BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MIRIAN FLORES,	:	File No. 5051312
Claimant,	:	ARBITRATION
vs.	:	DECISION
TYSON FRESH MEATS, INC.,	:	
Employer, Self-Employed, Defendant.	:	Head Note No.: 1803

STATEMENT OF THE CASE

Mirian Flores, claimant, filed a petition in arbitration seeking workers' compensation benefits from Tyson Fresh Meats, Inc. (hereinafter "Tyson"), self-insured employer. Hearing was held on October 28, 2015, in Sioux City, Iowa. Presiding at the hearing was Deputy Workers' Compensation Commissioner Erin Q. Pals.

Claimant, Mirian Flores, and Will Sager were the only witnesses who testified live at trial. The evidentiary record also includes claimant's exhibits 1-15 and defendant's exhibits A-D. The parties submitted a hearing report at the commencement of the evidentiary hearing. On the hearing report, the parties entered into certain stipulations. Those stipulations are accepted and relied upon in this decision. No findings of fact or conclusions of law will be made with respect to the parties' stipulations.

The parties requested the opportunity for post-hearing briefs which were submitted on November 13, 2015.

ISSUES

The parties submitted the following issues for resolution:

1. The extent of industrial disability that Ms. Flores sustained as a result of the July 17, 2013, work injury.

2. Assessment of costs.

FINDINGS OF FACT

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

The parties stipulate that Ms. Flores sustained a compensable injury to her body as a whole while working for Tyson on July 17, 2013. The parties further stipulate that said injury resulted in permanent disability and that this is an industrial disability case. The central dispute centers on the amount of industrial disability Ms. Flores has sustained as a result of the July 17, 2013, injury. I find that as a result of the July 17, 2013, work injury at Tyson Ms. Flores sustained 65 percent industrial disability.

Ms. Flores was born on December 31, 1965. She is originally from El Salvador and speaks Spanish. Ms. Flores attended school in El Salvador for eight years but then left school because her parents could not afford to send her to school any longer. She testified that she can understand words in English, but is not able to converse in English. She also cannot read or write English; she has friends or family members interpret English documents for her. In approximately 1997 she took some English classes but found that they were very difficult for her and quit after two months. (Testimony)

Ms. Flores testified that she does have a computer at home that her children use but she does not know how to use it. She owns a cell phone with internet and an e-tablet that she knows how to use, to some extent. She uses the e-tablet to listen to music, watch videos about cooking and sewing, and she uses the e-tablet to read. She does not know how to touch-type; when she types she uses the hunt and peck method. (Testimony)

Tyson hired Ms. Flores in 2001. Prior to that time, she did not have any back injury, back treatment, or limitations on her activities due to her back. She underwent a pre-employment physical which confirmed she was physically fit to work. (Testimony)

The first job Ms. Flores performed at Tyson was packing loins. This job involved taking loins from a container and laying two down at a time on the line. She was required to lift the loins and estimates that they weighed from 16 to 28 pounds. This work required her to be on her feet all day. It also required her to push the loins.

The next job Ms. Flores performed at Tyson was trimming loins. In this position she used a Whizard knife to trim the bone out of the loin. She was required to do similar lifting, pushing, and pulling as she was in the packaging loin job. Again, some of the loins weighed more than 20 pounds. This job also required her to be on her feet all day.

Her next job with Tyson was packing ribs. In this job there were ribs that weighed six or seven pounds. She had to package three or four ribs in a bag and then push them down the line. In this position she was also required to lift those boxes that weighed 30 pounds.

Ms. Flores' next position at Tyson was trimming ribs. She performed this job for approximately seven or eight years. This was the job she was performing at the time of her July 17, 2013, injury. To perform this job she held a knife with her right hand and

grabbed the ribs with her left hand, she would cut the ribs and then toss them to co-workers. She was required to stand all day in this job. On the date of injury Ms. Flores and five others were working on a line trimming ribs on a line. A big pile of ribs became stuck so Ms. Flores pushed the pile of ribs in an attempt to free them. While pushing on the pile of ribs she twisted her body and also twisted her upper back. She estimates that the pile she pushed weight 50 pounds. She felt a jerk and a burning sensation in her lower back on the left side down into her hip. She was able to continue working that day. By the following day the pain was going down her left leg a little.

