

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHAEL HINES,

Claimant,

vs.

TYSON FOODS, INC.,

Employer,
Self-Insured,
Defendant.

File No. 20700462.01

ARBITRATION DECISION

Headnotes: 1402.30, 1402.40, 1701,
1802, 1803, 2206, 2501, 2907, 4000.2

Claimant Michael Hines filed a petition in arbitration on May 19, 2020, alleging he sustained an injury to his back from performing repetitive work for Defendant Tyson Foods, Inc. ("Tyson") on March 2, 2020. Tyson filed an answer on June 29, 2020.

An arbitration hearing was held *via* CourtCall video conference on July 14, 2021. Attorney Joseph Powell represented Hines. Hines appeared and testified. Attorney Chris Scheldrup represented Tyson. Lee Avina appeared and testified on behalf of Tyson. Joint Exhibits ("JE") 1 through 8, and Exhibits 1 through 6 and A through K were admitted into the record. The record was held open through August 16, 2021, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

The parties submitted a Hearing Report, listing stipulations and issues to be decided. The Hearing Report was approved at the conclusion of the hearing. Tyson waived all affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed between Tyson and Hines at the time of the alleged injury.
2. Although entitlement to temporary benefits cannot be stipulated, Hines was off work from April 28, 2020, through April 19, 2021.
3. The commencement date for permanent partial disability benefits, if any are awarded, is April 20, 2021.
4. At the time of the alleged injury Hines's gross earnings were \$1,082.72 per week, he was single and entitled to one exemption, and the parties believe his weekly rate is \$660.35.
5. Costs have been paid.

ISSUES

1. Did Hines sustain an injury, which arose out of and in the course of his employment with Tyson, on March 2, 2020?
2. Is the alleged injury a cause of temporary disability during a period of recovery?
3. Is Hines entitled to temporary benefits from April 28, 2020, through April 19, 2021?
4. What is the nature of the injury?
5. Is the alleged injury a cause of permanent disability?
6. If the injury is found to be a cause of permanent disability, what is the extent of disability?
7. Is Hines entitled to payment of medical expenses set forth in Exhibit 5?
8. Is Hines entitled to recover the cost of the independent medical examination?
9. Is Tyson entitled to a credit for short-term disability benefits paid to Hines for the week beginning on April 13, 2020, 60 percent of wages, the week beginning April 20, 2020, 90 percent of wages, and from May 11, 2020, through July 20, 2020, 12 weeks paid at 90 percent of wages, for a total of \$11,288.40?
10. Is Tyson entitled to a credit for long-term disability benefits paid to Hines from July 28, 2020, through the present?
11. Is Tyson entitled to a credit for paid guaranteed wages during a company shutdown on April 27, 2020 (\$891.00) and May 4, 2020 (\$891.00), for a total of \$1,782.00?
12. Is Tyson entitled to a credit for medical/hospitalization expenses set forth in Exhibit 5?
13. Is Hines entitled to an award of penalty benefits for wrongful denial of the claim and subsequent failure to pay healing period and permanent partial disability benefits?
14. Should costs be assessed against either party?

FINDINGS OF FACT

Hines is single and lives in Waterloo. (Exhibit H, page 2; Transcript, p. 13) In 1981 Hines graduated from high school. (Ex. H, p. 3; Tr., p. 14) After graduating from high school he obtained a welding degree from Hawkeye Community College. (Ex. H, p. 3; Tr., p. 14) Hines does not know how to use a computer. (Tr., pp. 14-15) At the time of the hearing he was 58. (Tr., p. 13)

After obtaining his welding degree, Hines briefly worked as a laborer in Florida before returning to Iowa. (Ex. H, p. 4) In 1988, Hines commenced employment with Tyson's predecessor, IBP, and worked for Tyson until April 2020. (Ex. H, p. 4) Hines was receiving disability benefits and he remained an employee of Tyson at the time of the hearing. (Ex. H, p. 4)

When IBP hired Hines it did not have a plant in Waterloo. (Tr., p. 16) IBP hired Hines to help build the plant, which took almost three years to complete. (Tr., p. 16) After the plant was built, IBP offered Hines a transfer to a full-time general mechanic position in the maintenance department. (Tr., pp. 16-17)

As a general mechanic Hines went to the floor and worked on equipment. (Tr., p. 17) Hines worked as a general mechanic for 10 or 11 years. (Tr., p. 18) Hines bid on and received a rebuild mechanic position, rebuilding gearboxes, pumps, and hydraulic cylinders when the mechanics replaced the parts. (Tr., p. 17) Hines worked in his own shop rebuilding the equipment. (Tr., p. 17). Hines has worked for IBP and Tyson for 34 years.

During the night shift, the general mechanics would change out the gearboxes, pumps, and cylinders that needed to be repaired and put the parts in a rebuild or junk pile in Hines's work area. (Tr., p. 18) Hines would come in and pick through the parts. (Tr., p. 18) When he worked on a gearbox, Hines would take the gearbox apart, clean it, install new bearings and seals, and when he was through he would put the gearbox back in the supply room so it could be reused. (Tr., p. 19)

Most of the augers and conveyors in the plant are powered by motors. (Tr., p. 19) Hines would repair the motors when the general mechanics replaced them. (Tr., p. 19) The smaller motors weighed 30 to 40 pounds and the larger ones weighed over 500 pounds. (Tr., pp. 19-20) Hines moved most of the gearboxes onto pallets by himself, but if he needed help, he could ask someone for help. (Tr., p. 20) Hines used an electric hoist to lift the equipment up off a pallet to set on his workbench. (Tr., p. 21) When he opened the gearboxes, some of the individual parts weighed 60 to 70 pounds each. (Tr., p. 22) Hines also repaired the power tools and other mechanical items in the plant that needed to be repaired. (Tr., p. 23)

For the first eight or nine years Hines worked as a rebuild mechanic he worked with a helper. (Tr., p. 22) Tyson pulled Hines's helper to work on a different job and from that time he worked alone. (Tr., p. 22)

Hines testified that when he worked as a general mechanic and later as a rebuild mechanic he did not have any problems lifting and moving the parts around at Tyson. (Tr., p. 24) Hines reported he regularly worked with 100 pound boxes all day at work, often straining or hurting his back, but his back always healed and after two or three days or a week his back would feel fine again. (Tr., pp. 26, 37) Hines received some treatment for his low back before 2020.

On December 23, 2009, Hines received lumbosacral spine x-rays. (JE 2, p. 3) The reviewing radiologist listed findings of mild convex left curvature, pedicles intact, lumbar vertebral body heights preserved, minimal anterior wedging, T12 and L1, mild disc space narrowing, L1-2 and L2-3, with no evidence of spondylosis. (JE 2, p. 3) Hines testified after the x-rays he received muscle relaxers and his back pain and problems went away. (Tr., p. 47)

Hines has been diagnosed with acromegaly, which is a condition where the body produces too much growth hormone causing the tissues and bones to grow more quickly. (Tr., pp. 50-51) Hines has been treating for the condition since at least April 8, 2010, with Chitravathi Yerrapareddy, M.D., an endocrinologist. (JE 1, p. 1)

On January 4, 2010, Hines underwent an abdomen/pelvis computerized tomography scan. (JE 2, p. 1) The reviewing radiologist listed a finding of a 1.8 centimeter simple cyst in the superior right kidney, smaller cysts in the upper pole of each kidney with no solid mass or hydronephrosis or calcifications, degenerative disc disease throughout the lumbar spine, and osteoarthritis in both SI joints and hip joints. (JE 2, pp. 1-2)

Deborah Van Dyke, ARNP, with UnityPoint Clinic Endocrinology & Diabetes is Hines's treating medical provider. Hines testified he had treated with Van Dyke for 14 or 15 years and she was familiar with his job duties at Tyson. (Tr., p. 27) During an appointment in April 2019, Van Dyke excused Hines from work from April 15, 2019, through April 18, 2019, due to intractable back pain and released him to return to work on April 22, 2019. (JE 3, p. 1)

