BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOSE OCAMPO, Claimant, vs. NEW FASHION PORK, LLP, Employer, and THE HARTFORD, Insurance Carrier, Defendants.	:	File No. 20012252.01 ARBITRATION DECISION Head Note Nos.: 1403.30, 1703, 1803

STATEMENT OF THE CASE

Claimant Jose Ocampo seeks workers' compensation benefits from the defendants, employer New Fashion Pork, LLP, and insurance carrier The Hartford, for an alleged work injury to the body as a whole. The undersigned presided over an arbitration hearing on May 18, 2021, held by internet-based video under order of the Commissioner. Ocampo participated personally and through attorney James C. Byrne. The defendants participated through representative Sara Ferneding and by attorney Jessica R. Voelker. Ernest Nino-Murcia served as interpreter.

ISSUES

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

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

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

3) Is Ocampo entitled to recover the cost of an independent medical examination (IME) under Iowa Code section 85.39?

4) If Ocampo is entitled to permanent partial disability benefits, are the defendants entitled to a credit for payments made to Ocampo prior to hearing for five (5) weeks of compensation at the rate of eight hundred ninety-five and 59/100 dollars ($859.59) per week?

5) Is Ocampo entitled to taxation of the costs against the defendants?

STIPULATIONS

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

1) An employer-employee relationship existed between Ocampo and New Fashion Pork at the time of the stipulated injury.

2) Ocampo sustained an injury on June 3, 2019, which arose out of and in the course of his employment with New Fashion Pork.

3) The commencement date for permanent partial disability (PPD) benefits, if any are awarded, is July 22, 2019.

4) At the time of the stipulated injury:

   a) Ocampo's gross earnings were one thousand three hundred seventy-three and 38/100 dollars ($1,373.38) per week.

   b) Ocampo was married.

   c) Ocampo was entitled to six exemptions.

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

FINDINGS OF FACTS

The evidentiary record in this case consists of the following:

- Joint Exhibits (Jt. Ex.) 1 through 3;
- Claimant's Exhibits (Cl. Ex.) 1 through 7;
- Defendants' Exhibits (Def. Ex.) A through K; and
- Hearing testimony by Ocampo, Ferneding, Jack Mallett, Steve Larson, and Janet Sparks.

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

Ocampo's first language is Spanish. (Hrg. Tr. p. 14) His second language is English. (Hrg. Tr. p. 14–15) Ocampo can understand and speak English well enough to use it in a work setting, including when he supervised employees who spoke only English. (Hrg. Tr. pp. 15, 49–50, 54–57; Def. Ex. F; Def. Ex. E, p. 2)

However, the specialized terminology relating to agricultural work is different from that in medicine or the law. Ocampo's ability to understand English is limited enough that he needed an English-Spanish interpreter so he could understand legal and medical terms during the hearing in this case. (Hrg. Tr. pp. 15, 88) The undersigned finds Ocampo's use of an interpreter in this case was appropriate and draws no negative inference regarding his credibility from it.

Ocampo was forty-one years of age at the time of hearing. (Hrg. Tr. p. 14) He is originally from Veracruz, Mexico. (Hrg. Tr. p. 15) Ocampo attended ten years of schooling in Mexico. (Hrg. Tr. p. 15) He stopped going to school for financial reasons. (Hrg. Tr. p. 16)

Ocampo's first job was grinding keys. (Hrg. Tr. p. 17; Def. Ex. I, p. 12) The job included lifting boxes of keys. (Hrg. Tr. p. 17) The boxes weighed sixty or seventy pounds. (Hrg. Tr. p. 17)

Ocampo moved to the United States in 1999 or 2000. (Hrg. Tr. p. 17) He initially lived and worked in Kentucky. (Hrg. Tr. p. 18) Ocampo initially worked picking tobacco and berries. (Hrg. Tr. p. 18; Def. Ex. I, p. 11) This job required him to lift boxes and crates of produce that weighed from fifty to one hundred pounds. (Hrg. Tr. p. 18)

His next job was at a Kentucky horse farm. (Hrg. Tr. p. 19; Def. Ex. I, p. 11) Ocampo cleaned stalls, fed horses, and provided them with water. (Hrg. Tr. p. 19) These job duties required him to lift between thirty pounds, when carrying buckets of water, and eighty pounds, when carrying bales of straw. (Hrg. Tr. p. 19)

In 2002, Ocampo moved to Iowa, where Iowa Select Farms hired him as a laborer. (Hrg. Tr. pp. 19–20; Def. Ex. I, p. 11) His job duties included removing dead animals and cleaning troughs. (Hrg. Tr. p. 20) Ocampo had to lift bags of grain and dead pigs that weighed between forty and eighty pounds. (Hrg. Tr. p. 20)

In August of 2009, New Fashion Pork hired Ocampo. (Hrg. Tr. p. 21; Def. Ex. I, p. 11) He worked there as a crew leader for about seven years. (Hrg. Tr. p. 22) In that position, Ocampo had to cover when somebody else was off work, which meant he performed duties such as cleaning troughs, loading and unloading materials, counting pigs, and marking pigs. (Hrg. Tr. p. 22) To perform these duties, he had to lift tools, heaters, engines, and pigs ranging in weight from thirty to one hundred pounds. (Hrg. Tr. p. 22) Additionally, Ocampo sometimes had to help pull out pigs weighing more than one hundred pounds. (Hrg. Tr. p. 22)

In 2014, Ocampo sustained a work injury when he was removing a dead pig. (Hrg. Tr. p. 25) The tool he was using at the time broke, causing him to fall backwards and strike his coccyx. (Hrg. Tr. p. 25) New Fashion Pork provided care for about a

month. (Hrg. Tr. pp. 25–26) Ocampo's symptoms resolved and he returned to work without any permanent work restrictions. (Hrg. Tr. p 26) The weight of the evidence establishes this was a temporary injury that did not result in any permanent disability.

