BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MELVIN MAYES,	:	
Claimant,	:	File No. 5066393
vs.	:	A R B I T R A T I O N
TYSON FOODS, INC.,	:	D E C I S I O N
Employer,	:	
Self-Insured,	:	Head Note Nos.: 1108.50, 1402.40,
Defendant.	:	1402.60, 1803, 2501, 2502, 2907

STATEMENT OF THE CASE

Melvin Mayes, claimant, filed a petition in arbitration seeking workers' compensation benefits from Tyson Foods, Inc., self-insured employer as defendant. Hearing was held on November 26, 2019 in Des Moines, Iowa.

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.

Melvin Mayes and Jayme Storm were the only witnesses to testify live at trial. The evidentiary record also includes Joint Exhibits JE1-JE5, Claimant's Exhibits 1-10, and Defendant's Exhibits A-K. Unfortunately, the parties failed to remove duplicates from the exhibits; citation is not made to all copies of the same document. Prior to the hearing defendant filed a motion in limine to exclude Claimant's Exhibit 6; claimant filed a response to the motion. At the onset of the hearing, the undersigned heard arguments from both sides regarding the motion. The motion in limine was overruled. The evidentiary record closed at the conclusion of the arbitration hearing.

The parties submitted post-hearing briefs on January 17, 2020, at which time the case was fully submitted to the undersigned.

ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant injured his lumbar spine as the result of the August 6, 2018 work injury.

2. Whether claimant has reached maximum medical improvement (MMI).

3. The nature and extent of permanent disability as a result of the stipulated August 6, 2018 work injury.

4. Whether defendant is responsible for past medical expenses.

5. Whether claimant is entitled to alternate medical care.

6. Whether claimant is entitled to be reimbursed pursuant to Iowa Code section 85.39 for the independent medical evaluation (IME).

7. Assessment of costs.

FINDINGS OF FACT

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

Claimant, Melvin Mayes, was 55 years old at the time of the hearing. He began working for Tyson Foods, Inc. ("Tyson") on January 16, 2018, at the Columbus Junction, Iowa location. He was hired as a shag driver and was paid $19.90 per hour. Melvin did not have any problems with his neck prior to working at Tyson. He was required to undergo a pre-employment physical; he did not receive any type of restrictions as the result of that physical. (Claimant's Exhibit 1, pages 2- 6)

Melvin testified that the Job Summary for the shag driver position prepared by Tyson is accurate. The document lists the job description as follows:

> The shag driver is responsible for cleaning and then driving the trailers from the wash dock to a storage area. The trailer is then left there until needed. The driver will hook up the trailer and pull it into a dock door. The driver will "chock" the wheels of the trailer by placing a chock block between the back wheels and then will place a truck jack in front of the trailer. After the trailer has been filled, the driver will hook up the trailer to the shag truck remove the truck jack and chock. The trailer is then pulled back into a storage area.

(Cl. Ex. 1, p. 1)

The job summary also lists stressors associated with this task:

> The main stressors associated with this task are back stressors because of the constant jarring action of the shag truck over the non-paved surface and the climbing in and out of the truck.
>
> The driver must be able to lift up to 60 lbs. occasionally and is exposed to acclimate conditions ranging from 100 degrees in the summer and below

> freezing in the winter. The PBX drivers are provided "cool vest" that has ice packs in the lignin to keep drivers cool during the hot seasons.

Id.

The shag driver job required Melvin to drive short distances in "the yard." Melvin described the yard as gravel with craters that were created by rain or snow. He testified that there was constant jarring while he was being bounced around on craters all day in a truck without suspension. The driving he performs at work is on gravel and some is on paved areas. (Testimony; Cl. Ex. 2, p. 8)

On August 6, 2018, the date of the stipulated injury, Melvin was backing up to attach a trailer to his truck. According to Melvin, it is not uncommon for the truck and the trailer to be at different heights. The trailer was not the same height as the truck; this resulted in a jarring impact when the truck made contact with the trailer. As soon as the impact occurred Melvin felt like he had a crook or a thump in his neck. Shortly after the impact, Melvin thought his sore neck was just from turning around and looking around a lot. (Testimony)

