

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

VANESSA NUNO,

Claimant,

vs.

TRINITY HEALTH CORPORATION
d/b/a MERCY MEDICAL CENTER –
SIOUX CITY,

Employer,
Self-Insured,
Defendant.

File Nos. 5057137, 5057138,
5059173, 5068123

ARBITRATION DECISION

Headnotes: 1108.50, 1402.20, 1402.30,
1402.40, 1403.10, 1803, 2501, 2907

On January 4, 2019, Claimant Vanessa Nuno filed three petitions in arbitration, File Numbers 5057137, 5057138, and 5059173. In File Number 5057137, Nuno alleged she sustained an injury to her low back while working for Defendant Trinity Health Corporation, d/b/a Mercy Medical Center (“Mercy”) on November 22, 2015. In File Number 5057138, Nuno alleged she sustained an injury to her low back while working for Mercy on February 22, 2016. In File Number 5059173, Nuno alleged she sustained an injury to her low back while working for Mercy on January 4, 2017. On April 12, 2019, Nuno filed another petition in arbitration, File Number 5068123. In File Number 5068123, Nuno alleged she sustained an injury to her low back while working for Mercy on May 23, 2017. Mercy filed answers to File Numbers 5057137 and 5057138 on July 23, 2019. Mercy filed answers to File Numbers 5059173 and 5068123 on July 24, 2019.

An arbitration hearing was scheduled for December 17, 2020. Nuno filed a motion to a continue the hearing. In response to the motion, Mercy asked for an order precluding the parties from engaging in new discovery and adding additional exhibits. Nuno’s motion was granted on December 11, 2020, continuing the hearing to May 24, 2021. The order continuing the hearing stated “[n]o additional discovery may be taken without consent of both parties. The parties may refile the exhibits for the December 2020 hearing, but may not file any new exhibits without the consent of both parties.” Pursuant to the agreement of the parties, the hearing was continued again to June 4, 2021.

An arbitration hearing was held *via* CourtCall video conference on June 4, 2021. Attorney Mary Hamilton represented Nuno. Nuno appeared and testified, and her spouse, Adan Nuno, testified on her behalf. Attorney Lee Hook represented Mercy. Julie Anfinson appeared and testified on behalf of Mercy.

At the time of the hearing Nuno offered four exhibits that fell outside of the order from December 11, 2020, Exhibits 5, 7, 9, and 12. Mercy objected to the admission of the additional exhibits. At no time prior to the hearing did Nuno file a motion to submit additional evidence. Nuno withdrew Exhibit 12 at the time of the hearing and later withdrew Exhibits 5 and 9 in the offer of proof she filed on June 8, 2021. Joint Exhibits (“JE”) 1 through 11, and Exhibits 1 through 4, 6, 8, 10 through 11, and A through G were admitted into the record. I denied Nuno’s request to admit Exhibit 7 for failure to comply with the order from December 11, 2020. The record was held open through July 23, 2021, for the receipt of post-hearing briefs. The briefs were received, and the record was closed.

Prior to the hearing the parties submitted Hearing Reports for each case, listing stipulations and issues to be decided. The Hearing Reports were received and admitted into the record. Mercy waived all affirmative defenses.

FILE NUMBER 5057137

STIPULATIONS

1. An employer-employee relationship existed between Mercy and Nuno at the time of the alleged injury.
2. Nuno sustained an injury, which arose out of and in the course of her employment with Mercy on November 22, 2015.
3. The alleged injury is a cause of temporary disability during a period of recovery.
4. While entitlement to healing period benefits cannot be stipulated to, Nuno was off work from October 13, 2018, through June 13, 2019.
5. If the injury is found to be the cause of permanent disability, the disability is an industrial disability.
6. At the time of the alleged injury, Nuno’s gross earnings were \$502.41 per week, she was married, and entitled to six exemptions, and the parties believe the weekly rate is \$359.01.
7. Prior to the hearing, Nuno was paid 25 weeks of compensation at the rate of \$313.96 per week.
8. Costs have been paid.

ISSUES

1. Is the alleged injury a cause of permanent disability?
2. If the alleged injury is a cause of permanent disability, what is the extent of disability?

3. If the alleged injury is found to be a cause of permanent disability, what is the commencement date for permanent partial disability benefits?
4. Is Nuno entitled to healing period benefits for a second healing period that began on October 13, 2018, when she returned to Dr. Shumaker for pain control, and ended on June 13, 2019?
5. Is Nuno entitled to payment of medical expenses set forth in Exhibit 10?
6. Is Nuno entitled to alternate care under Iowa Code section 85.27?
7. Should costs be assessed against either party?

FILE 5057138

STIPULATIONS

1. An employer-employee relationship existed between Mercy and Nuno at the time of the alleged injury.
2. While entitlement to healing period benefits cannot be stipulated to, Nuno was off work from October 13, 2018, through June 13, 2019.
3. If the injury is found to be the cause of permanent disability, the disability is an industrial disability.
4. At the time of the alleged injury, Nuno's gross earnings were \$491.03 per week, she was married and entitled to five exemptions, and the parties believe the weekly rate is \$350.83.
5. Prior to the hearing, Nuno was paid 25 weeks of compensation at the rate of \$313.96 per week.
6. Costs have been paid.

ISSUES

1. Did Nuno sustain an injury which arose out of and in the course of her employment with Mercy on February 26, 2016?
2. Is the alleged injury a cause of temporary disability during a period of recovery?
3. Is Nuno entitled to healing period benefits for a second healing period that began on October 13, 2018, when she returned to Dr. Shumaker for pain control, and ended on June 13, 2019?
4. Is the alleged injury a cause of permanent disability?
5. If the alleged injury is found to be a cause of permanent disability, what is the extent of disability?

6. If the alleged injury is found to be a cause of permanent disability, what is the commencement date for permanent partial disability benefits?
7. Is Nuno entitled to payment of medical expenses set forth in Exhibit 10?
8. Is Nuno entitled to alternate care under Iowa Code section 85.27?
9. Should costs be assessed against either party?

FILE NUMBER 5059173

STIPULATIONS

1. An employer-employee relationship existed between Mercy and Nuno at the time of the alleged injury.
2. While entitlement to healing period benefits cannot be stipulated to, Nuno was off work from October 13, 2018, through June 13, 2019.
3. If the injury is found to be the cause of permanent disability, the disability is an industrial disability.
4. At the time of the alleged injury Nuno's gross earnings were \$505.37 per week, she was married and entitled to five exemptions, and the parties believe the weekly rate is \$360.46.
5. Prior to the hearing, Nuno was paid 25 weeks of compensation at the rate of \$313.96 per week.
6. Costs have been paid.

ISSUES

1. Did Nuno sustain an injury on January 4, 2017, which arose out of and in the course of her employment with Mercy?
2. Is the alleged injury a cause of temporary disability during a period of recovery?
3. Is Nuno entitled to healing period benefits for a second healing period that began on October 13, 2018, when she returned to Dr. Shumaker for pain control, and ended on June 13, 2019?
4. Is the alleged injury a cause of permanent disability?
5. If the alleged injury is found to be a cause of permanent disability, what is the extent of disability?
6. If the alleged injury is found to be a cause of permanent disability, what is the commencement date for permanent partial disability benefits?
7. Is Nuno entitled to payment of medical expenses set forth in Exhibit 10?

8. Is Nuno entitled to alternate care under Iowa Code section 85.27?
9. Is Nuno entitled to recover the cost of the independent medical examination?
10. Should costs be assessed against either party?

FILE NUMBER 5068123

STIPULATIONS

1. An employer-employee relationship existed between Mercy and Nuno at the time of the alleged injury.
2. While entitlement to healing period benefits cannot be stipulated to, Nuno was off work from October 13, 2018, through June 13, 2019.
3. If the injury is found to be the cause of permanent disability, the disability is an industrial disability.
4. At the time of the alleged injury Nuno was married and entitled to five exemptions.
5. Prior to the hearing, Nuno was paid 25 weeks of compensation at the rate of \$313.96 per week.
6. Costs have been paid.

ISSUES

1. Did Nuno sustain an injury, which arose out of and in the course of her employment with Mercy on May 23, 2017?
2. Is the alleged injury a cause of temporary disability during a period of recovery?
3. Is Nuno entitled to healing period benefits for a second healing period that began on October 13, 2018, when she returned to Dr. Shumaker for pain control, and ended on June 13, 2019?
4. Is the alleged injury a cause of permanent disability?
5. If the alleged injury is found to be a cause of permanent disability, what is the extent of disability?
6. If the alleged injury is found to be a cause of permanent disability, what is the commencement date for permanent partial disability benefits?
7. What is the rate?
8. Is Nuno entitled to payment of medical expenses set forth in Exhibit 10, page 69?