On January 7, 2020, Hines attended an appointment with Van Dyke, complaining of sciatic pain that felt like a shock down his left leg without weakness when he would make "a weird move," and reporting he felt the worst when lying down and sitting in a chair and better when he was up moving and walking. (JE 3, p. 2) Hines relayed the shock was "unbelievable" and the day before he picked up a pump and nearly dropped it and almost crushed his foot, noting, "I just lose control of that leg." (JE 3, p. 2) Hines reported he had his last Sandostatin injection for his acromegaly five weeks before his appointment and he had been experiencing pain since then. (JE 3, p. 2) Van Dyke assessed Hines with sciatica of the left side, ordered an x-ray of his back and hip, prescribed Flexeril, and referred him to Dr. Roswell Johnston for consideration of a steroid injection. (JE 3, pp. 4-5) Hines underwent imaging and the reviewing radiologist listed findings of mild retrolisthesis of L2 over L3 of 3 millimeters, mild decrease in disc space at L2-3 and L4-5, facet joint degenerative changes at L4-5 and L5-S1. (JE 3, p. 6)

Hines testified he went to Van Dyke as opposed to going to see a Tyson physician because he was not sure what was going on with his back. (Tr., p. 28) Hines relayed he told Van Dyke unlike his prior back issues, his back had not healed, so she sent him for imaging. (Tr., p. 28)

Hines returned to Van Dyke on February 12, 2020, complaining of horrible left hip pain, occasional shooting pain causing him to almost fall, throbbing in his foot, difficulty sleeping, and reporting he had been off work all week. (JE 3, p. 7) Van Dyke diagnosed Hines with acute, midline low back pain with left-sided sciatica, prescribed Flexeril for muscle spasms, and Norco for pain, and recommended magnetic resonance imaging and a referral to a neurosurgeon. (JE 3, pp. 7-9)

On February 14, 2020, Hines underwent lumbar spine magnetic resonance imaging. (JE 3, p. 10) The reviewing radiologist found he had a mild disc bulge with small left paracentral and subarticular zone disc protrusion, small endplate osteophytes at L1-L2, a mild diffuse disc bulge with small endplate osteophytes, bilateral facet joint degenerative changes and ligamentum flavum thickening, mild spinal canal stenosis and bilateral subarticular stenosis with mild foraminal narrowing at L2-L3, mild diffuse disc bulge with small central disc protrusion and minimal superior migration, bilateral facet joint degenerative changes and ligamentum flavum thickening, mild spinal canal stenosis, moderate right and moderate to severe left subarticular stenosis, and mild bilateral neural foraminal narrowing at L3-L4, and disc desiccation changes and a diffuse disc bulge at L4-L5. (JE 3, p. 11)

Hines attended a consultation with Blake Randolph, ARNP, with UnityPoint Health Neurosurgery Clinic on February 27, 2020, complaining of low back and left leg pain. (JE 5, p. 1) Randolph examined Hines, noted his pain was mostly in the left buttock and hip to his left posterior and lateral leg and to his left lateral foot, and he complained of a sharp, stabbing pain in the left leg that has been ongoing for four months. (JE 5, p. 5) Randolph diagnosed Hines with Tarlov cysts, spinal stenosis of the lumbar region with neurogenic claudication, degeneration of lumbar or lumbosacral intervertebral disc, and L4-L5 disc bulge, referred Hines to the pain clinic at Allen for evaluation of an injection of the left L4-L5 level, and noted if the injection did not provide relief he should be referred to the University of Iowa Hospitals and Clinics ("UIHC") for a neurosurgical consultation. (JE 5, pp. 5, 7) Hines testified he asked Randolph what he believed caused his back problems and Randolph stated he believed Hines's years of work at Tyson caused his back problems. (Tr., p. 29)

Hines testified in the years leading up to March 2020, "I had no idea what was going on with my back, you know. I was trying to determine what was going on. It seemed like back problems came more frequently as time went on, but it always went away; that was the big deal, it always got better." (Tr., p. 54)

On March 9, 2020, Hines attended an appointment with Ashar Afzal, M.D., a pain specialist, complaining of lower back pain. (JE 6, p. 1) Dr. Afzal examined Hines, noted he had mild to moderate trouble trying to stand up from a seated position, he had a markedly antalgic gait, and a severe limitation of lumbar spine flexion, up to 30 degrees and extension less than 5 degrees, slight exaggeration of thoracic kyphosis, marked spasm of the paraspinal muscles, and tenderness over the lumbar facets and sacroiliac joints. (JE 6, p. 2) Dr. Afzal reviewed Hines's imaging,

listed an impression of left-sided L5 radiculopathy, and recommended a transforaminal epidural injection on the left at L4-L5. (JE 6, p. 2)

Tyson arranged an appointment for Hines at Tyson with the plant physician, Robert Gordon, M.D., on March 17, 2020. (JE 4, p. 1) Dr. Gordon documented Hines told him he started noticing consistent pain in his lumbar region and left leg for the past four months, and that he first attributed his symptoms to a Sandostatin injection. (JE 4, p. 1) Dr. Gordon examined Hines, listed an impression of left leg lumbar radiculopathy, noting magnetic resonance imaging showed:

. . . at the L4-L5 level to be disc desiccation, diffuse disc bulge asymmetric to the left with superimposed left paracentral subarticular zone disc herniation causing indentation of the thecal sac, severe left lateral recess narrowing and indentation of the left L5 nerve root, bilateral facet joint degenerative changes. At L5-S1, there is noted to be disc desiccation, mild diffuse disc bulge with small central disc protrusion; bilateral facet joint degenerative changes.

(JE 4, pp. 2-3) Dr. Gordon imposed restrictions of no lifting, pulling, or pushing over 25 pounds and no bending at the waist greater than occasionally, and recommended a referral to a neurosurgeon. (JE 4, p. 3)

On March 24, 2020, Hines returned to Dr. Gordon. (JE 4, p. 4) Dr. Gordon examined Hines, prescribed Voltaren, continued his gabapentin and Flexeril, and continued his restrictions. (JE 4, p. 4) Hines reported Dr. Gordon saw him three times and on his third visit, he referred him to Chad Abernathy, M.D., a neurosurgeon. (Tr., p. 30)

Hines attended an appointment with Dr. Abernathy on April 20, 2020. (JE 7) Dr. Abernathy noted Hines had a history of chronic, intermittent back pain causing difficulty for several years, that his symptoms had progressed over time, and he could not recall any specific injury date or date of onset. (JE 7, p. 1) Dr. Abernathy examined Hines, noted he had a chronic lumbosacral strain, which had been persistent and progressive over the years, noted he was not interested in his neurosurgical opinion regarding treatment options, and stated he did not have much to offer to Hines. (JE 7, p. 2)

Jennifer Thompson, a claims examiner for Tyson sent Dr. Abernathy a check-the-box letter, providing a brief history of Hines's history, and asking for his opinion. (Ex. C) On April 28, 2020, Dr. Abernathy responded, agreeing based on his history and treatment of Hines he did not believe Hines's current low back condition was causally related to his employment with Tyson. (Ex. C, p. 2) When questioned whether Hines's work for Tyson aggravated the underlying condition, Dr. Abernathy wrote "NO SPECIFIC WORK INJURY HAS BEEN IDENTIFIED." (Ex. C, p. 2)

On May 5, 2020, Thompson sent Hines's counsel a letter stating on April 28, 2020, Dr. Abernathy had opined his current low back condition was not caused or aggravated by his work at Tyson, and therefore, Tyson was denying his claim effective the date of the letter. (Exs. 2, p. 45; B, p. 1) The letter advised Hines he could apply for short-term disability benefits and that his subsequent medical bills could be processed under his group health policy. (Exs. 2, p. 45, B, p. 1)

Hines received lumbar spine magnetic resonance imaging at the UIHC on May 12, 2020. (JE 8, p. 1) The reviewing radiologist listed an impression of "[m]ultilevel degenerative changes including mild to moderate thecal sac effacement throughout the lumbar spine as well as asymmetric effacement of the descending left L4 nerve root," and multiple bilateral perineural sleeve cysts. (JE 8, p. 2)

