

## BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SELENA PENA,

Claimant,

vs.

WELLS ENTERPRISES, INC.,

Employer,  
Self-Insured,  
Defendant.

File No. 20004791.01

## ARBITRATION DECISION

Headnotes: 1108, 1402.30, 1402.40,  
1801, 1803, 2907

Claimant filed a petition in arbitration on March 21, 2022, alleging she sustained injuries to her left foot, left knee, and back, while working for Defendant Wells Enterprises, Inc. ("Wells") on April 3, 2020. Wells filed an answer on April 4, 2022.

An arbitration hearing was held *via* Zoom video conference on May 2, 2023. Attorney Judy Freking represented Pena. Pena appeared and testified. Attorney Steven Durick represented Wells. Jon Robinson appeared and testified on behalf of Wells. Suzanne Wedeking provided Spanish interpretation services during the hearing. Joint Exhibits ("JE") 1 through 8 and Exhibits 1 through 11 and A through J, were admitted into the record. The record was held open through June 16, 2023, 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. A hearing report order was entered at the conclusion of the hearing accepting the parties' stipulations and the issues to be decided. Wells asserted the affirmative defenses of lack of timely notice under Iowa Code section 85.23 and untimely claim under Iowa Code section 85.26 and waived all other affirmative defenses.

**STIPULATIONS**

1. An employer-employee relationship existed between Wells and Pena at the time of the alleged injury.
2. The alleged injury is a cause of temporary disability during a period of recovery.
3. At the time of the alleged injury claimant was married and entitled to four exemptions.
4. Medical benefits are no longer in dispute.

5. Prior to the hearing claimant was paid temporary partial disability and/or temporary total disability benefits as set forth in Exhibit A.

### **ISSUES**

1. Did Pena sustain an injury on April 3, 2020, which arose out of and in the course of her employment with Wells?

2. What is the nature of the disability?

3. Is the alleged injury a cause of permanent disability?

4. If the alleged injury is a cause of permanent disability what is the extent of disability?

5. If the alleged injury is a cause of permanent disability, what is the commencement date for permanent partial disability benefits?

6. Is Pena entitled to temporary benefits from November 30, 2020 through February 8, 2023?

7. What is the rate?

8. Is Pena entitled to an award of penalty benefits?

9. Should costs be assessed against either party?

### **FINDINGS OF FACT**

Pena lives in LeMars with her husband and two of her children. (Exs. 8:31; C:20) Pena attended three years of middle school in Mexico. (Ex. 8:31; Tr.:22) Pena has experience working as an officer cleaner, kitchen helper in a nursing facility, and as a worker in a meat processing plant. (Ex. 8:33) Pena commenced work for Wells in 2017. (Ex. 8:33) At the time of the hearing Pena was 55 years old. (Tr.:10)

On April 3, 2020, Wells completed an onsite occupation nurse employee visit form for Pena. (Ex. 10:44) Pena reported she hurt her left knee and left foot two months before at work. (Ex. 10:44) The onsite nurse assessed Pena with mild left knee and foot pain and recommended she use ice for 15 to 20 minutes every two to three hours as needed and to take ibuprofen. (Ex. 10:44)

On April 17, 2020, Pena attended an appointment with Rodney Cassens, M.D., an occupational medicine physician, complaining of left foot pain, left knee pain, and left lower back pain. (JE 2:4) On the patient history form Pena wrote her injury occurred on September 1, 2019, from walking a lot and very far for boxes. (JE 2:7; Tr.:28) Dr. Cassens documented Pena reported she developed left foot pain in September 2019, and it had gradually become severe. (JE 2:4) Dr. Cassens noted Pena developed an antalgic gait due to her foot pain and subsequently developed left knee and left lower

back pain. (JE 2:4) Dr. Cassens assessed Pena with left foot plantar fasciitis, left knee synovitis secondary to antalgic gait due to plantar fasciitis, and left lumbar strain secondary to antalgic gait due to plantar fasciitis. (JE 2:4) Dr. Cassens prescribed bilateral heel cushions for her shoes, a neoprene splint for her left knee, physical therapy, golf ball massages to the plantar fascia of the left foot, and cold application 10 minutes three times per day, and he released her to return to work with a restriction of seated work only. (JE 2:4-6)