After about seven years at New Fashion Pork, Ocampo changed jobs and became a service manager. (Hrg. Tr. pp. 22–23) His job duties included walking the barns, transporting materials, covering for absent workers as needed, loading and unloading pigs, inventory, and providing information to the office. (Hrg. Tr. p. 23) The New Fashion Pork job description states a person working in the service manager job must be able to lift objects weighing up to seventy-five pounds. (Hrg. Tr. p. 25; Cl. Ex. 3, pp. 37–38) Ocampo agreed that he had to lift up to seventy-five pounds but added that sometimes he had to lift weights as much as one hundred pounds. (Hrg. Tr. p. 23)

Ocampo worked as a service manager for New Fashion Pork in Indiana. (Hrg. Tr. pp. 101–02) New Fashion Pork demoted Ocampo to the position of wean-to-finish technician due to poor performance. (Hrg. Tr. pp. 101–02) This meant he had to move from Indiana to Iowa, where he began working as a wean-to-finish technician on June 3, 2019. (Hrg. Tr. p. 101–02)

On Ocampo's first day as a wean-to-finish technician in Iowa, he was helping coworkers load pigs onto trucks. (Hrg. Tr. pp. 26, 105; Jt. Ex. 1, p. 6) A pig got out of a truck and jumped on Ocampo, which knocked him backwards. (Hrg. Tr. p. 26; Jt. Ex. 1, p. 6) He fell onto a concrete floor, striking his back, right hip, and head, with the weight of the approximately three-hundred-pound pig on him. (Hrg. Tr. pp. 27–28; Jt. Ex. 1, p. 6; Jt. Ex. 3, p. 107) The fall caused Ocampo to feel pain in his lower back and right hip, down into his right leg. (Hrg. Tr. p. 28) He had trouble getting back on his feet because of the pain. (Hrg. Tr. p. 28)

Ocampo reported the injury to New Fashion Pork. (Hrg. Tr. pp. 28–29) The defendants provided care for his injury at the Hansen Family Clinic in Iowa Falls. (Hrg. Tr. p. 29) On June 4, 2019, Thomas Waters, D.O., noted Ocampo felt okay immediately after the fall but later developed low-back pain that did not radiate into his legs. (Jt. Ex. 1, p. 1) He administered a shot of Toradol, gave Ocampo a prescription of naproxen, assigned work restrictions, and advised him to rest and perform stretching exercises at home. (Jt. Ex. 1, p. 1)

Dr. Waters released Ocampo to return to work within prescribed restrictions (Jt. Ex. 5, p. 5) The work restrictions included no lifting, pushing, or pulling above twenty-five pounds. (Jt. Ex. 5, p. 5) New Fashion Pork accommodated Ocampo's work restrictions with light-duty work. (Hrg. Tr. p. 30) Ocampo did laundry and checked the ventilation and feed levels in pigpens, and looked for dead pigs, which another worker would then remove. (Hrg. Tr. p. 30)

The relief the injection provided Ocampo lasted a few days and the naproxen upset his stomach. (Hrg. Tr. p. 31; Jt. Ex. 1, p. 11) On June 11, 2019, he returned to Hansen Family Clinic and received a second injection for his continuing right lower back pain. (Hrg. Tr. p. 31; Jt. Ex. 1, p. 11) Dr. Waters assigned Ocampo work restrictions of

no lifting over twenty-five pounds, ground-level work only, no kneeling, squatting, or climbing, and no repeated bending or twisting. (Hrg. Tr. p. 31; Jt. Ex. 1, p. 10)

On June 18, 2019, Ocampo returned to see Dr. Waters, complaining of right lower back pain that was radiating into his buttocks. (Jt. Ex. 1, p. 15) Dr. Waters noted Ocampo was "only able to straight[en] leg flexed at the hip on the right to about [thirty degrees]," decreased lumbar range of motion and rotation, and right-sided paraspinous muscle tenderness. (Jt. Ex. 1, p. 15) Dr. Waters referred Ocampo for physical therapy and continued his work restrictions. (Jt. Ex. 1, p. 14; Jt. Ex. 1, p. 17)

That same day, Ocampo was involved in an altercation with Abraham Smith, a crew leader who had worked for New Fashion Pork for about two years. (Hrg. Tr. p. 32–33) Smith directed Ocampo to change out an engine. (Hrg. Tr. p. 33) Ocampo believed changing out the engine would require him to act outside his work restrictions, so he refused. (Hrg. Tr. p. 33) Smith took umbrage with Ocampo's refusal and Ocampo did not like Smith's response. (Hrg. Tr. p. 33–34; Cl. Ex. 5, pp. 35–36)

The parties dispute what happened next. The New Fashion Pork separation notice is a company form with spaces to fill out with information about an employee separation. (Cl. Ex. 5, p. 35) For Ocampo's discharge, grow-finish supervisor Steve Larson completed the form. (Cl. Ex. 5, p. 35; Hrg. Tr. p. 111–13) On the form, Larson stated:

> Abraham Smith [and] Jose O. engaged in a verbal argument about a repair that needed to be completed by Jose. Jose called Abraham several names and threatened to beat Abraham up. Jose raised his fists to Abraham. Abraham reported it to Rick Morgan and Rick spoke to both of them. Friday a.m. 6/14/19 Abraham called HR (Janet) and reported a hostile work environment. I talke[d] to Rick Morgan on Monday 6/17. Rick explained the conversation between them to me. Jose had said to Rick M. that he was not worried about losing his job and would fight Abraham if it happened again.

(Cl. Ex. 5, p. 35) Larson signed the separation notice form after filling it out and dated it June 13, 2019. (Cl. Ex. 5, p. 35; Hrg. Tr. p. 113)

However, at hearing, Larson testified he spoke personally with Ocampo when Ocampo made the statements as opposed to how he described it in the separation notice. (Hrg. Tr. pp. 106–07) Larson offered confusing testimony about the discrepancy between the contents he wrote on the separation notice and his hearing testimony. (Hrg. Tr. pp. 111–14) Larson did not explain why he described the conversation as between Morgan and Ocampo on the separation notice but described it as between Ocampo and him in his testimony. (Hrg. Tr. p. 111–14)

Larson's testimony that he spoke with Ocampo personally and then recorded inaccurate information on the company's separation notice form is not credible. There was no reason for Larson to provide incorrect information and then sign his name to it.

The account Larson wrote of the New Fashion Pork investigation on the company's separation notice form is the most credible description of what led to Ocampo's discharge. Consequently, the weight of the evidence shows New Fashion Pork made the decision to terminate Ocampo based on how Morgan described his conversations with Smith and Ocampo to Larson, not a conversation Larson participated in with Ocampo. (Cl. Ex. 5, p. 35; Hrg. Tr. p. 134)

Ocampo concedes he and Smith had a heated discussion. (Hrg. Tr. p. 34–35) But he denies raising his fist to Smith in a threatening manner or calling him names. (Hrg. Tr. pp. 34–35, 140–41) Neither Smith nor Morgan testified under oath as part of this case. Thus, Larson's summary of Morgan and Smith's allegations against Ocampo in the written separation notice constitutes hearsay and is therefore given less weight than Ocampo's sworn testimony at hearing. Ocampo's testimony is more credible than the hearsay allegations in the separation notice.