On May 15, 2020, Hines attended an appointment with Hiroto Kawasaki, M.D., a neurosurgeon, at the UIHC. (JE 8, p. 3) Dr. Kawasaki examined Hines, noted his magnetic resonance imaging revealed a paracentral disc bulge at L4-L5 on the left with associated foraminal stenosis, assessed him with lumbar radiculopathy, L4-L5 distribution, and noted he could be a candidate for neurosurgical intervention, but he had not completed a trial of conservative measures. (JE 8, p. 4) Dr. Kawasaki recommended physical therapy, a referral to a pain clinic for epidural steroid injections at L4-L5 on the left, and noted if his symptoms did not abate he would discuss surgical options with Hines. (JE 8, p. 4)

Hines returned to Dr. Afzal on May 28, 2020, complaining of low back pain radiating into his left leg. (JE 6, p. 3) Dr. Afzal recommended and performed an epidural injection at L5-S1. (JE 6, p. 4)

On July 1, 2020, Hines attended a follow-up appointment with Dr. Afzal, reporting he did not receive much relief from the transforaminal epidural steroid injection performed on May 28, 2020. (JE 6, p. 5) Hines complained of pain across his back, radiating into his left leg that is worse with standing, walking, and activities. (JE 6, p. 5) Dr. Afzal recommended and performed an interlaminar approach to the epidural injection on the left side at L4-L5. (JE 6, p. 6)

After his injection, Hines contacted the UIHC on July 8, 2020 and reported he was experiencing immense pain after completing two rounds of injections. (JE 8, p. 8) Dr. Kawasaki issued a note on July 14, 2020, stating Hines would need to continue to be off work due to his medical condition, noting Hines would be returning for an appointment in August to determine if surgery is appropriate and, if surgery were appropriate, Hines would need to be off work for four to six months, including the preoperative period. (JE 8, pp. 24-25)

On July 28, 2020, Hines received a lumbar spine computerized tomography exam. (JE 8, p. 9) The reviewing radiologist listed an impression of no acute fracture or subluxation and degenerative changes with mild spinal canal stenosis at L4-L5. (JE 8, p. 9)

Hines spoke with Dr. Kawasaki over the telephone on August 14, 2020. (JE 8, p. 10) Dr. Kawasaki documented Hines had tried physical therapy and he had received epidural steroid injections, but he continued to have pain in his low back radiating into his left lower extremity. (JE 8, p. 10) Dr. Kawasaki noted the magnetic resonance imaging and computerized tomography scan showed a paracentral disc bulge and associated foraminal stenosis at L4-L5, and recommended Hines follow up in the clinic to discuss surgical options. (JE 8, p. 10) Dr. Kawasaki issued another note, stating Hines would need to remain off work and that he was scheduled for preoperative testing on September 25, 2020. (JE 8, p. 25)

On September 25, 2020, Hines returned to Dr. Kawasaki, reporting he continued to have back pain radiating into his left posterior thigh and calf muscle, down into his left foot. (JE 8, p. 11) Dr. Kawasaki diagnosed Hines with lumbar radiculopathy, noted his magnetic resonance imaging showed a left L4-5 paracentral disc herniation to the left causing compression of the left L4 nerve root, and recommended a left L4-L5 discectomy. (JE 8, p. 15)

On October 19, 2020, Dr. Kawasaki performed a left L4-L5 hemilaminotomy and discectomy on Hines. (JE 8, p. 17; Tr., p. 35) Following surgery Dr. Kawasaki imposed restrictions, including a 10-pound lifting restriction and to minimize bending, twisting, and lifting. (JE 8, p. 19) Dr. Kawasaki assessed Hines with lumbar region spinal stenosis with neurogenic claudication and referred Hines for physical therapy. (JE 8, pp. 23-24) On December 4, 2020, Hines attended an appointment with Dr. Kawasaki, reporting his left lower extremity radicular pain was "much improved," noting he had some numbness and tingling of the dorsal left foot and anterior calf. (JE 8, p. 21)

Dr. Kawasaki issued a note on February 19, 2021, noting Hines underwent a laminectomy and discectomy of his lumbar spine in October 2020, he experienced some improvement since surgery, but due to his continued neurological deficits, he was not ready to return to work, and stating he would reassess the restrictions during his appointment on June 4, 2021. (JE 8, p. 26)

On May 15, 2021, David Segal, M.D., a neurosurgeon, conducted an independent medical examination for Hines and issued a very detailed report on June 14, 2021. (Ex. 1) Dr. Segal examined Hines and reviewed his medical records. (Ex. 1) During his examination, Hines reported he was experiencing back pain, numbness and tingling in his left leg to the front half and entire bottom of his left foot and all toes, noting the numbness on the bottom of his foot was new since his surgery. (Ex. 1, p. 4) Hines relayed when the numbness is bad he cannot feel his toes on the ground, and that he has had near falls due to the numbness and tingling in his foot and believed he could not work due to his foot symptoms. (Ex. 1, p. 4)

Dr. Segal made detailed findings on exam in his report. (Ex. 1, p. 8) Dr. Segal opined Hines's work at Tyson was physically demanding and a substantial cause of his lumbar mechanical and radicular symptoms and need for treatment, including

surgery and continued impairment, and that while Hines believed his acromegaly medication injection was the cause of his radicular pain that began in December 2019, that was not the case. (Ex. 1, pp. 10-11) Dr. Segal further opined:

[s]ome of the findings on imaging may appear to be chronic, or degenerative; however, these findings have as one contributing factor Mr. Hines's work duties at Tyson. The work duties at Tyson "lit up" these degenerative changes, permanently aggravated those degenerative changes and accelerated the development of those degenerative changes. Mr. Hines has other risk factors for developing mechanical and radicular lumbar spine conditions, including general aging process, obesity, and acromegaly and its sequelae, but his work duties at Tyson were also a substantial factor in both the development of the mechanical low back and the lumbar radicular pain.

It is likely that about December 2019, Mr. Hines developed the disc herniation at L4-L5 on the left when his radicular symptoms began. There may have been one specific event that caused the herniation at L4-L5, or alternatively it was the work duties in general that caused the herniation.

(Ex. 1, p. 11) Dr. Segal noted there was a gradual progression in Hines's lumbar symptoms over the years he worked at Tyson, but his "symptoms and ability to work were drastically different before and after the period of time on or about the March 2, 2020, work injury compared with his pre-injury state," finding the worst period of aggravation of his lumbar condition was between December 2019 and March 2020. (Ex. 1, p. 11)

Dr. Segal discussed the issue of Hines's Tarlov cysts, which are cysts formed within the nerve root sheath at the dorsal root ganglion. (Ex. 1, p. 11) Dr. Segal noted the etiology of the cysts is not well understood and that current theories, which have not been tested or challenged, include increased pressure in cerebral spinal fluid, filling of congenital cysts with one-way valves, and inflammation in response to trauma or disease, and noted the discectomy improved Hines's radicular pain, which proves his radicular pain was from the disc herniation and not from the Tarlov cysts. (Ex. 1, p. 11)

Dr. Segal diagnosed Hines with left L5 radiculopathy, disc herniation at L4-L5, mild to moderate right and severe left lateral recess stenosis and moderate left neural foraminal narrowing at L4-L5, lumbar facet arthropathy and mechanical low back pain, left SI joint arthropathy, gait disturbance, and status post left L4-L5 discectomy. (Ex. 1, p. 15) Dr. Segal opined Hines's lumbar disc bulges, degenerative changes and the herniation at L4-L5 were likely caused or permanently aggravated by his cumulative work injury. (Ex. 1, p. 26)

Dr. Segal found Hines reached maximum medical improvement on April 20, 2021. (Ex.1, p. 28) Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Segal found Hines falls within DRE Lumbar

Category III and he assigned Hines a 13 percent whole person impairment. (Ex. 1, p. 29) Dr. Segal assigned an additional 3 percent permanent impairment for pain from the facet joint injury and an additional 3 percent for left SI joint pain not accounted for in DRE Category III, which he found added to the degree of dysfunction, for a combined 19 percent whole person impairment. (Ex. 1, p. 29) Dr. Segal noted Hines may need future treatment, including imaging, medication, exams, injections, and therapy. (Ex. 1, pp. 31-33)

Dr. Segal recommended permanent restrictions of sitting up to 30 minutes, with a 10 minute break for a total of 4 hours per day, standing up to 15 minutes, with a 15 minute break for a total of 3 hours per day, walking up to 15 minutes with a 15 minute break for a total of 3 hours per day, one bend occasionally, no repetitive bending, occasional overhead reaching, rarely lift or carry over 21 pounds, occasionally lift or carry up to 20 pounds, and frequently lift or carry up to 10 pounds, push or pull up to 25 pounds occasionally, climb 1 flight of stairs occasionally, climb 2 or more flights of stairs rarely, occasionally kneel, rarely crouch or squat, and use ladders occasionally. (Ex. 1, p. 34)

On June 23, 2021, Dr. Abernathy responded to a request for information from Tyson's counsel, as follows:

[t]his letter is in reference to your request for information regarding Michael Hines. It appears that the primary issue in this case involves causation. Frankly, I am not aware of any specific documented event which caused the patient's clinical presentation. It appears from the record and Dr. Segal's recent IME that the case is being made for a cumulative work injury to explain his presentation. Disc degeneration is a natural progression of the aging process. Any and all daily activities would contribute to the development of anatomic and radiographic degenerative findings. It is much easier to attribute causation to his work activities if there was a singular event.

