

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BERTA CALDERON,

FILED

Claimant,

MAR 01 2017

File No. 5054732

vs.

WORKERS COMPENSATION ARBITRATION

TYSON FRESH MEATS, INC.,

DECISION

Employer,
Self-Insured,
Defendant.

Head Note No.: 1803, 2602

STATEMENT OF THE CASE

Berta Calderon, claimant, filed a petition in arbitration seeking workers' compensation benefits from Tyson Fresh Meats, Inc., self-insured employer. Hearing was held on November 28, 2016 in Sioux City, Iowa.

Berta Calderon testified live at trial. The evidentiary record also includes claimant's Exhibits 1-19 and defendant's Exhibits A-E. The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The parties requested the opportunity for post-hearing briefs, which were submitted on December 23, 2016.

ISSUES

The parties submitted the following issues for resolution:

1. What, if any, additional industrial disability did claimant sustain as a result of the stipulated work injury?
2. Whether claimant is entitled to reimbursement for an independent medical evaluation (IME) under Iowa Code section 85.39?
3. Assessment of costs.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Claimant, Berta Calderon ("Berta") contends that she injured her back on September 15, 2014 or alternatively on November 13, 2014, caused by a traumatic injury while at work. Defendant admitted that she sustained a compensable back injury on November 13, 2014. On February 18, 2016, Berta filed an amended petition alleging mental sequelae. Defendant has denied the mental sequelae. (Testimony)

Berta was hired by Tyson in 2014. She testified that she passed her pre-employment physical and was allowed to work without any restrictions.

Tyson's records indicate that on September 10, 2014, Berta reported an incident of back pain to her supervisor. (Ex. 1, p. 1) On September 15, 2014, Berta was working in the middle position. In this job the cow carcass came from her left side, she grabbed the carcass with a hook in her left hand and pulled it towards her. She would bend forward a bit to cut some of the bottom of the cow that was dirty. This was fast-paced work. She testified that on the date of the injury when she pulled the hook she felt something crack in her back and felt pain. She has had pain in her back since this time. Claimant testified that the injury occurred on September 15, 2014; defendant offered no testimony to dispute this date. I find that the appropriate date of injury in this case is September 15, 2014. (Testimony)

Initially, Berta treated with the Tyson nurses' station. However, she continued to experience pain so she sought treatment on her own with Todd Woollen, M.D. The first note in evidence from Dr. Woollen's office is dated October 20, 2014. Berta was seen for right back pain that wrapped around to her abdomen, headache, nausea, and symptoms of pregnancy. The doctor's impression was cephalgia, mastalgia, constipation, irregular menses, and vaginal discharge. He recommended naproxen and Miralax powder. (Exhibit 2, pages 46-47) Berta testified that she continued to work at her job.

Berta returned to see Dr. Woollen again on November 17, 2014. The notes indicate a possible workers' compensation claim for her upper back. She reported that her back pain had been getting progressively worse since October 20, 2014. The doctor noted that when he saw her on the 20th of October, she did not mention any work injury. She reported this as work-related on November 13. The doctor noted that she claimed the injury was from pulling on the cow, she felt a popping noise, and then her pain began. Dr. Woollen's impression was back pain, thoracic region. He noted that it seemed to be a T8 level nerve impingement based on history. The doctor further noted that he could not definitely say this was caused by work due to her age, but he noted she claimed work made it worse. He recommended a trial of naproxen and a 30 pound lifting restriction. (Ex. 2, p. 48) Berta brought the restrictions to Tyson, who moved her to a light duty position. Her light duty work involved checking cows to be sure they were

put in the cooler properly and also documenting cows that were not properly cut. She performed this job until the plant closed on August 12, 2015. (Testimony)

Berta returned to see Dr. Woollen on December 2, 2014. She noted that her pain was worse after work. She reported a lot of stress in her family. She was prescribed additional naproxen. She continued to follow-up with Dr. Woollen and reported continued family stress. She reported that physical therapy helped with her back pain. She said the area that was hurting was weak so she has been performing a lot of home exercises. She still always has back pain and it was worse when the line at work was moving fast. Berta returned to the doctor in early January and reported that her pain was essentially the same. Her pain levels depended on what she did at work. Dr. Woollen recommended an MRI of the thoracic spine. The MRI was performed on January 15, 2015. The impression from the radiology report was moderate right paracentral disc protrusions at T11-12 resulting in stenosis to the right with effacement of the ventral thecal sac and anterolateral cord deformity; a small right paracentral disc protrusion at T7-8 without significant central canal stenosis or neural foraminal narrowing; and minimal disc bulging at some levels of the thoracic spine without central canal stenosis. (Ex. 2, pp. 49-55)