Ocampo went to physical therapy on June 19, 2019, with Kris Grimes, P.T. (Jt. Ex. 2, p. 53) He rated his right lower back pain at six on a scale of zero to ten and described his pain as "localized and sharp." (Jt. Ex. 2, p. 53) On examination, Ocampo was "tender to palpation of right lumbar paraspinal muscles with muscle tightness noted." (Jt. Ex. 2, p. 54) Grimes further noted, "Trunk AROM flexion 50%, extension 50%, rotation left and right 75%," and Ocampo complained of "increased back pain with trunk flexion." (Jt. Ex. 2, p. 54) Ocampo performed exercises without an increase in pain. (Jt. Ex. 2, p. 55)

On June 21, 2019, Ocampo returned to physical therapy with Grimes. (Jt. Ex. 2, p. 57) He rated his pain level at four out ten before the session and two out of ten at its end. (Jt. Ex. 2, p. 57) During the thirty-minute session, Grimes noted Ocampo "tolerated treatment today well with no reported increase in back pain." (Jt. Ex. 2, p. 58)

Ocampo had another physical therapy session on June 24, 2019. (Jt. Ex. 2, p. 59) Gale Bengtson, L.P.T.A., noted he rated his lower back pain at a three or four out of ten, with it at its highest when he stands up after prolonged sitting. (Jt. Ex. 2, p. 59) Bengtson noted, "Tender right lumbar/upper glut," but Ocampo tolerated exercise without increased pain. (Jt. Ex. 2, p. 60).

Ocampo's next physical therapy session was on June 26, 2019, with Bengtson. (Jt. Ex. 2, p. 62) He rated his pain level two out of ten when at rest and explained it increased with prolonged sitting or squatting and that his pain caused him to have trouble getting comfortable when laying down, which necessitated frequent repositioning. (Jt. Ex. 2, p. 62) Bengtson noted Ocampo was "very tender to palpation." (Jt. Ex. 2, p. 63)

Bengtson conducted a physical therapy session with Ocampo on June 27, 2019. (Jt. Ex. 2, p. 65) Ocampo reported his pain was better than when he started physical therapy, but he remained sore. (Jt. Ex. 2, p. 65) Ocampo denied any sharp or radiating pain but shared his pain level went up to five or six out of ten depending on the activity. (Jt. Ex. 2, p. 65) Bengtson noted Ocampo continued to be very tender to palpation and

was tactile defensive along his right lower lumbar paraspinals and posterior iliac crest with his pain increasing with wall slides in lower position. (Jt. Ex. 2, p. 67)

Ocampo saw Gregory Ogaard, D.O., at the Hansen Family Clinic on July 1, 2019. (Jt. Ex. 1, p. 21) Dr. Ogaard noted Ocampo's pain was better but had not resolved. (Jt. Ex. 1, p. 21) He also noted it "[d]oesn't really radiate to the groin or leg now." (Jt. Ex. 1, p. 21) Dr. Ogaard assigned work restrictions of no repeated bending or twisting and no pushing, pulling, or lifting over thirty pounds. (Jt. Ex. 1, p. 20)

On July 1, 2019, Ocampo had a physical therapy session with Grimes. (Jt. Ex. 2, p. 69) He reported no lower back pain except after prolonged sitting. (Jt. Ex. 2, p. 69) Ocampo declined ultrasound treatment. (Jt. Ex. 2, p. 69)

On July 2, 2019, The Hartford contracted with Genex for a nurse case manager (NCM) to work on Ocampo's claim. (Jt. Ex. 3, p. 7) Genex assigned Shelly Foss, R.N., to attend Ocampo's July 8, 2019 appointment with Dr. Ogaard "to assess progress from injury and determine if restrictions can be lifte[d]." (Jt. Ex. 3, p. 107)

Ocampo had his follow-up appointment with Dr. Ogaard as scheduled on July 8, 2019. (Jt. Ex. 1, p. 27) NCM Foss met with Ocampo at the clinic beforehand and obtained his consent to attend the appointment with Dr. Ogaard. (Jt. Ex. 3, p. 110) Ocampo informed her that he had no pain when inactive but that his pain level rose to a four or five out of ten with activity. (Jt. Ex. 3, p. 110)

During the appointment with Dr. Ogaard, Ocampo shared that his right lower back was "still quite sore," though he no longer had radiating pain down his leg. (Jt. Ex. 1, p. 27) Dr. Ogaard ordered an x-ray and directed Ocampo to continue physical therapy. (Jt. Ex. 1, p. 29) He maintained Ocampo's work restrictions. (Jt. Ex. 1, p. 26) That same day, Ocampo underwent the x-ray, which showed a "[r]adiographically normal appearing lumbar spine." (Jt. Ex. 1, p. 33) NCM Foss updated The Hartford regarding Ocampo's care. (Jt. Ex. 3, p. 110)

The next day, Ocampo had a physical therapy session with Scott Krueger, D.P.T. (Jt. Ex. 2, p. 72) He reported soreness in the hip, lateral upper glut, and the right side of his back from the sacral edge to the greater trochanter. (Jt. Ex. 2, pp. 72, 75) Krueger noted Ocampo was experiencing "most of his pain around the post superior iliac crest and down into the mid glut area." (Jt. Ex. 2, p. 75) He further noted Ocampo had increased pain with increased walking and pressure. (Jt. Ex. 2, p. 75) Because of Ocampo's symptoms, Krueger added to the therapy prone strengthening and manual physical therapy with a foam roller to the area, which caused him to be sore afterwards. (Jt. Ex. 2, p. 75)

Ocampo had a physical therapy session with Grimes on July 10, 2019. (Jt. Ex. 2, p. 77) He rated his lower back pain as between two-to-four out of ten. (Jt. Ex. 2, p. 77) He was slightly tighter on the right side than left during the session. (Jt. Ex. 2, p. 79)