Ms. Flores testified that she waited a few days to report the injury because she thought the pain would go away. During this time she went to see her own doctor who recommended that Ms. Flores report the injury to work. Ms. Flores reported the injury to Tyson on July 23, 2013. She was then sent to see David R. Archer, M.D. (Testimony)

Ms. Flores saw Dr. Archer on July 23, 2013; there was an interpreter present. (Exhibit 1, pages 2-4) The doctor noted left mid/low back pain to the left knee in an L5 pattern. The mechanism of injury was "RSI twist." (Ex. 1, p. 2) Dr. Archer's assessment was lumbar strain. He ordered medications and physical therapy. He noted that based on the description of the mechanism of injury this was a work-related injury. He returned her to full-duty work as tolerated but recommended that she try to avoid the "push-back-w/-the-left-arm part of the rotation." (Id.) In light of these restrictions, Tyson moved Ms. Flores to a light-duty position which involved rolling hams onto a line with her right arm; this did not involve using her left arm. (Testimony)

Ms. Flores continued to treat with Dr. Archer for several months. At the October 9, 2013, visit Dr. Archer noted that her pain remained unchanged. She complained of left low back pain, left SI joint pain, and left hip pain. He noted that she was working full duty, but for only four hours per day, which she is able to tolerate if she can sit between work periods. At hearing Ms. Flores testified that leading up to the October 9, 2013, appointment Tyson had her trimming loins, and she was allowed to sit as needed. Dr. Archer's assessment was sacroiliitis and recommended an orthopedic consult. He recommended return to full duty 50 percent pace. (Ex. 1, pp. 13-14)

Ms. Flores saw orthopaedic spine surgeon, Wade K. Jensen, M.D. on October 21, 2013. Dr. Jensen diagnosed spondylosis, likely herniation with L5 radiculopathy, and ordered an MRI of her lumbar spine. Her restrictions remained no lifting more than ten pounds, occasional twist, four hours working light-duty, and four hours regular duty. (Ex. 4, pp. 56-57)

The lumbar MRI was carried out on October 23, 2013. The MRI showed mild disc degeneration with small generalized disc bulges and ligamentous and facet joint hypertrophy at L3-L4 and L4-L5 causing mild central spinal stenosis and mild-to-moderate bilateral neural foraminal stenosis, worse at L4-5. (Ex. 5, p. 128)

Dr. Jensen reviewed the results of the MRI with Ms. Flores at the November 4, 2013, appointment. She reported continued pain and rated her pain as six out of ten.

Dr. Jensen diagnosed her with L4-5 degenerative spondylolisthesis with L5 radiculopathy on the left side. He proceeded with an L5 selective nerve root block on the left side. Her restrictions remained unchanged. (Ex. 4, pp. 66-67)

On November 5, 2013, Dr. Jensen sent a missive to Tyson responding to Tyson's questions. Dr. Jensen causally connected Ms. Flores' condition to her work at Tyson. (Ex. 4, p. 68)

On December 2, 2013, Ms. Flores was seen by a physician's assistant in Dr. Jensen's office. The notes indicate that although Ms. Flores was sent by Dr. Jensen for an L5 selective nerve root she cancelled this so she could have it done closer to home. At the Storm Lake facility she only had a caudal epidural injection. She reported that she continued to have pain in her lower back and that the injection actually caused an increase in pain. The notes also indicate she had subscapular pain with rhomboid spasm. At hearing Ms. Flores testified she believed this pain was because she was forcing her upper body more due to the pain in her lower back and leg. He recommended starting ibuprofen, Flexeril, and physical therapy. She was scheduled for a selective nerve root block at L5 on the left. Her restrictions remained unchanged. (Ex. 4, pp. 74-75)