Melvin had been having problems with his back and legs prior to August 6, 2018. In July of 2017 Melvin was seen at the University of Iowa Hospitals and Clinics (UIHC) with a history of right-sided Bell's Palsy. On July 6, 2017, he developed right leg and arm weakness. Doctors in Chicago advised him that he had a stroke. Intermittently, he had difficulty swallowing. The impression of the UIHC included right-side weakness and word finding difficulties. He was discharged with a recommendation to follow-up with neurology and his primary care physician. (JE3, pp. 1-10)

On July 16, 2018, Melvin saw Michael Hendricks, M.D. at Southeast Iowa Orthopaedics and Sports Medicine. He reported that he had bilateral leg pain for the past three weeks. His symptoms started suddenly and are related to no particular injury. Melvin described the pain as shooting and constant. He did not have pain while he was sleeping. He started his current job in January. His job involves opening doors and unhooking trailers. His previous job was a semi-truck brake specialist where he had to swing a 9- to 13-pound sledge hammer. X-rays revealed degenerative disc disease with multilevel spondylosis, degenerative cysts pedicle L1 or L2. The diagnosis was spondylosis with radiculopathy, lumbosacral region. (JE1, pp. 1-3)

Melvin returned to see Dr. Hendricks on August 15, 2018. He reported that his neck hurt when he turned his head to the side and he had stiffness. His lower back pain was worse on the right side and he had pain in his bilateral legs. He reported that his left thigh was completely numb. Melvin rated his pain as 9 out of 10. His pain is worse with walking or standing. He had been driving a truck since January 16, 2018 on very rough terrain. Since he started his job he cannot stand for 10 minutes; prior to this job he did not have any problem standing. The assessment was degenerative disc disease, spondylosis, possible healing pedicle fracture C3. The doctor recommended a CT of the cervical spine to rule out C3 pedicle fracture and immobilizing his neck with a

Philadelphia type collar. Melvin was given a work note of no jarring or shaking of his head, avoid rough rides, bumps, and twists of his neck. (JE1, pp. 4-6)

On August 16, 2018, Melvin was evaluated at UI Occupational Health – Tyson Onsite. He presented with neck and low back pain, and lower extremity sensory symptoms. He reported difficulty standing for periods of time, as well as pain in his bilateral legs, lower back, and neck. Melvin attributed his symptoms to his job at Tyson. He said there was very little suspension in the shag vehicle and he feels every bump while driving. He began to feel neck pain last week on Monday night, August 6, while working. He had difficulty hooking up a particular trailer and had to back up hard under the trailer. He felt a sudden onset of right neck pain following that particular task. The next day he had intense pain in his legs when he tried to get out of bed. The assessment was acute neck pain, cervical disc disorder with myelopathy. The doctor recommended a cervical MRI. He suggested changes to his medications. Melvin was restricted to sedentary/seated work only. He was also restricted to no lifting greater than 10 pounds and he was not to perform duties that involved significant flexion/extension of his neck. On August 20, the doctor wrote an addendum to that note. An MRI of the cervical spine was performed on August 17. Following review of the report, the doctor indicated that it remained difficult to determine if work activities could have caused or aggravated some of the mostly degenerative changes seen on the MRI. The doctor recommended a prompt Spine Clinic Consultation. He felt Melvin should be in a firm collar until the consultation. (JE2, pp. 1-4; JE4)

Andrew Pugely, M.D. UIHC Occupational Health, saw Melvin on August 21, 2018. He was seen for an evaluation of neck pain and increased headaches, hand numbness, and bilateral leg pain that began after driving equipment for Tyson. He reported a burning sensation in his thighs that went down his calves with complete numbness of his left anterior thigh. Melvin had none of these symptoms before he began working for Tyson. Dr. Pugely noted that a review of an outside cervical spine MRI demonstrated severe central stenosis at C4-5 and C5-6. Potential fracture was noted at C2 and C3 with a CT. The doctor could not definitively say if his condition was caused by work, but felt it could certainly have been exacerbated by the work activities. The doctor restricted Melvin to a five-pound lifting restriction and recommended that he should not bend or twist. He also ordered a lumbar MRI. His diagnoses were cervical spondylosis with myelopathy and spinal stenosis lumbar region with neurogenic claudication. (JE3, pp. 11-14)