On July 15, 2019, Ocampo returned to Dr. Ogaard. (Jt. Ex. 1, p. 35) NCM Foss did as well. (Jt. Ex. 3, p. 110) Ocampo told Dr. Ogaard his pain was improving. (Jt. Ex. 1, p. 35) Ocampo rated his pain at a level of zero, on a scale from zero to ten, that is positional at times. (Jt. Ex. 1, p. 35) Dr. Ogaard continued Ocampo's work restrictions, directed him to continue with physical therapy, and scheduled a follow-up exam—at which time Dr. Ogaard noted he "suspect[ed] he will be at MMI." (Jt. Ex. 1, p. 36) NCM Foss provided an update to The Hartford with the recommendation she attend Ogaard's July 22, 2019 follow-up appointment with Dr. Ogaard "for full work release and MMI." (Jt. Ex. 3, p. 113)

Krueger had another physical therapy session with Ocampo on July 12, 2019. (Jt. Ex. 2, p. 81) Ocampo reported he was sore after their previous session together but he thought he was improving. (Jt. Ex. 2, p. 81) Ocampo also relayed there was still a sore spot after he walks for a long time. (Jt. Ex. 2, p. 81) Krueger noted the stretching seemed to be helping and that Ocampo was still having pain, mostly on the superior portion of the iliac crest on his right side. (Jt. Ex. 2, p. 83)

Ocampo participated in a physical therapy session with Grimes on July 15, 2019. (Jt. Ex. 2, p. 89) He rated his pain at zero out of ten. (Jt. Ex. 2, p. 89) Grimes noted Ocampo demonstrated no guarding with movements. (Jt. Ex. 2, p. 91)

Ocampo did not attend his physical therapy session scheduled for July 16, 2019. (Jt. Ex. 2, p. 94) On July 18, 2019, Ocampo had a session with Grimes. (Jt. Ex. 2, p. 97) He rated his pain at zero out of ten. (Jt. Ex. 2, p. 97) Ocampo had another session with Grimes on July 22, 2019, and reported he was performing housework and mowing his lawn without any back pain. (Jt. Ex. 2, p. 102)

The Hartford sent NCM Foss to Ocampo's July 22, 2019 appointment with Dr. Ogaard "to obtain full work release and maximum medical improvement." (Jt. Ex. 3, p. 114) She met with Ocampo at the clinic before his appointment with Dr. Ogaard. (Jt. Ex. 3, p. 115) Ocampo reported "some leg pain when he woke up but since nothing." (Jt. Ex. 3, p. 115) He instructed her that he and his attorney did not want her present in the room during his appointment with Dr. Ogaard. (Jt. Ex. 3, p. 115) NCM Foss met with Dr. Ogaard before the appointment, then Ocampo had his follow-up with him. (Hrg. Tr. p. 39)

During the examination, Ocampo told Dr. Ogaard he had mild discomfort in his right low back. (Jt. Ex. 1, p. 43) Dr. Ogaard noted Ocampo's pain continued to improve and was nearly gone. (Jt. Ex. 1, p. 43) Dr. Ogaard released Ocampo from care and to return to work without any restrictions. (Jt. Ex. 1, pp. 42, 44) Ocampo did not seek care through New Fashion Pork for his work injury after Dr. Ogaard released him from care. (Hrg. Tr. p. 130)

The defendants paid to Ocampo five (5) weeks of workers' compensation benefits at the rate of eight hundred ninety-five and 59/100 dollars ($859.59) per week. The five weeks cover the time period beginning on June 18, 2019, and ending on July 22, 2019.

Iowa Select Farms hired Ocampo as an independent contractor to oversee about 16,000 pigs that weighed as much as 280 to 290 pounds. (Def. Ex. D; Hrg. Tr. pp. 79–80) Iowa Select Farms did not require Ocampo to undergo a physical before starting his job. (Hrg. Tr. p. 98) The reason for this was the liability for any injury fell on Ocampo as an independent contractor and not Iowa Select Farms. (Hrg. Tr. p. 98)

Jack Mallett supervised Ocampo while he worked for Iowa Select Farms. (Hrg. Tr. p. 77) In that capacity, he was around Ocampo about two hours each week from August 2019 through April 2020. (Hrg. Tr. p. 77–78, 82) Mallett testified Ocampo's responsibilities included feeding, watering, and vaccinating the animals. (Hrg. Tr. p. 79) Ocampo had to make sure the pens were kept up to maintain a certain standard of living for the pigs. (Hrg. Tr. pp. 79–80) To feed the animals, Ocampo had to lift bags of food weighing about fifty pounds and place them on a cart to move them. (Hrg. Tr. 79–80, 138)

Ocampo was also responsible for removing the carcasses of dead pigs, which weighed anywhere from twelve to two hundred eighty pounds. (Hrg. Tr. pp. 81–82) Iowa Select Farms provided a winch for the heavier carcasses. (Hrg. Tr. p. 81–82) These duties required lifting weights over forty pounds and repetitive bending and twisting. (Hrg. Tr. p. 81)

Ocampo began the work on July 23, 2019. (Ex. D, p. 1) He hired other workers to help with his heavier work duties. (Hrg. Tr. pp. 42–43, 68–69) Nonetheless, working as an independent contractor for Iowa Select Farms made Ocampo's back symptoms worse. (Hrg. Tr. p. 43–44) For example, bending was difficult for him because of his ongoing symptoms from the work injury at New Fashion Pork (Hrg. Tr. p. 44)

On September 25, 2019, The Hartford sent Dr. Ogaard a check-box letter inquiring about Ocampo's condition. (Jt. Ex. 1, p. 52) Dr. Ogaard indicated Ocampo had reached maximum medical improvement (MMI) as of July 22, 2019, and opined Ocampo had sustained no permanent disability from the work injury. (Jt. Ex. 1, p. 52) It is unclear whether Dr. Ogaard used the Fifth Edition of the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (Guides) in reaching this conclusion. (Jt. Ex. 1, p. 52) He signed and dated his responses October 4, 2019. (Jt. Ex. 1, p. 52)

Ocampo underwent an IME arranged by his attorney with Sunil Bansal, M.D., on June 10, 2020. (Cl. Ex. 1) The IME consisted of an in-person examination and records review. (Cl. Ex. 1, pp. 1–5) In an IME report dated July 6, 2020, Dr. Bansal noted tenderness to palpation over the lumbar back into the right sacroiliac joint with guarding. (Cl. Ex. 1, p. 4) Ocampo's Fabre's test was negative on the left and positive on the right. (Jt. Ex. 1, p. 5) Dr. Bansal measured Ocampo's range of motion as follows:

Flexion: 77 degrees
Extension: 28 degrees
Left Lateral Flexion: 35 degrees
Right Lateral Flexion: 29 degrees

