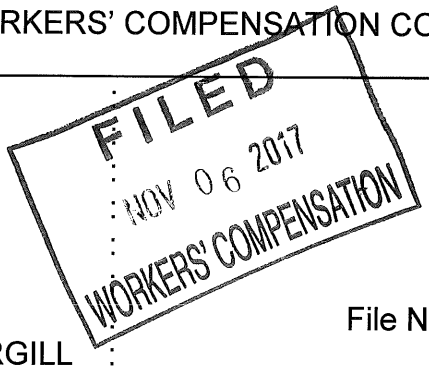
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



SHERRA YOUNG n/k/a HALL,

Claimant,

vs.

CARGILL INCORPORATED, CARGILL MEAT SOLUTIONS CORPORATION, and CARGILL ANIMAL PROTEIN – WAPELLO COUNTY FACILITY,

Employer,

and

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA and OLD REPUBLIC INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5033076

ARBITRATION

DECISION

Head Notes: 1803, 2000, 2502

STATEMENT OF THE CASE

Sherra Young n/k/a Hall, claimant, filed a petition in arbitration seeking workers' compensation benefits from Cargill Incorporated, Cargill Meat Solutions Corporation, and Cargill Animal Protein – Wapello County Facility, the alleged employer and the insurance carrier, Insurance Company of the State of Pennsylvania. The arbitration hearing was held on November 23, 2016. The parties filed post-hearing briefs on January 13, 2017, and the matter was considered fully submitted at that time.

The evidentiary record includes: Claimant's Exhibits 2, 4, 5, 6, 8, and 9 and Joint Exhibits A through Z, and AA through BB. The exhibits were admitted without objection. At hearing, claimant provided testimony.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

Included in the hearing report is the parties' stipulation to an employer-employee relationship at the time of the alleged injury of May 4, 2010, between claimant and Cargill Meat Solutions. Claimant's petition included other potential employers: Cargill Incorporated; & Cargill Animal Protein – Wapello County Facility.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Status of employer-employee relationship.
2. Did the stipulated work injury of May 4, 2010, cause permanent disability?
3. What is the extent of permanent disability, if any?
4. Is claimant entitled to 85.39 IME reimbursement?

FINDINGS OF FACT

After a review of the evidence presented, I find as follows:

Concerning the employer-employee relationship, the parties stipulated that claimant was an employee of Cargill Meat Solutions at the time of the work injury of May 4, 2010. (Hearing Report, page 1) Claimant did not assert a claim of concurrent employment or joint employment with another employer at the time of the injury. The evidence presented indicated that claimant worked at one location that changed ownership on at least two occasions. No evidence was presented to support a finding that claimant was employed on May 4, 2010, by any employer other than Cargill Meat Solutions. In view of the parties' stipulation, their inclusion of only Cargill Meat Solutions on the hearing report, and the lack of any evidence presented to support an employer-employee relationship on the date of the alleged injury concerning the other listed potential employers, I find that claimant was employed only by Cargill Meat Solutions on May 4, 2010.

References to defendants in this decision shall refer only to the employer Cargill Meat Solutions.

Claimant was 38 years old at the time of the hearing. (Transcript p. 63) Claimant graduated from Moravia High School and took some college level courses while in high school. She was on the Honor Roll and maintained good grades. (Transcript pp. 63-64) After high school, she took courses in journalism at Indian Hills Community College, but did not complete a degree. (Tr. p. 64)

On May 4, 2010, claimant was employed by Cargill Meat Solutions, a meat packing plant, as a loader/forklift operator in the shipping department. (Tr. p. 14) This required claimant to use a forklift to retrieve product from the cooler and place it in on a truck. (Tr. pp. 14-15) This job required claimant to manipulate a dock plate, which had

been malfunctioning. A steel flap on the ramp did not automatically extend outward as it should during the mechanical operation of the dock plate. Consequently, the forklift drivers had to manipulate this section of the dock plate by hand. They were provided with a hook to attach to the flap to manually extend it. (Tr. pp. 16-17) On May 4, 2010, claimant used the hook as directed and when pulling up on the steel flap, she felt pain and stiffness in her neck. She reported her incident to the employer. (Tr. p. 19)