To summarize, the degenerative changes demonstrated on MRI are consistent with age which is an accumulation of all aspects of daily life; of which, work activities are a component.

(Ex. D)

On June 24, 2021, Dr. Gordon sent a letter to Tyson after reviewing Dr. Segal's report. (Ex. E) With respect to Hines's left lower extremity radiculopathy, Dr. Gordon noted that when he examined Hines, Hines did not recall anything specific that brought about his symptoms, and that Dr. Abernathy had opined he did not believe his condition was related to his employment with Tyson. (Ex. E, p. 2) Dr. Gordon stated the cumulative trauma model for a lumbar disc disorder with associated radiculopathy has not been substantiated or validated in the medical literature with certainty, without citing to any authority to support his assertion. (Ex. E, p. 2) Dr. Gordon noted regardless of causation, Dr. Segal's impairment rating of

13 percent is reasonable if what Dr. Segal documented regarding Hines's current condition is accurate. (Ex. E, p. 2)

Dr. Gordon noted the cumulative trauma model for a lumbar disc disorder with associated radiculopathy and SI joint arthritis or dysfunction has not been substantiated or validated in the literature, without citing to any authority. (Ex. E, pp. 2, 4) He then noted while Hines's magnetic resonance imaging reveals facet arthropathy, "[t]his is indeed a change of maturation and is found in nearly 100% of individuals Mr. Hines' age. It cannot be substantiated or verified that he had/has a symptomatic condition due to these changes of maturation that were noted on MRI." (Ex. E, p. 2)

Dr. Gordon opined Dr. Segal engaged in "double dipping" by assigning additional impairments under Chapter 18 involving pain. (Ex. E, p. 3) Dr. Gordon noted in A Medical-Legal Companion to the AMA Guides Fifth, as published by the AMA from pages 188-89, the editors noted a 3 percent increase in the rating under Chapter 18 involving pain is disallowed because unlike the earlier version, the AMA Guides allowed for the examiner to account for the resolution or continuation of symptoms and their effect to perform activities of daily living under Chapter 15 involving the spine. (Ex. E, pp. 2-3)

Hines has not been back to work at Tyson since April 2020, but he remains an employee of Tyson. (Tr., p. 38) Hines reported he received short-term disability benefits for a period of time, then he transferred to long-term disability benefits, and he later filed for Social Security Disability Insurance ("SSDI") benefits. (Tr., p. 40) On March 9, 2021, the Social Security Administration approved Hines's application, finding he was entitled to \$1,981 per month in SSDI benefits beginning in September 2020. (Ex. 3; Tr., p. 40)

Hines testified he does not believe he could return to a mechanic position at Tyson, noting that he wanted to continue to work at Tyson, stating "[w]ith 34 years, I didn't have much time left in me, I would like to have retired," from Tyson. (Tr., p. 44) Hines reported he only had a couple more years left until retirement. (Tr., p. 59) Since his work injury Hines has not looked for another job because he believed he could not work "anywhere." (Tr., p. 61)

Hines reported no one from Tyson has asked him to return to work and that Tyson told him Tyson had denied his claim and that he could not return to work until he was released to return to work. (Tr., pp. 38-39)

Avina, with human resources at Tyson, reported in February 2021, Tyson sent Hines two letters of correspondence by certified mail regarding returning to work. (Tr., p. 74) One of the letters was returned and the other was signed for. (Tr., p. 74) Avina relayed the letter informed Hines that his approved leave of absence had "either expired or was going to expire and encouraged him to follow up" with Tyson. (Tr., p. 75) The letters were not submitted into evidence at hearing. Avina relayed there were several managerial positions that have opened

at Tyson he could have applied for. (Tr., p. 77) Avina did not testify regarding any specific positions, the qualifications for those positions, or the exact pay of the positions. There was no evidence presented Tyson offered Hines a position.

Tyson's attorney inquired about accommodations, and Avina responded, as follows:

Q. Would Tyson be able to accommodate his return to some modified type of mechanic rebuild position even with the restrictions that Dr. Segal proposed?

A. Yeah. As I stated, I do believe that would be a strong possibility in examining his shop and examining the tools that he used; possibilities may include an adjustable work station, different hoist capabilities, maybe different tools or the layout of tools that he uses possibly providing him with another area for the washout, assistance as needed, proposing different rules as far as how those pieces are brought out to him at the shop, rather than just dropped off, there could be, you know, a designated area or way to provide those to him. So I do think that there is opportunity to examine that and try to accommodate his current position.

(Tr., p. 79)

Hines testified he continues to have constant left foot and back pain, which interferes with his ability to sleep. (Tr., pp. 36, 41, 44-45, 68) Moving, twisting, and carrying weight make his pain worse. (Tr., p. 41) Hines explained, "[i]t's like I'm carrying extra weight. It's like I have got a 50-pound weight on my back and it's just straining my back, and the longer I stay up and doing the more pain I get, where it gets almost unbearable if I really push the limit." (Tr., p. 41) Hines reported he did not have any numbness in his foot until the day after Dr. Kawasaki performed the surgery on him. (Tr., p. 45)

Hines relayed he could not recall a specific incident at Tyson where he hurt his back. (Tr., pp. 52-53) Hines reported he would go home from work at night and his back would be sore, and he would take a hot shower and lie down. (Tr., p. 53)

Prior to his work injury Hines shoveled snow and performed his own lawn work, noting he is an outdoor person. (Tr., p. 43) Hines enjoyed fishing and hunting. (Tr., p. 48) Hines would engage in activities that involved bending, twisting, and lifting. (Tr., p. 48) Hines testified since his work injury he cannot tie his shoes in the morning or put his socks on. (Tr., pp. 55-56)

Hines reported since his work injury he cannot shovel snow or use a push mower. (Tr., p. 43) Hines lives alone and he purchased a riding lawn mower, but when he mows the lawn, "then my back is just killing me," and he has to go and sit

in his house for two to three hours before he returns to “normal.” (Tr., p. 43) Driving a vehicle is also difficult for Hines. (Tr., p. 44) Hines reported he drove from Waterloo to Des Moines for the hearing, and during the trip he had to stop twice because his back was “killing” him and he had to get out and walk around. (Tr., p. 44) Hines noted when he has gone to Iowa City from Waterloo, he would have to stop his car and lie down in the grass and he had a rough time returning home. (Tr., p. 43)

Tyson submitted surveillance at hearing, the majority of which shows Hines smoking, briefly driving his truck, and living a sedentary lifestyle. (Ex. K) Hines lives alone in a home. The video surveillance shows Hines lifting small items, rolling and briefly lifting an empty metal toolbox, weeding an elevated planter, obtaining water from an outdoor faucet, and moving what appear to be light objects in a wheelbarrow. (Ex. K)

Hines relayed during his last appointment with Dr. Kawasaki, Dr. Kawasaki told him there was nothing more he could do for his back. (Tr., pp. 36-37, 57) At the time of the hearing Hines was not receiving any treatment for his back or taking any pain medication. (Tr., pp. 37, 57) Hines agreed he had not taken pain medication since November 2020. (Tr., pp. 56-57)

CONCLUSIONS OF LAW

I. Applicable Law

This case involves the issues of arising out of and in the course of employment, nature and extent of disability, temporary benefits, credits, recovery of medical bills, entitlement to penalty benefits, and recovery of costs. In 2017, the Iowa Legislature enacted changes to Iowa Code chapters 85, 86, and 535 effecting workers' compensation cases. 2017 Iowa Acts chapter 23 (amending Iowa Code sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.45, 85.70, 85.71, 86.26, 86.39, 86.42, and 535.3). Under 2017 Iowa Acts chapter 23 section 24, the changes to Iowa Code sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.71, 86.26, 86.39, and 86.42 apply to injuries occurring on or after the effective date of the Act. This case involves an injury occurring after July 1, 2017, therefore, the provisions of the new statute involving the nature and extent of disability, temporary benefits and recovery to the cost of the independent medical examination under Iowa Code sections 85.33, 85.34, and 85.39 apply to this case.