Pena attended a follow-up appointment with Dr. Cassens on May 1, 2020. (JE 2:8) Dr. Cassens examined Pena, assessed her with left foot plantar fasciitis, left foot metatarsalgia, left knee synovitis, and left lumbar strain, advised Pena to use both heel cushions and metatarsal cushions, and continued her physical therapy and work restriction. (JE 2:8-10)

On May 15, 2020, Pena returned to Dr. Cassens. (JE 2:11) Dr. Cassens noted her plantar fasciitis and metatarsalgia of the left foot were not improving, he continued the use of the splint and cushions, continued her restriction, and referred her to an orthopedic surgeon. (JE 2:11-12)

On May 29, 2020, Pena attended an appointment with Phinit Phisitkul, M.D., an orthopedic surgeon, on a referral from Dr. Cassens. (JE 4:26-29) Dr. Phisitkul documented Pena had reported since September 2019 she had been working 12 hours per day with excessive walking and weightbearing, lifting, and standing, and complaining of left foot pain. (JE 4:26; Tr.:28) Dr. Phisitkul examined Pena, ordered x-rays, listed an impression of a work-related injury causing a collapse of the foot arch and overloading of the second metatarsal head and posterior tibial tendonitis, and recommended physical therapy and bilateral custom orthotics. (JE 4:28-34)

Pena returned to Dr. Phisitkul on June 29, 2020, for her left foot injury. (JE 4:37) Dr. Phisitkul continued her physical therapy and use of insoles, and released her to return to work with restrictions of standing up to four hours per day with light duty work and sedentary duty for the remainder of the day, and to progress as tolerated. (JE 4:38, 40-42)

On July 20, 2020, Pena attended a follow-up appointment with Dr. Phisitkul regarding her left foot pain. (JE 4:43) Dr. Phisitkul documented Pena had also seen Dr. Cassens for left knee pain. (JE 4:43) Pena relayed she was having continued difficulty with her left foot, noting physical therapy and her insole had not provided much help, and reporting her pain was now into her ankle. (JE 4:43) Dr. Phisitkul recommended Pena tape her second MTP joint to keep it in slight plantar flexion, continued her physical therapy and use of insoles, recommended diclofenac gel to decrease her pain and inflammation, and imposed restrictions of standing and walking up to four hours per day and then sedentary duty for the remainder of the day. (JE 4:44, 46-48)

On August 21, 2020, Pena returned to Dr. Phisitkul reporting her insoles, taping, and physical therapy had been helping and stating the only pain she had was in the posterior lateral aspect of her ankle joint and the peroneal tendons. (JE 4:49) Dr.

Phisitkul continued Pena's physical therapy, taping, and medications, and recommended work hardening, increasing her standing and walking from four to five hours, increasing by one hour per week, and to continue sedentary work the remainder of the day. (JE 4:50-54)

Pena attended a follow-up appointment with Dr. Phisitkul on September 21, 2020, reporting she was 80 percent better and noted she had pain with walking. (JE 4:55) Dr. Phisitkul continued Pena's physical therapy, taping, use of insoles, and restrictions. (JE 4:56-60)

On October 20, 2020, Pena attended an appointment with Dr. Phisitkul reporting she was working eight to 10 hours per day and her pain was worse with prolonged standing and walking. (JE 4:61) Dr. Phisitkul recommended continued work hardening with no work beyond 10 hours. (JE 4:62-64)

Pena attended an appointment with Dr. Phisitkul on November 20, 2020, reporting she was having pain in the lateral border of her foot. (JE 4:65) Dr. Phisitkul documented her left knee and foot were abnormal on exam. (JE 4:65) Dr. Phisitkul found Pena had reached maximum medical improvement, released her to full duty, noted she had not sustained any significant disability from the work injury, and stated he would see her on an "as needed basis." (JE 4:66-68)

On November 30, 2020, Wells terminated Pena's employment after finding she falsified an injury that allegedly took place at work on November 13, 2020. (Ex. 5:19-22) Pena reported she injured her left shoulder from lifting and placing a pallet on BT 6. (Ex. 5:19) Wells pulled the camera footage to see how the injury took place and Wells found another worker moved a pallet at 5:56 a.m. that day, and the footage revealed the only time Pena moved a pallet into place was on November 11, 2020, at 1:20 p.m. and at that time she pushed the pallet with her right hand while carrying a piece of cardboard with her left hand. (Ex. 5:19)