Prior to working at Cargill Meat Solutions, claimant worked in a dairy barn, at Kentucky Fried Chicken, a convenience store, a Hy-Vee bakery, at A.Y. McDonald where she tested valves, and the Rubbermaid plant in Centerville, Iowa, which is no longer in operation. Claimant's jobs primarily involved unskilled, labor intensive work. (Tr. pp. 12-13)

Claimant testified that she believed that despite her work injury, she could return to her job at Kentucky Fried Chicken, where she did "a little bit of everything, register, the food prep, janitor, whatever was necessary." (Exhibit AA, p. 308; Tr. p. 65)

Concerning her former job at Rubbermaid, in Centerville, Iowa, claimant stated in her deposition that she believed she would be able to return to that job and provided no qualifications in that regard. (Ex. AA, p. 308) However, at the hearing claimant stated that she did not believe she could return to the job, if it involved production, although her previous job primarily involved operating a forklift. (Tr. pp. 65-66) She then agreed that she would be able to return to the forklift operator position at Rubbermaid. (Tr. p. 66) Claimant was terminated from Rubbermaid due to an accident and for accumulating too many points. (Tr. p. 67) Rubbermaid no longer operates a facility in Centerville, Iowa.

At A.Y. McDonald, where claimant was a laborer testing valves, she had a work injury resulting in a partial finger amputation. (Tr. p. 67) She did not believe that she could return to that position because of the stress of working in a facility that she perceived to be unsafe. (Tr. p. 67)

Claimant agreed that she could return to her former convenience store job where she worked in the deli and as a cashier. (Tr. pp. 68-69) However, she added that she questioned whether or not she would be hired due to her difficulty standing for long periods of time and needing to sit down. (Tr. p. 69) Although, she agreed that no physician has assigned her any restriction regarding standing. (Tr. p. 69) Concerning her ability to walk, claimant testified that she believed she could walk for one to two hours. She also described her limitation on walking as limited to two to three blocks. She also stated that she could walk for a mile or two. (Tr. pp. 44-45, 71) This testimony was confusing and left the undersigned without a definitive sense of what claimant believed her walking endurance level actually was.

Claimant began working at the facility that became known as Cargill Meat Solutions about 11 years before the work injury in this case. The facility operated under different owners and/or different names prior to becoming known as Cargill Meat Solutions. (Tr. P. 13) She initially worked for about one and one half years bagging

product. (Tr. p. 71) She then bid into a higher paying job in cryovac, which she did for about a year. Prior to the work injury as pleaded in this case, claimant left her cryovac position for a job in shipping because she felt that she could no longer physically or mentally continue with the cryovac job. (Tr. p. 72) Claimant agreed that, despite her claimed work injury, she could return to any of the jobs that she has held at Cargill.

At the time of the hearing claimant continued to work for Cargill as a storer/forklift operator. (Tr. p. 73) The storer/forklift operator position requires claimant to scan product with a handheld scanner and use a forklift to take product from the production area to the cooler. (Tr. pp. 16, 38)

After the stipulated work injury on May 4, 2010, claimant reported the injury and asked to see a nurse. (Tr. p. 19) An Employee Statement of Injury was completed in which claimant stated that while pulling the flap, her right side, her shoulder and neck "spasmed" and she could not turn her neck very well to the right and her shoulder was stiff. (Ex. E, p. 58)

On May 4, 2010, claimant was seen by Robert Gordon, M.D. and she advised that her neck felt stiff and she felt pain when she tried to rotate it to the right. (Ex. G, p. 82) Dr. Gordon diagnosed a right cervicotrapezius strain. (Ex. G, p. 83) She was given medication and prescribed physical therapy. (Id.)