(Cl. Ex. 1, p. 5) He also measured sensation using a two-point discriminator and found a loss of sensory discrimination of the posterior thigh. (Cl. Ex. 1, p. 5) Dr. Bansal measured no loss of strength in Ocampo's lower extremities. (Cl. Ex. 1, p. 5)

Dr. Bansal diagnosed Ocampo with sacroiliitis and determined he reached maximum medical improvement (MMI) on July 22, 2019, the date on which Dr. Ogaard released him from care. (Cl. Ex. 1, pp. 5–6) On the question of causation, Dr. Bansal opined:

> He was loading hogs onto a trailer, when one of them turned around and knocked him to the ground. He landed on his back and right hip. He was able to get up on his own, but had increasing pain in his back and right hip throughout the rest of the day.
>
> BACK:
>
> The above mechanism of being knocked to the ground on June 3, 2019 is consistent with the development of sacroiliitis.
>
> According to the Mayo Clinic, the mechanism of falling is consistent with the development of sacroiliitis.
>
> The sacroiliac joint is twice as susceptible to axial torsion overloading than are the lumbar motion segments. Imbalanced loads such as from a fall may jeopardize the interlocking sacral mechanics by impeding balanced transiliac bony fixation and ligamentous tension across the sacrum.
>
> Of note is that sacroiliitis commonly manifests as both back and hip pain, as the joint is the space between the iliac crest and sacrum.

(Cl. Ex. 1, p. 6 (citing http://www.mayoclinic.org/diseases-conditions/sacrilitis/basics/causes/con-20028653))

Dr. Bansal assigned Ocampo the permanent work restrictions of no prolonged sitting greater than thirty minutes at a time, no frequent bending or twisting, and no lifting greater than forty pounds. (Cl. Ex. 1, p. 7) After Dr. Bansal assigned Ocampo the work restrictions, he stopped working at Iowa Select Farms because his work duties there exceeded the restrictions. (Hrg. Tr. p. 44) Ocampo's next job was working for a couple of weeks in receiving and counting piglets in February 2021. (Hrg. Tr. pp. 44–45)

Ocampo applied to work at Sukup Manufacturing in early 2021. (Hrg. Tr. p. 70; Def. Ex. E) Before Sukup hired him, it required him to undergo a pre-employment physical with CRT out of Dubuque. (Hrg. Tr. p. 70; Def. Ex. E, p. 5) The CRT test combined shoulder, knee, and trunk strength and functional measurements to determine Ocampo to have a "physical/functional strength" under the federal Department of Labor Titles "light-medium" work designation. (Def. Ex. E, p. 5) After Ocampo passed the physical, Sukup hired him (Cl. Ex. 6, p. 40; Hrg. Tr. pp. 45, 70)

At Sukup, Ocampo works making sheets for feed and corn tanks. (Hrg. Tr. p. 45) The job requires him to lift sheets weighing up to thirty pounds. (Hrg. Tr. p. 46) He primarily works standing up while using machines. (Hrg. Tr. p. 71) At the time of hearing, Ocampo was earning seventeen and 00/100 dollars ($17.00) per hour at Sukup. (Cl. Ex. 6, p. 40)

Ocampo credibly testified during the hearing his pain level was three out of ten on a normal day. (Hrg. Tr. p. 47) The activities of bending, twisting, and heavy lifting bother Ocampo the most. (Hrg. Tr. p. 47) Because Ocampo works primarily standing up at Sukup, he is able shift positions when his symptoms from the work injury at New Fashion Pork flare up. (Hrg. Tr. pp. 72–73)

CONCLUSIONS OF LAW

In 2017, the Iowa legislature amended the Iowa Workers' Compensation Act. See 2017 Iowa Acts, ch. 23. The 2017 amendments apply to cases in which the date of an alleged injury is on or after July 1, 2017. Id. at § 24(1); see also Iowa Code § 3.7(1). Because the injury at issue in this case occurred after July 1, 2017, the Iowa Workers' Compensation Act, as amended in 2017, applies. Smidt v. JKB Restaurants, LC, File No. 5067766 (App. Dec. 11, 2020).

1. Permanent Disability.

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

The "broad purpose of workers' compensation" is "to award compensation (apart from medical benefits), not for the injury itself, but the disability produced by a physical injury." Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, (Iowa 2010). Under Iowa Code section 85.34(2), the method of compensating permanent partial disability caused by a work injury is generally based on whether the injury is to a body part itemized in the statutory schedule. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404, 407 (Iowa 1994). "Scheduled permanent partial disabilities . . . are 'arbitrarily' compensable according to the classifications of section 85.34(2) without regard to loss of earning capacity." Id. (quoting Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 14–15 (Iowa 1993)).

Before 2017, permanent partial disability to an unscheduled body part caused by a work injury was "compensated by the industrial disability method which takes into account the loss of earning capacity." Id. (citing Mortimer, 502 N.W.2d at 14–15). An industrial disability analysis was used regardless of whether the injured employee returned to work with the defendant-employer or the level of earnings at the time of hearing relative to the date of injury. Mannes v. Fleetguard, Inc., 770 N.W.2d 826, 830 (Iowa 2009) (quoting Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824, 831 (Iowa

1992)); see also Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 158 (Iowa 1996); Arrow-Acme Corp. v. Bellamy, 500 N.W.2d 92, 95 (Iowa App. 1993). With the 2017 amendments, the legislature carved out an exception to this general rule and created a mandatory bifurcated litigation process on the issue of permanent disability under certain circumstances. See 2017 Iowa Acts ch. 23, § 8 (now codified at Iowa Code § 85.34(2)(*v*)). The statute now articulates an exception and the circumstances triggering the bifurcated litigation process as follows:

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

Iowa Code § 85.34(2)(*v*).

Thus, the 2017 amendments changed the statute so that its text expressly incorporates the agency's review-reopening process to create a mandatory bifurcated litigation process when certain criteria are met. See, e.g., Garcia v. Smithfield Foods, File No. 1657969.01 (Arb. February 16, 2022). Under Iowa Code section 86.14(2), review-reopening is a process by which a determination of compensation is revisited due to a change in the claimant's condition. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 391–95 (Iowa 2009) The bifurcated litigation process created in section 85.34(2)(*v*) allows a claimant to seek a new agency determination of permanent disability using an industrial disability analysis when the defendant-employer terminates the claimant's employment after the initial agency award or approval of the parties' agreement for settlement. Presumably, this is because the defendant-employer's discharge of the claimant after the award or agreement for settlement creates a potential change in the claimant's condition that could trigger reopening the determination of permanent disability. See id.