9. Is Nuno entitled to alternate care under Iowa Code section 85.27?
10. Is Nuno entitled to recover the cost of the independent medical examination?
11. Should costs be assessed against either party?

FINDINGS OF FACT

Nuno is married and lives in Elk Point, South Dakota. (Exhibit 8, page 44; Transcript, pp. 26, 28) At the time of the hearing she was 42. (Tr., p. 126)

Nuno was born in Venezuela. (Tr., p. 27) She moved to the United States in 1990 and grew up in the Sioux City area. (Tr., p. 27) Nuno dropped out of high school in the eleventh or twelfth grade, and later earned a GED. (Tr., pp. 27-28) Nuno attended one semester of community college to become a medical assistant, but she did not finish the program. (Tr., pp. 28-29) Nuno has experience working as a school paraprofessional, as a billing clerk, as a sales associate for a convenience store, as a collection representative, and as a certified nursing assistant (“CNA”). (Ex. 8, pp. 47-48; Tr., pp. 30-31)

In January 2015, Mercy hired Nuno as a CNA for the resource team. (Tr., pp. 29, 89) The resource team works in various departments throughout the hospital, as needed. (Tr., p. 89) Nuno reported as a CNA she gave baths, transferred patients, lifted patients, took vital signs, empties catheters, emptied Jackson-Pratt drains, and she provided interpretation services for people who did not speak English well. (Tr., pp. 31, 90)

On November 22, 2015, Nuno was performing rounds and checking on the patients. (Tr., pp. 34-35) Nuno relayed,

[a]nd there was this incident – this incident that I went in to check on one of the patients, and she needed to be boosted because her feet were touching the footboard of the bed, so she needed to be lifted.

So the nurse who was in charge of that patient asked me if I wanted to lift her up or boost her up in bed. And her weight was a little bit over 300 pounds. So we try to boost her up. And I think we try a couple of times to lift her and boost her up.

And I think after the third time I just felt something on my back, like a pop on my lower back. And I just continue until the end of the shift, even – minimal pain, but the pain was there. And I finished the shift that day.

(Tr., p. 35) Nuno testified she came back the second night to the same department and helped boost that same patient. (Tr., p. 36) Nuno reported her pain increased to the charge nurse, Carla, who told her to report it to nursing services. (Tr., p. 36) Nuno did not report the incident to nursing services and she went home. (Tr., p. 36) Nuno continued to work until December 7, 2015, when she reported the incident to Carol Benjamin and Benjamin referred her for medical treatment. (Tr., pp. 36-37)

Nuno has a history of back pain dating back to 2010. During an emergency room visit on December 2, 2010, Nuno reported a history of back pain, she was tearful and complaining of pain in the center of her lower back, and pain radiating down her right leg. (JE 1, p. 1) According to the medical record, Nuno complained of low back pain that began when she was bending over and twisting at the store, and later when she went home, the pain became worse, “primarily on the right side of the back.” (JE 1, p. 2) Nuno did not seek any ongoing treatment for the injury.

On December 7, 2015, following the first injury, Nuno attended an appointment with Rodney Cassens, M.D., with Mercy Business Health Services, complaining of low back pain. (JE 3, p. 67) Dr. Cassens examined Nuno, assessed her with a lumbar strain, prescribed naproxen, Flexeril, and physical therapy, and released her to return to work with restrictions of no lifting over 10 pounds, no bending, squatting, or twisting, no repetitive pushing, pulling, or above the shoulder reaching, and to alternate sitting and standing as tolerated. (JE 3, p. 67)

Nuno returned to Dr. Cassens on December 15, 2015, reporting she had not attended physical therapy, that her pain was at zero, but had increased at times and that she had some stiffness that morning while sitting and waiting for her appointment. (JE 3, p. 68) Dr. Cassens switched Nuno from naproxen to Celebrex, continued her Flexeril, prescribed physical therapy twice per week, and imposed restrictions of no lifting over 15 pounds, to limit bending, squatting, or twisting to occasionally, and to alternate sitting and standing as tolerated. (JE 3, pp. 68-69)

On December 23, 2015, Nuno attended an appointment with Dr. Cassens reporting her pain was worse. (JE 3, p. 70) Nuno relayed she had to lift someone while she was working. (JE 3, p. 70) Given her worsening symptoms, Dr. Cassens ordered lumbar spine magnetic resonance imaging and imposed a 10-pound lifting restriction with no bending, squatting, or twisting. (JE 3, p. 70) Nuno underwent the imaging and the reviewing radiologist listed an impression of:

1. L5-S1 focal minimal right posterior lateral disc herniation with no neural contact. Subligamentous extent.
2. Right S1 superior facet producing mild right osseous femoral narrowing L5-S1.
3. L4-5 bilateral mild facet and ligament flavum hypertrophy. No stenosis.
4. Negative exam T11-T12 through L3-4.

(JE 1, p. 8)

Nuno returned to Dr. Cassens on January 6, 2016, reporting she had missed six days of work due to her pain. (JE 3, p. 71) Dr. Cassens examined Nuno and reviewed her imaging results, assessed her with a lumbar strain, small disk herniation at L5-S1 with no neural contact, and lumbar degenerative disc disease, continued her medication and restrictions, and recommended a pain clinic consult. (JE 3, p. 71)

On January 26, 2016, Nuno attended an appointment with David Fran, M.D., a pain specialist, complaining of low back pain that started after she tried to boost a patient in November 2015. (JE 1, p. 9) Nuno described her pain as a constant, sharp pain from her lower back radiating down to both buttock areas, which is worse with walking, standing, and sitting, and reported difficulty lying flat on her back secondary to pain. (JE 1, p.9) Dr. Fran examined Nuno, reviewed her imaging, assessed her with chronic low back pain, lumbar spondylosis without radiculopathy or myelopathy, bilateral lumbar facet arthropathy, and bilateral SI joint dysfunction. (JE 1, p. 10) Dr. Fran recommended bilateral lumbar facet injections and physical therapy. (JE 1, p. 10)

Nuno returned to Dr. Cassens on February 4, 2016, reporting her pain was much worse. (JE 3, p. 72) Due to the severity of her pain, Dr. Cassens increased Nuno's Flexeril, restricted her from working two days, and then released her to return to work with restrictions of no lifting over 10 pounds, no bending, squatting, twisting, no repetitive pushing, pulling, or above shoulder reaching, and to alternate sitting and standing as tolerated. (JE 3, p. 72)

On February 9, 2016, Nuno returned to Dr. Fran, reporting she had a new onset of pain. (JE 1, p. 11) Nuno relayed she was experiencing sharp pain going down from her buttock down to her left lower extremity just above the knee, and she complained of continued aching pain on both sides of her lower back. (JE 1, p. 11) Dr. Fran administered bilateral lumbar facet and bilateral SI joint injections, and documented Nuno should follow up in the pain clinic as needed. (JE 1, p. 11)

Nuno attended a follow-up appointment with Dr. Cassens on February 10, 2016, reporting her pain had improved somewhat following her injections. (JE 3, p. 73) Dr. Cassens recommended daily home stretching exercises and released her to return to work with restrictions of no lifting over 10 pounds, no bending, squatting, twisting, to limit pushing, and pulling to occasionally, no above shoulder reaching, and to alternate sitting and standing as tolerated. (JE 3, p. 73)

On February 17, 2016, Nuno returned to Dr. Cassens reporting significant improvement in her pain. (JE 3, p. 74) Dr. Cassens ordered physical therapy twice per week for strengthening exercises, discontinued her Celebrex, continued her Flexeril, and released her to return to work with restrictions of no lifting over 10 pounds, no bending, squatting, twisting, to limit pushing and pulling to occasionally, and no above shoulder reaching. (JE 3, p. 74)

Nuno attended a recheck with Dr. Cassens on February 24, 2016, reporting continued improvement. (JE 3, p. 75) Dr. Cassens assessed Nuno with a lumbar strain and spondylosis and bilateral sacroiliac joint dysfunction, improving, continued her Flexeril, recommended she commence physical therapy twice per week, and released her to return to work with restrictions of no lifting over 20 pounds, and to limit bending, squatting, twisting, pushing, pulling, and reaching to occasionally. (JE 3, p. 75)

Nuno testified she sustained a second injury on February 26, 2016, when she went to assist a patient with a transfer to the commode. (Tr., p. 40) Nuno reported she waited a long time for assistance after putting on the call light, and she took a couple of

steps to see if someone was coming and she saw “the gentleman rise up, and he was about to fall when he got up, took a step, and then beginning to fall down, I grab his gait belt, and I believe I pull his JP.” (Tr., p. 41) Nuno reported she felt something, but she was not concentrating on the pain because there was blood coming out of the man. (Tr., p. 42) Nuno testified her pain increased over the next few days and she reported the incident to her supervisor who took her to the emergency room. (Tr., p. 42) Nuno reported the pain was greater than the pain she experienced following the November 2015 injury. (Tr., p. 42)