On May 13, 2010, an MRI was ordered for claimant's cervical spine by Gregory Clem, M.D., an associate of Dr. Gordon. (Ex. G, p. 87) The MRI was completed on May 14, 2010 and showed "mild spinal canal stenosis, C5-6, and a central disc bulge at C4-C5." (Ex. G, p. 90; Ex. H, p. 106) She was then referred to Chad Abernathey, M.D., a spine specialist for "a second opinion for treatment." (Ex. G, p. 90)

On May 28, 2010, claimant was seen by Dr. Abernathey. (Ex. I, p. 107) At that time she presented with a cervical strain that was dissipating and Dr. Abernathey recommended conservative treatment and did not suggest any surgical intervention. (Id.)

Claimant had physical therapy that appears to have occurred from June 7, 2010 to August 4, 2010. (Ex. J) At the last visit, the therapist noted that claimant indicated she was to have three additional chiropractor visits and then return to regular work and her care would be concluded. (Ex. J, p. 133) Claimant reported that she still had some tightness in her neck, but the therapist believed it would continue to gradually improve and claimant was appropriate for discharge. (Id.)

On July 15, 2010, claimant stated on a visit to Dr. Gordon that "her neck is doing much better." (Ex. G, p. 101) Claimant returned to see Dr. Gordon on August 26, 2010 after the conclusion of physical therapy and chiropractic care and it is recorded that "[s]he denies any functional limitation at this time," and she was noted to be "[o]verall doing well," and she was discharged from care at that time. (G, p. 105) Dr. Gordon opined that claimant had reached maximum medical improvement (MMI) at that time

and he assigned an impairment rating of zero percent (0%) impairment based on the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition, but indicated that she could use medications of Tramadol and Relfan as prescribed, but also only as needed. (Id.)

On December 23, 2010 Marc Hines, M.D. issued a report following an independent medical evaluation (IME). Dr. Hines indicated that he reviewed medical records, which included records from Ottumwa Chiropractic Clinic dating back to September 2, 2008, which is about 20 months prior to the work injury of May 4, 2010. (Ex. L, p. 142) Dr. Hines opined that claimant had "a cervical scapular syndrome of muscle spasm along with trigger point dysfunction." (Ex. L. p. 136) He stated that claimant had "a marked increase severity of migraine related to the accident and injury of 5-4-10." (Ex. L, p. 136) Dr. Hines also opined that claimant had "secondary depression that has been worsened, particularly with agitation and anxiety features worsened by the accident and injury and the pain and the nonrestorative sleep secondary to the injury of 5-4-10." (Id.) However, he stated that claimant had not yet reached MMI. (Ex. L, p. 138) Nevertheless, he concluded that claimant had sustained: a 10 percent impairment secondary to an exacerbation of headaches; a 10 percent impairment due to a pain syndrome identified as Class 2; and an 8 percent impairment due to "dysfunction throughout the cervical area . . ." (Ex. L. pp. 136-137) The impairments were added to arrive at 25 percent whole person impairment. (Ex. L. p. 137) Dr. Hines assigned restrictions, which included a 50 pound lifting restriction and avoiding placing her head in a continuous flexion/extension position. (Id.) Finally, Dr. Hines also made recommendations for potential additional medical treatment including medication to treat migraine headaches, medication and injections to treat pain and to promote restful sleep. (Ex. L. pp. 137-138)

