hours of work each week. (Hrg. Tr. p. 32) However, the weight of the evidence shows this was more aspirational in nature and not set in stone. Sometimes Nguyen worked more or less than 45 hours in a week.

The wage records in evidence show that in 2023, before the date of hearing, she worked 40.03, 35.83, 36.83, 32.46, and 17.78 hours during certain weeks. (Ex. H, p. 29) For the remaining weeks, she worked between 44 and 46 weeks. (Ex. H, p. 29) Her wages for the weeks between January 16, 2023, and March 3, 2023, were:

- 1/16/23–1/22/23: $1,289.41
- 1/23/23–1/29/23: $1,031.34
- 1/30/23–2/5/23: $1,006.14
- 2/6/23–2/12/23: $1,355.91
- 2/13/23–2/19/23: $1,333.51
- 2/20/23–2/26/23: $1,325.80
- 2/27/23–3/5/23: $909.07

(Ex. H, p. 29)

The evidence shows Nguyen earned less in each individual week after reaching MMI than her stipulated average weekly wage of $1,452.47 per week, which reflects her weekly earnings at the time of the work injury to her left leg. As the evidence shows, this is in part because of a reduction in her overtime hours after reaching MMI in comparison to the weeks leading up to her work injury. (Compare Ex. H, p. 23, with Ex. H, p. 29) While Nguyen's earnings after reaching MMI are similar to what they were in the lead-up to the date of injury, the weight of the evidence shows she did not return to work with Hy-Vee and receive the same or greater salary, wages, or earnings that she received at the time of the injury.

V. CONCLUSIONS OF LAW.

In 2017, the Iowa legislature amended the Iowa Workers' Compensation Act. See 2017 Iowa Acts, ch. 23. The 2017 amendments took effect on July 1, 2017. Id. at § 24(1); see also Iowa Code § 3.7(1). Because the injury at issue in this case occurred after July 1, 2017, the Iowa Workers' Compensation Act, as amended in 2017, applies. See Stiles v. Annett Holdings, Inc., No. 5064673, 2020 WL 6037539 *2 (Iowa Workers' Comp. Comm'r, Oct. 2, 2020) (App. Decision).

A. Sequela.

An employer covered by the Iowa Workers' Compensation Act must "provide, secure, and pay compensation according to the provisions of this chapter for any and all personal injuries sustained by an employee arising out of and in the course of the employment, and in such cases, the employer shall be relieved from other liability for recovery of damages or other compensation for such personal injury." Iowa Code § 85.3(1). "[W]here an accident occurs to an employee in the usual course of his employment, the employer is liable for all consequences that naturally and proximately flow from the accident." Oldham v. Scofield & Welch, 266 N.W. 480, 482, opinion modified on denial of reh'g, 222 Iowa 764, 269 N.W. 925 (Iowa 1936). This includes, but is not limited to, a mental health condition caused by a work injury. See Coghlan v. Quinn Wire & Iron Works, 164 N.W.2d 848, 852–53 (Iowa 1969).

"[T]he burden of proof is on the claimant to prove some employment incident or activity was a proximate cause of the health impairment on which he bases his claim." Anderson v. Oscar Mayer & Co., 217 N.W.2d 531, 535 (Iowa 1974). "[A] possibility is insufficient; a probability is necessary." Id. The claimant must prove causation by a preponderance of the evidence. See, e.g., St. Luke's Hosp. v. Gray, 604 N.W.2d 646, 652 (Iowa 2000) (citing Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 150 (Iowa 1996)).

"'Whether an injury has a direct causal connection with the employment or arose independently thereof is essentially within the domain of expert testimony.'" IBP, Inc. v. Harpole, 621 N.W.2d 410, (Iowa 2001) (quoting Dunlavey v. Econ. Fire & Cas. Co., 526 N.W.2d 845, 853 (Iowa 1995)). The agency, "as the fact finder, determines the weight to be given to any expert testimony." Sherman v. Pella Corp., 576 N.W.2d 312, 321 (Iowa 1998). The agency must weigh the evidence in a case and accept or reject an expert

opinion based on the entire record. Dunlavey, 526 N.W.2d at 853. The agency may accept or reject an expert opinion in whole or in part. Sherman, 576 N.W.2d at 321.

As found above, Nguyen has met her burden of proof on whether her back condition is a sequela to the work injury to her left knee. Dr. Bansal's opinion on causation is reinforced by Stageman's post-surgery opinion and the most persuasive in the record. Dr. Bansal's causation opinion is therefore adopted. It is more likely than not that Nguyen's left knee injury was a significant contributing factor in causing her current back condition.

B. PPD Benefits.

The parties dispute whether Nguyen is entitled to benefits based on an industrial disability analysis or for the functional impairment caused by her injuries. Nguyen argues she earns less now than at the time of injury because she has not worked over 50 hours since reaching MMI. The defendants argue her hourly rate is higher than it was at the time of injury and her hours are similar, which means she is entitled to PPD benefits based only on her functional impairment.

Workers' compensation is "a creature of statute." Darrow v. Quaker Oats Co., 570 N.W.2d 649, 652 (Iowa 1997). This means an injured employee's "right to workers' compensation is purely statutory." Downs v. A & H Const., Ltd., 481 N.W.2d 481 N.W.2d 520, 527 (Iowa 1992). And "it is the legislature's prerogative to fix the conditions under which the act's benefits may be obtained." Darrow, 570 N.W.2d at 652.

The Iowa Supreme Court has held:

> The legislature enacted the workers' compensation statute primarily for the benefit of the worker and the worker's dependents. Therefore, we apply the statute broadly and liberally in keeping with the humanitarian objective of the statute. We will not defeat the statute's beneficent purpose by reading something into it that is not there, or by a narrow and strained construction.

Gregory v. Second Inj. Fund of Iowa, 777 N.W.2d 395, 399 (Iowa 2010) (quoting Holstein Elec. v. Breyfogle, 756 N.W.2d 812, 815–16 (Iowa 2008) (citations omitted)).

"Although the workers' compensation statute is to be liberally construed in favor of the worker, the statute is not to be expanded by reading something into it that is not there." Downs v. A & H Const., Ltd., 481 N.W.2d 520, 527 (Iowa 1992) (citing Cedar Rapids Community School Dist. v. Cady, 278 N.W.2d 298 (Iowa 1979)). "To determine legislative intent, we look to the language chosen by the legislature and not what the legislature might have said." Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, (Iowa 2016) (citing Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 337 (Iowa 2008)). The "broad purpose of workers' compensation" is "to award compensation (apart from medical benefits), not for the injury itself, but the disability produced by a physical injury." Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, (Iowa

2010) (citing 4 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 80.02, at 80–2 (2009)).