Following the incident, Nuno presented to the emergency room reporting she was helping transfer a patient up from the commode and when the patient almost fell, she grabbed the gait belt, and she strained her lower back before assisting the patient to bed. (JE 1, p. 13) Nuno relayed as she left the room and started to walk, she had severe back pain and spasm. (JE 1, p. 13) Hospital staff assessed Nuno with a muscle strain and chronic back pain, administered Toradol and Valium, prescribed Norco, and encouraged her to follow up with the pain clinic if her symptoms did not improve. (JE 1, p. 14)

Nuno returned to the emergency room on February 29, 2016, reporting her pain had worsened since she went to the emergency room and that she had pain and tingling and numbness to her right upper thigh and groin. (JE 1, p. 15) Hospital staff ordered magnetic resonance imaging. (JE 1, p. 16) The reviewing radiologist listed an impression that the L3-L4, L4-L5, and L5-S1 levels were negative for spinal or foraminal stenosis, and that there was an “[a]rea of abnormal signal in the area of the sacral recess does not appear to involve sitting right S1 or S2 root but may compress or displace the proximal right S3 root.” (JE 1, p. 18) Hospital staff examined Nuno, assessed her with back pain with radiculopathy, chronic back pain, and abnormal magnetic resonance imaging, and referred her to Grant Shumaker, M.D., a neurosurgeon. (JE 1, p. 16)

On March 1, 2016, Nuno attended an appointment with Dr. Shumaker, complaining of low back pain. (JE 4, p. 85) Nuno reported she developed low back pain after lifting a patient in November 2015, and she developed severe low back pain after lifting a patient at work on February 26, 2016. (JE 4, p. 85) Dr. Shumaker examined Nuno, assessed her with low back pain without a clear radicular component, referred her to physical therapy and to Dr. Fran for repeat injections, and imposed restrictions of a four-hour work day with sedentary work, and to avoid repeated bending and twisting. (JE 4, p. 86)

On March 2, 2016, Nuno attended a follow-up appointment with Dr. Cassens, reporting she had reinjured her back at work while attempting to help a patient on the commode, her pain was severe, and she sought emergency medical treatment twice because of the pain. (JE 3, p. 76). Dr. Cassens noted magnetic resonance imaging did not show any acute changes and that she had been referred to Dr. Shumaker and to the pain clinic. (JE 3, p. 76) Dr. Cassens noted he would compare her prior imaging and obtain the notes from Dr. Shumaker, and restricted her from working. (JE 3, p. 76)

Nuno returned to Dr. Cassens on March 4, 2016, reporting her pain was stable. (JE 3, p. 77) Dr. Cassens referred Nuno to Dr. Shumaker for ongoing care and released her to return to work with restrictions of a four-hour work day, no lifting over five pounds, no bending, squatting, or twisting, and to alternate sitting and standing, as tolerated. (JE 3, p. 77)

On March 15, 2016, Nuno attended a follow-up appointment with Dr. Fran. (JE 1, p. 25) Nuno reported she was doing well after her injections and she was back to work and able to perform activities of daily living with minimal discomfort. (JE 1, p. 25) Nuno relayed on February 26, 2016, she had another incident with her lower back while trying to help a patient and that she had seen Dr. Shumaker, she started physical therapy, but she was unable to continue after the incident. (JE 1, p. 25) Nuno complained of pain mainly confined to her lower back. (JE 1, p. 25) Dr. Fran examined Nuno and administered additional bilateral lumbar facet and SI joint injections. (JE 1, pp. 25-26)

Nuno returned to Dr. Shumaker for a recheck on May 19, 2016. (JE 4, p. 90) Dr. Shumaker assessed Nuno with intractable back and bilateral leg pain with increasing left leg radicular distribution pain, ordered EMG/nerve conduction testing of the bilateral lower extremities, referred Nuno to a pain clinic, and restricted Nuno to medium duty work. (JE 4, p. 91)

On June 10, 2016, Nuno attended an appointment with Todd Johnson, M.D., a pain specialist with Siouland Pain Clinic, on a referral from Dr. Shumaker, complaining of low back pain with bilateral hip area pain. (JE 6, p. 141) Dr. Johnson recommended and administered a left L5-S1 transforaminal epidural steroid injection. (JE 6, p. 142)

On July 13, 2016, Eric Phillips, M.D., an orthopedic surgeon, conducted a comprehensive medical review for Mercy. (JE 7, p. 173) Dr. Phillips documented,

[t]oday, she complains of low back pain greater than bilateral leg pains. Low back pain is constant and greater on the left side. Her leg pain is generally greater on the left than right legs. It alternates areas affected. Left leg pain is generally anterior or posterior thigh and occurs about 3 times weekly and lasts about 1-2 minutes. Her right leg pain is also about 3 times weekly and lasting about 1-2 minutes; it occurs usually over her lateral thigh as cramping. She denies numbness or tingling. No weakness. Bowel and bladder function are intact. Her pain is worse with repetitive pushing a wheelchair at work. She does have some pain over the left buttock and thigh worst when sitting but this is not as painful as her low back.

(JE 7, p. 173)

Dr. Phillips examined Nuno, reviewed her medical records, listed an impression of lumbago, L4-L5 lumbar disc degeneration, lumbosacral disc degeneration, right leg pain, and left leg pain, and stated he did not believe there were any surgical solutions for her problem. (JE 7, pp. 175-78) Dr. Phillips opined he suspected her back pain was

the result of a symptomatic disc bulge at L4-L5 and L5-S1, found Nuno had reached maximum medical improvement for the November 21, 2015 work injury and she did not need any further treatment, assigned her a five percent permanent impairment rating, and recommended Nuno undergo a functional capacity evaluation to determine restrictions. (JE 7, p. 178)

On August 23, 2016, Nuno underwent a functional capacity evaluation ordered by Dr. Shumaker with Timothy Saulsbury, PT, DPT. (JE 8, p. 179) Saulsbury noted the results were borderline invalid, but he found Nuno was capable of performing work in the medium physical demand level. (JE 8, p. 179) Saulsbury found Nuno's material handling abilities are: (1) back lift to 15 pounds infrequently, 10 pounds occasionally, 10 pounds frequently, and 5 pounds constantly; (2) leg lift up to 30 pounds infrequently, 25 pounds occasionally, 20 pounds frequently, and 10 pounds constantly; (3) power lift up to 35 pounds infrequently, 30 pounds occasionally, 20 pounds frequently, and 10 pounds constantly; (4) shoulder lift up to 25 pounds infrequently, 20 pounds occasionally, 15 pounds frequently, and 5 pounds constantly; (5) overhead lift up to 20 pounds infrequently, 15 pounds occasionally, 10 pounds frequently, and 5 pounds constantly; (6) two hand carry up to 25 pounds infrequently, 20 pounds occasionally, 15 pounds frequently, and 5 pounds constantly; (7) one hand carry up to 20 pounds infrequently, 15 pounds occasionally, 10 pounds frequently, and 5 pounds constantly; (8) walking while pushing and pulling up to 25 pounds infrequently, 25 pounds occasionally, 15 pounds frequently, and 5 pounds constantly; and (9) standing while pushing and pulling up to 25 pounds infrequently, 25 pounds occasionally, 15 pounds frequently, and 5 pounds constantly. (JE 8, p. 194) Saulsbury found Nuno had nonmaterial handling abilities of infrequent bending, squatting, kneeling, and crawling, and occasional stair climbing and ladder climbing. (JE 8, p. 194) He also found she could engage in frequent standing, walking, forward reaching, overhead reaching, occasional sitting, critical balancing, and she could operate light arm and light leg controls and engage in fine hand activities. (JE 8, p. 194)

Nuno returned to Dr. Shumaker on September 20, 2016. (JE 4, p. 99) Dr. Shumaker noted the nerve conduction studies showed no evidence of radiculopathy, he personally reviewed her imaging, noting Nuno has minimal degenerative changes at the L5-S1 level, and that her functional capacity evaluation from August 23, 2016 was borderline invalid with recommendations for medium physical duty with an eight hour work day. (JE 4, p. 99) Dr. Shumaker assessed Nuno with slowly improving back pain syndrome, found she had reached maximum medical improvement, and released her to work full-time with restrictions of medium work with restrictions of no lifting over 50 pounds occasionally, 25 pounds frequently, and 10 pounds constantly. (JE 4, pp. 99-100)