The parties dispute whether section 85.34(2)(*v*) requires Ocampo to follow the bifurcated litigation process to obtain a determination of what, if any, industrial disability he has sustained due to his unscheduled work injury. The defendants believe Ocampo must follow it because he returned to work with New Fashion Pork at the requisite earnings level after the stipulated work injury. Ocampo disagrees because New Fashion Pork terminated his employment before the hearing.

The legislature has not empowered the agency to interpret the Iowa Workers' Compensation Act, but the agency necessarily must do so when performing its quasi-judicial function as tribunal for workers' compensation contested case proceedings. See Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 518–19 (Iowa 2012); see also Iowa Ins. Inst. v. Core Group of Iowa Ass'n for Justice, 867 N.W.2d 58, 68 (Iowa 2015). To determine Ocampo's entitlement to permanent partial disability (PPD) benefits in this case, it is necessary to first determine whether Ocampo must use the bifurcated litigation process under the statute given the timing of New Fashion Pork's termination of his employment. Therefore, this decision must interpret section 85.34(2)(*v*).

The defendants ask the agency to use one sentence of section 85.34(2)(*v*). Read alone, this sentence states that an injured employee is entitled only to PPD benefits for functional impairment if the employee "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." Iowa Code § 85.34(2)(*v*). As the defendants point out, the sentence contains no express requirement that the injured worker remain employed after returning to work at the requisite earning level. But the analysis of this statutory provision does not end with the punctuation that concludes this sentence.

Iowa statutes are interpreted as a whole, not in part. See, e.g., Doe v. State, 943 N.W.2d 608, 610 (Iowa 2020). When interpreting the text of a provision in the Iowa Code, courts and the agency must "take into consideration the language's relationship to other provisions of the same statute and other provisions of related statutes." Id. Therefore, the entirety of section 85.34(2)(*v*) and its interplay with the rest of the Iowa Workers' Compensation Act must be considered, not just one sentence. The next sentence of section 85.34(2)(*v*) states an injured employee who "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" may seek reopening of the agency award or an agreement for settlement on the question of permanent disability.

The Commissioner considered the interplay of these two new sentences in Martinez v. Pavlich, Inc., File No. 5063900 (App. July 30, 2020). In Martinez, the claimant voluntarily quit employment with the defendant-employer and accepted a position with a different employer at higher pay. Id. While the nature of the employment separation differs from the one in this case, Martinez is nonetheless guiding. Id. The Commissioner considered how the two sentences cited by the parties in this case should be construed and found:

> [W]hen the two new provisions . . . are read together, as they are set forth in the statute, it appears the legislature intended to address *only the scenario* in which a claimant initially returns to work with the defendant-employer or is offered work by the defendant-employer at the same or greater earnings but is later terminated by the defendant-employer.

Id. (emphasis added). Put otherwise, the statute requires a bifurcated litigation process on permanent disability only under the circumstances its text expressly details.

Reinforcing the Commissioner's reading is the traditional statutory construction principle of *expressio unius est exclusio alterious*, which holds that legislative intent is expressed by exclusion and inclusion alike with the express mention of one thing implying the exclusion of another. Kucera v. Baldazo, 745 N.W.2d 481, 487 (Iowa 2008). In section 85.34(2)(*v*), the text expressly requires a bifurcated litigation process only when the claimant returns to employment with the defendant-employer or is offered work by the defendant-employer at the requisite earnings level and is then discharged after an agency award of permanent disability or an agreement for settlement with respect to permanent disability. The statute contains no mention of any other circumstances that mandate a bifurcated litigation process to determine the extent of permanent disability. The legislature could have included such language in the statute but did not. This choice implies that the requirement for a bifurcated ligation process only applies when the defendant-employer discharges the claimant after the agency issues an award or approves the parties' agreement for settlement on the question of permanent disability based on functional impairment.

Relatedly, the Iowa Workers' Compensation Act "is not to be expanded by reading something into it that is not there." Downs, 481 N.W.2d at 527 (citing Cedar Rapids Cmty. Sch. Dist. v. Cady, 278 N.W.2d 298 (Iowa 1979)). Because the statutory text does not include an express requirement for a bifurcated litigation process when the defendant-employer terminates the claimant's employment before hearing, it would be legal error to expand the circumstances under which section 85.34(2)(*v*) requires such a process by reading something into its text that is not there. Compounding the legal error that such an interpretation would constitute is the fact it would undermine an important purpose of the Iowa Workers' Compensation Act.

In Zomer v. West River Farms, Inc., 666 N.W.2d 130 (Iowa 2003), the Iowa Supreme Court considered the Commissioner's authority to reform a workers' compensation insurance policy. Even though this opinion construed the scope of the Commissioner's authority under section 85.21, its reasoning applies here. Id. at 132–33. The court drew on longstanding precedent as the foundation of its holding:

> The fundamental reason for the enactment of this legislation is to avoid litigation, lessen the expense incident thereto, minimize appeals, and afford an efficient and speedy tribunal to determine and award compensation under the terms of this act.
>
> "It was the purpose of the legislature to create a tribunal to do rough justice—speedy, summary, informal, untechnical. With this scheme of the legislature we must not interfere; for, if we trench in the slightest degree upon the prerogatives of the commission, one encroachment will breed another, until finally simplicity will give way to complexity, and informality to technicality."

Id. at 133 (quoting Flint v. City of Eldon, 183 N.W. 344, 345 (1921) (citation omitted)).

The court concluded a "bifurcated litigation process" that is drawn out "is a far cry from the efficient and speedy remedy envisioned by the general assembly when it adopted the workers' compensation act." Id. at 133–34. The court held it would be erroneous "to read into the statute a limitation on the [C]ommissioner's authority to decide claims for compensation, particularly when to do so would defeat one of the primary purposes of the statute—the provision of a prompt and adequate remedy." Id. Applying Zomer here, expanding the circumstances in which a bifurcated litigation process is required under section 85.34(2)(*v*) requires reading something into the statute that is not there and would result in a longer, drawn-out process that would hinder the agency's ability to provide a prompt and adequate remedy, which would defeat one of the primary purposes of the Act.