A September 5, 2018, CT of the cervical spine revealed no acute displaced fracture or dislocation. There was indication of a probable small chronic fracture fragment posterior to the right C2-3 facet joint. An MRI of the lumbar spine, on that same date, demonstrated multilevel degenerative and discogenic disease with neuroforaminal and spinal canal narrowing, most severe at L4-L5 with anterior spondylolisthesis, also severe at L2-3. (JE3, pp. 20)

On September 6, 2018, Dr. Pugely noted Melvin continued to have fairly severe pain in his neck, radiating down into his arms and legs. A discussion was had about

performing an anterior cervical discectomy and fusion at C4/5 and C5/6. (JE3, pp. 24-27)

Dr. Pugely saw Melvin again on September 20, 2016. Dr. Pugely advised Melvin that his spinal cord in his neck was being compressed and if he did not have surgery there was a risk of paralysis if he were to have another trauma such as a fall and hit his head. The doctor also advised Melvin that he would not have instant relief of his symptoms. The diagnoses were cervical myelopathy, cervical stenosis of spinal canal, related to the workers' compensation claim of August 6, 2018. Melvin decided to proceed with surgery. The next day Dr. Pugely performed an anterior cervical discectomy and fusion at C4-5 and C5-6. (JE3, pp. 30-38)

On September 24, 2018, Melvin reported difficulty with swallowing. A CT was performed but did not reveal any acute pathology. (JE3, pp. 36, 39, 42)

By October 9, 2018, Melvin reported that his swallowing was improving and he had no difficulty eating or drinking. He was still experiencing some residual numbness and tingling in his hands, left greater than right, but this was slowly improving. (JE3, pp. 44-45)

Dr. Pugely saw Melvin again on November 13, 2018. The doctor noted that Melvin was a 54-year-old, who was 6 weeks out from a 2 level anterior cervical discectomy and fusion performed for cervical myelopathy for a work-related injury. His dysphagia had slightly improved. He occasionally has to turn his head to the left and look upright in order to swallow. At times he has to grind his food. He also reported difficulty with incisional pain and burning pain in his arms and legs. Melvin believed that his arm symptoms were worse since surgery. (JE3, pp. 47-49)

On November 29, 2018, Melvin was seen at the UI Occupational Health – Tyson Onsite. He reported difficulty in swallowing that dated back to his cervical spine surgery. The clinic felt some of his symptoms were suggestive of a globus sensation with muscle tension dysphonia and/or oropharyngeal dysmotility. Recommendation was made for consideration of a speech pathology and/or ENT evaluation with oropharyngeal motility study and possible fiberoptic evaluation of his larynx. Dr. Hartley would defer to the treating orthopedic spine surgeon on treatment and whether the ongoing dysphagia in the context of an anterior cervical decompression and fusion could be attributable to the surgical procedure. (JE2, pp. 5-8)

Melvin returned to see Dr. Pugely on December 13, 2018. He reported anterior neck, low back, and bilateral leg pain which he rated a 6 or 7 out of 10. He described his pain and burning and pins and needles in his legs as well as numbness at the anterior left thigh. He reported that he could stick a pin in his thigh and not feel it. Melvin had continued difficulty swallowing which was now more difficult than it was at his last appointment. Recommendation was made for a consultation with an ENT for evaluation of prolonged dysphagia. He was also to continue physical therapy for conditioning. (JE3, pp. 52-55)

Melvin was seen at the Otolaryngology Clinic at the UIHC on December 19, 2018. He reported the difficulty he had been having swallowing since his fusion. He also felt that he had to force his voice to get out. A cookie swallow and speech therapy swallowing evaluation was planned. (JE3, pp. 56-58)

On January 8, 2019 Melvin underwent testing at the UIHC and saw a speech language pathologist. The testing revealed mild impairment or dysfunction in oral or pharyngeal stage that required modified diet or therapeutic precautions to minimize aspiration risk. It was recommended that Melvin sit upright, go slow, take small bites and drinks, alternate liquids and solids, double swallow, and make effortful swallows. He was also told about speech therapy close to his home for swallowing exercises and assistance with diet consistency with eating and drinking. (JE3, pp. 59-64)