In 2017, the legislature amended the Iowa Workers' Compensation Act to require the use of the *Guides* when determining the functional impairment caused by a work injury. See 2017 Iowa Acts ch. 23, § 6 (now codified at Iowa Code § 85.34(2)). The legislature also changed how an injured employee's entitlement to workers' compensation is determined by amending what is now section 85.34(2)(*v*) to provide:

> If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity. Notwithstanding section 85.26, subsection 2, if an employee who is eligible for compensation under this paragraph returns to work with the same employer and is compensated based only upon the employee's functional impairment resulting from the injury as provided in this paragraph and is terminated from employment by that employer, the award or agreement for settlement for benefits under this chapter shall be reviewed upon commencement of reopening proceedings by the employee for a determination of any reduction in the employee's earning capacity caused by the employee's permanent partial disability.

With the 2017 amendments, the legislature changed how permanent disability is determined for workers' compensation purposes. Before the 2017 amendments, the agency could use all evidence in the administrative record, as well as agency expertise, when determining the permanent disability of an injured worker. See, e.g., Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 421 (Iowa 1994). Under agency rules before the 2017 amendments, the *Guides* were considered a "useful tool in evaluating disability." Seaman v. City of Des Moines, File Nos. 5053418, 5057973, 5057974 (App. Oct. 11, 2019) (quoting Bisenius v. Mercy Med. Ctr., File No. 5036055 (App. Apr. 1, 2013)); see also Westling v. Hormel Foods Corp., 810 N.W.2d 247, 252 (Iowa 2012). However, in cases involving injuries on or after July 1, 2017, the *Guides* are more than a tool when determining functional impairment; they are dispositive.

> [W]hen determining functional disability and not loss of earning capacity, the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American medical association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A. Lay testimony or agency expertise shall not be utilized in determining loss or percentage of permanent impairment pursuant to paragraphs "*a*" through "*u*", or paragraph "*v*" when determining functional disability and not loss of earning capacity.

Iowa Code § 85.34(2)(*x*).

As found above, the parties stipulated that Nguyen had average weekly earnings at the time of the stipulated work injury of $1,452.47 and she did not earn that much in any of the weeks between when she reached MMI and returned to work with Hy-Vee on March 5, 2023. Consequently, Nguyen's entitlement to PPD benefits is determined based on an industrial disability analysis evaluating her lost earning capacity. The extent of an injured employee's industrial disability is based on consideration of the following factors: functional disability, age, education, qualifications, work experience, inability to engage in similar employment, earnings before and after the injury, motivation to work, personal characteristics, and the employer's inability to accommodate the injured employee's functional limitations. See Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 526 (Iowa 2012); IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 632–33 (Iowa 2000); E.N.T. Assoc. v. Collentine, 525 N.W.2d 827, 830 (Iowa 1994); Ehlinger v. State, 237 N.W.2d 784, 792 (Iowa 1976).

One factor to consider is the worker's functional impairment. Under the *Guides*, "**Impairment percentages** or **ratings** developed by medical specialists are consensus-derived estimates that reflect the severity of the medical condition and the degree to which the impairment decreases an individual's ability to perform common **activities of daily living (ADL)**, *excluding* work." *Guides*, p. 4. Nguyen's work injury to her knee and sequela to her back caused her to sustain an 18 percent impairment to her whole body in activities of daily living, excluding work.

Dr. Bansal's permanent work restrictions have been adopted. They consist of no frequent kneeling or squatting, avoiding multiple stairs or climbing, and no frequent bending or twisting. This limits the types of job duties Nguyen can perform and, by extension, the number of jobs she could obtain.

A personal characteristic of Nguyen that must be considered is her limited English proficiency. See Lovic v. Constr. Prod., Inc., File No. 5015390 (App. 2007); see also Merivic, Inc. v. Gutierrez, 825 N.W.2d 327 (Iowa App.2012) (table) (rejecting a collateral attack on Lovic, recognizing it as controlling agency precedent, and affirming a final agency decision that relied on it). The test for English language learning is the same as other retraining or education. Does the record show the claimant would likely be successful and the knowledge gained would more likely than not lead to gainful employment? Id. "Without such proof, use of any retraining effort, or lack thereof, in assessing a loss of earning capacity would be speculative, at best." Id.

Nguyen has lived in the United States for over 20 years. She was 60 years of age at the time of hearing. She completed high school in Vietnam, but has had no schooling or training since then. Given these facts, it is unlikely Nguyen would return to school and enjoy success that would allow her to improve her earning capacity.

English is the language most used in the United States and Iowa. Despite living here for over two decades, Nguyen has limited English proficiency. This does not mean that she is unable to function in a workplace where English is the language used to

communicate. By all accounts, she is an excellent employee at Hy-Vee and loves her job. It is simply to say that she would be more limited in her job opportunities if she left Hy-Vee. Nguyen's continued employment with Hy-Vee is what prevents the results of her work injury from having a more significant negative impact on her earning capacity.

Section 85.34(2)(*v*) requires consideration of the number of years the injured employee was reasonably expected to continue working at the time of injury. The statute leaves unsaid how this impacts a disability determination. Nguyen was 60 years of age at the time of hearing and there is an insufficient basis in the record from which to conclude the injury impacted how long she will continue to work.

Nguyen has met her burden of proof with respect to industrial disability. The evidence shows the work injury and sequela have caused her to sustain a 25 percent industrial disability. Five hundred multiplied by 25 percent is 125 weeks. Under Iowa Code section 85.34(2)(*u*), Nguyen is entitled to 125 weeks of PPD benefits.

C. Commencement Date.

The parties dispute the proper commencement date for PPD benefits. The defendants argue for adoption of January 3, 2023. Nguyen contends February 28, 2023, is the proper commencement date.

Under Iowa Code section 85.34(2), the commencement date for permanent partial disability benefits occurs when:

1. The claimant has reached maximum medical improvement (MMI) from the work injury;

2. The extent of any permanent impairment caused by the work injury can be determined using the *Guides*.

The Iowa Supreme Court has explained MMI in workers' compensation thusly:

> "MMI" is a term of art commonly used by the commissioner, attorneys practicing in the field of workers' compensation law, and medical providers expressing opinions affecting claimants' entitlement to healing period benefits and permanent partial disability benefits under Iowa Code section 85.34. The term is used as an alternative means of expressing the point at which "it is medically indicated that significant improvement from the injury is not anticipated." Iowa Code § 85.34(1). A treatise on Iowa workers' compensation law uses "maximum recuperation" as an alternative moniker for the MMI concept. See 15 James R. Lawyer, Iowa Practice Series: Workers' Compensation, § 13:3, at 135 (2011).

Waldinger Corp. v. Mettler, 817 N.W.2d 1, 6 n. 2 (Iowa 2012).

Each party's position is flawed based on the findings of fact above. Dr. Honkamp's opinion on MMI is limited to Nguyen's left knee. If the only injury that constituted a work injury under Iowa law was the left knee, his opinion would be dispositive. However, Nguyen has a sequela to her back for which she treated after January 3, 2023, and February 28, 2023, the date on which Dr. Bansal concluded, without explanation, she had reached MMI.