Following her termination from Wells, Pena began working for Short Staffed, a temporary staffing agency at Nor-Am Cold Storage. (Tr.:17) Pena reported she worked at the location for three weeks and then she sustained an injury when she slipped on some grease on the floor. (Tr.:18) After the incident Pena did not return to Nor-Am Cold Storage. (Tr.:18)

Pena attended an appointment with Dr. Cassens on January 5, 2022, complaining of right wrist, low back, right knee, right ankle, and right foot pain after slipping and falling on some lard at work. (JE 2:14) Dr. Cassens ordered x-rays, which he found showed no evidence of fracture or dislocation, assessed Pena with a right wrist sprain, pelvis contusion, right knee sprain, right ankle sprain, and right foot contusion, prescribed a right wrist splint for work and a right ankle figure-of-eight splint, and released her to return to work with restrictions of seated work only, and occasional gripping and pinching with the right hand. (JE 2:14-16)

On January 12, 2022, Pena attended a follow-up appointment with Dr. Cassens reporting her pain had improved significantly. (JE 2:18) Dr. Cassens recommended Pena continue to wear the right wrist and ankle splints as needed and released her to return to work with restrictions of limiting bending, occasional squatting and twisting, no lifting over 15 pounds, and no frequent gripping and pinching with the right hand. (JE 2:18-19)

Pena attended a recheck of her right wrist, pelvis contusion, right knee sprain, and right ankle and foot contusion on January 19, 2022. (JE 2:20) Dr. Cassens documented Pena's pain had improved significantly, found she had reached maximum medical improvement, and released her to return to work without restrictions. (JE 2:20-21)

Pena attended appointments with her family medical provider between March 15, 2021, and November 8, 2022. (Tr.:33-34) Pena agreed on cross-examination her medical records contain no mention of any ongoing left foot pain, left knee pain, or back pain. (Tr.:34)

After the incident at Nor-Am Cold Storage, Pena worked for IML Containers for one month on the production line, Pella Windows for one month, Diamond Vogel for five to six months, and for the Pizza Ranch. (Tr.:19-21, 34-37) Pena testified she only worked for IML Containers for one month "[b]ecause I couldn't work anymore," noting she had a lot of pain in her knee and shoulder. (Tr.:19) Pena testified she quit her job with Pella Windows after one month "[b]ecause I had to do, like, four to five jobs in one. There was all sorts of computer stuff and math, and then I had to work on various doors and windows. And I couldn't work anymore. My body couldn't stand it." (Tr.:19-20) Pena reported she quit her job at Diamond Vogel because her foot, knee, and hip were hurting her. (Tr.:21) Pena relayed she quit her job with the Pizza Ranch "[b]ecause my knee and my foot couldn't stand it anymore. I had to carry a lot of pizzas and climb stairs." (Tr.:21)

On October 4, 2022, counsel for Wells sent Dr. Phisitkul a check-the-box letter asking for his opinions regarding Pena's left foot injury. (JE 5:69) Dr. Phisitkul responded without providing any written comments. (JE 5:69) Dr. Phisitkul agreed with the question, "[i]s it your medical opinion that based upon your examination of Selena Pena, as well as the history you obtained during the course of your evaluation of her, that you would be unable to state to within a reasonable degree of medical probability that her employment duties at Wells Enterprises were a significant and/or substantial contributing factor in her left foot condition for which you evaluated her and provided her treatment?" (JE 5:70) Dr. Phisitkul further agreed with the question, "[i]s it your medical opinion, based upon your physical examination of Selena Pena, that she did not sustain any permanent impairment per the AMA Guides, 5th Edition?" (JE 5:70)

Sunil Bansal, M.D, performed an independent medical examination for Pena on February 28, 2023, and issued his report on March 24, 2023. (Ex. 3) Dr. Bansal reviewed Pena's medical records and examined her. (Ex. 3) Dr. Bansal opined Pena developed right foot plantar fasciitis from her cumulative walking throughout the

workday on September 1, 2019. (Ex. 3:13). Dr. Bansal opined Pena reached maximum medical improvement the date of his report and found she may benefit from intermittent steroid injections. (Ex. 3:14) Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) (“AMA Guides”), Dr. Bansal assigned seven percent lower extremity impairment for dorsiflexion of nine degrees, which he converted to a whole person impairment. (Ex. 3:14) Dr. Bansal recommended permanent restrictions of avoiding walking or standing for more than 30 minutes at a time for three hours cumulatively per day. (Ex. 3:14)

Dr. Bansal diagnosed Pena with sacroiliitis that has progressively worsened from her altered gait secondary to her right foot pathology. (Ex. 3:14-15)