The calculation of interest is governed by Deciga-Sanchez v. Tyson Foods, File No. 5052008 (Ruling on Defendant's Motion to Enlarge, Reconsider, or Amend Appeal Decision Re: Interest Rate Issue), which holds interest for all weekly benefits payable and not paid when due which accrued before July 1, 2017, is payable at the rate of ten percent; all interest on past due weekly compensation benefits accruing on or after July 1, 2017, is 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. Again, given this case concerns an injury occurring after July 1, 2017, the new provision on interest applies to this case.

II. Arising Out of and in the Course of Employment

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of and in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment, and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs "in the course of employment" when:

. . . it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of his employer.

Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174, 177 (Iowa 1979).

Whether a claimant's injury arises out of the claimant's employment is a "mixed question of law and fact." Lakeside Casino v. Blue, 743 N.W.2d 169, 173 (Iowa 2007). The Iowa Supreme Court has held,

[t]he factual aspect of this decision requires the [trier of fact] to determine "the operative events that [gave] rise to the injury." Meyer v. IBP, Inc., 710 N.W.2d 213, 218 (Iowa 2006). Once the facts are determined, a legal question remains: "[W]hether the facts, as determined, support a conclusion that the injury 'arose out of . . . [the] employment,' under our workers' compensation statute."

Id.

The claimant bears the burden of proving the claimant's work-related injury is a proximate cause of the claimant's disability and need for medical care. Ayers v. D & N Fence Co., Inc., 731 N.W.2d 11, 17 (Iowa 2007); George A. Hormel & Co. v. Jordan,

569 N.W.2d 148, 153 (Iowa 1997). “In order for a cause to be proximate, it must be a ‘substantial factor.’” Ayers, 731 N.W.2d at 17. A probability of causation must exist, a mere possibility of causation is insufficient. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997). The cause does not need to be the only cause, “[i]t only needs to be one cause.” Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60, 64 (Iowa 1981).

The question of medical causation is “essentially within the domain of expert testimony.” Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must “weigh the evidence and measure the credibility of witnesses.” Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997). When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert’s education, experience, training, and practice, and “all other factors which bear upon the weight and value” of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

It is well established in workers’ compensation that “if a claimant had a preexisting condition or disability, aggravated, accelerated, worsened, or ‘lighted up’ by an injury which arose out of and in the course of employment resulting in a disability is found to exist,” the claimant is entitled to compensation. Iowa Dep’t of Transp. v. Van Cannon, 459 N.W.2d 900, 904 (Iowa 1990). The Iowa Supreme Court has held,

[a] disease which under any rational work is likely to progress so as to finally disable an employee does not become a “personal injury” under our Workmen’s Compensation Act merely because it reaches a point of disablement while work for an employer is being pursued. It is only when there is a direct causal connection between exertion of the employment and the injury that a compensation award can be made. The question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause.

Musselman v. Cent. Tel. Co., 261 Iowa 352, 359-60, 154 N.W.2d 128, 132 (1967).

Hines alleges he sustained a cumulative injury to his low back while working for Tyson, which manifested in March 2020. Tyson alleges Hines’s injuries were not caused by his employment with Tyson.

A cumulative injury is an occupational disease that develops over time, resulting from cumulative trauma in the workplace. Baker v. Bridgestone/Firestone, 872 N.W.2d 672, 681 (Iowa 2015); Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842, 851 (Iowa 2009); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368, 372-74 (Iowa 1985). “A cumulative injury is deemed to have occurred when it manifests – and ‘manifestation’ is that point in time when ‘both the fact of the injury and the causal relationship of the injury to the claimant’s employment would have become plainly apparent to a reasonable person.’” Baker, 872 N.W.2d at 681. The Iowa Supreme Court has held,

[a] cumulative injury is manifested when the claimant, as a reasonable person, would be plainly aware (1) that he or she suffers from a condition or injury, and (2) that this condition or injury was caused by the claimant's employment. Upon the occurrence of these two circumstances, the injury is deemed to have occurred.

Herrera v. IBP, Inc., 633 N.W.2d 284, 288 (Iowa 2001).

Hines testified he sustained many injuries to his back during the 34 years he has worked for Tyson. The difference was in 2020 his back did not heal after a period of a few days to a week. During the hearing I assessed Hines's credibility by considering whether his testimony was reasonable and consistent with other evidence I believe, whether he made inconsistent statements, his "appearance, conduct, memory and knowledge of the facts," and his interest in the case. State v. Frake, 450 N.W.2d 817, 819 (Iowa 1990). During the hearing Hines engaged in direct eye contact, he did not engage in furtive movements, and I found his testimony to be reasonable and consistent with the other evidence I believe. I believe Hines did not believe his employment had caused him to sustain a permanent low back condition until 2020.

Three physicians have provided causation opinions in this case, Dr. Abernathey, a treating neurosurgeon, Dr. Gordon, an occupational medicine physician who works for Tyson in the plant, and Dr. Segal, a neurosurgeon who performed an independent medical examination for Hines. Dr. Abernathey found no causation. Dr. Gordon relied on Dr. Abernathey's conclusions and stated he could not substantiate or verify whether Hines's facet arthropathy was caused by age. Dr. Segal opined Hines's lumbar disc bulges, degenerative changes and the herniation at L4-L5 were likely caused or permanently aggravated by his cumulative work injury. I find Dr. Segal's opinion to be the most persuasive.

Dr. Segal and Dr. Abernathey have superior training to Dr. Gordon. Dr. Segal's opinion is very thorough and contains detailed physical findings on exam. He also cites to the literature throughout his opinion to support his causation finding. Dr. Segal diagnosed Hines with left L5 radiculopathy, disc herniation at L4-L5, mild to moderate right and severe left lateral recess stenosis and moderate left neural foraminal narrowing at L4-L5, lumbar facet arthropathy and mechanical low back pain, left SI joint arthropathy, gait disturbance, and status post left L4-L5 discectomy. (Ex. 1, p. 15) Based on his examination, experience, and the literature, Dr. Segal opined Hines's lumbar disc bulges, degenerative changes and the herniation at L4-L5 were likely caused or permanently aggravated by his cumulative work injury. (Ex. 1)

Dr. Abernathey's treatment note from April 20, 2020 is limited, and provides Hines presented with a chronic lumbosacral strain that had been persistent and progressive over the years. (JE 7) He did not provide any measurements or other findings in his treatment record. In responding to a check-the-box letter from Tyson, Dr. Abernathey opined Hines's "low back condition" is not causally related to his employment and was not aggravated by his employment. (Ex. C) When questioned about whether Hines's work at Tyson aggravated the underlying condition, Dr. Abernathey wrote, "NO SPECIFIC WORK INJURY HAS BEEN IDENTIFIED." (Ex. C, p. 2)

Dr. Abernathey did not provide a diagnosis or identify what condition or conditions Hines has. Nor did he state that the “condition” could only be caused by a specific, traumatic event.

On June 23, 2021, pursuant to an inquiry from Tyson, Dr. Abernathey opined that disc degeneration is a natural progression of the aging process and that “degenerative changes demonstrated on MRI are consistent with age which is an accumulation of all aspects of daily life; of which work activities are a component.” (Ex. D) In this opinion Dr. Abernathey retreated from his earlier opinion. He did not reject Dr. Segal’s opinion that Hines’s condition could have been caused by a cumulative work injury.