On December 30, 2014, Brian Koeppen, D.P.T. noted that he had last seen Berta for therapy on December 19, 2014. At that time, she was doing really well. She had improved her strength and was having less pain with deep breathing and work activities. Berta was able to meet all of the physical therapy goals and had returned back to work full duty. (Ex. 3, p. 66)

On January 20, 2015, Dr. Wollen noted that Berta was still having pain on the left at the T8 level. Her pain was worse with lying down. He noted that she had failed PT to date. The pain was the same after several sessions as before she began physical therapy. He noted the MRI did show a small right paracentral disc protrusion at T7-8, without central canal stenosis or neural foraminal narrowing. He felt that this would be unlikely to be causing the pain she described. He recommended referral to a spine specialist. (Ex. 3, pp. 69-72) It is not clear to the undersigned if Dr. Wollen had the benefit of the notes from Brian Koeppen, D.P.T.

Berta saw Andrew Huff, M.D. at Medical Anesthesia Associates on March 9, 2015, for a thoracic epidural steroid injection. Berta reported that a couple of months ago she began having problems in her mid-back region, radiating somewhat to the right. Dr. Huff's assessment was thoracic disk displacement with myelopathy and thoracic back pain. Pursuant to Ric E. Jensen, M.D.'s recommendations, a right interlaminar epidural steroid injection at T11-12 was performed. (Ex. 5, pp. 84-86) On March 24, 2015, Berta returned and reported that after the epidural steroid injection her pain was reduced by about 70 percent. Dr. Huff released her to work. She was going to try to work at full capacity for 3 weeks. She was also given some Flexeril. (Ex. 5, p. 87)

In March of 2015, Berta was seen by Dr. Jensen of Neurosurgical Associates of Nebraska. He noted that Berta did not report radiating paresthesias/pain across either chest wall; this indicated to him an absence of focal, thoracic radicular

irritation/compression. She appeared to have an exaggerated kyphosis within the mid-to-upper thoracic spine which he felt was a consequence of spondylosis and degenerative disc disease and the noted protrusion at the T11-12 segment. He noted she was under restrictions and provided her with a Medrol dose pack. If she responded in a positive manner then he would likely schedule a thoracic epidural injection. Berta's lower extremity neurological exam was normal. Dr. Jensen diagnosed her with thoracic spondylosis of a mild degree; thoracic disc protrusion of the right at the T11-12 segment (in the absence of a focal annular tear); thoracic paraspinal pain syndrome likely secondary to multi-level thoracic spondylosis and focal annular wall bulge, as noted at the T11-12 segment; chronic thoracic muscle fatigue related to the adverse biomechanics of her thoracic spinal region; fatigue-related thoracic back pain syndrome; associated thoracic kyphosis noted in association with spondylosis/annular bulge. Dr. Jensen thought Berta had likely exacerbated pre-existing pathology within her thoracic spine as the result of her alleged work-related injury. However, he stated that this would require additional analysis and investigation. He recommended continued use of naproxen and physical therapy, and trial of epidural cortisone injections. (Ex. 4)

Dr. Jensen saw Berta again on April 1, 2015. The epidural cortisone injections to the thoracic spine did not produce any lasting benefit, but did reduce her pain to 60 percent. He felt that she would require a thoracic discogram to further identify a pain focus at her T11-12 intervertebral disc segment and potential surgical treatment. Dr. Jensen gave her a prescription for oxycodone. The note states they will attempt to gain insurance coverage for an outpatient thoracic discogram. (Ex. 4, p. 83)

Berta saw Dr. Huff again on April 14, 2015. She reported the Flexeril had not helped very much. She felt her pain was pretty much the same as it was prior to the injection. She related her pain at a 5 to 6 but with sharp, shooting twinges of pain. Dr. Huff wrote a note to the nursing staff at Berta's work stating that, if possible, he would be willing to do a percutaneous discectomy of T11-12 in the hopes of providing some significant relief of Berta's symptoms. (Ex. 5, p. 88)