On January 6, 2011, claimant had a "[f]lare of pain," in the upper thoracic area and into the base of her neck. (Ex. D, p. 54) She returned to see her family doctor, Gerald Haas, D.O. (Ex. D, p. 54) Claimant was then directed by the employer to Kurt Smith, D.O., of Iowa Ortho, who she saw for the first time on March 24, 2011. (Ex. O, pp. 172, 174) On June 14, 2011, Dr. Smith confirmed his diagnosis of claimant finding that she had "[c]ervical myalgia as a result of a work-related injury." (Ex. O, p. 179) On October 5, 2011, in response to questions from defense counsel, Dr. Smith opined that claimant had reached MMI and he assigned a five (5) percent permanent impairment for muscular pain and spasm, concerning the cervical myalgia and trapezius symptoms. He then assigned zero (0) percent impairment for headaches. (Ex. O, pp. 182-184) Dr. Smith stated that claimant required no restrictions and opined that claimant's current headache complaints were not related to the May 4, 2010 incident. (Ex. O, pp. 183-184) He also agreed that he had not observed any evidence of mental health issues, including depression and that claimant did not raise any such concerns during her treatment. (Ex. O, p. 184)

On March 9, 2011, claimant was directed to Charles Wadle, D.O., of Wadle and Associates by defendants for the purpose of an IME. Dr. Wadle is board certified in

psychiatry. (Ex. N, p. 166) Dr. Wadle was asked by defense counsel to offer opinions regarding claimant's diagnosis and any causal connection to the May 4, 2010 work injury and whether he recommended any treatment related thereto. (Ex. N, p. 165) Dr. Wadle administered the Minnesota Multiphasic Personality Inventory (MMPI) and found the "questions yielded an invalid profile with an F-scale T-score of 85." (Ex. N, p. 169) He noted that the "[l]ikely diagnostic implications would be malingering or bipolar disorder." (Id.) Dr. Wadle then concluded that claimant did not have a diagnosable mental health condition related to the May 4, 2010 work injury and that therefore, no treatment was recommended. (Ex. N, pp. 169-170)

On April 5, 2011, claimant was directed by defendants to Lynn Nelson, M.D. of Des Moines Orthopedic Surgeons, P.C. for the purpose of an IME. (Ex. M, p. 156) Dr. Nelson diagnosed claimant with "right sided neck, trapezial and periscapular pain, myofascial." (Ex. M, p. 162) Dr. Nelson agreed that claimant was at MMI and deferred to Dr. Smith concerning the assignment of MMI from a "noninvasive standpoint." (Ex. M, p. 163) He assigned no restrictions and assigned a five (5) percent impairment rating using the AMA Guides, relying on a "DRE Cervical Category II impairment (Table 15-5, page 392)." (Ex. M, p. 163) Dr. Nelson had been provided with records including those from Ottumwa Chiropractic Clinic dating back to September, 2008. (Ex. M, p. 154)

On December 2, 2011, Dr. Smith provided handwritten responses to questions. (Ex. O, pp. 186-194) He opined that claimant's ongoing cervical myalgia was the result of her work injury and that the same was a permanent problem that would require medication and possible office visits into the indefinite future. (Ex. O. pp. 186, 188, 190) He also indicated that he would defer to a psychologist or psychiatrist for care and treatment of depression or anxiety. (Ex. O, p. 191)

On November 14, 2012, claimant returned to see Dr. Smith who noted that the severity of the pain in the right lateral neck was moderate and unchanged. (Ex. O, p. 195) At that time the plan included: "[c]hange work restrictions; sweeping, active above shoulder level and weight." (Ex. O, p. 197) She was noted to "require chronic management of medications." (Id.)

On February 27, 2013, Dr. Smith referred claimant to psychology re: "multifactorial depression." (Ex. O, p. 202) In a response to questions from defense counsel, Dr. Smith indicated his opinion that the work injury "did not substantially or materially cause or contribute to" the multifactorial depression. (Ex. O, p. 203)

On August 2, 2013, claimant returned to see Dr. Hines for a second or follow-up appointment IME at the request of claimant's counsel. At that time, Dr. Hines referenced additional medical records that he reviewed. Following an evaluation, Dr. Hines confirmed his prior opinion of 25 percent whole person impairment, which includes impairment for depression. He also assigned restrictions of no lifting over 40 pounds and to use the left arm for activities when possible and he recommended continued medication management. (Ex. L, pp. 146-147)