Stageman released Nguyen from care for her back on March 17, 2023, after her final physical therapy session on March 16, 2023. Nguyen could not have reached MMI on February 28, 2023, because she was still receiving treatment for her back. Therefore, the proper MMI date for her back is March 17, 2023, when Stageman released her from care.

While causally intertwined, Nguyen sustained injuries that required separate courses of treatment. The treatment for her left knee ended before that for her back. At the time the care for her knee injury concluded, she had reached MMI, and the extent of loss or percentage of permanent impairment could be determined for that body part. It would run contrary to the "beneficent purpose" and text of the statute to read a requirement into it that is not there as requiring Nguyen to wait for the PPD benefits to which she was entitled for her left knee injury until after she also reached MMI for her back. See Xenia Rural Water Dist. v. Vegors, 786 N.W.2d 250, 257 (Iowa 2010). Therefore, the proper commencement date for PPD benefits is January 3, 2023, the date on which she first reached MMI for an injured body part that caused an impairment compensable under the law.

D. Rate.

The parties stipulated Nguyen's gross earnings on the stipulated injury date were $1,452.47 per week. They also stipulated she was married and entitled to 3 exemptions at the time. Based on the parties' stipulations, Nguyen's workers' compensation rate is $928.69 dollars per week.

E. TPD Benefits.

The parties dispute Nguyen's entitlement to TPD benefits from January 16, 2023, through March 3, 2023. The parties stipulated Nguyen's average weekly earnings for workers' compensation rate purposes were $1,452.47. The parties disagree on what this means for her entitlement to TPD.

Nguyen argues that Dr. Honkamp did not release her to work without any restriction on hours on January 3, 2023. Indeed, he did not. As noted above, he released her from care on that date, with instructions to work no more than 45 hours per 5-day week for the next 2 weeks.

The 2017 amendments to the Iowa Workers' Compensation Act on which the below conclusion regarding MMI is based make Nguyen's argument unavailing. Before the 2017 amendments, section 85.34(2) stated the commencement date for PPD

benefits was the end of the healing period as provided in section 85.34(1). The legislature changed the criteria so that the commencement date is when it is medically indicated the injured employee has reached MMI and the extent of loss or percentage of permanent impairment can be determined using the *Guides*.

Nguyen's is not entitled to TPD benefits from January 16, 2023, through March 3, 2023, because the evidence shows she reached MMI for her left knee injury and the extent of her permanent impairment caused by that injury could be determined using the *Guides* on January 3, 2023. That is all the statutory text requires. Therefore, she is not entitled to TPD benefits for the time period in question because January 3, 2023, is the proper commencement date for PPD benefits relating to her left knee.

F. Medical Benefits.

The parties identified Nguyen's entitlement to alternate care under Iowa Code section 85.27(4) as a disputed issue for determination in Section 8 of the Hearing Report. "Iowa Code section 85.27(4) affords an employer who does not contest the compensability of a workplace injury a qualified statutory right to control the medical care provided to an injured employee." Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 769 (Iowa 2016) (citing R.R. Donnelly & Sons v. Barnett, 670 N.W.2d 190, 195, 197 (Iowa 2003)). Under the law, the employer must "furnish reasonable medical services and supplies *and* reasonable and necessary appliances to treat an injured employee." Stone Container Corp. v. Castle, 657 N.W.2d 485, 490 (Iowa 2003) (emphasis in original). Such employer-provided care "must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee." Iowa Code § 85.27(4).

An injured employee dissatisfied with the employer-furnished care (or lack thereof) may share the employee's discontent with the employer and if the parties can't reach an agreement on alternate care, "the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care." Id. "Determining what care is reasonable under the statute is a question of fact." Long v. Roberts Dairy Co., 528 N.W.2d 122, 123 (Iowa 1995); Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433, 436 (Iowa 1997). As the party seeking relief in the form of alternate care, the employee bears the burden of proving that the authorized care is unreasonable. Id. at 124; Gwinn, 779 N.W.2d at 209; Reynolds, 562 N.W.2d at 436; Long, 528 N.W.2d at 124. Because "the employer's obligation under the statute turns on the question of reasonable necessity, not desirability," an injured employee's dissatisfaction with employer-provided care, standing alone, is not enough to find such care unreasonable. Id.

Nguyen did not address the issue in her post-hearing brief. The defendants did. Based on their argument, it appears Nguyen seeks authorization for a back brace and follow-up care as needed with a back specialist.

There is no indication in the record that Nguyen requested and the defendants denied a back brace or follow-up care with the DMOS spine clinic. Nor is there a

sufficient basis in the evidence from which to conclude Nguyen informed the defendants of her dissatisfaction with care or lack thereof, a prerequisite under the statutory text. Consequently, the undersigned finds no basis for determining Nguyen is entitled to alternate care under the Iowa Workers' Compensation Act.

Nothing in this section of the decision shall be construed to limit the defendants' right and responsibility under section 85.27(1) to promptly furnish reasonable care in the future or Nguyen's right to apply for alternate care under section 85.27(4) in the future.

G. IME Reimbursement.

The parties dispute what costs relating to Dr. Bansal's examination of Nguyen and the resultant IME report the defendants are responsible for under Iowa Code section 85.39(2). In the defendants' post-hearing brief, they assert that the IME costs relating to Dr. Bansal's report must be reimbursed under Iowa Code section 85.39(2) and may not be taxed as costs under Iowa Code section 10A.328 and Iowa Administrative Code rule 876—4.33. (Defs' Post-Hr'g Brief, p. 18) The defendants contend that under section 85.39(2), Nguyen is only entitled to reimbursement of $500.00, an amount that covers only Dr. Bansal's impairment rating and excludes all costs relating to Dr. Bansal's physical examination of Nguyen, his review of medical records relevant to the work injury at the center of this case, and his IME report. Id.

The Iowa Court of Appeals considered the scope of an employer's responsibility to pay for an examination by a doctor of the injured employee's choice in Kern v. Fenchel, Doster & Buck, P.L.C., 966 N.W.2d 326, 2021 WL 3890603, *2 (Iowa App. 2021) (Table). The work injury at issue in Kern occurred on May 20, 2016, so the opinion construed Iowa Code section 85.39 (2016). Id. at *2–3. The statutory text, as amended in 2017, was not at issue in the case. See id.

At the agency level, the claimant sought reimbursement of the costs relating to an IME by Dr. Bansal. Id. at *2; see also Kern v. Fenchel, Doster & Buck, P.L.C., No. 5062419, 2017 WL 6764066, *1, *13–*14 (Iowa Workers' Comp. Comm'r, Dec. 18, 2017) (Arb. Decision). Relying on the Iowa Supreme Court's holding in Young, the presiding deputy concluded that the claimant was not entitled to reimbursement because she had failed to establish the prerequisites to qualify for an evaluation at the defendants' expense under section 85.39. Id. at *2–*3; see also Kern, 2017 WL 6764066 at *14. The commissioner affirmed on intra-agency appeal. See id.; see also Kern v. Fenchel, Doster & Buck, P.L.C., No. 5062419, 2019 WL 4135356 *2 (Iowa Workers' Comp. Comm'r, Jul. 2, 2019) (App. Decision). On judicial review, the district court also affirmed. Id. at *2.