Lastly, reading the requirement for a bifurcated litigation process to apply only under the circumstances expressly stated in section 85.34(2)(*v*) is consistent with Iowa Supreme Court precedent requiring the agency and courts to "apply the workers' compensation statute broadly and liberally in keeping with its humanitarian objective: the benefit of the worker and the worker's dependents." Xenia Rural Water Dist. v. Vegors, 786 N.W.2d 250, 257 (Iowa 2010). Applying the statute as written allows a claimant to receive a final determination on permanent disability when the issue is ripe for determination. Getting such a determination via a single contested case proceeding before the agency means the claimant will receive payment of all PPD benefits to which the claimant is legally entitled sooner in time and without having to go through litigation of a second contested cast proceeding. Therefore, the result of adhering to the statutory text is beneficial to the injured worker and the worker's dependents.

For these reasons, the text of section 85.34(2)(*v*) does not limit the determination of permanent disability to that based only on functional impairment when the defendant-employer terminates the claimant's employment before the hearing. In such circumstances, the statute does not require a bifurcated litigation process. Because New Fashion Pork discharged Ocampo before the hearing in this case, this decision will determine what, if any, industrial disability he sustained because of the stipulated work injury.

The factors considered when determining industrial disability are: functional disability, age, education, qualifications, work experience, inability to engage in similar employment, earnings before and after the injury, motivation to work, personal characteristics, and the employer's inability to accommodate the functional limitations. See id.; Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 526 (Iowa 2012); IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 632–33 (Iowa 2000); Ehlinger v. State, 237 N.W.2d 784, 792 (Iowa 1976).

Dr. Ogaard assigned Ocampo a zero percent functional impairment rating after he had been off work for weeks. Ocampo credibly testified some physical activities increase his symptoms, such as bending, twisting, or lifting heavy weights. Further, it is unclear what specific observations or measurements informed Dr. Ogaard's conclusory

opinion on Ocampo's functional impairment rating. There is also no reference to the Guides, as required by Iowa Code section 85.34(2)(*x*), in his opinion.

In contrast, Dr. Bansal performed a physical examination, documented his findings from it, and explained how he reached his conclusion on Ocampo's impairment rating using the Guides. For these reasons, Dr. Bansal's functional impairment rating of five percent to the whole body is most persuasive. It is adopted.

Dr. Bansal's permanent work restrictions are largely consistent with the findings of his examination and Ocampo's credible testimony regarding activities that impact his symptoms. They are also reinforced by the findings of the preemployment physical Ocampo completed at Sukup. Dr. Bansal's permanent work restrictions are adopted.

Ocampo was forty-one years of age at the time of hearing. He has a limited education background, having dropped out of high school before obtaining a degree. It is more likely than not he will not obtain postsecondary education resulting in a degree or certificate.

Ocampo is bilingual. This skill makes him more marketable than an employee who is fluent in just one of either English or Spanish. His language skills were unaffected by the work injury.

Ocampo has work experience managing employees. His permanent work restrictions do not impact his managerial experience. This skill set bolsters his earning capacity.

Nonetheless, Ocampo's permanent work restrictions resulting from the stipulated work injury limit his ability to do field work or care for horses like he did on farms in Kentucky. They also limit his ability to care for pigs like he did for Iowa Select Farms and New Fashion Pork. The injury and resulting disability have thus effectively foreclosed him from being able to perform the required duties of the types of jobs he has held during the majority of his working life.

Ocampo is nonetheless motivated to work. He applied for and obtained employment with Sukup. He was employed there at the time of hearing, earning less than what he earned at New Fashion Pork.

For these reasons, Ocampo has met his burden of proof on the question of industrial disability. The weight of the evidence establishes Ocampo has sustained an industrial disability of thirty percent. This entitles him to one hundred fifty weeks of PPD benefits (five hundred weeks multiplied by thirty percent equals one hundred fifty).

2. Rate.

The parties stipulated Ocampo's gross earnings at the time of injury were one thousand three hundred seventy-three and 38/100 dollars ($1,373.38) per week. They also stipulated Ocampo was married and entitled to six exemptions. Based on the

parties' stipulations, Ocampo's weekly compensation rate is eight hundred ninety-five and 59/100 dollars ($895.59).

3. Credit.

The defendants paid to Ocampo five (5) weeks of compensation at the rate of eight hundred fifty-nine and 59/100 dollars ($859.59) per week. The five weeks cover the time period beginning on June 18, 2019, and ending on July 22, 2019. The defendants contend Ocampo was not entitled to those benefits because of the reason for his discharge and they should count as a credit toward any award of PPD benefits in this case. Ocampo disagrees, alleging the reason for his discharge does not constitute a refusal of suitable work.

Section 85.33(3)(*a*) provides in pertinent part:

> If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, and be compensated with temporary partial benefits. If the employer offers the employee suitable work and the employee refuses to accept the suitable work offered by the employer, the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal.

In Schutjer v. Algona Manor Care Center, the Iowa Supreme Court articulated the following two-factor test to determine whether an injured worker is ineligible from benefits under section 85.33(3):

1) The employer offered the employee suitable work; and

2) The employee refused the offer. 780 N.W.2d 549, 559 (Iowa 2010).

The court concluded that an injured employee's voluntary quit may constitute refusal of an offer of suitable work in satisfaction of the second requirement. Id.

Two years later, the court held "[t]he language of the statute requires that the work offered to an injured worker must be both 'suitable' and 'consistent with the employee's disability' before the employee's refusal to accept such work will disqualify him from receiving temporary partial, temporary total, and healing period benefits." Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 520 (Iowa 2012). Thus, in order for the sanction provisions in Iowa Code section 85.33(3) to come into play, the employer must first offer the injured employee suitable work that is consistent with the employee's disability. New Fashion Pork offered Ocampo work within his restrictions at the same work site, which satisfies the first prong under Schutjer.

Because the evidence shows New Fashion Pork discharged Ocampo, the analysis focuses on whether the reason for the discharge constitutes a refusal by Ocampo of suitable work. "Termination by itself is not sufficient grounds to disqualify an

employee from temporary benefits under Iowa Code section 85.33(3)." Gully v. Liguria Foods, Inc., File No. 5063429 (App. Jan. 30, 2020). "[N]ot every act of misconduct justifies disqualifying an employee from workers' compensation benefits even though the employer may be justified in taking disciplinary act." Reynolds v. Hy-Vee, Inc., File No. 5046203 (App. Oct. 31, 2017). For termination to disqualify an employee from compensation it must be for misconduct so extreme it is "tantamount to refusal to perform the offered work" because it is "the type of conduct that would cause any employer to terminate any employee" due to the "serious adverse impact on the employer." Id. (citing Brodigan v. Nutri-Ject Systems, Inc., File No. 5001106 (App. April 13, 2004) and Wortley v. Lowe's Home Centers, Inc., File No. 1298582 (App. December 22, 2006)).