Berta testified that she does not want to have surgery because she is scared of the potential complications. On April 16, 2015, she submitted a request for medical care to see if there were non-surgical treatment options for her. (Ex. 1, p. 15)

On April 21, 2015, Berta was seen at the Nebraska Spine and Pain Center by J.B. Gill, M.D. After taking a history and examining Berta, Dr. Gill recommended conservative, non-operative care. He noted that she did not have any symptoms suggestive of a thoracic radiculopathy. He did feel that the degenerative disc at the T7-T8 area was likely symptomatic for her. Dr. Gill opined that her symptoms would be made worse with surgery. He did not think that she would be able to tolerate her regular full duty job. He restricted her to light duty of no lifting over 20 pounds, no excessive or repetitive bending, twisting or stooping. The restrictions also included the ability to change positions as needed for comfort. The note stated Berta would be able to return to work with restrictions permanently. Dr. Gill thought her symptoms would likely subside given some additional time. (Ex. 7, pp. 92-102)

Following that appointment with Dr. Gill, Berta gave the restriction sheet to Tyson who then completed papers for her to sign. Tyson also told her to carry a card that had her permanent restrictions listed on it. Tyson respected those permanent restrictions completely. Berta worked light duty until the plant closed. (Ex. 1, pp. 18-19; Testimony)

On June 16, 2015, Dr. Gill authored a missive to Berta's attorney at the time. Dr. Gill stated that his diagnosis was thoracic pain and thoracic disc degeneration T7-8, herniated disc T11-12 on the right. He opined that the mechanism of injury was consistent with her diagnosis and presentation at the time of the injury. He felt that she likely exacerbated the degenerative disc at the T7-8 area. He did not feel that the T11-12 disc herniation occurred at the time of the injury; he felt this was an incidental finding on the MRI report. He noted that the herniation was on the right side but her symptoms were on the left side. Overall he felt her prognosis was good. He indicated that her full duty job was going to be very difficult for her; he recommended reassignment of her job. Dr. Gill assigned 5 percent permanent partial disability. (Ex. 7, pp. 103-04)

Berta testified that her prior attorney sent her to see Dr. Taylon. According to Berta, there was no interpreter present; rather, her boyfriend helped with interpretation. Berta felt the communication was not good. (Testimony) Dr. Taylon authored a letter dated June 17, 2015. Dr. Taylon stated that he performed an independent medical evaluation of Berta Calderon on June 12, 2015. He reviewed multiple medical records, examined Berta, and took a history from her. The neurosurgeon noted that the central disc protrusion at T11-T12 is not consistent with her areas of complaints. Dr. Taylon ultimately concluded:

As a result of a work-related injury dated either July or September 2014, Ms. Calderon, in my opinion, sustained a musculoligamentous/mechanical injury to her thoracic spine. There is much nonorganic overlay to her history and physical exam which makes her more difficult to interpret. As long as she can, she should work as tolerated. I do not feel she has permanent restrictions. Once again, she is very difficult to interpret because of all of the hysterical/nonorganic overlay.

(Ex. 8, p. 127)

On June 23, 2015, Berta returned to see Dr. Woollen. She reported that she had seen two specialists who felt that she was not having radiculopathy causing her pain. According to Berta, her pain was intolerable. She reported that she had constant back pain and it hurt to breathe. Berta told the doctor that her pain was in her back into her leg. She also reported a needle/stabbing/prickly pain on the lateral ankles bilaterally; she described it as a strong pain that starts in her back and travel down to her foot. The doctor recommended follow-up with Dr. Gill, as scheduled. (Ex. 2, pp. 56-57)

On June 26, 2015, Berta returned to Dr. Gill's office. She had continued complaints of thoracic back pain, but now she also had low back pain with radiation

nonspecifically to the toes bilaterally. She reported this had been going on for the past four weeks. She was working light duty with great difficulty. She reported constant pain and was not certain what made it better. Due to her subjective complaints, a MRI of her lumbar spine was recommended. She was to continue with her work restrictions. Dr. Gill prescribed a new anti-inflammatory medication as well as Neurontin. (Ex. 7, pp. 105-09)

According to Berta, her depression became more significant in June of 2015. She attributes this to her pain and frustration regarding her inability to do things. (Testimony)