After receiving Dr. Shumaker's restrictions, Nuno's manager, Jacob Trierweiler, prepared a job modifications summary for Nuno on November 1, 2016, agreeing to make modifications to her work, including allowing Nuno to use lifting equipment and devices and to request assistance, as needed. (Ex. E, pp. 9-11) Nuno testified she worked under Dr. Shumaker's restrictions. (Tr., p. 45)

On November 4, 2016, Nuno attended an appointment with Jill Bundy PA-C with Siouxland Community Health, reporting she had two back injuries in the past year, she had seen multiple specialists and had injections that only helped temporarily. (JE 2, p. 52) Nuno reported she had constant pain with intermittent shooting pain and numbness and tingling in her legs, and that her work as a CNA exacerbated her pain, but that she could not afford to take time off work. (JE 2, p. 52) Bundy examined Nuno, assessed her with back pain, offered her a day off work to rest, which she declined, discontinued her hydrocodone, continued her naproxen and gabapentin, and prescribed cyclobenzaprine HCL and Aleve. (JE 2, p. 53)

Nuno attended a follow-up appointment with Bundy on December 9, 2016, regarding her low back pain. (JE 2, p. 55) Nuno relayed she was unable to work the day before due to her pain, she cannot always get through her daily activities, and that the pain shoots to her legs. (JE 2, p. 56) Bundy examined Nuno, assessed her with low back pain, referred her back to orthopedics, recommended a pain management referral, and encouraged stretching. (JE 2, p. 57)

Nuno testified she performed her regular duties on the resource team after she returned to work on or about September 20, 2016. (Tr., p. 91) Nuno worked on the medical and postsurgery floor, urology floor, and the rehab floor. (Tr., pp. 92-93) Nuno answered call lights, changed patients that were incontinent, got patients up and took them to the bathroom, took vital signs, and bathed patients. (Tr., p. 93) She also performed wound care, one-on-ones, and she worked the floor. (Tr., p. 93)

Nuno testified she sustained a third injury while working for Mercy on January 4, 2017. (Tr., p. 45) Nuno reported she was providing one-on-one care to a patient who was wearing a boot who had behavior problems and wanted to get out of bed. (Tr., p. 46) Nuno relayed the man put his legs on the side rails of the bed and Nuno tried to block him. (Tr., p. 47) Nuno testified when she walked out of the room she felt a sharp, shooting pain down her leg, but she came back and stayed with the man until she could not tolerate the pain. (Tr., p. 47)

Nuno went to the emergency room, reporting she had tried to help get a patient who was crawling over his bedrail back into bed at work and developed pain in her lower back, more on the left, that was worsening, and radiating into her left hip. (JE 1, p. 28) Hospital staff examined Nuno, assessed her with an acute lumbosacral strain, prescribed a Medrol Dosepak, Norco, and Flexeril, recommended she follow up with occupational medicine, and restricted her from working. (JE 1, p. 29)

Nuno returned to Siouxland Community Health on January 10, 2017, complaining she could not sit because her pain was so severe. (JE 2, p. 58) David Faldmo, PA-C examined her, noted she had been seen in the emergency room regarding her pain, her pain flares up when she lifts something heavy, noted she had not followed up with an occupational medicine provider, and she reported she was frustrated with her recurring problem. (JE 2, p. 60) Faldmo assessed Nuno with low back pain and continued her medication. (JE 2, p. 61)

On January 13, 2017, Nuno attended an appointment with Dr. Cassens complaining of severe low back pain after assisting a patient who was trying to get out of bed on January 4, 2017. (JE 3, p. 79) Dr. Cassens assessed Nuno with an acute lumbar strain, continued her medications, ordered physical therapy twice per week, and restricted her from working. (JE 3, p. 79)

Nuno returned to Dr. Cassens for a recheck on January 17, 2017, reporting her pain had not changed significantly. (JE 3, p. 80) Dr. Cassens ordered lumbar spine magnetic resonance imaging and restricted her from working. (JE 3, p. 80) Nuno underwent lumbar spine magnetic resonance imaging and the reviewing radiologist listed an impression of:

[t]here is normal alignment of the lumbar spine. The vertebral body heights are preserved. The distal thoracic spinal cord and conus medullaris appear grossly unremarkable. The conus medullaris terminates at T12-L1 level. No fracture or dislocation in the lumbar spine, no spondylolisthesis, the bone marrow signal is unremarkable.

L1-L2 through L3-L4 levels are unremarkable.

L4-L5: Diffuse disc bulge associated with moderate bilateral facet joint hypertrophy contribute to minimal narrowing of the spinal canal and both neural foramina.

L5-S1: Mild disc bulge associated with mild bilateral facet joint hypertrophy contribute to mild narrowing of both neural foramina. The spinal canal is unremarkable.

(JE 1, p. 30)

On January 19, 2017, Nuno attended a recheck with Dr. Cassens, reporting her pain had decreased. (JE 3, p. 81) Dr. Cassens noted the findings on the imaging from January 18, 2017, were consistent with the findings from December 2015 and February 2016. (JE 3, p.81) Dr. Cassens assessed Nuno with a lumbar strain and exacerbation of preexisting inferior lumbar degenerative disc disease, ordered physical therapy three times per week, prescribed medication, and restricted her from working. (JE 3, p. 81)

Nuno attended a follow-up appointment with Dr. Cassens on January 26, 2017, reporting her pain had improved with the addition of tizanidine, and that she had not attended physical therapy due to transportation issues. (JE 3, p. 82) Dr. Cassens continued her medication, recommended she attend physical therapy three times per week, and restricted Nuno from working. (JE 3, p. 82)

On January 27, 2017, Sunil Bansal, M.D., an occupational medicine physician, conducted an independent medical examination for Nuno and issued his report on April 19, 2017. (Ex. C) Dr. Bansal examined Nuno and reviewed her medical records. (Ex. C) Dr. Bansal diagnosed Nuno with an aggravation of lumbar spondylosis with L5-S1 herniation and aggravation of lumbar facet arthropathy. (Ex. C, p. 12) Dr. Bansal found Nuno had “two work-related injuries on November 23, 2015 and February 26, 2016 that

aggravated her lumbar spondylosis resulting in an L5-S1 disc herniation, as well as aggravating her lumbar facet arthropathy. Both mechanisms were fairly similar and involved supporting/transferring heavy weight.” (Ex. C, p. 12) Dr. Bansal noted the literature supports that using the back muscles to lift instead of the legs can cause a herniated disc and twisting while lifting can make the spine vulnerable, “lifting large, heavy objects can lead to a herniated disc, as can twisting and turning while lifting,” and “[a]n acute mechanical load such as that caused by heavy or awkward lifting would place tremendous pressure to the L5-S1 region, easily capable of aggravating underlying spondylosis.” (Ex. C, pp. 12-13)

Dr. Bansal found Nuno reached maximum medical improvement on January 27, 2017. (Ex. C, p. 13) Using Table 15-3 of the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) (“AMA Guides”), Dr. Bansal found Nuno met the criteria for a DRE Category II impairment and some from Category III, noting “[s]he has radicular complaints, guarding, and loss of range of motion. She has an MRI showing considerable disc pathology at L5-S1, and she has continued pain,” and he assigned her an eight percent whole person impairment. (Ex. C, p. 13) Dr. Bansal disagreed that the functional capacity results imply any malingering, secondary gain, or lack of sincerity of effort, and assigned Nuno restrictions of no lifting over 25 pounds occasionally, over 15 pounds frequently, no frequent bending or twisting, and to be able to sit, stand, and walk, as tolerated, noting Nuno should avoid sitting for more than 60 minutes, standing for more than 30 minutes, and walking for more than 30 minutes at a time. (Ex. C, p. 15)

On February 21, 2017, Nuno returned to Dr. Shumaker complaining of back and left leg pain. (JE 4, p. 105) Nuno relayed on January 4, 2017, she was helping restrain a patient at work and noted a marked increase in her back pain and that she developed constant left leg pain. (JE 4, p. 105) Nuno reported she had severe back pain with diffuse radiation into her left leg that is worse with any movement. (JE 4, p. 105) Dr. Shumaker personally reviewed magnetic resonance imaging from January 18, 2017, noted there has been a slight progression of disc bulging at the L4-L5 level compared to the scan from February 29, 2016, and he assessed Nuno with bilateral low back pain without sciatica. (JE 4, p. 106) Dr. Shumaker noted when he examined Nuno after the November 2015 and February 2016 incidents, she had a “minimal disc bulge at S1 felt not to be the etiology of her pain syndrome,” and with the third incident from January 4, 2017, “[t]here has been some slight disc bulging at the 4-5 level. This is again felt to be incidental in nature. There is no change at the 5-1 level. There is no evidence of lumbar instability. Patient did have prior EMG on May 27, 2016 without clear-cut evidence of radiculopathy.” (JE 4, p. 106) Dr. Shumaker recommended repeat nerve conduction studies. (JE 4, p. 106)