Dr. Pugely saw Melvin on March 28, 2019. He reported that his low back pain and leg pain was 5-7 out of 10. He was not having pain in his neck or arms. The doctor placed him at MMI and indicated he would assign permanent restrictions based on a functional capacity evaluation (FCE). He assigned 25 percent whole person impairment pursuant to table 15-5 on page 392 of The AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (JE3, pp. 76-82)

On May 15, 2019, Melvin underwent an FCE at Advantage Physical Therapy and Rehab. The FCE report stated that Melvin gave maximal and consistent effort. The FCE placed Melvin at the lower end of the medium work category. The therapist recommended that Melvin be allowed to transition between sitting, standing, and walking activities as needed and not to exceed any one activity for greater than an occasional basis or 30 minutes. (Cl. Ex. 5)

On May 23, 2019, Dr. Pugely authored a letter to Tyson. He stated Melvin was at MMI as of March 28, 2019. He opined that his low back complaints and difficulty walking were not related to the August 6, 2018 work injury. He noted that an April 8, 2019 FCE had been deemed to be an invalid assessment of his functional abilities. Dr. Pugely expected that Melvin would have some permanent restrictions including two-handed lifting no greater than 40 pounds. (JE3, p. 73)

On August 5, 2019, Melvin saw Rhonda J. Dunn ARNP at the UIHC. There was a discussion about how his disc disease and degenerative disease in the spine did not happen from a completely normal spine in a few weeks. It would be expected that these changes would happen over a period of several years, even though he may not have been symptomatic in the earlier stages of the degenerative changes. She stated, "[a]lthough he reports that he did not have any problems prior to the job with Tysons [*sic*], the changes in the lumbar spine are likely long-standing." (JE3, p. 87) Dr. Pugely opined that it was possible for some of his leg symptoms to be related to his neck. Now that his neck had been fused and stable for some time, if any of the leg symptoms were related to the neck then they should have changed. The note also states that his degenerative changes in the low back should be evaluated outside the workers' compensation clinic. (JE3, pp. 83-88)

At the request of his attorney, Melvin underwent an IME with Irving L. Wolfe, D.O. on September 5, 2019. Dr. Wolfe stated, "the work that Mr. Mayes performed at Tyson represents a substantial contributing and aggravating factor in the impairments . . ." (Cl. Ex. 6, p. 41) Dr. Wolfe noted that Melvin did not suffer from any low back or right or left leg symptoms or neck symptoms prior to beginning his employment at Tyson Foods in January 2018. With regard to the cervical injury, Dr. Wolfe noted that medical records documented a specific injury on August 6, 2018 while he was mating his shag truck to a trailer. Dr. Wolfe felt that Melvin had not yet reached MMI. However, Dr. Wolfe assigned 25 percent whole person impairment for the cervical spine, plus 3 percent impairment for pain. With regard to Melvin's lumbar spine, Dr. Wolfe placed him in the DRE Lumbar Category II and assigned 10 percent impairment of the whole person. He recommended that Melvin follow the restrictions as set forth in the May 15, 2019 FCE. Additionally, he recommended that Melvin perform no work that requires repetitive rotation of his head and neck or sustained position of his head or neck. (Cl. Ex. 6)

At the request of the defendant, claimant underwent an IME with Trevor R. Schmitz, M.D. on October 8, 2019. Dr. Schmitz was asked what medical diagnoses he believed were casually related to the August 6, 2018 work injury. He stated:

> I would not state that he has any medical diagnoses casually related to his alleged August 6, 2018 injury. He did not mention this injury at his initial visits including visits on July 16 and August 15, 2018. He was having leg numbness and tingling as well as radiating pain into both legs as well as neck pain at each of these visits and did not attribute either to any specific injury. The first record I have of him stating he had any alleged August 6, 2018 injury was when he first reported the initial injury on August 16, 2018 with the UI Occupational Health, Tyson on site. Given this discrepancy in the records, I would state that there is no medical diagnosis causally related to the alleged on August 6, 2018 injury. He does have several degenerative findings on his cervical spine MRI, which were most certainly present for years, preceding his employment with Tyson, and as such, I cannot attribute any of these degenerative changes in his neck to his short stent [*sic*] while working at Tyson.