Berta was seen again in Dr. Gill's office on July 7, 2015 to follow-up on her lumbar MRI. She reported that her symptoms were unchanged. The symptoms Berta described in her lower legs could not be verified on the MRI scan. Dr. Gill felt Berta had exhausted all conservative measures. He placed her at MMI for her low back and mid-thoracic pain. Dr. Gill noted that he was the third spine provider that she had seen and her symptoms had not really changed during that entire time. He felt she could tolerate the job she was currently working in. He kept her current restrictions in place. The restrictions were: no lifting over 20 pounds, no excessive or repetitive bending, twisting, or stooping. She also required the ability to change positions as needed for comfort. (Ex. 7, pp. 110-17)

On August 12, 2015, Berta returned to Dr. Gill's office with complaints of increased thoracic pain, low back pain, and bilateral leg pain. She saw John Beckenhauer, PA-C, along with Dr. Gill. The notes state, "[i]n retrospect she states she has pain all over her body. She states this is worse now than when previously seen, but when queried on when it got worse, she states it has been ongoing since she was last seen. This makes very little sense. She demonstrates all with Waddell's signs today." (Ex. 7, p. 118) She complained of pain from the top of her head down to the bottom of her feet; total body pain. Berta was informed that this was not related to her lower back or work-related injury. She reported some depression. He recommended a primary care physician or psychiatrist for her depression. He did give her some Elavil, an antidepressant. The notes also indicate that Dr. Gill's office was provided with a video for her work and asked to determine whether she was able to participate in that work. The notes states, "I have reviewed this video. I see no reason why she cannot medically perform this type of job. This type of job is medically reasonable and appropriate for this patient." (Ex. 7, p. 122) She was released to return to work full duty in the Final High Trim job. (Ex. 7, p. 123)

Berta testified that Tyson sent Dr. Gill video of the Final Trim job. However, Berta testified that this is different than the High Trim job. The job shown in the video was less strenuous; Berta believes she could perform that job. (Testimony)

The Tyson plant closed in mid-August of 2015. (Testimony)

Sunil Bansal, M.D. performed an IME of the claimant on November 30, 2015. As a result of the IME, Dr. Bansal issued a report dated January 6, 2016. Berta reported

that she continued to have aching back pain with a shooting component, which occasionally burned and made it hard to breathe. She also reported pain, numbness, and tingling at her waist as well as both of her legs. On the right, it radiated to the sole of her foot. She reported all of her toes were affected and she had cramping. On the left, her pain, numbness, and tingling radiated the same as the right. She also stated that she was unable to lift and that her daughters help her when she is in the bathroom. She also reported the need to be able to move around. After standing in one place for 30 minutes Berta felt dizzy and nauseous. Dr. Bansal's diagnosis was herniated disc at T11-T12 on the right. He agreed with Dr. Gill that Berta had reached MMI as of July 7, 2015. Dr. Bansal opined that the act of bending and twisting on September 15, 2014 was a significant contributory factor for the aggravation of her T11-T12 disc herniation. Dr. Bansal noted that prior to her injury she was not experiencing problems with her back and had been able to perform all of her job duties without any difficulty. Dr. Bansal assigned 5 percent impairment of the whole person. He restricted her to no lifting over 30 pounds occasionally and no lifting over 15 pounds frequently. No frequent bending or twisting. With regard to future care, Dr. Bansal stated that Berta would benefit from intermittent pain medications and NSAIDs. (Ex. 9)

On February 4, 2016, Berta saw Rose Mary Mason, M.D. for upper and middle back pain; she also reported neck pain up into her head. She has strong headaches. Berta testified that she was in extreme back pain so she sought treatment. Berta reported that at times the pain is so bad she felt like she might pass out. Berta no longer had Tyson insurance. She felt Tyson should be covering her treatment because it was a workers' compensation problem. The doctor's office called Berta's attorney's office to see what he thought they needed to do. Dr. Mason diagnosed her with back pain from T8-T12 radiating to her neck secondary to a work injury and degenerative disc disease of her upper back and neck and degenerative osteoarthritis. (Ex. 10, pp. 145-46)