On March 14, 2017, Nuno returned to work at Mercy. (Tr., p. 96) Nuno had been told to return to work the day before, but she did not return due to a snowstorm. (Tr., p. 96) When she returned to work Nuno assisted patients on 5 Central, walking patients to their appropriate destinations in the hospital. (Tr., p. 96) Nuno was earning

\$12.69 per hour, plus shift differential and an additional five percent on the weekend. (Tr., p. 97)

On March 15, 2017, Nuno went to the emergency room reporting she had gone to physical therapy that day and was not having back pain, and then she developed back pain and weakness in her legs and pain radiating down her left leg. (JE 1, pp. 35-36) Hospital staff assessed Nuno with acute exacerbation of lumbosacral pain with known history of chronic back pain and disc bulging at L4-L5, and L5-S1, noted she was taking meloxicam, tizanidine, and hydrocodone, prescribed a Medrol Dosepak and gabapentin, and recommended a referral to Dr. Shumaker or to the pain clinic. (JE 1, p. 37)

On April 14, 2017, Nuno attended an appointment with Arthur Pepper, CNP, with Sanford Health Vermillion Clinic, complaining of lower back pain that started about a year ago. (JE 5, p. 119) Nuno reported she had attended physical therapy in the past, but she believed physical therapy aggravated her symptoms. (JE 5, p. 119) Pepper examined Nuno, assessed her with chronic bilateral thoracic back pain and chronic bilateral low back pain with left-sided sciatica, administered a Toradol injection, switched her from meloxicam to Indocin, and continued her Zanaflex. (JE 5, pp. 119-20)

Nuno underwent a second functional capacity evaluation with Saulsbury on May 23, 2017, ordered by Dr. Cassens. (JE 8, p. 195) Saulsbury noted the results of the test were invalid. (JE 8, p. 195)

Nuno testified she believed she hurt her back when doing a back lift during the functional capacity evaluation. (Tr., p. 98) Nuno acknowledged she did not tell Saulsbury that she had been injured during the evaluation. (Tr., p. 99) Nuno went back to Mercy for about 20 minutes and told Carol Benjamin she had hurt her back and she could not work any longer. (Tr., pp. 99-100) Benjamin referred Nuno back to Dr. Cassens. (Tr., p. 100) May 23, 2017, is the last day Nuno worked at the hospital. (Tr., p. 100)

Nuno attended a follow-up appointment with Pepper on May 25, 2017, complaining of continued lumbar back and left leg pain. (JE 5, p. 121) Nuno relayed she had some increase in left foot weakness at times when the pain is most intense. (JE 5, p. 121) Pepper documented Nuno reported the Toradol injection reduced her pain, but only for a short time. (JE 5, p. 121) Nuno stated she was frustrated that her pain seemed to be getting worse, rather than improving, and admitted she was not taking her NSAIDs or Zanaflex on a daily basis, only when the pain became unbearable. (JE 5, p. 121) Pepper assessed Nuno with chronic bilateral low back pain with left-sided sciatica, administered a Toradol injection, and referred her to neurosurgery. (JE 5, p. 122)

On May 31, 2017, Dr. Cassens issued a note stating he had placed Nuno at maximum medical improvement on May 17, 2017, and he had ordered a functional capacity evaluation, which was conducted on May 23, 2017, and was invalid. (JE 3, p. 83) He also noted Nuno had undergone a valid functional capacity evaluation that had

been ordered by Dr. Shumaker and he had imposed permanent restrictions. (JE 3, p. 83) Based on the invalid functional capacity evaluation, Dr. Cassens imposed no additional restrictions beyond those imposed by Dr. Shumaker and released Nuno from treatment. (JE 3, p. 83)

Nuno returned to Pepper on June 1, 2017, complaining of continued back pain and throbbing pain in her left leg. (JE 5, p. 123) Nuno reported the Toradol injection helped her pain significantly, but only provided short-time relief. (JE 5, p. 123) Pepper administered a Toradol injection, prescribed a Medrol Dosepak, and referred Nuno to neurosurgery. (JE 5, pp. 123-24) Pepper restricted Nuno from working until she saw neurosurgery. (JE 5, p. 130)

Nuno attended an appointment with Dr. Johnson on July 21, 2017, complaining of back pain and left radicular symptoms in her foot. (JE 6, p. 144) Dr. Johnson noted she underwent a left L5 selective nerve root block without benefit. (JE 6, p. 144) Dr. Johnson assessed Nuno with lumbar neuritis, prescribed Lyrica, and recommended an epidural steroid injection at L5-S1, which he administered on August 17, 2017. (JE 6, pp. 145-46)

Nuno testified after the January 2017 injury, it was difficult for her to drive because it was difficult for her to sit up straight and she had to lean forward on her right due to tingling, numbing, and burning feelings. (Tr., p. 49) Nuno requested FMLA paperwork from Mercy, which she knew needed to be submitted by the end of June 2017. (Tr., p. 52) Nuno did not submit the paperwork by the end of June and on July 6, 2017, Mercy terminated Nuno's employment, noting she had received a last and final written warning for attendance and a no call, no show on April 14, 2017. (Ex. E, p. 1)

On July 6, 2017, Nuno attended an appointment with Heather Kleeman, D.O., a family medicine provider with Sanford Health Vermillion Clinic, complaining of severe back pain localized along the midline/left side, which radiates down her left leg. (JE 5, p. 126) Nuno relayed her symptom onset has been waxing and waning for a period of two years, described the pain as stabbing, shooting, and sharp, and reported her symptoms had become worse over time. (JE 5, p. 126) Nuno requested Dr. Kleeman fill out FMLA paperwork for her and stated she did not understand why Sanford neurosurgery would not see her and Dr. Kleeman discussed her imaging and nerve conduction studies do not show any nerve impingement or problems and that there is nothing that can be done surgically. (JE 5, p. 126) Dr. Kleeman assessed Nuno with chronic radicular low back pain, prescribed tramadol and gabapentin, and referred her to pain management. (JE 5, p. 127)

On November 30, 2017, Nuno attended an appointment with Greg Alvine, M.D., an orthopedic surgeon with Core Orthopedics, complaining of low back and left leg pain. (JE 9, p. 209) Dr. Alvine examined Nuno, diagnosed her with anesthesia of skin, weakness, low back pain, and lumbar region radiculopathy, requested her medical records, ordered new magnetic resonance imaging, and prescribed a Medrol Dosepak. (JE 9, p. 210) The reviewing radiologist listed a conclusion of:

1. No focal disc herniation, spinal canal stenosis or high-grade foraminal narrowing at any level, specifically along the left.
2. Marked facet arthropathy at L4-L5, left greater than right, slightly contacts the exiting left L4 nerve as it exits the foramen. Findings may contribute to the patient's left lower extremity radiculopathy symptoms.
3. Multilevel facet arthropathy with varying degrees of interfacet edema, likely contribute to the patient's overall back pain.

(JE 9, p. 213) Dr. Alvine reviewed the imaging, determined there was not a surgical option for Nuno, opined "I do think if push comes to shove, that the 4-5 motion segment is probably contributing in some fashion with lateral recess stenosis at 4-5 and the fluid in the facet joints. Again, I am just not convinced that surgery is going to help her," and recommended a referral to Thomas Ripperda, M.D. for recommendations on other conservative measures. (JE 9, p. 214)

On October 18, 2018, Nuno returned to Dr. Shumaker, reporting four total work exposures that aggravated her pain symptoms. (JE 4, p. 107) Dr. Shumaker noted he did not have anything to offer in terms of surgical intervention and referred Nuno for pain management. (JE 4, p. 108)

Dr. Shumaker referred Nuno to Dustin Sorenson, M.D., with Siouxland Pain Clinic for a consultation for a spinal cord stimulator. (JE 6, p. 148) Nuno reported she had pain radiating down to the front, the side, and the back that radiates into the top of her foot. (JE 6, p. 148) Dr. Sorenson recommended Nuno proceed with a spinal cord stimulator trial consultation, noting she has a lot of pain in her low back as well as her left leg, which covers the L4 and L5 dermatomes. (JE 6, p. 149)

Dr. Sorenson inserted a trial stimulator on February 12, 2019. (JE 6, pp. 168-69; JE 11, p. 228) A week later Nuno returned to Dr. Sorenson reporting she was doing really well with walking and reported 55 or 65 percent improvement, which she was happy with, but reported difficulties with exercising. (JE 6, p. 170) Dr. Sorenson recommended Nuno proceed with a spinal cord stimulator with Dr. Shumaker and noted she would have to work her way back into exercise because she is deconditioned. (JE 6, p. 172)