On judicial review, a court of appeals panel reversed, concluding:

> In this case, Kern presented herself for an examination by Dr. Paulson, a provider of the employer's choosing. *See* Iowa Code § 85.39. Although Dr. Paulson did not use the words "zero" or "no" disability, the clear effect of his no-causation determination was a finding of no compensable

> permanent disability. Kern disagreed and thought such a determination was "too low." If we read section 85.39 liberally to benefit the worker, the next logical step was for Kern to have an IME, seeking evidence of permanent disability, which can only be made if there is also a causation determination, typically done in the same examination. In fact, there can be no disability determination arising out of a disability evaluation without a determination there was causation. Kern's request that the employer pay for that evaluation is consistent with the statutory procedural requirements of section 85.39 and also promotes an appropriate balance of the interests of each party.
>
> We see no conflict applying our supreme court's interpretation of section 85.39 in *Young* to a finding that Dr. Paulson's opinion on lack of causation was tantamount to a zero percent impairment rating and, in fact, we find such interpretation compelling.

Id. at *4–*5 (italics used in original citations).

The agency has followed the court of appeals' Kern opinion. The case Hines v. Tyson Foods, Inc. centered on a March 2, 2020 injury governed by Iowa Code section 85.39, as amended in 2017. No. 20700462.01, 2022 WL 265341 *26 (Iowa Workers' Comp. Comm'r, Jan. 18, 2022) (Arb. Dec.; Palmer, Dep.). In Deputy Palmer's arbitration decision, she cited to Kern in concluding that a claimant was entitled to reimbursement for an IME that included a causation opinion with respect to a March 2, 2020, injury. No. 20700462.01, 2022 WL 265341 *26 (Iowa Workers' Comp. Comm'r, Jan. 18, 2022) (Arb. Dec.). The commissioner affirmed the conclusion on appeal. See Hines v. Tyson Foods, Inc., No. 20700462.01, 2022 WL 1788263 (Iowa Workers' Comp. Comm'r, May 13, 2022) (App. Decision; Cortese, Comm'r). The commissioner's application of Kern to a post-2017 amendments case makes sense because nothing in the legislation undermines the conclusion that an opinion of no causation is the functional equivalent to a finding of no impairment that underpins the panel's holding in that case. Thus, under agency precedent, a claimant is entitled to reimbursement for an IME under section 85.39(2) after a doctor chosen by the employer finds no causation.

Another court of appeals panel considered the scope of Iowa Code section 85.39(2) in Sandlin v. MidAmerica Construction, 992 N.W.2d 237, 2023 WL 2148754 (Iowa App. Feb. 22, 2023) (Table). The date of injury in Sandlin was September 6, 2017, which means Iowa Code section 85.39, as amended in 2017, applies. Id. at *1, *3–*4. Deputy Walsh concluded that the defendants obtained a zero percent impairment rating from a doctor of their choice, which meant they were responsible for reimbursing the claimant for the entirety of the $2,020.00 in costs on the invoice for the IME performed by Mark Taylor, M.D., the claimant's chosen doctor. Sandlin v. MidAmerican Constr., LLC, No. 5806495, 2020 WL 3447641, *4 (Iowa Workers' Comp. Comm'r, Jun. 18, 2020) (Arb. Decision).

After the agency issued the arbitration decision, the defendants moved for rehearing, contending in pertinent part the presiding deputy erred in awarding IME

expenses. Sandlin v. MidAmerica Constr., LLC, No. 5806495, 2020 WL 4067924, *1 (Iowa Workers' Comp. Comm'r, Jul. 13, 2020) (Ruling on Defs' Application for Reh'g). The defendants relied on IBP, Inc. v. Harker, 633 N.W.2d 322 (Iowa 2001), a case which centered on whether the defendants had "retained" treating physicians chosen by the claimant under Nebraska law in satisfaction of the requirement under section 85.39. Id. Deputy Walsh found the defendants' argument on retention unavailing in ruling:

> In this case, Mr. Sandlin was never told to direct his own medical treatment. The employer initially discouraged claimant from getting any treatment at all and then, begrudgingly authorized him to treat at Medical Associates Clinic the only clinic which was open at the time he sought treatment. The defendants seek to cast this as the claimant's decision. I find it was not. This case is distinguishable from Harker in that the claimant in Harker was specifically allowed to direct his own medical care from the beginning of the claim. Nothing of the sort occurred here. In fact, the opposite is true. The record reflects that Mr. Sandlin was directed to see Dr. Kennedy by the insurance carrier. (Defendants' Exhibit G, Sandlin Depo, pages 16-17) On July 12, 2019, in response to an inquiry from defense counsel, claimant's authorized treating physician referred Mr. Sandlin to Occupational Medicine Associates for the final impairment rating. (Jt. Ex. 3, p. 18) Based upon the facts presented, this can, in no way, be construed to be a physician retained by the claimant.

Id.

The defendants appealed to the commissioner, arguing, "the reimbursement provisions of this section were never triggered because they did not retain Dr. Kennedy, who ultimately opined claimant did not sustain any permanent impairment to his foot" and that, after the 2017 amendments to section 85.39, the "claimant should only be entitled to reimbursement for $174.25, or at the most, $500.00." Sandlin v. MidAmerican Constr., LLC, No. 5806495, *2, *4 (Iowa Workers' Comp. Comm'r, Jan. 27, 2021) (App. Decision). On whether the defendants retained Dr. Kennedy, Commissioner Cortese affirmed Deputy Walsh's arbitration decision with additional analysis documenting in detail the factual distinctions between the events surrounding the IME at issue in Harker and those in Sandlin. Id. at *3–*4. Commissioner Cortese also rejected the defendants' contention that Dr. Taylor's IME costs were unreasonable because Dr. Taylor asserted in his report they were reasonable and there was no contrary, persuasive evidence in the record to the contrary. Id. at *5.

On judicial review, the court of appeals panel in Sandlin concluded the agency erred:

> From the record, in the "local area," Dr. Taylor charges separately for preparing an IME and for preparing an impairment rating. But the statute as now written only allows for reimbursement of an examination based on the typical fee charged for an impairment rating, not the extent of information a full IME entails.[1] Thus, giving effect to the words of the

> statute, we award the "typical fee charged by the medical provider to perform an impairment rating." To do otherwise would authorize payment for an expanded examination, report, and intensive review of medical records, in contravention of what the legislature has determined. We reverse the reimbursement award of $2020.00 and remand for the entry of a reimbursement award based on the impairment rating fee, which on this record is $500.00.