Dr. Gordon responded to Dr. Segal’s opinion in June 2021. Dr. Gordon did not challenge Dr. Segal’s diagnoses or provide his own diagnosis or diagnoses. (Ex. E) During his original exam in March 2020, Dr. Gordon listed a diagnostic impression of “[l]eft leg lumbar radiculopathy.” (JE 4, p. 2) Dr. Gordon noted during his 2020 examination, Hines could not recall anything specific that brought about his symptoms and that Dr. Abernathey did not believe Hines’s condition was related to his employment with Tyson. (Ex. E, p. 2) Dr. Gordon stated the cumulative trauma model for a lumbar disc disorder with associated radiculopathy and SI joint arthritis or dysfunction has not been substantiated or validated in the literature, without citing to any authority. (Ex. E, pp. 2, 4) He then noted while Hines’s magnetic resonance imaging reveals facet arthropathy, “[t]his is indeed a change of maturation and is found in nearly 100% of individuals Mr. Hines’ age. It cannot be substantiated or verified that he had/has a symptomatic condition due to these changes of maturation that were noted on MRI.” (Ex. E, p. 2)

The record evidence supports Hines engaged in heavy, repetitive lifting over his 34 years with Tyson, and that his work for Tyson caused or permanently aggravated his lumbar disc bulges, degenerative changes, and the herniation at L4-L5. I find Hines has established he sustained a permanent cumulative injury to his low back caused by his work at Tyson.

III. Extent of Disability

Hines seeks industrial disability benefits for his permanent work injury. Tyson avers Hines is only entitled to recover for his functional loss in this case.

Iowa Code section 85.34(2) governs compensation for permanent partial disabilities. The law distinguishes between scheduled and unscheduled disabilities. The Division of Workers Compensation evaluates disability using two methods, functional and industrial. Simbro v. Delong’s Sportswear, 332 N.W.2d 886, 887 (Iowa 1983).

The Division applies the functional method for a scheduled injury to each part of the body listed in the statute, including: (1) a thumb; (2) a first finger; (3) a second finger; (4) a third finger; (5) a fourth finger; (6) a first or distal phalange of the thumb or any finger; (7) loss of more than one phalange of the thumb or a finger; (8) a great toe; (9) one of the toes other than the great toe; (10) a first phalange of any toe; (11) loss of more than one phalange of any toe; (12) a hand; (13) an arm; (14) a shoulder (added in

2017); (15) a foot; (16) a leg; (17) an eye; (18) “loss of an eye, the other eye having been lost prior to the injury;” (19) hearing, other than occupational loss; (20) occupational hearing loss; (21) “loss of both arms, or both hands, or both feet, or both legs, or both eyes, or any two thereof, caused by a single accident;” and (22) disfigurement of the face or head. Iowa Code § 85.34(a)-(u); Westling v. Hormel Foods Corp., 810 N.W.2d 247, 252 (Iowa 2012). Each of these subsections provides a maximum number of weeks of compensation for the complete loss of a scheduled member or body part. Since 2017, compensation or functional loss for scheduled injuries is determined by taking the number of weeks allowed for a complete loss of the body part or scheduled member, multiplied by a percentage of impairment determined using the AMA Guides. Iowa Code § 85.34(2)(x).

The statute also requires compensation be awarded for functional loss when an employee returns to work or is offered work, as follows:

[i]f 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 rating resulting from the injury, and not in relation to the employee’s earning capacity. Notwithstanding section 85.26, subsection 2, if an employee who is eligible for compensation under this paragraph returns to work with the same employer and is compensated based only upon the employee’s functional impairment resulting from the injury as provided in this paragraph and is terminated from employment by that employer, the award or agreement for settlement of benefits under this chapter shall be reviewed upon commencement of reopening proceedings by the employee for a determination of any reduction in the employee’s earning capacity caused by the employee’s permanent partial disability.

Id. § 85.34(2)(v).

The Division uses the industrial method for “all cases of permanent partial disability other than those” set forth in Iowa Code section 85.34(2)(a) through (u). Id. All other cases are classified as “unscheduled injuries.” Westling, 810 N.W.2d at 252-53. Compensation for unscheduled injuries is determined examining the reduction of earning capacity. Id. at 53.

At the time of the hearing Hines was not working. While he remains an employee of Tyson, he has not physically worked at the Tyson plant since April 2020. The only wages he has received were during a company shutdown due to Covid-19 when Tyson paid all employees wages. During an appointment on February 19, 2021, Dr. Kawasaki restricted Hines from working and noted he would reassess the restriction during his appointment on June 4, 2021. (JE 8, p. 26)

Tyson did not submit a letter showing it offered Hines work at his same or greater salary than he received at the time of the injury following his surgery. Avina did not identify any specific jobs Tyson offered Hines or the salaries or hourly rates of the jobs. Tyson's argument lacks merit. Hines sustained a work injury to his low back and underwent surgery. The surgery caused Hines to develop additional symptoms of numbness in his left foot, which has affected his functioning permanently. He was in a healing period prior to the time he reached maximum medical improvement in April 2021. The proper analysis for determining Hines's disability is the industrial disability analysis. Iowa Code § 85.34(2)(v).

"Industrial disability is determined by an evaluation of the employee's earning capacity." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 852 (Iowa 2011). In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (Iowa 2010). The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138.

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(v).

Dr. Segal found under Table 15-3, Hines falls in DRE Lumbar Category III with significant signs of radiculopathy and he has a history of a herniated disc on the side of the radiculopathy, and remains symptomatic after surgery, and he assigned Hines a 13 percent whole person impairment. (Ex. 1, p. 29) To his credit, Dr. Gordon agreed with Dr. Segal's impairment rating, if what he documented regarding Hines's current condition was accurate, given Dr. Gordon had not recently examined Hines. (Ex. E, p. 2)

Dr. Gordon attacked the additional 3 percent Dr. Segal assigned for his facet arthropathy using Chapter 18 of the AMA Guides, which is for pain, and the additional 3 percent Dr. Segal assigned for left SI joint pain. (Ex. E, pp. 3-4) Dr. Segal cited to published authority to support his assertion that Dr. Segal was "double dipping," by assigning the additional six percent using the pain chapter and not the spine chapter of the AMA Guides. Dr. Segal did not provide a rebuttal opinion to Dr. Gordon's opinion challenging his methodology and I do not find that portion of his opinion assigning an additional six percent permanent impairment for pain persuasive.

Dr. Segal recommended permanent restrictions sitting up to 30 minutes, with a 10 minute break for a total of 4 hours per day, standing up to 15 minutes, with a 15 minute break for a total of 3 hours per day, walking up to 15 minutes with a 15 minute break for a total of 3 hours per day, one bend occasionally, no repetitive

bending, occasional overhead reaching, rarely lift or carry over 21 pounds, occasionally lift or carry up to 20 pounds, and frequently lift or carry up to 10 pounds, push or pull up to 25 pounds occasionally, climb 1 flight of stairs occasionally, climb 2 or more flights of stairs rarely, occasionally kneel, rarely crouch or squat, and use ladders occasionally. (Ex. 1, p. 34)

Dr. Gordon found Dr. Segal assigned “arbitrary permanent restrictions,” and noted it would be appropriate for Hines to undergo a functional capacity evaluation. (Ex. E, p. 5) It does not appear Tyson ordered a functional capacity evaluation. Dr. Segal most recently examined Hines and his physical findings on exam are detailed in his report. I adopt Dr. Segal’s restrictions as Hines’s current restrictions.

This is a denied claim. Hines has not returned to work since April 2020, but he continues to be an employee of Tyson. Tyson has paid a portion of his health insurance since he has been off work.

At hearing, Avina testified Tyson recently sent Hines a letter by certified mail regarding returning to work. The letter was not submitted as part of the record. Avina also testified there are positions at Tyson Hines would be capable of engaging in, given his restrictions. Hines has not contacted Tyson to state that he wants to return to work. Tyson did not offer Hines any specific position prior to hearing. Hines has not applied for any work outside of Tyson. I do not find he is motivated to work.