(Defendant's Ex. B, pp. 6-7)

Dr. Schmitz opined that it was more likely than not, that the cervical condition was attributable to personal conditions not related to his employment. He felt that the conditions were present prior to his employment with Tyson. He felt Melvin experienced a stepwise progressive deterioration of his cervical myelopathy. Dr. Schmitz placed Melvin at MMI as of March 28, 2019. He assigned 25 percent whole person impairment based on Table 15-5 of the Guides due to a successful arthrodesis. He did agree with the restrictions assigned by Dr. Pugely. With regard to Melvin's lumbar spine, Dr. Schmitz stated that there was a July 16, 2018 note from Southeast Iowa Sports Medicine indicating that his symptoms started suddenly and were not related to any particular injury, which obviously predated the alleged August 6, 2018 work injury. Additionally, the doctor felt this note indicated that he did not really sustain a specific

work injury. He indicated that any axial low back pain is a personal underlying health condition. Dr. Schmitz felt that the lumbar condition was related to the neck. Melvin presented with diffuse upper extremity numbness and tingling in his arms and legs, which Dr. Schmitz felt was likely related to cervical myelopathy, especially given the fact that he did not have any high-grade stenosis in his lumbar spine. Dr. Schmitz was also asked to address Melvin's difficulties swallowing. The doctor stated that his dysphagia for liquids and solids were related to his fusion and is a known complication of anterior cervical decompression and instrumented fusion. (Def. Ex. B)

The defendant has stipulated that Melvin sustained an injury which arose out of and in the course of employment on August 6, 2018 and that the injury is the cause of permanent disability with regard to his cervical condition. (Hearing Report)

Melvin has alleged that he also sustained injury to his lumbar spine as the result of the August 6, 2018 work injury. Defendant disputes that his lumbar condition is work-related. There are several medical opinions in the record regarding causation and the lumbar spine. Claimant relies on the opinions of Dr. Wolfe, Dr. Hartley, and Dr. Schmitz, while defendant relies on the opinion of Dr. Pugely. Dr. Wolfe and Dr. Hartley's opinions support the argument for a cumulative or repetitive aggravation of the lumbar spine. However, their opinions do not support the theory that Melvin's injury occurred due to a jarring collision on August 6, 2018.

Dr. Pugely stated that Melvin's low back complaints and difficulty walking are not related to the August 6, 2018 work injury. He stated that it was possible for some of Melvin's leg symptoms to be related to his neck. (Def. Ex. C; JE3, p. 87) Dr. Schmitz opined that the vast majority of Melvin's lumbar condition is related to his cervical condition. The doctor provided the rationale for his opinion. Furthermore, Dr. Schmitz was hired by the defendant to conduct the IME. Therefore, he can hardly be said to be biased against the defendant. With regard to the issue of causation and Melvin's lumbar condition, I find the opinions of Dr. Schmitz to carry the greatest weight. Defendant has stipulated that claimant's cervical condition is related to the August 6, 2018 work injury. Dr. Schmitz opined that Melvin's lumbar condition is related to his cervical condition. Thus, I find claimant's lumbar condition is related to the August 6, 2018 work injury. (Def. Ex. B, p. 8)

Melvin also contends that he has not reached MMI for his work injuries. The only doctor to support this position is Dr. Wolfe, the doctor claimant selected to perform an IME. On this issue, I do not find the opinions of Dr. Wolfe to be persuasive. Rather, I find the opinions of Dr. Pugely and Dr. Schmitz to carry the greatest weight on the issue of maximum medical improvement. Thus, I find claimant reached MMI on March 28, 2019. (JE3; Def. Ex. B)

We now turn to the issue of permanent impairment and permanent restrictions. Dr. Pugely, Dr. Wolfe, and Dr. Schmitz all assign 25 percent whole person impairment as the result Melvin's cervical injury. Dr. Wolfe assigned an additional 3 percent for pain; however, neither Dr. Pugely nor Dr. Wolfe assigned the additional 3 percent. With regard to the cervical spine, I find Melvin sustained 25 percent functional impairment to

his whole person. With regard to Melvin's lumbar spine, the only expert to offer an impairment rating is Dr. Wolfe. He assigned 10 percent whole person impairment. I find claimant has demonstrated he sustained 10 percent whole person impairment of his lumbar spine. Using the Combined Values Table in The Guides, Melvin has sustained 33 percent functional impairment to his whole person.