Examples of misconduct so extreme that it constitutes a refusal of suitable work under section 85.33(3) include theft from the employer, id., and threatening to kill coworkers, Black v. John Deere Des Moines Works, File No. 5010502 (App. Mar. 29, 2006). In contrast, misconduct the agency has found insufficiently severe to disqualify a claimant from temporary benefits includes:

- Taking a piece of paper with customer personal information on it from employer premises, Wortley v. Lowe's Home Centers, Inc., File No. 1298582 (App., Dec. 22, 2006);

- The claimant leaving work before the end of a scheduled shift in violation of work rules and without supervisor permission for the third time, Franco v. IBP, No. 5004766 (App. Feb. 28, 2005);

- The claimant leaving work to be with his sick mother despite his supervisor informing him his leave of absence had not been approved because he had only made an oral request for a leave of absence and not filled out the appropriate form, Alonzo v. IBP, Inc., File No. 5009878 (App. Oct. 31, 2006); and

- The claimant's failing a drug test and refusing to take a second test or attend a drug program at the employee's own expense, Gully, File No. 5063429; see also Edwards v. Weitz Corporation, File No. 5032285 (Arb. Jun. 22, 2011) (finding termination for a positive drug test did not constitute disqualifying misconduct) (aff'd and adopted as final agency action (App. Aug. 22, 2012)).

The defendants have the burden to prove misconduct extreme enough to constitute a refusal of suitable work. Id. Here, the defendants failed to meet its burden. As discussed above, the allegations in the separation notice are hearsay and therefore less credible than Ocampo's sworn hearing testimony. Consequently, the defendants have failed to prove by a preponderance of the evidence Ocampo committed misconduct extreme enough to constitute a refusal of suitable work. The defendants are not entitled to a credit based on the benefits paid to Ocampo during the time period in question.

4. IME.

Ocampo seeks reimbursement for Dr. Bansal's IME. The defendants dispute his entitlement to reimbursement. They believe Ocampo is only entitled to the taxation of Dr. Bansal's report as a cost.

Iowa Code section 85.39(2) provides:

> If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination.

On the question of whether an injured employee is entitled to reimbursement for an IME when the employee does not follow the statutory requirements to obtain one, the Iowa Supreme Court held:

> Our legislature established a statutory process to govern examinations of an injured worker in order to obtain a disability rating to determine the amount of benefits required to be paid by the employer. Neither courts, the commissioner, nor attorneys can alter that process by adopting contrary practices. If the injured worker wants to be reimbursed for the expenses associated with a disability evaluation by a physician selected by the worker, the process established by the legislature must be followed.

Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 846 (Iowa 2015)

The defendants chose Dr. Ogaard as a treating physician. On October 4, 2019, he opined Ocampo sustained no permanent impairment from the stipulated work injury. Ocampo disagreed with Dr. Ogaard's rating and underwent an IME with Dr. Bansal on June 10, 2020, after which Dr. Bansal authored a report dated July 6, 2020. However, there is no indication in the record Ocampo applied to the agency for an IME. Consequently, he is not entitled to IME reimbursement under section 85.39(2). Nonetheless, the cost of Dr. Bansal's report may be taxed as a cost under Iowa Code section 86.40 and rule 876 IAC 4.33(6). See id. at 847.

5. Costs.

The agency has the discretion to tax costs incurred in the hearings it holds. Iowa Code § 86.40. "Fee-shifting statutes using 'all costs' language have been construed 'to limit reimbursement for litigation expenses to those allowed as taxable court costs.'" Young, 867 N.W.2d at 846 (quoting City of Riverdale v. Diercks, 806 N.W.2d 643, 660 (Iowa 2011)). Statutes and administrative rules providing for recovery of costs are

strictly construed. Id. (quoting Hughes v. Burlington N. R.R., 545 N.W.2d 318, 321 (Iowa 1996)).

Under rule 876 IAC 4.33(6), a party may have the cost of physician's report taxed if it is not reimbursed as an IME under Iowa Code section 85.39(2). "[A] physician's report becomes a cost incurred in a hearing because it is used as evidence in lieu of the doctor's testimony. The underlying medical expenses associated with the examination do not become costs of a report needed for a hearing, just as they do not become costs of the testimony or deposition." Id. at 846. Activities such as "research and review of the file are akin to expenses associated with an examination and therefore cannot be taxed" as the cost of a report. Voshell v. Compass Group, USA, Inc./Chartwells d/b/a Au Bon Pain Café, File No. 5056857 (App. Sep. 27, 2019) (citing Young, 867 N.W.2d at 847, and Kirkendall v. Cargill Meat Solutions Corp., File No. 5055494 (App. Dec. 17, 2018)).

Because Ocampo has prevailed on the majority of the disputed issues in this case, he is entitled to taxation of costs against the defendants for the following:

- Seven and 5/100 dollars ($7.05) for the costs of service of the original notice under 876 IAC 4.33(3);
- One thousand six hundred seventeen and 00/100 dollars ($1,617.00) for the reasonable costs of obtaining Dr. Bansal's report under 876 IAC 4.33(6); and
- One hundred three and 00/100 dollars ($103.00) for the filing fee and convenience fee incurred by using the payment gateway on the Workers' Compensation Electronic System (WCES) under 876 IAC 4.33(7).

ORDER

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

1) The defendants shall pay to Ocampo one hundred fifty (150) weeks of permanent partial disability benefits at the rate of eight hundred ninety-five and 59/100 dollars ($895.59) per week from the commencement date of July 22, 2019.

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

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

4) The defendants shall be given no credit for benefits previously paid.

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

6) Ocampo is not entitled to reimbursement for all reasonable expenses relating to Dr. Bansal's IME under Iowa Code section 85.39(2).

7) Under Iowa Code section 86.40 and rule 876 IAC 4.33, the defendants shall pay to Ocampo the following amounts for the following costs:

   a) Seven and 5/100 dollars ($7.05) for the costs of service of the original notice;

   b) One thousand six hundred seventeen and 00/100 dollars ($1,617.00) for the reasonable costs of obtaining Dr. Bansal's report; and

   c) One hundred three and 00/100 dollars ($103.00) for the filing fee and convenience fee incurred by using the payment gateway on the Workers' Compensation Electronic System (WCES).

Signed and filed this 4th day of March, 2022.

BENJAMIN G. HUMPHREY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

James Byrne (via WCES)

Jessica Voelker (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.