Hines is a high school graduate. Following high school, he obtained a welding certificate. Hines has worked for Tyson as a mechanic for more than 30 years. Hines is a valued employee of Tyson. At the time of the hearing he was 58. During the hearing I found Hines to be articulate. Avina testified there are supervisory positions Hines could perform with his years of experience at Tyson. Hines did not obtain an opinion from a vocational expert in this case to support he is incapable of working. No physician has opined he is incapable of working. Based on all of the factors of industrial disability, I find Hines has sustained an 80 percent industrial disability at this time, entitling Hines to 400 weeks of permanent partial disability benefits, at the stipulated rate of \$660.35, commencing on the stipulated commencement date of April 20, 2021.

IV. Temporary Benefits and Credits

Hines seeks temporary benefits from April 28, 2020, through April 19, 2021. While the parties did not stipulate Hines is entitled to temporary benefits, they stipulated Hines was off work from April 28, 2020, through April 19, 2021.

Iowa Code section 85.33 governs temporary disability benefits, and Iowa Code section 85.34 governs healing period and permanent disability benefits. Dunlap v. Action Warehouse, 824 N.W.2d 545, 556 (Iowa Ct. App. 2012).

An employee has a temporary partial disability when because of the employee's medical condition, "it is medically indicated that the employee is not capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability." Iowa Code § 85.33(2). Temporary partial disability benefits are payable, in lieu of temporary total disability and healing period benefits, due to the reduction in earning ability as a result of the employee's temporary partial disability, and "shall not be considered benefits payable to an employee, upon termination of temporary partial or temporary total disability, the healing period, or permanent partial disability, because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury." Id.

As a general rule, "temporary total disability compensation benefits and healing-period compensation benefits refer to the same condition." Clark v. Vicorp Rest., Inc., 696 N.W.2d 596, 604 (Iowa 2005). The purpose of temporary total disability benefits and healing period benefits is to "partially reimburse the employee for the loss of earnings" during a period of recovery from the condition. Id. Temporary total, temporary partial, and healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986); Stourac-Floyd v. MDF Endeavors, File No. 5053328 (App. Sept. 11, 2018); Stevens v. Eastern Star Masonic Home, File No. 5049776 (App. Dec. Mar. 14, 2018). The appropriate type of benefit depends on whether or not the employee has a permanent disability. Dunlap, 824 N.W.2d at 556. I find Hines sustained a permanent impairment to his low back caused by his work for Tyson, therefore, if he is entitled to temporary benefits, he is entitled to healing period benefits.

Hines was restricted from working from April 28, 2020. He had not returned to work at the time he reached maximum medical improvement. I find Hines is entitled to healing period benefits beginning on April 20, 2020.

Tyson avers it is entitled to a credit for wages paid to all employees, including Hines, during the plant shutdown due to Covid-19, for the weeks beginning April 27, 2020 and May 4, 2020. Avina testified during the shutdown, all employees of Tyson were paid wages during the shutdown period. (Tr., p. 84) Exhibit G documents the wages paid to Hines for these two weeks. I find Hines is entitled to healing period benefits for the week of April 20, 2020, and from May 11, 2020 through April 19, 2021, at the stipulated rate of \$660.35.

V. Credit for Short-Term Disability Benefits

Tyson seeks a credit for short-term disability payments made to Hines. Hines alleges Tyson is not entitled to a credit because Tyson has failed to establish entitlement to a credit in this case.

Iowa Code section 85.38(2) provides:

2. Benefits paid under group plans.

a. In the event the employee with a disability shall receive any benefits, including medical, surgical, or hospital benefits, under any group plan covering nonoccupational disabilities contributed to wholly or partially by the employer, which benefits should not have been paid or payable if any rights of recovery existed under this chapter, chapter 85A, or chapter 85B, then the amounts so paid to the employee from the group plan shall be credited to or against any compensation payments, including medical, surgical, or hospital, made or to be made under this chapter, chapter 85A, or chapter 85B. The amounts so credited shall be deducted from the payments made under these chapters. Any nonoccupational plan shall be reimbursed in the amount deducted. This section shall not apply to payments made under any group plan which would have been payable even though there was an injury under this chapter or an occupational disease under chapter 85A or an occupational hearing loss under chapter 85B.

The Iowa Supreme Court has held that the purpose of Iowa Code section 85.38(2) is to preclude an employee with a disability from receiving a double recovery of workers' compensation benefits and group disability plan benefits provided by the employer. State v. Erbe, 519 N.W.2d 812, 815 (Iowa 1994).

An employer seeking the credit bears the burden of proving entitlement to the credit. Miller v. Maintainer Corp. of Iowa, Inc., File No. 5020192 (App. Dec. 2, 2009). To meet this burden, Tyson must prove: (1) the benefits were received under a group plan; (2) contribution to the plan was made by the employer; (3) the benefits should not have been paid if workers' compensation benefits were received; and (4) the amount to be credited or deducted from payments made or owed under Iowa Code chapter 85. Id.

Hines testified he received short-term disability benefits from Tyson for a period of time. Exhibit G is a short-term disability log Tyson prepared for Hines. Exhibit G provides a listing of payments made by week, and that Hines was paid a total of \$11,288.40 in hourly short-term disability benefits as of the October 1, 2020 payroll date. (Ex. G)

Tyson did not produce a copy of the plan documents at hearing. A copy of the plan is necessary to determine whether short-term disability benefits should not be paid if workers' compensation benefits are received under the plan. Due to this failure, I have nothing to review. Tyson is not entitled to a credit for short-term disability benefits paid to Hines.

VI. Penalty Benefits

Hines seeks an award of penalty benefits in this case, given Tyson denied his claim and refused to pay him healing period and permanency benefits. Tyson avers no penalty benefits should be awarded because it relied on Dr. Abernathey's opinion in denying his claim.

Iowa Code section 86.13 governs compensation payments. Under the statute's plain language, if there is a delay in payment absent "a reasonable or probable cause or excuse," the employee is entitled to penalty benefits, of up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse. Iowa Code § 86.13(4); see also Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996) (citing earlier version of the statute). "The application of the penalty provision does not turn on the length of the delay in making the correct compensation payment." Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 236 (Iowa 1996). If a delay occurs without a reasonable excuse, the commissioner is required to award penalty benefits in some amount to the employee. Id.

The statute requires the employer or insurance company to conduct a "reasonable investigation and evaluation" into whether benefits are owed to the employee, the results of the investigation and evaluation must be the "actual basis" relied on by the employer or insurance company to deny, delay, or terminate benefits, and the employer or insurance company must contemporaneously convey the basis for the denial, delay, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits. Iowa Code § 86.13(4). An employer may establish a "reasonable cause or excuse" if "the delay was necessary for the insurer to investigate the claim," or if "the employer had a reasonable basis to contest the employee's entitlement to benefits." Christensen, 554 N.W.2d at 260. "A 'reasonable basis' for denial of the claim exists if the claim is 'fairly debatable.'" Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 267 (Iowa 2012). "Whether a claim is 'fairly debatable' can generally be determined by the court as a matter of law." Id. The issue is whether the employer had a reasonable basis to believe no benefits were owed to the claimant. Id. "If there was no reasonable basis for the employer to have denied the employee's benefits, then the court must 'determine if the defendant knew, or should have known, that the basis for denying the employee's claim was unreasonable.'" Id.

Benefits must be paid beginning on the eleventh day after the injury, and "each week thereafter during the period for which compensation is payable, and if not paid when due," interest will be imposed. Iowa Code § 85.30. In Robbennolt, the Iowa Supreme Court noted, "[i]f the required weekly compensation is timely paid at the end of the compensation week, no interest will be imposed As an example, if Monday is the first day of the compensation week, full payment of the weekly compensation is due the following Monday." Robbennolt, 555 N.W.2d at 235. A payment is "made" when the check addressed to the claimant is mailed, or personally delivered to the claimant. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996) (abrogated by Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299 (Iowa 2005) (concluding the

employer's failure to explain to the claimant why it would not pay permanent benefits upon the termination of healing period benefits did not support the commissioner's award of penalty benefits)).