On February 10, 2016, Berta returned to see Dr. Mason. According to Berta, Dr. Gill felt she had depression and should seek help with her family doctor. Berta did not feel so much depressed as frustrated. Berta reported that Dr. Gill gave her some medicines for depression. Dr. Gill had given her amitriptyline as an antidepressant and to see if it would help with her pain. Berta said that the medication made her dizzy and sleepy so she could not take it. Berta still did not have currently have insurance. She reported her pain as pulsating, burning, cramping, and the pain goes from her back to her neck and to her shoulders. Dr. Mason's diagnoses included: back pain from T8 to T12 radiating to her neck secondary to a work injury while working at Tyson's pulling a cow; degenerative disc disease of her upper back and neck; degenerative osteoarthritis; and chronic pain and depression related to the chronic pain. Dr. Mason provided Berta with some samples of Cymbalta for pain and depression. (Ex. 10, pp. 147-48)

On April 29, 2016, Berta filed an application for alternate medical care seeking pain management for her back as recommended by Dr. Mason and Dr. Bansal. However, defendant denied liability for the condition sought to be treated; therefore, the alternate care petition had to be dismissed.

On May 10, 2016, Dr. Gill authored a missive to defendant's attorney. He stated that the only objective findings that Berta had were related to the MRI scan. He noted there was a moderate right paracentral disc protrusion at T11-12 and also a small right paracentral disc protrusion at T7 and T8. Otherwise the doctor felt the remaining portion of her exam was subjective. Based on his last note of August 12, 2015, the doctor stated that Berta could return to a full duty job which was a Final High Trim job. He did not put her on any type of permanent restrictions. Dr. Gill agreed with Dr. Taylon's findings. He felt Berta did have some nonorganic overlay; however, that did not affect his impairment rating. Dr. Gill did not think the back pain radiating from T8 to T12 to her neck was causally related to her Tyson injury. He noted that any type of disc herniation would produce radicular-type symptoms which would be in a dermatomal distribution around the patient's chest wall area. Dr. Gill did not feel that the diagnosis of depression was causally related to her injury. (Ex. 7, pp. 124-25)

On October 18, 2016, Berta returned to Dr. Mason with complaints of pain between her shoulders and difficulty sleeping. She was taking Naprosyn 500 mg two times a day and alternating that with ibuprofen 800 mg. Dr. Mason advised her she should not really take both of those pills on the same day. She reported she has no insurance so she did not want any expensive medications but she would like to take something for depression and also something for sleep. She was going to be in court in November and she wanted a copy of this note faxed to her attorney. Dr. Mason's diagnoses included: back pain from T8-T12 radiating to her neck secondary to a work injury while working at Tyson's pulling a cow; degenerative disc disease of her upper back and neck, degenerative osteoarthritis, chronic pain, depression related to chronic pain and insomnia. (Ex. 10, p. 149)

Berta testified that prior to her work at Tyson she had never experienced any problems with her back, had not had any treatment for her back, and had never been given any restrictions for her back. (Testimony) Berta testified that after her injury she was no longer capable of performing her prior job due to the frequent twisting and the pulling on the large carcasses. This testimony is consistent with Tyson placing her on light-duty work in November of 2014. She continued working in this light duty position until the Tyson plant closed in August of 2015. She was never returned to the job she was performing at the time of the injury. (Testimony)

Claimant did sustain an injury to her back which resulted in permanent impairment. It is noted that both Dr. Gill and Dr. Taylon found the presence of nonorganic overlay. I find the opinions of Dr. Gill, an orthopaedic spine surgeon, to be persuasive. Based on the opinions of Dr. Gill, I find that Berta sustained five percent permanent functional disability to her body as a whole as a result of the work injury. I find that as a result of the work injury claimant does have permanent restrictions. In April of 2015, Dr. Gill stated that Berta would be able to return to work with restrictions permanently. (Ex. 7, p. 102) Tyson acknowledged that the restrictions were in fact permanent and provided her work within those restrictions for the remainder of her employment. (Ex. 1, pp. 18-19; testimony) In June of 2015, Dr. Gill indicated that a full duty job was going to be very difficult for Berta and recommended reassignment of her

job. (Ex. 7, pp. 103-04) In July of 2015, Dr. Gill again noted her restrictions. (Ex. 7, pp. 110-117) In August, Tyson sent a video of a job of the Final High Trim job. Dr. Gill reviewed the video and felt Berta could medically perform this job. He released her to return to work full duty in the Final High Trim job. I find Dr. Gill's statement in August does not release Berta to full-duty work with no restrictions at any job. I find his August statement was merely in reference to the Final High Trim job. I note that the restrictions Dr. Gill had permanently placed on Berta throughout his treatment of her are similar to the restrictions assigned by Dr. Bansal, the IME doctor she selected. Dr. Bansal has restricted her to no lifting over 30 pounds occasionally, and no lifting over 15 pounds frequently and no frequent bending or twisting. (Ex. 9, p. 137) Based on the opinions of Dr. Gill and Dr. Bansal, I find that Berta does have permanent restrictions as a result of the work injury.