We now turn to permanent restrictions. I find that as the result of the August 6, 2018 work injury Melvin has permanent restrictions consistent with the May 15, 2019 FCE. These include, but are not limited to, no lifting more than 20 pounds, minimal lifting, bending or twisting of the spine. He should also be allowed to transition between sitting, standing, and walking activities as needed and should not exceed any one activity for greater than 30 minutes. (Cl. Ex. 5)

Melvin has not worked for Tyson since July 25, 2019. He was released to return to work by Dr. Pugely in July of 2019. Tyson put him back to work as a shag driver without any accommodation. Melvin was concerned about performing the shag driver job because of the constant jarring and getting in and out of the truck and his continued pain symptoms. He expressed his concerns to his supervisor, who directed Melvin to the plant manager. Melvin did not receive a positive response from the plant manager, so he continued to perform the shag driver job for several weeks. However, during this time he had to stop approximately every 15 to 20 minutes due to the burning sensation in his legs. He also had to turn and force his neck muscles to go where they were not supposed to, which produced a throbbing pain in his neck and lower back. It was also painful for him to get in and out of the shag truck. Melvin weighs 256 pounds and would have to pull himself up approximately 4 feet into the truck. Melvin felt that merely lifting his body weight into the truck would not be consistent with the 40-pound lift restriction. Melvin testified that he was not offered any other positions at Tyson. (Transcript pp. 94-99; Cl. Ex. 10, p. 51)

Around July 22, 2019, while Melvin was working, he began having sharp pains in his legs and severe numbness on the right side of his neck, from his ear down to his shoulder. He punched out of work 15 minutes early and went home to see if his symptoms would decrease. However, by the following morning his symptoms had not decreased so he went to the plant nurse before work. Melvin requested to return to Dr. Pugely because his pain was getting worse. However, he was not offered any treatment; rather, he was informed that there was a process that had to occur before he could see Dr. Pugely. Melvin sought treatment on his own at the emergency room at Great River Health. He was prescribed gabapentin. (Cl. Ex. 10, p. 51, Tr. p. 96-136)

Tyson's plant manager, Billy was notified of Melvin's request for treatment. He directed Melvin to contact Emanuel in human resources. Emanuel put Melvin on temporary leave and told him to get paperwork for Family and Medical Leave Act (FMLA). Melvin was asked to go to Tyson's plant on July 25, 2019 to discuss the parties' next steps. (Cl. Ex. 10, p. 51; Tr. pp. 97-98)

Jayme Storm, testified on behalf of the defendant at the hearing. At the time of the hearing, Jayme was the in-house nurse manager at Tyson. She had been in that

position for not quite one year; she was not the nurse manager at the time of the August 6, 2018 injury. The first time she interacted with Melvin was in June of 2019. Jayme testified that she discussed possible jobs with Melvin that would involve him working on the production floor on the cold side. She did not discuss a specific position with Melvin and she did not have any recollection of whether there was a discussion about which positions would be within Melvin's restrictions. She testified that Melvin indicated that he did not want to work in production. Melvin did not think he was capable of standing that long. Jayme testified that she was not offering him a job, but rather was offering him the ability to look at the other jobs to see if he would be willing to complete those jobs. She does not have the ability to hire or fire at Tyson. Melvin testified that he did not refuse any work. (Tr. pp. 131-39)

There is no documentation in evidence to demonstrate that Tyson offered Melvin work. It seems there was a discussion about potential positions for Melvin, but those discussions never got to the point where Tyson offered Melvin work. Even if I were to find that the July discussions constituted an offer of a job, there is no evidence in the record to show and that Melvin would receive the same or greater wages then he received at the time of his injury. It is also unknown if the positions that were being considered were consistent with Melvin's restrictions. Further, there is no documentation that Melvin refused any such offer of work. I find the evidence does not demonstrate that Melvin was offered work for which he would receive the same or greater wages than he received at the time of the August 6, 2018 injury.