MidAmerican Constr. LLC v. Sandlin, 992 N.W.2d 237, 2023 WL 2148754, *5 (Iowa App. Feb. 22, 2023) (Table). Sandlin applied for further review to the Iowa Supreme Court, which granted the application. MidAmerican Constr., LLC v. Sandlin, No. 22-0471. As of this decision, the Iowa Supreme Court had not issued an opinion in the case.

Rife v. P.M. Lattner Manufacturing Co. dealt with an alleged August 6, 2018 shoulder injury and the cost of an IME by Sunny Kim, M.D., who opined the cost he charged was reasonable and in line with what physicians in his area charged. No. 1652412.02, 2021 WL 3849591, *13 (Iowa Workers' Comp. Comm'r, Aug. 20, 2021) (Arb. Decision). Deputy Lunn found Dr. Kim's assertion credible. Id. He applied pre-Kern agency precedent and concluded the claimant was entitled to reimbursement for the full cost of the IME. See id. On appeal, the commissioner held:

> The final issue on appeal is whether claimant is entitled to reimbursement for the entirety of Dr. Kim's IME charge. Defendants' only argument on appeal is that they should not be assessed any portion of the costs associated with Dr. Kim's evaluation of claimant's non-work-related right ankle injury.
>
> Defendants are correct that Iowa Code section 85.39, as amended in 2017, provides that defendants are only responsible for reimbursement relating to examinations of compensable, work-related injuries. See Iowa Code § 85.39(2). And defendants are likewise correct that claimant's counsel asked Dr. Kim to address whether claimant had any permanent disability relating to his non-work-related right ankle injury. (Claimant's Ex. 1, p. 5)
>
> Dr. Kim, however, did not review any records relating to claimant's right ankle injury, he did not take any measurements of claimant's right ankle range of motion like he did with claimant's right shoulder, and he offered no opinions regarding claimant's right ankle. (See Cl. Ex. 1, p. 5 for medical records given to Dr. Kim to review; Cl. Ex. 1, pp. 2-3) Instead, Dr. Kim indicated he would defer to claimant's treating surgeon or a foot/ankle specialist. (Cl. Ex. 1, p. 3) As a result, I do not find any of the costs of Dr. Kim's exam to be associated with claimant's right ankle injury.
>
> On appeal, defendants do not take issue with the deputy commissioner's analysis or rationale in finding that the reimbursement provisions of Iowa

> Code section 85.39 were triggered in this case, so I will not address or disturb that portion of the arbitration decision in this appeal decision.

Rife v. P.M. Lattner Mfg. Co., No. 1652412.02, 2022 WL 265661, *3 (Iowa Workers' Comp. Comm'r, Jan. 21, 2022) (App. Decision).

The defendants sought judicial review and the district court reversed. 2023 WL 3862594, *1 (Iowa App. Jun. 7, 2023). Rife appealed and a court of appeals panel ruled, "Because Lattner did not contest whether Rife triggered the reimbursement provision found in section 85.39 to the deputy commissioner or the commissioner, error on whether section 85.39 was triggered was not preserved. We reverse the district court with respect to such determination." Id. at *3.

Despite that conclusion, the court of appeals panel considered whether the defendants' argument with respect to the reduction of the requested IME reimbursement was correct under the law and concluded the commissioner erred in holding the defendants were responsible for the entirety of the IME costs because "it is unclear from the record before us what portion of Dr. Kim's fee related to the impairment rating for his right shoulder rather than the examination as a whole." Id. at *3. It further concluded, "The amount of the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted is absent from this record." Id. Rife sought further review of the panel's opinion and the Iowa Supreme Court granted it.

Under Iowa Rule of Appellate Procedure (IRAP) 6.1208(2)(*b*), no procedendo of a court of appeals action shall issue for 27 days after an opinion is filed in a case under the IAPA, "nor thereafter while an application for further review by the supreme court is pending." IRAP 6.1103(6) further provides, "When an application for further review is denied by order of the supreme court, the clerk of the supreme court shall immediately issue procedendo." Thus, when the Iowa Supreme Court grants an application for further review of a court of appeals opinion, the court of appeals may not issue procedendo because it no longer has the authority to remand the case back to the district court.

In Iowa, an appellate court remands a case to the lower court by the issuance of procedendo. In re M.T., 714 N.W.2d 278, 281 (Iowa 2006). Procedendo is "[a] higher court's order directing a lower court to determine and enter a judgment in a previously removed case." Black's Law Dictionary (11th ed. 2019), procedendo). Once the appellate court issues procedendo, its jurisdiction ends. Id. at 282. "Indeed, the entire purpose of procedendo is to notify the lower court that the case is transferred back to that court." Id.

Thus, neither the court of appeals panel opinion in Sandlin nor the one in Rife has become final. Both cases are currently pending before the Iowa Supreme Court. Because of the cases' current status, neither panel opinion currently has more precedential heft than the commissioner's appeal decisions they considered on judicial review.

It is unclear at present whether the Iowa Supreme Court will address the contours of IME reimbursement under section 85.39, as amended in 2017, because after granting an application for further review, under IRAP 6.1103(3)(*d*), the court "may review any or all of the issues raised in the original appeal or limit its review to just those issues brought to the court's attention by the application for further review." Nonetheless, it seems likely that the court will consider the issue and hopefully clear up the murky waters surrounding IME costs under section 85.39(2).

Despite the procedural status of Rife, the commissioner applied the court of appeals panel opinion in Fuller v. Bimbo Bakery USA, No. 20012896.01, 2023 WL 6140681, *3–*4 (Iowa Workers' Comp. Comm'r, Sept. 12, 2023) (App. Decision; Cortese, Comm'r). The commissioner concluded that it is the agency's responsibility "to parse out the cost and fee of non-reimbursable items under Iowa Code section 85.39(2)." Id. That is what the undersigned will attempt to do, with the understanding that the Iowa Supreme Court may render the analysis erroneous in the near future.

In doing so, the undersigned declines to apply the court of appeals panel decisions in Sandlin or Rife. Procedendo has not issued in either case because the Iowa Supreme Court granted further review. Moreover, to the extent they have any precedential value, they are unpersuasive given the facts in the current case.

Workers' compensation is "a creature of statute." Darrow v. Quaker Oats Co., 570 N.W.2d 649, 652 (Iowa 1997). This means an injured employee's right to benefits is "purely statutory." See Downs v. A & H Const., Ltd., 481 N.W.2d 481 N.W.2d 520, 527 (Iowa 1992). And "it is the legislature's prerogative to fix the conditions under which the act's benefits may be obtained." Darrow, 570 N.W.2d at 652.

The Iowa Supreme Court has held:

> The legislature enacted the workers' compensation statute primarily for the benefit of the worker and the worker's dependents. Therefore, we apply the statute broadly and liberally in keeping with the humanitarian objective of the statute. We will not defeat the statute's beneficent purpose by reading something into it that is not there, or by a narrow and strained construction.