Ms. Flores was sent to Jeremy B. Poulsen, D.O. who performed a left L4-5 transforaminal epidural steroid injection and prescribed her Tramadol and Gabapentin. (Ex. 6, pp. 133-140) According to Ms. Flores, her pain reduced by 60 percent but returned after two weeks. (Testimony)

Ms. Flores continued to receive conservative treatment from Dr. Jensen's office. However, because conservative treatment was not helping Dr. Jensen performed lumbar surgery on April 3, 2014. The surgery consisted of 1) L4 laminectomy including medial facetectomy and foraminotomy for L4 nerve root decompression, 2) partial L5 laminectomy including medial facetectomy and foraminotomy for L5 nerve root decompression, 3) posterolateral arthrodesis L4-5 for fusion, 4) posterior pedicle screw instrumentation L4 and L5 bilaterally, 5) bone marrow aspirate right iliac crest, 6) local autograft for fusion, and 7) morselized allograft for fusion. (Ex. 7, pp. 144-45)

Ms. Flores returned to Dr. Jensen's office on April 14, 2014. The notes indicate she was two weeks status post L4-5 fusion without interbody. She reported she still had quite a bit of pain in her low back and down her legs. She reported she was unable to walk more than three minutes at a time and that she was taking hydrocodone for pain and some Flexeril for muscle relaxer. The P.A. noted she also had weakness into the left tibialis anterior. He recommended she continue with her pain medications and return in four weeks. She was to remain off work. (Ex. 4, pp. 104-07)

At hearing claimant testified that while she was off work and taking pain medications her pain only calmed down "a little bit." (Testimony)

She returned to see Dr. Jensen on May 21, 2014. At that time she was "doing reasonably well, really no complaints of significant discomfort or back pain." She did have a little bit of residual L5 nerve root issues, but Dr. Jensen felt they had almost completely resolved. She was allowed to return to work with a less-than-10-pound lifting restriction. She was also to sit and stand as needed. (Ex. 4, pp. 108-15)

Ms. Flores did return to light duty work for Tyson. She worked in the sewing room, sewing aprons. She was able to sit and stand as needed. She estimates that she sat six out of the eight hours per day. She testified that she performed this job from May until October of 2014. During this time she said her pain worsened. (Testimony)

Ms. Flores took a leave of absence from July 10 to July 14, 2014. She testified that she took this leave due to her back pain and because she was very depressed. She was at work, vomited, and was dizzy. She went to the Tyson infirmary and was then sent to her doctor. Her doctor advised her that her blood pressure was high. She was taken off of work for four days. (Testimony)

After those four days she returned to work at Tyson and continued to have low back, left hip, and left leg pain. Additionally, she experienced upper back, left shoulder, and left arm symptoms. She believes the upper back pain was due to overusing it because of her lower back pain. (Testimony)

Dr. Jensen saw Ms. Flores again on July 28, 2014. He noted that she had been poorly progressing through therapy. He ordered an MRI of the lumbar spine. (Ex. 4, pp. 117-20) She returned to Dr. Jensen on September 17, 2014. He noted that the MRI results were normal. He did not recommend any additional treatment. He placed her at maximum medical improvement (MMI) for her back. Dr. Jensen felt she was ready for a functional capacity evaluation (FCE) to determine her long-term restrictions. He noted that her upper back complaints and left arm numbness did not make a lot of sense as being related to her lumbar spine. (Ex. 4, pp. 123-25)

An FCE was performed at Sports Rehab Professional Therapy Associates in Storm Lake, on October 9, 2014. The testing lasted 2.25 hours. The findings of the FCE were not always consistent. The therapist noted she scored 5/5 Waddell signs, which indicated the significant presence of non-organic findings which are not necessarily related to pain, impairment, or disability. She passed only 6 of the 40 validity criteria which indicated a very poor effort and invalid test results. Due to the invalid test results the therapist estimated that she could work in the light physical demand levels. (Ex. 8)