When considering an award of penalty benefits, the commissioner considers "the length of the delay, the number of the delays, the information available to the employer regarding the employee's injuries and wages, and the prior penalties imposed against the employer under section 86.13." Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 336 (Iowa 2008). The purposes of the statute are to punish the employer and insurance company and to deter employers and insurance companies from delaying payments. Robbennolt, 555 N.W.2d at 237.

Tyson initially denied Hines's claim on May 5, 2020, after receiving Dr. Abernathey's opinion on April 28, 2020, stating he did not believe Hines's current low back condition was causally related to his employment. (Exs. 2, p. 45; B, p. 1) Hines did not obtain a contrary opinion from a physician until Dr. Segal issued his opinion on June 14, 2021. (Ex. 1) Dr. Segal opined Hines had sustained a permanent cumulative injury to his low back caused by work at Tyson. (Ex. 1) Tyson requested an opinion from Dr. Abernathey regarding Dr. Segal's contention that Hines's condition was the result of a cumulative work injury. On June 23, 2021, Dr. Abernathey responded,

[t]his letter is in reference to your request for information regarding Michael Hines. It appears that the primary issue in this case involves causation. Frankly, I am not aware of any specific documented event which caused the patient's clinical presentation. It appears from the record and Dr. Segal's recent IME that the case is being made for a cumulative work injury to explain his presentation. Disc degeneration is a natural progression of the aging process. Any and all daily activities would contribute to the development of anatomic and radiographic degenerative findings. It is much easier to attribute causation to his work activities if there was a singular event.

To summarize, the degenerative changes demonstrated on MRI are consistent with age which is an accumulation of all aspects of daily life; of which, work activities are a component.

(Ex. D)

Tyson did not commence any additional investigation after receiving Dr. Abernathey's opinion and went forward to hearing on July 14, 2021. Until a month before the hearing no physician had opined Hines's low back condition was due to a cumulative work injury. After receiving Dr. Segal's report, Tyson conducted additional investigation with Dr. Abernathey. I find his claim to benefits was fairly debatable until June 23, 2021, three weeks before the hearing. At that time, Tyson should have commenced paying at least temporary benefits. Hines is awarded \$500.00 in penalty benefits.

VII. Out-of-Pocket Medical Bills

Hines seeks to recover out-of-pocket medical bills he paid from May 12, 2020, through June 4, 2021, totaling \$807.05, and pending medical bills submitted to his insurance carrier through Tyson totaling \$833.00. (Ex. 5)

An employer is required to furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, hospital services and supplies, and transportation expenses for all conditions compensable under the workers' compensation law. Iowa Code § 85.27(1). The employer has the right to choose the provider of care, except when the employer has denied liability for the injury. Id. "The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee." Id. § 85.27(4). If the employee is dissatisfied with the care, the employee should communicate the basis for the dissatisfaction to the employer. Id. If the employer and employee cannot agree on alternate care, the commissioner "may, upon application and reasonable proofs of the necessity therefor, allow and order other care." Id. The statute requires the employer to furnish reasonable medical care. Id. § 85.27(4); Long v. Roberts Dairy Co., 528 N.W.2d 122, 124 (Iowa 1995) (noting "[t]he employer's obligation under the statute turns on the question of reasonable necessity, not desirability"). The Iowa Supreme Court has held the employer has the right to choose the provider of care, except when the employer has denied liability for the injury, or has abandoned care. Iowa Code § 85.27(4); Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010).

This is a denied claim. Hines received medical treatment using his group health insurance for Tyson. The bills Hines seeks to recover are for out-of-pocket expenses he incurred that were not covered by insurance. I find the treatment Hines received was reasonable and necessary for his work injury. Tyson is responsible for the cost of all causally-connected medical care Hines has received and may need in the future, including the outstanding bills in Exhibit 5. Tyson is entitled to a credit for all bills paid through its group health insurance plan.

VIII. Recovery of the Cost of the Independent Medical Examination

Hines seeks to recover the \$4,500.00 for Dr. Segal's independent medical examination. (Ex. 6) Tyson alleges Hines is not entitled to recover the cost of the independent medical examination because no physician retained by Tyson provided an impairment rating before Dr. Segal performed his independent medical examination.

Iowa Code section 85.39, provides, in part:

[a]fter an injury, the employee, if requested by the employer, shall submit for examination at some reasonable time and place and as often as reasonably requested, to a physician or physicians authorized to practice under the laws of this state or another state, without cost to the employee; but if the employee requests, the employee, at the employee's own cost,

is entitled to have a physician or physicians of the employee's own selection present to participate in the examination. If an employee is required to leave work for which the employee is being paid wages to attend the requested examination, the employee shall be compensated at the employee's regular rate for the time the employee is required to leave work, and the employee shall be furnished transportation to and from the place of examination, or the employer may elect to pay the employee the reasonable cost of the transportation. . . . If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination. . . .

The Iowa Court of Appeals recently addressed this issue in Kern v. Fenchel, Doster & Buck, P.L.C., No. 20-1206, 2021 WL 3890603 (Iowa Ct. App. Sept. 1, 2021). In Kern, the defendants' expert found there was no causation. Kern disagreed with the opinion and sought an independent medical examination at the defendants' expense. The Commissioner found Kern was not entitled to recover the cost of an independent medical examination. The Court of Appeals reversed, finding the "opinion on lack of causation was tantamount to a zero percent impairment rating," which is reimbursable under Iowa Code section 85.39. Dr. Abernathey found Hines did not sustain a permanent impairment to his low back or aggravation of a preexisting condition to his low back caused by his work activities at Tyson. Hines disagreed and sought an independent medical examination with Dr. Segal, which occurred after Dr. Abernathey issued his opinion. Under Kern, I find Hines is entitled to recover the \$4,500.00 cost of Dr. Segal's independent medical examination.

IX. Costs

Hines seeks to recover the \$103.00 cost of the filing fee, the \$6.90 cost of service, and the \$94.50 cost of Hines's deposition transcript. (Ex. 6) Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Rule 876 Iowa Administrative Code 4.33, provides costs may be taxed by the deputy workers' compensation commissioner for: (1) the attendance of a certificated shorthand reporter for hearings and depositions; (2) transcription costs; (3) the cost of service of the original notice and subpoenas; (4) witness fees and expenses; (5) the cost of doctors' and practitioner's deposition testimony; (6) the reasonable cost of obtaining no more than two doctors' or practitioners' reports; (7) filing fees; and (8) the cost of persons reviewing health service disputes. I found Hines was successful in proving his case. Therefore, using my discretion I find Hines should be awarded the \$103.00 cost of the filing fee, the \$6.90 cost of service, and the \$94.50 cost of his deposition transcript.

ORDER

IT IS THEREFORE ORDERED, THAT:

Defendant shall pay Claimant four hundred (400) weeks of permanent partial disability benefits at the stipulated rate of six hundred sixty and 35/100 dollars (\$660.35), commencing on the stipulated commencement date of April 20, 2021.

Defendant shall pay Claimant healing period benefits for the week of April 20, 2020, and from May 11, 2020 through April 19, 2021, at the stipulated rate of six hundred sixty and 35/100 dollars (\$660.35).

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. Deciga-Sanchez v. Tyson Foods, File No. 5052008 (Apr. 23, 2018 Ruling on Defendant's Motion to Enlarge, Reconsider, or Amend Appeal Decision Re: Interest Rate Issue).

Defendant shall pay Claimant five hundred and 00/100 dollars (\$500.00) in penalty benefits.

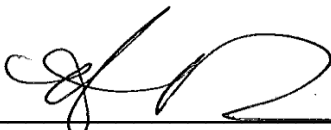
Defendant is responsible for the cost of all causally-connected medical care Hines has received and may need in the future, including the outstanding bills in Exhibit 5.

Defendant shall reimburse Claimant four thousand five hundred and 00/100 dollars (\$4,500.00) for the cost of Dr. Segal's independent medical examination.

Defendant shall reimburse Claimant one hundred three and 00/100 dollars (\$103.00) for cost of the filing fee, six and 90/100 dollars (\$6.90) for the cost of service, and ninety-four and 50/100 dollars (\$94.50) for the cost of the deposition transcript.

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

Signed and filed this 18th day of January, 2022.



HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Joseph Powell (via WCES)

Jason Wiltfang (via WCES)

Chris Scheldrup (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.