Gregory v. Second Inj. Fund of Iowa, 777 N.W.2d 395, 399 (Iowa 2010) (quoting Holstein Elec. v. Breyfogle, 756 N.W.2d 812, 815–16 (Iowa 2008) (citations omitted)).

"Although the workers' compensation statute is to be liberally construed in favor of the worker, the statute is not to be expanded by reading something into it that is not there." Downs v. A & H Const., Ltd., 481 N.W.2d 520, 527 (Iowa 1992) (citing Cedar Rapids Community School Dist. v. Cady, 278 N.W.2d 298 (Iowa 1979)). "To determine legislative intent, we look to the language chosen by the legislature and not what the legislature might have said." Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, (Iowa 2016) (citing Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 337 (Iowa 2008)).

"When an injury is sustained by a worker covered by our system of workers' compensation, a statutory process exists that not only directs the treatment and care for the worker, but also the future examination for any disability resulting from the injury following the healing period." Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 843 (Iowa 2015) (citing Iowa Code §§ 85.27, .39). Iowa Code section 85.39 "is devoted to the examination of an injured worker for the purpose of ascertaining 'the extent and character of the injury' for purposes of paying benefits in the event of a disability resulting from the injury." Id. (quoting Daugherty v. Scandia Coal Co., 206 Iowa 120, 124, 219 N.W. 65, 67 (1928)). "The statutory process balances the competing interests of the employer and employee and permits the employee to obtain an independent medical examination at the employer's expense." Id. at 844.

In 2017, the General Assembly amended section 85.39, dividing it into two subsections and adding language. See 2017 Iowa Acts ch. 23, § 15 (now codified at Iowa Code § 85.39). After the amendment, subsection (1) governs examinations arranged by the employer with a physician of its choosing and subsection (2) governs examinations by a physician of the employee's choosing if the employee disagrees with the opinion of the employer's chosen doctor on the question of permanent disability. The two subsections of section 85.39 must be read together because the process they set forth "balances the competing interests of the employer and employee," Young, 867 N.W.2d at 844, and as the Iowa Supreme Court recently reiterated in Chavez v. MS Technology LLC, 972 N.W.2d 662, 668 (Iowa 2022), Iowa courts and administrative agencies must consider the entirety of the Iowa Workers' Compensation Act—not just part of it, in isolation—when construing one of its provisions. See also Iowa Ins. Inst. v. Iowa Ass'n for Justice, 867 N.W.2d 58, 72 (Iowa 2015).

Section 85.39(1) provides:

> After an injury, the employee, if requested by the employer, shall submit for examination at some reasonable time and place and as often as reasonably requested, to a physician or physicians authorized to practice under the laws of this state or another state, without cost to the employee; but if the employee requests, the employee, at the employee's own cost, is entitled to have a physician or physicians of the employee's own selection present to participate in the examination. If an employee is required to leave work for which the employee is being paid wages to attend the requested examination, the employee shall be compensated at the employee's regular rate for the time the employee is required to leave work, and the employee shall be furnished transportation to and from the place of examination, or the employer may elect to pay the employee the reasonable cost of the transportation. The refusal of the employee to submit to the examination shall forfeit the employee's right to any compensation for the period of the refusal. Compensation shall not be payable for the period of refusal.

There is no limitation on the scope of a section 85.39(1) examination. The examination could focus solely on causation, impairment, the extent of permanent

disability, or all three. And an injured employee must submit to such an examination or lose workers' compensation benefits during the period of refusal. The result of an examination by a physician chosen by the employer triggers an employee's right to obtain an IME under section 85.39(2), which provides, "If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination."

The statute thus creates a condition precedent to an employer shouldering the legal responsibility to pay for the reasonable costs associated with an examination by a physician chosen by the injured employer must be considered. Section 85.39(2) identifies the triggering event as "an evaluation of permanent *disability* by a physician retained by the employer and the employee believes this evaluation to be too low." (emphasis added); see also Young, 867 N.W.2d at 843–44. Without an evaluation of permanent disability, an injured employee has no right to obtain an IME with a physician of the employee's choice at the employer's expense. This has implications for an employee's entitlement to benefits and requires consideration of other changes the legislature made to the Iowa Workers' Compensation Act in 2017.

Section 85.39 examinations are intended to inform the determination of an injured employee's entitlement to workers' compensation benefits. Young, 867 N.W.2d at 843. Under sections 85.34 (2) and (3), an injured employee's entitlement to disability benefits is based on the nature and extent of permanent disability. The legislature altered this process a bit in 2017 by carving out an exception under section 85.34(2)(*v*) which creates a mandatory bifurcated litigation process on the question of industrial disability when the employer offers the injured employee work at the same or greater earnings level after the employee has reached MMI and the employee remains employed by the employer at the time of hearing. See Martinez v. Pavlich, Inc., No. 5063900, 2020 WL 5412838, *3–*6 (Iowa Workers' Comp. Comm'r, Jul. 30, 2020) (App. Decision). Under such circumstances, an injured employee is only entitled to benefits based on functional impairment until termination of the employment relationship. See Ocampo v. New Fashion Pork, LLP, No. 20012252.01, 2022 WL 1787362, * (Iowa Workers' Comp. Comm'r, Mar. 4, 2022) (Arb. Decision), aff'd 2022 WL 17171095 (Iowa Workers' Comp. Comm'r, Sep. 17, 2022) (App. Decision); see also Dungan v. Den Hartog Indus., No. 21700246.01, 2022 WL 17170554, *14–*21 (Iowa Workers' Comp. Comm'r, Sep. 30, 2022), aff'd 2023 WL 363118 (Iowa Workers' Comp. Comm'r, Jan. 13, 2023) (App. Decision). After the creation of this new exception and mandatory bifurcated litigation process, an injured employee's entitlement to workers' compensation benefits is based on either permanent disability or impairment.

Reading section 85.39(2) as a whole reveals the first part of chapter 85 that undermines the suggested interpretation by the defendants. Section 85.39(2) provides, "The physician chosen by the employee has the right to confer with and obtain from the

employer-retained physician sufficient history of the injury to make a proper examination." Construing section 85.39(2) as the defendants advocate would effectively read this sentence out of the statutory text because it would mean the physician chosen by the employee has the right to confer with the employer-chosen physician for purposes of developing an accurate understanding of the employee's medical history, but the employer is not responsible for any costs relating to the physician doing so. This would tilt the balance of interests to the employer's favor by granting the employee's chosen physician the right to confer with the employer's chosen physician and sticking the injured employee, who generally has fewer resources than the employer or insurance carrier, with the bill. Such a reading would be strained in theory and nonsensical in practice.