Dr. Bansal also found Pena sustained a left knee and low back injury on April 3, 2020, as a result of the September 1, 2019, injury to her left foot. (Ex. 3:15). Dr. Bansal again opined Pena reached maximum medical improvement on February 28, 2023. (Ex. 3:15) Dr. Bansal opined Pena falls into DRE Lumbar Category II, he assigned five percent permanent impairment for her low back, and he imposed permanent restrictions of no lifting over 25 pounds and no frequent bending or twisting. (Ex. 3:15)

On April 13, 2023, counsel for Wells sent Dr. Cassens a check-the-box letter asking him for his opinions regarding Pena’s left leg and low back complaints. (JE 3:22) Dr. Cassens responded without providing any written comments. (JE 3:22) Dr. Cassens agreed with the question “[i]s it your medical opinion that you would not anticipate Ms. Pena as having sustained any permanent injury to either her left knee and/or her back as a result of her alleged injury at Wells Enterprises?” (JE 3:22) He further agreed with the question “[i]s it your medical opinion that you would not have anticipated Ms. Pena to have required any type of permanent work restrictions in connection with her alleged left knee and/or back complaints/condition/injury?” (JE 3:23)

At hearing, Pena testified she continues to have problems with her right and left feet, left knee and back. (Tr.:13)

During her deposition, Pena testified she thought she could work in a gas station or in a restaurant kitchen. (Tr.:22) At hearing Pena reported she would not be able to stand on her feet for an eight-hour shift or carry heavy boxes of food. (Tr.:22) Pena relayed she did not believe she would be able to return to work on the production line at Wells. (Tr.:24)

## **CONCLUSIONS OF LAW**

### **I. Permanent Impairment Arising Out of and in the Course of Employment**

Pena alleges she sustained a permanent injury to her left foot and sequelae injuries to her left knee and back arising out of and in the course of her employment with Wells. Wells disputes her claim.

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).

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, 569 N.W.2d at 156. 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 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).

An employer is responsible for a sequela injury “that naturally and proximately flow[s] from” an injury arising out of and in the course of employment. Oldham v. Schofield & Welch, 266 N.W.2d 480, 482 (Iowa 1936) (“[i]f an employee suffers a compensable injury and thereafter suffers further disability which is the proximate result of the original injury, such further disability is compensable”); see also Mallory v. Mercy Med. Ctr., 2012 WL 529199, File No. 5029834 (Iowa Workers’ Comp. Comm’n Feb. 15, 2012). A sequela may occur as the result of a fall during treatment, an altered gait, or a later injury caused by the original injury.

Three experts have given opinions on whether Pena sustained a permanent impairment to her left foot and sequelae impairments to her left knee and low back caused by the alleged April 3, 2020, work injury, Dr. Phisitkul, a treating orthopedic surgeon, Dr. Cassens, a treating occupational medicine physician, and Dr. Bansal, an occupational medicine physician who performed an independent medical examination for Pena.

Dr. Phisitkul signed a check-the-box letter agreeing he “would be unable to state to within a reasonable degree of medical probability that [Pena’s] employment duties at Wells Enterprises were a significant and/or substantial contributing factor in her left foot condition for which [he] evaluated her and provided her treatment.” (JE 5:70). He also agreed Pena did not sustain any permanent impairment under the AMA Guides. (JE 5:70) Dr. Phisitkul treated Pena over time. I find his opinion persuasive and consistent with the record evidence.

Dr. Cassens also signed a check-the-box letter stating he “would not anticipate Ms. Pena as having sustained any permanent injury to either her left knee and/or her back as a result of her alleged injury at Wells Enterprises.” (JE 3:22) Dr. Cassens opinion is equivocal. He agreed he did not anticipate Pena would sustain a permanent impairment to her left knee or low back caused by the work injury. I do not find his opinion particularly helpful.

Dr. Bansal opined Pena developed right foot plantar fasciitis from her cumulative walking throughout the workday on September 1, 2019, and he assigned a seven percent permanent impairment. (Ex. 3:13-14) Dr. Bansal opined Pena also sustained sacroiliitis that has progressively worsened as a result of her altered gait secondary to her right foot pathology. (Ex. 13:14-15) Later in his report Dr. Bansal opined Pena sustained a left knee and low back injury on April 3, 2020, as a result of a September 1, 2019, injury to her left foot, and he assigned five percent permanent impairment to her low back. (Ex. 3:15)



Dr. Bansal's opinion is confusing as he assigned permanent impairment for a right foot injury. He also diagnosed Pena with sacroiliitis that had progressively worsened from her altered gait secondary to her right foot pathology, but later assigned permanent impairment for a low back injury as a result of the injury to her left foot.