On April 2, 2019, Nuno returned to Dr. Shumaker regarding her low back pain. (JE 4, p. 109) Dr. Shumaker examined Nuno, assessed her with bilateral low back pain with bilateral sciatica, unspecified chronicity, and recommended a spinal cord stimulator. (JE 4, p. 110)

Nuno returned to Dr. Shumaker on June 6, 2019, after having a spinal cord stimulator placed by Dr. Shumaker on May 22, 2019. (JE 4, p. 113; JE 11, p. 229) Dr. Shumaker noted Nuno was doing fairly well overall, and that she was a little stiff and sore from the surgical sites. (JE 4, p. 113) During a return visit on June 13, 2019, Dr. Shumaker noted Nuno was doing well and he recommended she follow-up with him, as

needed. (JE 4, p. 116) Nuno requested an appointment with Dr. Shumaker on October 8, 2019, and Dr. Shumaker's nurse noted Dr. Shumaker did not want her to be scheduled to see him. (JE 4, pp. 117-18)

Dr. Bansal performed a second independent medical examination for Nuno and issued his report on July 23, 2020. (Ex. 1) Dr. Bansal reviewed Nuno's medical records and examined her. (Ex. 1) Dr. Bansal noted since he had last seen Nuno, she had sustained an additional injury on May 23, 2017, during a functional capacity evaluation. (Ex. 1, p. 10) Dr. Bansal diagnosed Nuno with an aggravation of lumbar spondylosis with lumbar facet arthropathy and status post epidural spinal cord stimulator. (Ex. 1, p. 12) Dr. Bansal found she had sustained an additional injury on May 23, 2017, but his report does not address causation or provide any analysis concerning causation. (Ex. 1, p. 12)

Dr. Bansal agreed with Dr. Shumaker that Nuno reached maximum medical improvement on June 13, 2019. (Ex. 1, p. 12) Using Table 15-3 of the AMA Guides, Dr. Bansal found Nuno falls into DRE Lumbar Category III, noting she has radiculopathy that has resulted in the placement of a spinal cord stimulator, and she has continued pain, and he assigned her an 11 percent impairment to the body as a whole. (Ex. 1, p. 12) Dr. Bansal assigned permanent restrictions of no lifting over 20 pounds occasionally or over 10 pounds frequently, no frequent bending or twisting, and to avoid sitting for more than 30 minutes, no standing over 30 minutes, no walking more than 30 minutes at a time, and to avoid multiple stairs. (Ex. 1, p.13)

After her termination from Mercy, Nuno worked with a vocational rehabilitation counselor from South Dakota. (Tr., p. 67) Nuno testified she has applied for a bookkeeper position, a teaching assistant position, a position with MCI, and for different positions with Allied Solutions. (Tr., pp. 64-65)

Nuno found a position at the Holiday Inn Express on her own. (Tr., p. 68) On December 9, 2019, Holiday Inn Express in Dakota Dunes hired Nuno as a part-time night auditor, working 20 to 24 hours per week at \$12.00 per hour. (Ex. 8, p. 45; Tr., pp. 67, 69, 109-10) Nuno processed guests checking in and out of the hotel, started breakfast, tended to the garbage, picked up linens and towels from the pool, and stocked soda. (Ex. 8, p. 45; Tr., pp. 69, 110-11) During cross-examination, Nuno admitted the position required her to "bend over a lot" because the printers were close to the floor. (Tr., pp. 113-14) Nuno also had to stand a lot in the job. (Tr., p. 114)

Nuno reported she had difficulty working for the Holiday Inn Express if she stood too long, when bending over to put things away, while lifting the coffee pots and ketchup trays, and while carrying a basket with wet towels to a cart. (Tr., pp. 70-72) Nuno did laundry and reported she would get stiff when transferring clothes into the dryer and washer. (Tr., pp. 72-73) Nuno testified she quit in April 2020 because she could not take the excruciating pain anymore. (Tr., p. 73) After she quit Nuno worked with her vocational rehabilitation counselor again, but reported she has not been able to find employment since she left the Holiday Inn. (Tr., pp. 73-74)

On May 7, 2020, Dr. Shumaker signed a letter from Mercy's counsel agreeing to the following written statements:

. . . .Based upon your evaluation and treatment of Ms. Nuno over the past four years I understand that you hold the following opinions within a reasonable degree of medical certainty.

1. It is your opinion that Ms. Nuno did not sustain any permanent injury to her low back or spine, nor did she sustain any permanent aggravation of a preexisting condition of her spine as a result of her work activities and alleged work injuries at Mercy Medical Center – Sioux City.
2. You placed a spinal cord stimulator on May 30, 2019. It is your opinion medical care associated with the placement of the spinal cord stimulator is unrelated to her alleged work injuries.

(Ex. F, pp. 1-2)

On July 31, 2020, Saulsbury sent a letter to counsel for Mercy, answering questions posed by Mercy's counsel, as follows:

1. Did Ms. Nuno sustain any injury to her back as a result of the May 23, 2017 FCE?

No. Please refer to the Static Strength Data Report series #1 Back Lift. Ms. Nuno gradually generated strength increases throughout the duration of the test peaking at just under 4 seconds, and maintaining that force to the conclusion of the test at 5 seconds. If she was injured during that test her force would have dropped off dramatically at the time of the injury. As an example: If a person is running a race and they strain a hamstring muscle half way through, they do not maintain, or increase their speed. The same is true if a person is lifting a weight and strains their rotator cuff. They do not lift more weight. Their ability to generate force drops off dramatically.

2. Did Ms. Nuno Report any work-related injury to you?

No. She did not report any injury during or after her FCE

3. Please, explain the "back lift" test described by Ms. Nuno, and how she performed that test on May 23, 2107

The back lift in this case is a static test, meaning that force is generated in forward bent posture but there is no movement. The test is for 5 seconds. Prior to the test strict and detailed instructions are given to the person. They are told to generate strength to the best of their ability. No increases in pain are to be felt. If the person does feel an increase in pain they are to stop immediately. The protocol calls for 3 repetitions. In the case of

someone who's [*sic*] injury was to their back it is at the administrator's discretion as to the number of repetition. It is my policy, that when the injury was to a persons [*sic*] back, only one repetition is performed. Ms. Nuno's test is pretty normal. The force generation is a little slow, but overall it is an unremarkable test.

4. Overall, how do you describe Ms. Nuno's effort during the May 23, 2017 FCE?

Her effort was poor with numerous failed validity criteria. In addition, symptom exaggeration and non-organic pain behaviors are present.

(Ex. G, pp. 3-4)

On September 22, 2020, John Kuhnlein, D.O., an occupational medicine physician, conducted an independent medical examination of Nuno for Mercy and issued his report on November 16, 2020. (Ex. D) Dr. Kuhnlein examined Nuno and reviewed her medical records. (Ex. D)

Dr. Kuhnlein opined if the history is accurate, Nuno "sustained a lumbar strain and sacroiliitis in the context of pre-existing lumbar degenerative disc disease," as a result of the November 21, 2015 injury. (Ex. D, p. 13) Using the AMA Guides Dr. Kuhnlein assigned no permanent impairment for the injury because Nuno had not reached maximum medical improvement by the time of the February 26, 2016 injury, noting she had three additional back injuries after the injury and it is not known if she needed permanent restrictions or whether she needed medical care due to the injury, noting each injury might have contributed to the need for treatment and restrictions. (Ex. D, pp. 13-14)

With respect to the February 26, 2016 injury, Dr. Kuhnlein opined if the history is accurate, Nuno sustained an aggravation of her pre-existing chronic musculoskeletal low back pain, noting "[i]t is difficult to tell if this was a temporary or permanent condition, based on the nature of the records," and noting psychosocial factors may have influenced her physical complaints that would not be physiologically related to the back injury, citing to records from Dr. Phillips and from the August 23, 2016 functional capacity evaluation. (Ex. D, p. 14) Dr. Kuhnlein opined, "as before, there was no objective evidence of radiculopathy other than her complaints. As a result, giving her the benefit of the doubt, I believe that the diagnosis of an aggravation of the pre-existing nonradicular low back condition is appropriate, with the understanding that the history Ms. Nuno presents is accurate regarding the mechanism of injury arising in and out of the course of her work activities." (Ex. D, p. 14) Dr. Kuhnlein found Nuno reached maximum medical improvement for the first and second injuries on or about September 20, 2016, and using reasonably demonstrable objective findings and the AMA Guides, he deferred to Dr. Shumaker's impairment rating and to his assigned restrictions because Dr. Kuhnlein saw her after two subsequent alleged injuries. (Ex. D, pp. 14-15)