Further undermining the construction for which the defendants advocate is the entirety of the 2017 legislation. The 2017 amendments included the addition of language mandating a larger role for the *Guides* in the statutory process for determining an injured employee's entitlement to benefits. 2017 Iowa Acts ch. 23, § 9 (codified at Iowa Code § 85.34(2)(*x*)). Before the 2017 amendments, the *Guides* were a tool the agency could use when determining the extent of permanent disability caused by an employee's work injury. Seaman v. City of Des Moines, Nos. 5053418, 5057973, 5057974, 2019 WL 6358911, *15 (Iowa Workers' Comp. Comm'r, Oct. 11, 2019) (App. Decision) (quoting Bisenius v. Mercy Med. Ctr., File No. 5036055, 2013 WL 1493035, *1 (Iowa Workers' Comp. Comm'r, Apr. 1, 2013) (App. Decision); see also Westling v. Hormel Foods Corp., 810 N.W.2d 247, 252 (Iowa 2012). The legislature amended the Iowa Workers' Compensation Act in 2017 to mandate use of the *Guides* when determining permanent impairment. Iowa Code § 85.34(2)(*x*). Now the *Guides* must be used to determine the injured employee's permanent impairment when the agency determines functional disability.

Against this backdrop, the defendants' proposed reading of section 85.39 makes little sense. The statute mandates the use of the *Guides* for the determination of permanent impairment, which means that a doctor who issues an opinion that adheres to the framework in the *Guides* is typically found more credible than one who does not. The *Guides* contain a process for physicians to use when evaluating permanent impairment with the impairment rating punctuating that process. Under the *Guides*, the evaluation of permanent impairment is inextricably intertwined with assigning an impairment rating. And for many body parts, the physical examination includes objective measurements without which there can be no impairment rating.

The introductory chapter of the *Guides* states the following with respect to the process it details for evaluating permanent impairment or disability:

> Generally, the physician evaluates all available information and provides as comprehensive a medical picture of the patient as possible, addressing the components listed in the Report of Medical Evaluation form discussed in Chapter 2. A complete impairment evaluation provides valuable information beyond an impairment percentage, and it includes a discussion about the person's abilities and limitations, including the ability

> to perform common activities listed in Table 1-2. Combining the medical and nonmedical information, and including detailed information about essential work activities, if requested, is a basis for improved understanding of the degree to which the impairment may affect the individual's work ability.

Guides, § 1.12, p. 15.

Chapter 2, "Practical Application of the *Guides*," provides the following with respect to the examiners' roles and responsibilities:

> Full and complete reporting provides the best opportunity for physicians to explain health status and consequences to patients, other medical professionals, and other interested parties such as claims examiners and attorneys. Thorough documentation of medical findings and their impact will also ensure that reporting is fair and consistent and that individuals have the information needed to pursue any benefits to which they are entitled.

Id., § 2.3, p. 18. Moreover, the *Guides* state, "A clear, accurate, and complete report is essential to support a rating of permanent impairment." Id., § 2.6, p. 21.

To that end, the *Guides* lay out a list of elements that "should be included in **all** impairment evaluation reports. Id. (emphasis in original). The list is a narrative history of medical condition(s) consisting of

> the onset and course of the condition, symptoms, findings on previous examination(s), treatments, and responses to treatment, including adverse effects. Include information that may be relevant to onset, such as an occupational exposure or injury. Historical information should refer to any relevant investigations. Include detailed list of prior evaluations in the clinical data section.

Id., § 2.6a.1, p. 21.

In addition, the *Guides* direct a physician to "[a]ssess **current clinical status**, including current symptoms, review of symptoms, physical examination, and a list of contemplate treatment, rehabilitation, and any anticipated reevaluation." Id., § 2.6a.3, p. 21. They also direct inclusion of discussion of diagnostic study results and outstanding pertinent diagnostic studies, whether the injured employee is at MMI, and diagnoses and impairments. Id., §§ 2.6a.4–2.6a.6, pp. 21–22. Moreover, the *Guides* state a report should discuss impairment rating criteria, prognosis, residual function, and limitations; calculation of the impairment rating; and discussion of how the impairment rating was calculated. Id., §§ 2.6a.8, 2.6b, 2.6c. p. 22.

The *Guides* also state that other elements may be included in an impairment evaluation that include "a work history with detailed, chronological description of work

activities, specific type and duration of work performed, materials used in the workplace, any temporal associations with the medical condition and work, frequency, intensity and duration of exposure and activities, and any protective measures" as well as "discussion of causation and apportionment." Id., §§ 2.6a.4, 2.6a.6, pp. 21–22. As discussed above, an Iowa Court of Appeals panel has opined that causation is effectively a zero percent impairment rating and therefore opinions on causation are reimbursable and the agency has followed this holding.

The *Guides* provide a "Sample Report for Permanent Medical Impairment" for physicians to follow to help ensure they adhere to the process in the *Guides*. Id., pp. 23–24. The sample includes a section entitled "Identifies" with information about the injured employee and examination. Id., p. 23. The next section is entitled, "Introduction," and consists of, "Purpose (impairment or IME evaluation, personal injury, workers' compensation) and procedures (who performed the exam, patient consent, location of examination." Id. Following that is the "Narrative History," which includes, "Chief complaints, history of injury or illness, occupational history, past medical history, family history, social history, [and] review of symptoms." Id. After that is the section entitled, "Medical record review," which is described as, "Chronology of medical evaluation, diagnostic studies, and treatment for the injury or illness." Id.

Next is a section detailing the physician's physical examination. Id. After that, a section discussing diagnostic studies. Id., p. 24. Then the section, "Diagnoses and Impairments," with the note, "If requested, discuss work readiness, causation, apportionment, restrictions, accommodations, assistive devices." Id.

The report then has a section entitled, "Impairment Rating Criteria," which includes, "MMI residual function, limitations of activities of daily living, [and] prognosis." Id. This is following by the "Impairment Rating and Rationale," which includes the body part or system being rated, the chapter number of the *Guides* used, the table number of the *Guides* used, the percentage impairment of the whole person, and "[d]iscussion of rationale of impairment rating and any possible inconsistencies in the examination." Id.

The report template concludes with a section entitled, "Recommendations," which is for, "Further diagnostic or therapeutic follow-up care." Id. Then there is a section labeled, "Work ability, work restrictions." Id. This final section includes the explanatory note, "If requested, review abilities and limitations in reference to essential job activities." Id.

Unsurprisingly, every section of the "Sample Report for Permanent Medical Impairment" in the *Guides* is relevant to the determination of permanent disability or impairment in workers' compensation cases before the agency. As discussed above, the rationale for directing a physician to write a report contained in the *Guides* is accurate:

> Full and complete reporting provides the best opportunity for physicians to explain health status and consequences to patients, other medical professionals, and other interested parties such as claims examiners and

> attorneys. Thorough documentation of medical findings and their impact will also ensure that reporting is fair and consistent and that individuals have the information needed to pursue any benefits to which they are entitled.