At the time of the hearing, Melvin was 55 years old and lived in Burlington, Iowa. He graduated from high school in 1982. He attended a technical school where he earned certifications to perform semi-trailer brake repair and welding. His work history includes repairing trailers and truck body frames, fabricated doors, changing tires, and replacing brakes. This job required him to lift anywhere from 25 to 100 pounds, depending on the specific task. He estimated that he earned $600.00 per week. He also has experience working for a temporary agency where he was placed in an assembly position. He packaged satellite parts and needed to lift up to 50 pounds. This job required lifting 35 to 50 pounds. He was paid $7.25 per hour. He also has experience with preventative maintenance and repair of floor scrubber machines and cleaning equipment. He was paid $14.00 per hour. This job required him to lay on the ground to get under machines in awkward positions. (Cl. Ex. 7; Testimony)

Claimant has offered a vocational evaluation report authored by Carma Mitchell, M.S. dated October 18, 2019. Ms. Mitchell conducted a telephone interview with Melvin and reviewed written documentation provided to her by claimant's counsel. Ms. Mitchell noted that in light of the August 6, 2018 injury and the restrictions set forth in the FCE, Melvin would have to be selective in the type of work he performs. She identified job categories that she felt would offer job options for Melvin within his physical restrictions. These jobs included parking lot attendant, light truck driver, taxi driver/chauffeur, courier/messenger, packager, counter attendant, dining room/cafeteria attendant, dishwasher, maid/housekeeper and other cleaning positions. The combined mean wage in Iowa for the occupations she identified was $12.07 per hour. Given that Melvin

was earning $19.90 at the time of his injury, she opined that Melvin had sustained a 39.32 percent loss of earnings. (Cl. Ex. 7)

Melvin's past employment involves manual labor. He does not have any experience with clerical work. Melvin does stutter when he speaks. He testified that his speech impairment would not hamper his ability to perform a job dealing with the public, but the difficulty in communication is something he would rather not deal with mentally. Melvin has not applied for any jobs because he is still an employee at Tyson.

Although Melvin cannot return to his prior job, no medical provider has opined that he cannot work. Ms. Mitchell has identified several potential categories of work that he could perform. I find Melvin's restrictions preclude him from a significant number of jobs. I find Melvin could pursue alternate employment if he were so motivated. However, Melvin has demonstrated little motivation to find alternate work or retraining.

I also find that Melvin has sustained a significant loss of future earning capacity as a result of the work injury. Unfortunately, he now has significant restrictions and has lost access to a significant portion of his pre-injury employment opportunities. However, he should be able to expand his employment opportunities with a willingness to work and retraining. Considering Melvin's age, educational background, employment history, ability to retrain, limited motivation to seek work outside of Tyson, 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 he has sustained a 60 percent loss of future earning capacity as a result of his work injury with the defendant employer.

Melvin is seeking payment of past medical expenses as set forth in Claimant's Exhibit 8. Melvin is seeking payment for medical expenses in the amount of $272.00 which were incurred on July 16, 2018 at SE Iowa Ortho and Sports Medicine. I find that these expenses were not incurred as the result of August 6, 2018 work injury. Therefore, these expenses are the responsibility of the defendant.

Melvin is also seeking payment for medical expenses in the amount of $210.00 which were incurred on August 15, 2018 at SE Iowa Ortho and Sports Medicine. He sought treatment for neck pain and lower back pain. I find that these expenses were incurred as the result of August 6, 2018 work injury. Therefore, these expenses are the responsibility of the defendant.

Additionally, Melvin is seeking payment of expenses incurred with the City of Burlington Ambulance which total $2,070.60. These charges were incurred on September 24, 2018, just days after his surgery. Following his cervical surgery, he had considerable pain and swelling and functional limitations with swallowing, eating, and speaking. Dr. Schmitz opined that Melvin's dysphagia for liquids and solids were related to his fusion and is a known complication of anterior cervical decompression and instrumented fusion. (Def. Ex. B) Defendant argues that the ambulance was not necessary because his swallowing concerns were not of an emergent nature and he did not contact the employer first to request treatment. I find that given these particular

circumstances, difficulty swallowing just days after his surgery, it was reasonable for Melvin to seek emergency care. I find that these expenses were incurred as the result of the cervical operation and are related to the August 6, 2018 work injury. Thus, defendant is responsible for these expenses.