In April 2020, Pena did not report she sustained an injury to her right foot. Pena reported she sustained an injury to her left foot that started in September 2019 and had become progressively worse over time. Pena did not receive treatment for a right foot injury from Dr. Phisitkul or any other medical provider in 2020. She did report another work injury to her right wrist, low back, right knee, right ankle, and right foot pain after slipping and falling on some grease while working for another employer in January 2022. (JE 2:14)

No expert physician in this case has opined Pena sustained permanent impairment to her left foot caused by the alleged work injury at Wells. Dr. Bansal assigned permanency for an alleged right foot condition. Pena reported she sustained an injury to her left foot, not the right, in April 2020. Pena received treatment for an injury to her left foot starting in April 2020. Pena's counsel never sought clarification from Dr. Bansal whether his opinions regarding the right foot actually involved the left foot. I find his opinion confusing and unreliable. I find Pena has not met her burden of proof she sustained permanent impairment to her left foot caused by the April 2020 work injury. I also find she failed to prove she sustained permanent impairment to her right foot caused by the work injury, or that she sustained permanent sequelae injuries to her back and left knee caused by the alleged work injury at Wells. Given this finding, I find the remaining issues moot, other than entitlement to temporary benefits and costs.

## **II. Entitlement to Temporary Benefits**

Pena seeks temporary benefits from November 30, 2020, through February 8, 2023. Wells contends she is not entitled temporary benefits for this period.

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. The appropriate type of benefit depends on whether or not the employee has a permanent disability. Dunlap, 824 N.W.2d at 556.

“[A] claim for permanent disability benefits is not ripe until maximum medical improvement has been achieved.” Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 201 (Iowa 2010). “Stabilization of the employee’s condition ‘is the event that allows a physician to make the determination that a particular medical condition is permanent.’” Dunlap, 824 N.W.2d at 556 (quoting Bell Bros. Heating & Air Conditioning, 779 N.W.2d at 200). If the employee has a permanent disability, then payments made prior to permanency are healing period benefits. Id. If the injury has not resulted in a permanent disability, then the employee may be awarded temporary total benefits. Id. at 556-57.

Iowa Code section 85.33(1) governs temporary total disability benefits as follows:

[e]xcept as provided in subsection 2 of this section, the employer shall pay to an employee for injury producing temporary total disability weekly compensation benefits, as provided in section 85.32, until the employee has returned to work or is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

Under Iowa Code section 85.33(6), “‘employment substantially similar to the employment in which the employee was engaged at the time of the injury’ includes, for purposes of an individual who was injured in the course of performing as a professional athlete, any employment the individual has previously performed.”

During her appointment on November 20, 2020, Dr. Phisitkul found Pena had reached maximum medical improvement, released her to full duty, and noted she had not sustained any significant disability from the work injury. (JE 4:65-68) Wells terminated Pena on November 30, 2020, after finding she falsified an injury that allegedly took place at work on November 13, 2020. (Ex. 5:19-22) Pena’s termination occurred after Dr. Phisitkul found she had reached maximum medical improvement and after he released her to full duty. At that time she was not under any restrictions precluding her from working. No treating physician imposed any additional restrictions due to the alleged April 2020 injury after Dr. Phisitkul released her to return to work without restrictions. I do not find Pena is entitled to temporary benefits from November 30, 2020, through February 8, 2023.

### III. Costs

Pena requested reimbursement for the filing fee from Wells on the hearing report. Iowa Code section 86.40 (2020), provides, “[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.” Rule 876 IAC 4.33(6), provides

Costs taxed by the workers’ compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors’ and practitioners’ deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors’ or practitioners’ reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes.

Pena was not successful in this case. Using my discretion I find the parties should bear their own costs.


### ORDER

IT IS THEREFORE ORDERED, THAT:

Claimant shall take nothing further in this case.

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 10<sup>th</sup> day of July, 2023.



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HEATHER L. PALMER  
DEPUTY WORKERS’  
COMPENSATION COMMISSIONER

The parties have been served as follows:

Judy Freking (via WCES)

Steven Durick (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.