We now turn to the mental sequelae portion of this claim. Berta contends that she sustained mental sequelae as a result of her physical back injury. Tyson disputes that Berta has sustained any mental injury.

On March 18, 2016, Berta saw Rosanna M. Jones-Thurman, Ph.D. for a psychological evaluation as part of an IME by Dr. Terry Davis. A translator was present for her interview and testing. Berta reported that prior to the work injury she had no mental health problems, but since the injury she has had very bad mental health problems. She reported that she was not sleeping and she wanted to cry due to her pain. She said that when she applies for jobs and gets rejected it is hard for her because the potential employers see the application and see that there are restrictions. She cannot play with her kids and do normal things like she used to do. She reported that her attention and concentration were okay. Dr. Jones-Thurman noted that the testing results indicated that Berta was elevated on the scales for major depression, anxiety, somatoform and compulsive personality traits. Diagnostic consideration included major depression, generalized anxiety disorder, somatization disorder and obsessive compulsive, paranoid and histrionic personality traits. The result from the MMPI-2 also indicated diagnostic considerations of schizophrenic disorder or severe somatization disorder. (Ex. 11)

On May 6, 2016, Terry A. Davis, M.D., forensic psychiatrist, authored a missive to defense counsel. Dr. Davis had performed a psychiatric evaluation on Berta on March 18, 2016. Dr. Davis also recommended that Berta undergo the psychological evaluation and testing which was performed by Dr. Jones-Thurman. Dr. Davis reviewed Berta's records, interviewed Berta, and evaluated her.

Dr. Davis diagnosed Berta with somatic symptom disorder, with predominant pain. Dr. Davis stated that a number of factors may contribute to the development of somatic symptom disorder, such as genetic factors, early traumatic experiences, learning and cultural and social factors. Dr. Davis stated that it was "not caused, aggravated, or exacerbated by a work accident or injury. The presence of preexisting psychological factors resulting in the development of Somatic Symptom Disorder in Ms. Calderon was confirmed by her psychological testing results." (Ex. 12, p. 174) Dr. Davis further explained that this was not a case where a preexisting or latent

condition was "lighted up" by her work injury. Dr. Davis opined that Berta "'adopted' her reported accident and injury as the cause of all of her problems and as a way to escape the conflicts and stresses she was already experiencing." (*Id.*) In Dr. Davis's opinion, Berta "does not suffer from any depression, anxiety, or other emotional or psychological symptoms or injury as a result of any alleged work accident or injury at Tyson. She does not have any mental disorder that was caused, aggravated, or exacerbated by any such alleged work accident or injury." (*Id.*)

Dr. Davis also diagnosed Berta with histrionic personality traits; this included a pervasive pattern of excessive emotionality and attention seeking. Dr. Davis noted that these traits date back to childhood or early adolescence and were not caused, aggravated, or exacerbated by any alleged work accident or injury at Tyson. (Ex. 12, p. 175)

It is Dr. Davis's opinion that from a psychiatric standpoint, Berta is fully capable of working at any job for which she has the necessary education, training, and experience without any psychiatric restrictions or limitations. Dr. Davis stated that Berta does not have a diagnosis of depression or any mood or anxiety disorder. She further stated that Berta did not need any psychiatric or psychotherapeutic treatment for anything related to the alleged work injury at Tyson. (Ex. 12, pp. 175-76)

On July 1, 2016 Catalina D. Ressler, Ph.D. issued a psychological report as a result of an independent mental health evaluation that she performed on June 13, 2016, at the request of Berta's attorney. Dr. Ressler evaluated and conducted testing. Dr. Ressler diagnosed Berta with somatic symptom disorder. She opined that Berta "started to develop symptoms of this condition in response to her feeling unheard and distrusted about her physical difficulties." (Ex. 13, p. 188) Dr. Ressler felt that Berta's focus on her health concerns caused major emotional distress and problems with daily functioning. Such individuals are prone to develop physical symptoms in response to such stressors. Based on the history and the testing she had no reason to believe that Berta was malingering. Dr. Ressler opined that Berta was not prepared to return to work. From a psychological perspective, added stressors without the resolution of her physical health concerns would only exacerbate her symptoms. Dr. Ressler indicated that if Berta were to return to work she would have problems primarily with absenteeism and attention/concentration. Dr. Ressler believes that Berta has become quite reactive to not being trusted about her symptoms and has increasingly become more stressed because she had been unable to find employment due to her physical restrictions. She recommended cognitive-behavioral therapy. It is Dr. Ressler's opinion that Berta's symptoms developed as her frustration increased regarding her treatment and her inability to find employment. (Ex. 13)