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).

Iowa Code section 85.34(2)(v) states in pertinent part:

> 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.

Based on the above findings of fact, I conclude there is no documentation in evidence to demonstrate that Tyson offered Melvin work. There is also no documentation that Melvin refused any such offer of work. I find the evidence does not demonstrate that Melvin was offered work for which he would receive the same or

greater wages than he received at the time of the August 6, 2018 injury. Because the evidence does not demonstrate that Melvin was offered work for which he would have received the same or greater wages than he received at the time of the injury, his compensation is not based only upon his functional impairment, rather an award of industrial disability is appropriate.

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.

Based on the above findings of fact, I conclude that Melvin has sustained 60 percent loss of earning capacity. As such, he has demonstrated entitlement to 300 weeks of permanent partial disability benefits at the stipulated rate of $464.13 per week. The parties have stipulated that if claimant does not demonstrate entitlement to a running award of healing period benefits then permanency benefits shall commence on March 29, 2019.

Melvin has requested alternate medical care. The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975). Dr. Wolfe's opinion was issued two weeks before hearing. Prior to the hearing, defendant denied claimant's lumbar claim. However, defendant has now been found liable for Melvin's lumbar condition. Under Iowa law, the employer has the right to control the medical treatment for work-related injuries. I find defendant maintains this right. Defendant is responsible for the reasonable cost of any future treatment that is causally connected to the August 6, 2018 work injury.

Claimant is seeking payment of past medical expenses. Under section 85.27, Code of Iowa, defendant is responsible for the reasonable and necessary medical expenses incurred due to the work injury. Based on the above findings of fact, I conclude defendant is responsible for the medical expenses in the amount of $210.00 which were incurred on August 15, 2018 at SE Iowa Ortho and Sports Medicine. Additionally, defendant is responsible for the expenses incurred with the City of Burlington Ambulance which total $2,070.60.

Melvin is also seeking reimbursement of the IME performed by Dr. Wolfe on September 5, 2019. 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. At the request of the defendant, Dr. Pugely rendered an impairment rating on March 28, 2019. I find that the prerequisites of section 85.39, Code of Iowa were met. Thus, I conclude defendant shall reimburse claimant for the IME of Dr. Wolfe in the amount of $2,800.00. (CL. Ex. 9)

Finally, claimant is seeking an assessment of costs. Costs are to be assessed at the discretion of the hearing deputy or the workers’ compensation commissioner. I find that claimant was generally successful in his claim and therefore, an assessment of costs is appropriate. 876 IAC 4.33. Specifically, claimant is seeking the filing fee in the amount of $100.00; I find this is an appropriate cost under rule 4.33(7). Claimant is also seeking the transcription cost of claimant’s deposition in the amount of $151.80; I find this is an appropriate cost under rule 4.33(2). Pursuant to rule 4.33(6) I find that an assessment in the amount of $500.00 is appropriate for the report of Dr. Pugely and an assessment in the amount of $850.00 is appropriate for the FCE of Charles Goodhue. Thus, defendant is assessed costs totaling $1,601.80

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the stipulated rate of four hundred sixty-four and 13/100 dollars ($464.13).

Defendant shall pay three hundred (300) weeks of permanent partial disability benefits commencing on the stipulated commencement date of March 29, 2019.

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

Defendant shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the

one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Deciga Sanchez v. Tyson Fresh Meats, Inc., File No. 5052008 (App. Apr. 23, 2018) (Ruling on Defendants' Motion to Enlarge, Reconsider or Amend Appeal Decision re: Interest Rate Issue).

Defendant shall be responsible for past medical expenses as set forth above.

Defendant shall reimburse claimant 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 26th day of March, 2020.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Nicholas Shaull (via WCES)

Jason Wiltfang (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.