On October 21, 2014, Dr. Jensen responded to a letter from Tyson. Dr. Jensen indicated that he felt permanent restrictions pursuant to the FCE were appropriate for Ms. Flores. Specifically, he agreed with the estimated restrictions of occasional lift, carry, push, pull up to 20 pounds and frequent lift, carry, push, pull up to 10 pounds. Additionally, she was allowed frequent stand, walk, bend, reach, squat, and stair climb. She was limited to occasional crawl. Dr. Jensen also indicated that he viewed a video

representation and detailed job description of the grade ribs position and felt it fit within the permanent restrictions of Ms. Flores. (Ex. 2, pp. 37-41) He opined that as a result of the work injury Ms. Flores sustained 20 percent body as a whole impairment. (Ex. 2, p. 43)

Since the time of Ms. Flores' injury Tyson has modified the grade ribs job to make it easier. One of the results of the modification is that ribs no longer pile up as they did at the time of the injury. At hearing Ms. Flores testified that she had reviewed the video representation of the grade ribs position. This video shows the job as it has been modified, not as it was at the time of her injury. At the time of the injury and at the time of the hearing, the job requires the worker to be on their feet all day. (Testimony)

In November of 2014, Tyson attempted to gradually return Ms. Flores to the modified grade ribs position. However, after approximately one month she reported that her low back and leg symptoms increased. She believes the increase was due to the amount of required standing. (Testimony) In December of 2014, Tyson placed her back in the light-duty sewing position she performed from May through October of 2014. (Testimony)

Tyson again attempted to return Ms. Flores to regular-duty work in the modified grade ribs job. However, her back pain worsened and she reported that the physical therapy did not help. Ms. Flores testified she was not able to be on her feet all day due to her back pain. The worst pain was in her lower back, left hip, and left lower extremity. (Testimony)

At her attorney's request Ms. Flores saw Sunil Bansal, M.D. for an independent medical evaluation on December 5, 2014. His report was not generated until February 4, 2015. Dr. Bansal agreed with Dr. Jensen in that Ms. Flores reached MMI on September 17, 2014. He opined that the "forceful push and twisting mechanism aggravated her lumbar spondylosis." (Ex. 9, p. 187) He noted that the "injury set off a cascade of neuroregulatory and immunochemical events, sensitizing her L4-L5 disc and causing chronic pain." (Ex. 9, p. 188) He noted that as a result of the injury she sustained 22 percent whole person impairment. He agreed with Dr. Jensen's assignment of occasional lift, carry, push, pull up to 20 pounds and the frequent lift, carry, push, pull up to 10 pounds. However, he also restricted her bending to occasional and no prolonged standing or walking greater than one hour at a time. He felt she would benefit from NSAIDs, pain medications and physical therapy. (Ex. 9, p. 189)

Ms. Flores returned to Dr. Jensen's office on January 12, 2015. She reported mid-back pain, most notably on the left side which radiated up into the shoulder, neck, and left arm. She also reported occasional numbness and tingling into her left arm. Her pain was worse when working. The assessment was back pain at the midscapular level left side and L4-5 decompression and fusion. Ms. Flores was prescribed physical therapy and was told to follow up on an as-needed basis. (Ex. 4, pp. 126-27)

Ms. Flores testified that on February 11, 2015, she took Dr. Bansal's restrictions to Tyson. Ms. Flores testified that Tyson told her they would not consider the restrictions from Dr. Bansal because he was not an authorized treating physician. Therefore, Tyson did not place her back into the light-duty sewing position. Instead, Ms. Flores was given the option of either performing the modified grade ribs job or going on bid watch/walk, which meant she would go home and periodically check on job postings listed at the plant to see if there was a job within her restrictions to bid on. Ms. Flores refused the modified grade ribs position because she felt she could not perform this on a full-time basis due to her back pain. Specifically, she testified she could not be on her feet all day. She took a leave of absence. Ms. Flores testified that since February 2015, she has been on bid watch and continues to look for work at Tyson every two weeks. She either goes into the plant herself to look at the jobs or her husband, who is an employee of Tyson, checks for her. She testified that she did find one job which she thought appeared to be within her restrictions. She bid on that job in May or June of 2015 because she thought she would be allowed to sit periodically. However, she was informed by Tyson that she could not sit periodically and that the position required her to lift more than 20 pounds. (Testimony)

We now turn to Ms. Flores' claim for industrial disability benefits. Dr. Bansal is the only physician to address the issue of permanent functional impairment as a result of the injury. He assigns 22 percent of the body as a whole. Based on this unrebutted opinion, I find that Ms. Flores sustained 22 percent functional impairment as a result of the July 17, 2013, work injury. Functional impairment is just one of the elements to consider in addressing industrial disability.