On October 12, 2016, Dr. Davis issued a supplemental report after she had reviewed the psychological evaluation report dated July 1, 2016 authored by Dr. Catalina Ressler. Dr. Ressler's report indicated that Berta had reported a significant family history of mental illness and substance abuse problems to her that she had not reported to Dr. Davis. Ultimately, the opinions of Dr. Davis remained the same as in her May 6, 2016 report. (Ex. 12, pp. 177-82)

I find the opinions of Dr. Davis and Dr. Jones-Thurman to be persuasive. Their opinions are more consistent with the record as a whole than the opinions of Dr. Ressler. Dr. Davis and Dr. Jones-Thurman diagnosed Berta with Somatic Symptom Disorder with predominant pain and histrionic personality traits. Both noted that Berta did not qualify for a diagnosis of depression or any mood anxiety. Dr. Davis opined that Berta's Somatic Symptom Disorder was not caused, aggravated, or exacerbated by any alleged work injury. Dr. Davis felt Berta did not have any restrictions or limitations from a psychiatric standpoint and was full capable of employment. Whereas Dr. Ressler concludes that Berta's condition is related to the work injury and she is not able to return to work. Dr. Ressler also felt Berta would have difficulty working due to absenteeism and issues with concentration. I find that Dr. Ressler's opinion is not consistent with the record as a whole and therefore is not persuasive. Claimant has seen numerous providers in this case including Dr. Jensen, Dr. Taylon, Dr. Gill, Dr. Bansal, Dr. Davis, and Dr. Jones-Thurman; none of them have opined that Berta could not return to work. Additionally, claimant was able to do light duty work at Tyson for nearly one year after the injury. Furthermore, Berta's testimony does not support Dr. Ressler's opinion that Berta is not capable of working. Berta specifically testified at hearing that she believes she probably is capable of performing the job seen in the video by Dr. Gill. Berta consistently points to her physical restrictions as the reason she cannot find employment. Berta testified that her depression comes and goes. She further testified that she has no difficulty with her attention or concentration. She is able to attend her classes. I do not find the opinions of Dr. Ressler to be persuasive. Thus, I find that claimant has failed to carry her burden of proof to show that she sustained a mental sequela as a result of the work injury.

We now turn to the issue of industrial disability. Since Berta last worked at Tyson in August of 2015, she has only worked for a couple of months cleaning at the unemployment office. Berta testified that her daughter was the one who actually cleaned while Berta supervised and dusted. She performed this job from November 2015 to January of 2016. She worked a total of four hours per week. (Testimony)

Berta has applied for work at Hy-Vee, Wal-Mart, Monogram, and Farmland. However, she has not had any offers of employment; she believes this is due to her restrictions. The last time she applied for work was in October when she applied at El Jimador restaurant. Her daughter works at this restaurant and told Berta about this job opening. However, Berta said she was not hired due to her restrictions. She has applied for approximately six jobs since the Tyson plant closed in August of 2015; I find that this does not demonstrate high motivation to return to the workforce. Since November of 2015 through the time of the arbitration hearing Berta she was taking English classes four hours per day, Monday through Thursday. These classes also include some basic computer courses. Berta has been receiving unemployment benefits since November of 2015 through the date of the arbitration hearing. While the undersigned acknowledges that claimant is taking classes, the lack of initiative to find even a part-time job is concerning. (Testimony)

At the time of hearing, Berta resided in Denison, Iowa and was in her late thirties. She attended school in El Salvador through the 6th grade. While in El Salvador, Berta worked cleaning and housekeeping. Berta moved to the United States in 2003. Once in the United States, Berta worked cleaning houses in California. She also worked in Kansas at IBP trimming brisket. She also worked packaging cabinets. Additionally, she has cleaned for an airplane fabrication company. She testified that due to her physical restrictions she could no longer perform any of these jobs. Berta can understand some words in English. For example, she can understand basic instructions at work but she is not fluent in English. She relies on friends and family to help her understand English documents. (Testimony)