For the January 4, 2017, injury, Dr. Kuhnlein opined, if the history is accurate, Nuno sustained an acute lumbar strain in the context of the previous chronic low back

pain, noting her magnetic resonance imaging from January 2017 was not significantly different from the September 15, 2016 imaging a few months before and electromyography did not show clear-cut evidence of radiculopathy, finding no objective evidence to explain Nuno's leg complaints or a worsening of her lumbar condition due to the January 2017 injury, other than her statements, concluding she only sustained a temporary change in her chronic condition. (Ex. D, p. 15)

Dr. Kuhnlein placed Nuno at maximum medical improvement on June 6, 2019, after the spinal cord stimulator was placed, and stated "I am not able to assign impairment. Impairment ratings have to be based on the reasonably demonstrable objective findings, and, unfortunately, in this case, Ms. Nuno's physical examination had multiple nonphysiologic findings that made it impossible to objectively assign impairment, even with the spinal cord stimulator placement." (Ex. D, pp. 15-16) Dr. Kuhnlein agreed with Dr. Cassens' note from May 31, 2017, that Dr. Shumaker's previous restrictions would be appropriate and that she did not need any additional restrictions for the January 2017 injury, noting her functional abilities should have improved with the spinal cord stimulator, as it should have decreased her pain and increased her function, but it has not done so. (Ex. D, p. 16) Dr. Kuhnlein recommended core strengthening exercises, battery replacements and maintenance of the stimulator, and that she needs to exercise, noting Nuno self-limits her activities more than she should and that she should try to work through her discomfort, which would improve her endurance and make her less symptomatic. (Ex. D, p. 16)

For the May 23, 2017, alleged work injury, Dr. Kuhnlein opined

[i]t cannot be proven that Ms. Nuno sustained an injury during the May 23, 2017, functional capacity evaluation. During my evaluation, she stated that her pain significantly worsened during the test, but she did not report it to the therapist. In her deposition, she stated that she had horrible, stabbing back pain to the point that she could not walk normal but also states that she did not report the pain to the therapist, alleging that he could see she was in pain (see page 49). In his July 31, 2020, correspondence, Mr. Saulsbury noted that she did not report any injury during or after the FCE. He also described factors in the functional capacity evaluation that he believes shows she was not injured, to which I defer the reader.

Given her previous alleged incidents, a reasonable person who experienced such a change in her symptoms to the point she could not walk normally and already had multiple problems would reasonably report a change in symptoms, but she did not do so. I cannot state that she sustained an injury during the functional capacity evaluation.

(Ex. D, p. 16)

Nuno testified during the hearing after sitting she was feeling irritated because her muscles constrict and get stiff and hard. (Tr., p. 80) She relayed she had to stand up because her right leg is numb and tingling. (Tr., p. 80) Typically she experiences

tingling, numbness, and burning pain in her left leg and sharp pain in her hip and waist area on the left, but sometimes she has pain across her entire lower back and on the right side. (Tr., p. 80)

Nuno reported she could not return to her past employment as a teaching assistant with Dr. Shumaker's restrictions because the position required a lot of leaning forward and squatting with the kids and she is not fast on her feet or able to walk like she used to. (Tr., pp. 83-84) She testified she did not believe she could return to her past employment as a billing clerk because she would have to file, stand, sit, and squat and move back and forth which would aggravate her pain. (Tr., pp. 84-86) Nuno reported she does not believe she could return to work as a collection representative because the job involved too much sitting, but if she were allowed to alternate sitting and standing, she could do the job. (Tr., p. 87)

At the time of the hearing Nuno was not working with a vocational rehabilitation counselor. (Tr., p. 87) Nuno reported the counselor told her she would not be able to find her a job given Dr. Bansal's recommended restrictions. (Tr., p. 88)

Nuno has received medical assistance from South Dakota. (Ex. 10) The State of South Dakota has filed a claim for subrogation totaling \$86,382.33. (Ex. 10)

CONCLUSIONS OF LAW

I. Applicable Law

This case involves the issues of nature and extent of disability, recovery of the cost of an independent medical examination, and recovery of costs under Iowa Code sections 85.34, 85.39, and 86.40. 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 alleged injuries occurring before July 1, 2017, therefore, the provisions of the new statute involving extent of disability and recovery of the cost of an independent medical examination under Iowa Code sections 85.34 and 85.39 do not 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 10 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.

II. Nature and Extent of the Alleged Injuries

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 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 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).

“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).

Four physicians have provided causation opinions in this case, Dr. Shumaker, a treating neurosurgeon, Dr. Phillips, an orthopedic surgeon who performed an independent medical examination for Mercy in 2016, Dr. Bansal, an occupational medicine physician who conducted independent medical examinations for Nuno in 2017 and 2020, and Dr. Kuhnlein, an occupational medicine physician who conducted an independent medical examination for Mercy in 2020.

A. November 2015 and February 2016 Injuries

Dr. Phillips examined Nuno in 2016 and diagnosed her with lumbago, L4-L5 lumbar disc degeneration, lumbosacral disc degeneration, right leg pain, and left leg pain. (JE 7) Dr. Phillips found Nuno did not need any additional treatment for the November 2015 injury and assigned Nuno a 5 percent permanent impairment rating. (JE 7, p. 178) Dr. Phillips's report does not reference which version of the AMA Guides he was using. He did not address the 2016 injury. Based on these failures, I do not find his opinion persuasive.

Following a functional capacity evaluation, Nuno returned to Dr. Shumaker on September 20, 2016. (JE 4, p. 99) Dr. Shumaker assessed Nuno with slowly improving back pain syndrome, found she had reached maximum medical improvement, and released her to work full-time with restrictions of medium work with restrictions of no lifting over 50 pounds occasionally, 25 pounds frequently, and 10 pounds constantly. (JE 4, pp. 99-100) Dr. Shumaker noted the nerve conduction studies showed no evidence of radiculopathy, he personally reviewed Nuno's magnetic resonance imaging

and found Nuno had minimal degenerative changes at the L5-S1 level. (JE 4, p. 99) Dr. Shumaker did not assign a permanent impairment rating or offer a causation opinion at that time.

Dr. Bansal conducted an independent medical examination for Nuno in 2017, and found the November 2015 and February 2016 work injuries aggravated her lumbar spondylosis, resulting in an L5-S1 disc herniation, and aggravated her lumbar facet arthropathy, caused by supporting or transferring heavy weight. (Ex. C, p. 12) Dr. Bansal assigned Nuno an 8 percent permanent impairment and assigned restrictions of no lifting over 25 pounds occasionally, over 15 pounds frequently, no frequent bending or twisting, and to be able to sit, stand, and walk, as tolerated, noting Nuno should avoid sitting for more than 60 minutes, standing for more than 30 minutes, and walking for more than 30 minutes at a time. (Ex. C, pp. 13-15)

With respect to the November 2015 injury, Dr. Kuhnlein found if Nuno's history is accurate, she "sustained a lumbar strain and sacroiliitis in the context of pre-existing lumbar degenerative disc disease." (Ex. D, p. 13) He did not assign a permanent impairment for the injury because Nuno had not reached maximum medical improvement at the time of the February 2016 injury. (Ex. D, p. 13)

With respect to the February 2016 injury, Dr. Kuhnlein opined if Nuno's history is accurate, Nuno sustained an aggravation of her pre-existing chronic musculoskeletal low back pain. (Ex. D, p. 14) He then opined, "[i]t is difficult to tell if this was a temporary or permanent condition, based on the nature of the records," noting psychosocial factors may have influenced her physical complaints that would not be physiologically related to the back injury, citing to records from Dr. Phillips and from the August 23, 2016 functional capacity evaluation. (Ex. D, p. 14) Dr. Kuhnlein found, "as before, there was no objective evidence of radiculopathy other than her complaints. As a result, giving her the benefit of the doubt, I believe that the diagnosis of an aggravation of the pre-existing nonradicular low back condition is appropriate, with the understanding that the history Ms. Nuno presents is accurate regarding the mechanism of injury arising in and out of the course of her work activities." (Ex. D, p. 14) Dr. Kuhnlein found Nuno reached maximum medical improvement on or about September 20, 2016 for the first and second injuries, and he deferred to Dr. Shumaker's impairment rating and assigned restrictions, given Dr. Kuhnlein examined Nuno after the alleged third and fourth injuries. (Ex. D, pp. 14-15)

On May 7, 2020, Dr. Shumaker later signed a letter prepared by Mercy's counsel agreeing it is his opinion that Nuno did not sustain any permanent impairment to her low back or spine or sustain any permanent aggravation of a preexisting condition of her spine as a result of her work activities at Mercy. (Ex. F) Dr. Shumaker did not provide any written comments or explain why he had previously assigned permanent work restrictions in 2016 following the November 2015 and February 2016 injuries. (Ex. F)

I find Dr. Bansal's opinion to be the most persuasive with respect to the November 2015 and February 2016 injuries, as supported by Dr. Phillips's opinion. Both Dr. Bansal and Dr. Phillips found Nuno sustained a permanent impairment caused

by the work injury. Dr. Kuhnlein stated he could not determine whether Nuno sustained a permanent impairment or not and deferred to Dr. Shumaker. Dr. Shumaker originally assigned permanent restrictions following the November 2015 and February 2016 work injuries, which Mercy followed, but later opined he did not believe she sustained a permanent impairment to her low back or spine or sustained any permanent aggravation of a preexisting condition of her spine as a result of her work activities at Mercy. Dr. Shumaker did not explain why he had assigned permanent work restrictions or provide any opinions on the cause of Nuno's conditions. I do not find his opinion persuasive. I find Nuno has met her burden of proof that she sustained injuries, arising out of and in the course of her employment in November 2015 and February 2016, which aggravated her preexisting lumbar spine conditions. I also find Dr. Bansal's restrictions from his 2017 report to be Nuno's permanent restrictions.