At the hearing, Ms. Flores testified that she understands her permanent restrictions are no lifting more than 10 to 20 pounds, no frequent bending over, and she is not to stand or walk more than one hour at a time. She said she was given these restrictions by Dr. Bansal. She testified that the surgeon, Dr. Jensen, also assigned her permanent restrictions. However, it is her understanding that those restrictions are different from Dr. Bansal's in that Dr. Jensen did not restrict her walking, standing, or bending. Based on how her body feels, Ms. Flores believes that Dr. Bansal's restrictions are more accurate. With her restrictions/limitations, as assigned by Dr. Bansal, Ms. Flores cannot think of a job at Tyson or outside of Tyson which she could perform. (Testimony)

I find the opinions of Dr. Jensen to carry greater weight than those of Dr. Bansal. Dr. Jensen is a spine surgeon and as such he is uniquely qualified to address the issues surrounding Ms. Flores' spine. Dr. Jensen was able to see Ms. Flores on numerous occasions over a long period of time. He had the advantage of seeing how she responded to different treatment options and her symptomology over that long period of time. Furthermore, Dr. Jensen's opinions regarding restrictions are more consistent with the FCE testing results than the restrictions of Dr. Bansal. Ms. Flores' FCE results suggested symptom and disability exaggeration and the presence of non-organic findings which were not necessarily related to pain, impairment, or disability. Based on Ms. Flores' subjective complaints, Dr. Bansal restricts Ms. Flores to only

occasional bending and no prolonged standing or walking greater than one hour at a time. Although Dr. Bansal acknowledges the invalid FCE results, he fails to provide any explanation as to what, if any, consideration he gave the FCE when assigning her restrictions. For these reasons I find that as a result of the work injury Ms. Flores' permanent work restrictions are occasional lift, carry, push, pull up to 20 pounds and frequent lift, carry, push, pull up to 10 pounds. Additionally, she was allowed frequent stand, walk, bend, reach, squat, and stair climb. She was limited to occasional crawl.

Prior to working for Tyson Ms. Flores was a housewife and took care of her four children and her husband. She testified that she performed this full-time job for approximately 20 years. She said she had to lift her children when they were young and would also have to move furniture from time to time. She does not believe she could go back to performing this type of work due to the lifting that was required. (Testimony)

Ms. Flores testified that she continues to have low back and left leg pain. She continues to take hydrocodone and ibuprofen every day for her ongoing pain. She has not sought treatment for her back since she was released by Dr. Jensen. (Ex. C, p. 16) She testified that she does not believe she could go back and perform the packaging or trimming loins or the packing ribs jobs at Tyson. She could not perform these jobs because some of the meat weighed more than 20 pounds. Also, she would have to push more than 20 pounds at once. Additionally, these jobs required her to be on her feet all day, and she testified she can no longer do that. (Testimony)

As previously noted, Dr. Jensen reviewed the job of grade ribs and confirmed that Ms. Flores would be capable of performing this job. However, rather than perform that position which was available to her, Ms. Flores' chose to take a leave of absence in February of 2015. Ms. Flores testified in her deposition on October 13, 2015, that she has not applied for work with any other company. She has not looked for jobs anywhere. She has not looked at an unemployment office, newspaper ads, or the internet. She said this is because she does not think she could find a job she could perform. (Ex. C, pp. 18-19) I find that Ms. Flores lacks motivation to return to the workforce. Despite the fact that she testified she has family members who can translate written documents for her she has failed to take even the most basic steps to try and find employment. Furthermore, Ms. Flores' lack of effort in her FCE also demonstrates her lack of motivation.