Berta continues to experience a lot of mid-back pain. Carrying objects or moving sideways bothers her back. She takes two Naproxyn per day and also takes ibuprofen and Tylenol. Her biggest problem is her mid-back pain. She also has pain in her left arm, pain that runs up to her head, she sometimes has pain in her legs. Additionally, she testified that sometimes when she breathes her chest is painful. She attributes all of these symptoms to the work injury. (Testimony)

Considering Berta's age, educational background, employment history, ability to retrain, low motivation to obtain a job, length of healing period, permanent impairment, and permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that claimant has sustained a 30 percent loss of future earning capacity as a result of her work injury with Tyson.

Claimant is seeking reimbursement pursuant to Iowa Code section 85.39 for the IME conducted by Dr. Bansal in the amount of \$2,530.00. The IME was conducted on November 30, 2015. This was after the employer had received an impairment rating from Dr. Gill. Defendant offers no argument in its brief as to why the claimant should not be reimbursed for the IME. I find that defendant shall reimburse claimant pursuant to Iowa Code section 85.39 in the amount of \$2,530.00 for the IME of Dr. Bansal.

Finally, claimant is seeking an assessment of costs under rule 876 IAC 4.33. Because claimant was generally successful in her claim, I find an assessment of costs is appropriate.

Claimant is seeking the \$100.00 filing fee; I find this is appropriate under subsection 7.

Claimant is also seeking the service fees in the amount of \$13.48; I find this cost is appropriate under subsection 3.

Claimant is seeking costs in the amount of \$75.00 for IME interpretation; I find that this is not an allowable cost under rule 876 IAC 4.33.

Claimant is seeking Dr. Bansal's IME report as a cost. Because defendant is responsible for reimbursement of this IME pursuant to Iowa Code section 85.39, this issue is now moot.

Claimant is seeking the \$1,110.00 expense of Dr. Ressler's report under rule 4.33(6). The invoice for Dr. Ressler's services reveals that only \$240.00 of that expense was for the report. The remainder of the expenses were for the clinical interview, psychological testing, and medical records review. (Ex.18, p. 232) I find that only the portion for the report is appropriate as a cost pursuant to rule 876 IAC 4.33(6).

Thus, I find defendant is assessed costs totaling \$353.48.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6)(e).

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).

In the present case, claimant failed to establish by a preponderance of the evidence that she sustained a mental health condition that arose out of and in the course of her employment as a result of the initial physical injury. Therefore, I conclude claimant has failed to show she sustained a compensable physical/mental injury.

However, claimant did sustain a compensable work injury which resulted in permanent disability. 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 R. Co., 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. In the present case, the parties have stipulated that there was no lost time as a result of the work injury and therefore, the commencement date for permanent partial disability benefits shall be the date of the injury, September 15, 2014.

Based on the above findings of facts, I concluded that claimant sustained 30 percent industrial disability as a result of the September 15, 2014 work injury. Therefore, claimant is entitled to 150 weeks of permanent partial disability benefits.

Claimant is also seeking reimbursement under Iowa Code section 85.39 for the IME of Dr. Bansal. Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

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

Claimant is seeking reimbursement pursuant to Iowa Code section 85.39 for the IME conducted by Dr. Bansal in the amount of \$2,530.00. I concluded that defendant shall reimburse claimant pursuant to Iowa Code section 85.39 in the amount of \$2,530.00 for the IME of Dr. Bansal.

Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. Based on the above findings of fact I conclude defendant is assessed costs totaling \$353.48.

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the rate of three hundred sixty-six and 51/100 dollars (\$366.51).

Defendant shall pay claimant one hundred fifty (150) weeks of permanent partial disability benefits commencing on the stipulated date of September 15, 2014.

All past due weekly benefits shall be paid in lump sum with applicable interest pursuant to Iowa Code section 85.30.

Defendant shall reimburse claimant for Dr. Bansal's independent medical evaluation fee in the amount of two thousand five hundred thirty and no/100 dollars (\$2,530.00)

Defendant shall reimburse claimant's costs in the amount of three hundred fifty-three and 48/100 dollars (\$353.48).

Defendant shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1 (2) and 876 IAC 11.7.

Signed and filed this 1st day of March, 2017.


ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876 4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.