At the time of the hearing Nuno was 42. While Nuno did not graduate from high school, she later completed a GED and one semester of college. I believe Nuno is capable of retraining. Nuno is fluent in Spanish and English. I also believe she could use her language skills to find additional work consistent with her restrictions.

Nuno has experience working in bookkeeping, a sedentary job. She also has experience working as a CNA, school paraprofessional, as a billing clerk, as a sales associate for a convenience store, as a collection representative, and night auditor. Given Dr. Bansal's permanent restrictions, I believe Nuno would not be able to return to working as a CNA or school paraprofessional. I believe Nuno is capable of returning to work as a bookkeeper or auditor, consistent with her restrictions. Considering all of the factors of industrial disability, I find Nuno has sustained a combined 30 percent industrial disability with respect to the November 2015 and February 2016 work injuries, entitling her to 150 weeks of permanent partial disability benefits at the rate of \$359.01 per week. Nuno returned to work on February 27, 2016. I find permanent partial disability benefits commenced on February 27, 2016, when she returned to work. Evenson v. Winnebago Indus., Inc., 881 N.W.2d 360, 372-74 (Iowa 2016) (under an earlier version of the statute, the healing period lasts until the claimant has returned to work, has reached maximum medical improvement, or until the claimant is medically capable of returning to substantially similar employment, "whichever occurs first").

B. January 2017 Injury

Nuno saw Dr. Bansal on January 27, 2017, for an independent medical examination. During his examination, Dr. Bansal mentioned the January 4, 2017 injury, but opined Nuno had reached maximum medical improvement for her previous injuries. Dr. Bansal did not find Nuno sustained an injury on January 4, 2017, caused by her employment. (Ex. C) Nuno returned to Dr. Bansal for a second independent medical examination in 2020. (Ex. 1) Dr. Bansal did not find Nuno had sustained an injury on January 4, 2017, caused by her employment in either report. (Exs. 1, C) No other physician has opined Nuno sustained a permanent impairment caused by the January 4, 2017, injury. No physician has assigned permanent restrictions caused by the January 4, 2017 injury. I find Nuno has not met her burden of proof she sustained a permanent injury on January 4, 2017, arising out of the course of her employment with

Mercy. Given this finding, the remaining issues relating to the alleged January 4, 2017, injury are moot.

C. May 2017 Injury

Dr. Kuhnlein found it cannot be proven Nuno sustained an injury during the May 23, 2017, functional capacity evaluation. (Ex. D, p. 16) During his evaluation, Nuno stated her pain significantly worsened during the functional capacity evaluation, but she did not report it to the therapist. (Ex. D, p. 16) In a letter dated July 31, 2020, Saulsbury also reported Nuno did not report any injury during her functional capacity evaluation, and described factors he opined showed she was not injured. (Ex. G, pp. 3-4)

In his 2020 report, Dr. Bansal diagnosed Nuno with an aggravation of lumbar spondylosis with lumbar facet arthropathy and status post of an epidural spinal cord stimulator, and assigned an 11 percent permanent impairment rating. (Ex. 1, pp. 12-13) I do not find his opinion persuasive. In his report, Dr. Bansal found Nuno sustained an additional injury, but he did not address causation or provide any analysis concerning causation. Nuno did not request Dr. Bansal provide a supplement opinion after receiving Saulsbury's opinion letter, or Dr. Kuhnlein's report. Nuno worked in a hospital as a CNA and she had reported other injuries in the past, but she did not do so during the functional capacity evaluation. I find Nuno has not met her burden of proof that she sustained an injury on May 23, 2017, arising out of and in the course of her employment with Mercy. Given this finding, the remaining issues relating to the May 23, 2017 injury, with the exception of the recovery of the cost of the independent medical examination and filing fee are moot.

III. Healing Period Benefits

Nuno alleges she entered a second healing period on October 13, 2018, when she returned to Dr. Shumaker for pain control, which ended on June 13, 2019. Mercy alleges Nuno is not entitled to any healing period 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.

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). Although permanent partial disability benefits commenced on June 6, 2016, under Evenson, Nuno may be entitled to payment of intermittent healing period benefits that are payable concurrently with permanent partial disability benefits. Stourac-Floyd, File No. 5053328 (App. Sept. 11, 2018).

Nuno seeks temporary benefits following the January 4, 2017, and May 23, 2017 work injuries. As discussed above, I found Nuno did not meet her burden of proof she sustained permanent injuries on January 4, 2017 and May 23, 2017, arising out of and in the course of her employment. In doing so, I rejected Dr. Bansal’s May 23, 2017, opinion. In his July 23, 2020, report, Dr. Bansal analyzed the May 23, 2017, work injury and found that injury resulted in the placement of a spinal cord stimulator. (Ex. 1, p. 12) Dr. Shumaker has opined Nuno’s spinal cord stimulator is unrelated to her alleged work injuries. No physician has causally related the need for a spinal cord stimulator or other treatment to the November 2015 or February 2016 work injuries. I do not find Nuno is entitled to temporary benefits from October 13, 2018, through June 13, 2019.

IV. Medical Bills and Alternate Care

Nuno alleges Mercy should be responsible for the medical bills set forth in Exhibit 10. Mercy rejects her assertion.

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).

Most of the bills contained in Exhibit 10 are for treatment Nuno received after Dr. Shumaker found she reached maximum medical improvement in September 2016. I do not find Mercy responsible for the charges incurred after September 20, 2016, based on my earlier findings. Nuno has not provided any explanation regarding the charges before September 20, 2016, for use in determining whether the care was reasonable and beneficial. I do not find Mercy is responsible for the charges set forth in Exhibit 10.

V. Independent Medical Examination for the May 23, 2017 Date of Injury

Nuno seeks to recover the \$2,748.00 cost of Dr. Bansal's independent medical examination. (Ex. 1, p. 14) Mercy alleges Nuno is not entitled to recover the cost of the 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. . . .

Dr. Bansal issued his report on July 23, 2020, after Dr. Shumaker issued his May 7, 2020 opinion finding Nuno did not sustain any permanent injury to her low back or spine or any permanent aggravation of a preexisting condition of her spine as a result of her work activities or alleged work injuries at Mercy.

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. Shumaker opined Nuno did not sustain any permanent injury to her low back or spine or any permanent aggravation of a preexisting condition of her spine as a result of her work activities or alleged work injuries at Mercy. Nuno disagreed and sought an independent medical examination with Dr. Bansal, which was issued after Dr. Shumaker's opinion. Under Kern, Nuno is entitled to recover the \$2,748.00 cost of Dr. Bansal's independent medical examination regarding the May 23, 2017 work injury.

VI. Costs

Nuno seeks to recover the \$100.00 filing fee, for the May 23, 2017 injury. 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 did not find Nuno was successful in proving her claim with respect to the May 23, 2017 injury. Using my discretion I do not find she is entitled to recover the filing fee.

ORDER

IT IS THEREFORE ORDERED, THAT:

For File Numbers 5059173 and 5068123 Claimant shall take nothing.

For File Numbers 5057137, 5057138:

Defendant shall pay Claimant one hundred fifty (150) weeks of permanent partial disability benefits at the rate of three hundred fifty-nine and 01/100 dollars (\$359.01), commencing on February 27, 2016.

Defendant shall receive a credit for all benefits paid to date.

Defendant shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. 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 reimburse Claimant two thousand seven hundred forty-eight and 00/100 dollars (\$2,748.00) for the cost of Dr. Bansal's 2020 independent medical examination.

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 _____ 15th _____ day of November, 2021.



HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Mary Hamilton (via WCES)

Lee Hook (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.