Id., § 2.3, p. 18. "A clear, accurate, and complete report is essential to support a rating of permanent impairment." Id., § 2.6, p. 21.

The *Guides* reflect what agency experience and expertise reinforces: The IME report is important in the determination of an employee's entitlement to workers' compensation benefits, especially in contested cases before the agency. The AMA has established criteria in the *Guides* so that doctors are providing the information injured workers, employers, insurance carriers, and tribunals such as the agency need to equitably determine an individual's entitlement to workers' compensation benefits based on the injury they sustained and the disability the injured has caused. Presumably, this is why the legislature mandated use of the *Guides* when determining permanent impairment. Consequently, this mandate cannot be ignored when determining what is reimbursable as a reasonable cost under section 85.39(2). The costs that stem from a physician following the *Guides* in accordance with the requirement in section 85.34(2)(*x*) when performing an IME under section 85.39(2) are therefore reasonable.

Further reinforcing this conclusion is binding precedent and the principle of *stare decisis*. The defendants' proposed interpretation is an invitation to reject the court of appeals panel in Kern and the commissioner's appeal decision in Hines because their suggestion necessarily requires rejecting the holding that the portion of an IME consisting of an opinion on causation is reimbursable under section 85.39. The undersigned respectfully declines this invitation.

Nguyen's injury is to the knee. And the process in the *Guides* for evaluating permanent impairment to the lower extremity lends additional support to this interpretation. Chapter 17, "The Lower Extremities," states:

> The evaluation should include a comprehensive, accurate medical history; a review of all pertinent records; a comprehensive description of the individual's current symptoms and their relationship to daily activities; a careful and thorough physical examination; and all findings of relevant laboratory, radiologic (imaging), and ancillary tests. It is also essential that the rater include in the report a description of how the impairment was calculated. Because many ratings are reviewed by other physicians and third-party administrators, the explanation of the calculation will lead to a better understanding of the method used and the report will be considered more reliable.

Guides, § 17.1, p. 524.

The *Guides* also address methods of assessment. Id., § 17.2, p. 525–27. Chapter 17 contains 13 methods that can be used to assess lower extremity impairment

that fall within three categories of assessment: (1) anatomic, (2) functional, or (3) diagnosis based. Id., p. 252.

> Diagnosis-based estimates are used to evaluate impairments caused by specific fractures and deformities, as well as ligamentous instability, bursitis, and various surgical procedures, including joint replacements and meniscectomies. In certain situations, diagnosis-based estimates are combined with other methods of assessment.

Id.

> The *Guides* further provide:
>
> Table 17-33 provides impairment estimates for certain lower extremity impairments. For most diagnosis-based estimates, the ranges of impairment are broad, and the estimate will depend on the clinical manifestations and their impact on the ability to perform activities of daily living. Hip replacements should first be rated using Table 17-34 and knee replacements using Table 17-35. The points obtained from the assessment are then applied to Table 17-33 for the diagnosis impairment rating. If limb length discrepancy also exists, that impairment rating should be combined with the impairment from the joint replacement using the Combine Values Chart (p. 604).

Id., § 17.2j, p. 545.

Thus, there can be no impairment rating for a total knee replacement using the *Guides* without understanding the injured employee's medical history. The type of injury and corrective surgery must be considered when rating the impairment. Further, a physical examination is required to determine whether limb length discrepancy has occurred and how it should be rated. The impairment rating is then written down, with the information on which it is based, in accordance with the directives in the *Guides* so that the injured employee, the employer, insurance carrier, attorneys, and agency can consider it on the question of entitlement to permanent disability benefits. This also allows a court considering the case on judicial review under chapter 17A to apply the substantial evidence standard. The entire system is based on doctors producing reports containing the information the *Guides* direct them to include when providing an impairment rating.

In the current case, the record shows Dr. Bansal's report substantially complies with Chapter 2 of the *Guides* generally, the "Sample Report for Permanent Medical Impairment" in particular, and Chapters 17 and 15. Dr. Bansal's examination and report therefore comply with the mandate in section 85.34(2)(*u*) that, "when determining functional disability and not loss of earning capacity, the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the [*Guides*]." This makes the costs relating to the IME and report reasonable.

Furthermore, many IMEs come before the agency, which allows the undersigned to use agency experience and expertise to conclude that Dr. Bansal's charges are in line with those of an occupational medicine doctor with a practice in the Des Moines metro area performing an evaluation of permanent impairment in accordance with the *Guides*.

For the above reasons, Nguyen has prevailed on the question of what costs relating to Dr. Bansal's IME and report for which the defendants are responsible under section 85.39(2). The evidence in the record, the Iowa Workers' Compensation Act as a whole, and the *Guides* render the entirety of the costs in Dr. Bansal's invoice reasonable. The defendants shall reimburse Nguyen for the entirety of Dr. Bansal's examination and report under Iowa Code section 85.39(2).

H. Costs.

"All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commission." Iowa Code § 86.40. "Fee-shifting statutes using 'all costs' language have been construed 'to limit reimbursement for litigation expenses to those allowed as taxable court costs.'" Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 846 (Iowa 2015) (quoting Riverdale v. Diercks, 806 N.W.2d 643, 660 (Iowa 2011)). Statutes and administrative rules providing for recovery of costs are strictly construed. Id. (quoting Hughes v. Burlington N. R.R., 545 N.W.2d 318, 321 (Iowa 1996)).

Because Nguyen prevailed on multiple disputed issues, under Iowa Code section 86.40 and Iowa Administrative Code rule 876—4.33(7), $103.00 is taxed against the defendants for the filing fees, including convenience fees incurred by using the payment gateway on the Workers' Compensation Electronic System (WCES).

VI. ORDER.

Based on the above findings of fact and conclusions of law, it is ordered:

1) The defendants shall pay to Nguyen 125 weeks of permanent partial disability benefits at the rate of nine hundred twenty-eight and 69/100 dollars ($928.69) per week from the commencement date of January 3, 2023.

2) The defendants shall pay accrued weekly benefits in a lump sum.

3) The defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

4) The defendants are to be given the credit for benefits previously paid for the stipulated amount.

5) The defendants shall file subsequent reports of injury as required by Rule 876 IAC 3.1(2).

6) The defendants shall pay to Nguyen three thousand seven hundred-nineteen and 00/100 dollars ($3,719.00) for the reasonable costs of Dr. Bansal's IME.

7) The defendants shall pay to Nguyen the one hundred three and 00/100 dollars ($103.00) for the filing and convenience fees as a taxed cost.

8) The parties shall be responsible for paying their own hearing costs. Each party shall pay an equal share of the cost of the transcript.

Signed and filed this 20TH day of October, 2023.

BENJAMIN G. HUMPHREY
Deputy Workers' Compensation Commissioner

The parties have been served, as follows:

Robert C. Gainer (via WCES)

Lindsey E. Mills (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.