The evidence demonstrates that Ms. Flores is no longer physically capable of performing work at the levels necessary to perform some of her prior jobs. However, according to the permanent restrictions placed on her by Dr. Jensen she is capable of returning to the grade ribs position. Although Ms. Flores has physical restrictions that she did not have when she started her employment at Tyson she could still work, if she were so inclined or motivated.

I find Ms. Flores' restrictions preclude her from a significant number of jobs. However, I find that the preponderance of the evidence does not show that she is

permanently and totally disabled. Unfortunately, she has not demonstrated a strong desire to return to work on a full-time basis.

I also find that Mr. Flores has sustained a significant loss of future earning capacity as a result of the work injury. Unfortunately, she has now been out of the labor market for several months and she has significant restrictions. She has lost access to a portion of her pre-injury employment opportunities. Considering Ms. Flores' age, educational background, employment history, ability to retrain, lack of motivation, length of healing period, permanent impairment and permanent restrictions and the other industrial disability factors identified by the Iowa Supreme Court, I find that Ms. Flores has proven that she sustained a 65 percent loss of future earning capacity as a result of her work injury with Tyson.

Claimant is also seeking an assessment of costs. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. Because claimant was generally successful in her claim I find it is appropriate to assess costs against the defendant.

First, claimant is seeking as assessment of cost in the amount of $100.00 for the filing fee in this matter. I find this is an appropriate cost under rule 4.33(7).

Next, claimant is seeking as assessment of cost in the amount of $12.96 for the service fees. I find these are appropriate costs under rule 4.33(3).

Finally, claimant is seeking as assessment of cost in the amount of $2,595.00 for Dr. Bansal's IME report. Because Iowa Code section 85.39 is the sole method for reimbursement of an examination, I find that this is not an appropriate cost. Although the cost of obtaining the report may be recovered as a cost there is not enough information in the record for that to occur in this case. I find that the invoice submitted simply states, "Independent Medical Examination and report: FLORES, Miriam . . . . . .$2,595". Therefore, there is no way for the undersigned to ascertain what the cost was of just the report. Thus, claimant's request for reimbursement of Dr. Bansal's report as a cost is denied.

Defendant shall reimburse claimant costs totaling $112.96.

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 R. App. P. 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).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

Claimant asserts she is permanently and totally disabled under the traditional industrial disability analysis. The parties stipulate that this injury involves an injury to the body as a whole and should be compensated with industrial disability pursuant to Iowa Code section 85.34(u).

Because 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).

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

In considering all of the evidence within this record, I found the most relevant industrial disability factors in this case to be the length of claimant's healing period, the significant permanent impairment rating, the permanent work restrictions, claimant's lack of motivation to return to work either at Tyson or elsewhere and claimant's age and educational background, employment history as the most relevant factors affecting the industrial disability award. Though all industrial disability factors identified by the Iowa Supreme Court were weighed and considered. Having considered all of the relevant industrial disability factors, I found that claimant did not prove by a preponderance of the evidence that she is permanently and totally disabled at the present time. Nevertheless, I did find that Ms. Flores has proven a significant loss of future earning capacity. I specifically found that she has shown by a preponderance of the evidence a 65 percent loss of future earning capacity.

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. The parties stipulated that the commencement date for permanent disability benefits was May 23, 2014.

Costs are to be assessed at the discretion of the deputy commissioner hearing the case. Because claimant was generally successful in her claim I find it is appropriate to assess costs against the defendant as set forth above.

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay unto the claimant three hundred twenty-five (325) weeks of permanent partial disability benefits at the stipulated rate of three hundred ninety-seven and 98/100 dollars ($397.98) commencing on the stipulated commencement date of May 23, 2014.

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

Defendant shall be entitled to credit for all weekly benefits paid to date.

Defendant shall reimburse claimant's costs as set forth above.

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 20th day of January, 2016.

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.