On December 26, 2013, claimant returned to see Dr. Smith, frustrated with her ongoing pain. She was advised that she had been at MMI for quite some time and would need future doctor visits for medication management. At that time, Dr. Smith indicated that claimant's restrictions were "permanent," although they are not clearly spelled out. (Ex. O, p. 208)

On February 27, 2014, claimant was directed by defendants to Philip Ascheman, Ph.D. of Psychology Associates, for the purpose of an IME. Dr. Ascheman concluded that following completion of the Minnesota Multiphasic Personality Inventory-2 (MMPI-2) claimant produced an invalid profile based on an F scale T-score of 96, which Dr. Ascheman described as "typically associated with exaggeration of symptoms." (Ex. P, p. 223) Dr. Ascheman then concluded that claimant's "presentation of malingering precludes accurate assessment of depressed and anxious symptoms." (Id.)

On May 13, 2014, Dr. Smith responded to questions posed by defense counsel after reviewing additional medical records that he had not previously seen, which indicated that claimant had reported neck complaints during each of the five years before the work injury, and had periodic flare-ups of pain prior to the May 4, 2010 work injury. Dr. Smith now opined that in consideration of the history of flare-ups, he agreed with Dr. Gordon who assigned MMI on August 26, 2010, which is when claimant reported no functional limitations. He further agreed that the injury was temporary and resulted in no permanent impairment and that any permanent restrictions claimant may currently need are due to her pre-existing condition and that any complaints after August 26, 2010 would not be related to the May 4, 2010 work injury. (Ex. O, pp. 215-216)

In June, 2014, claimant had treatment with Unity Point Mental Health. I note that her stressors included: "work stress – conflict [with] co-worker, [mother] in hospital." (Ex. 4, unnumbered p. 10) It is notable to the undersigned that claimant's stressors did not include such things as: pain; chronic pain; limited physical function; or difficulty performing work or household chores.

Prior to the work injury, claimant had multiple motor vehicle accidents and the records indicate that she had complaints of neck pain and similar symptoms to those that she described after the May 4, 2010 work injury. (Tr. pp. 99-103) Although, based on the records presented at hearing, her last treatment for her neck at Tubaugh Family Chiropractic was April 29, 2008. (Ex. A, p. 36) Her last complaint of neck pain at Ottumwa Chiropractic Clinic before the work injury, was October 31, 2008. (Ex. B, p. 38) Her last complaint to Dr. Haas, her family doctor, about neck pain prior to the work injury, was on October 26, 2009. (Ex. D, p. 53) It appears that even though claimant had prior neck complaints, she had not sought treatment for a period of about six months before the work injury.

Claimant had a second deposition about three weeks prior to the hearing. At that time, she stated that her symptoms were: "through my right side of my neck into the right side of my shoulder and the upper right of my back. It's like a -- just like a constant

dull ache, like heat." (Ex. BB, p. 343) This statement was followed with an exchange regarding the frequency of the symptoms:

> Q: Does it ever go away?
>
> A: Some days. Some days are good, some days are bad.
>
> Q: But there are times when it totally goes away?
>
> A: Yep. There's some days I just feel great. I feel fine. No problems at all. But the majority of it, it's almost like a [sic] everyday thing."

(Ex. BB, p. 343) She went on to describe increasing symptoms as the workweek progressed and that relief often came with a day of rest. She stated that her symptoms had been fluctuating like that for about four and a half to five years. (Ex. BB, pp. 343-344) At hearing, when claimant was asked about having some days with no problems at all, she appeared to qualify her prior deposition testimony by stating that she has a high pain tolerance and "some things you just learn to live with. You go numb to it after a while." (Tr. p. 113) However, she then confirmed that there are some days that she feels great. (Tr. p. 114)

Claimant also described migraine headaches that she stated occur with greater frequency and intensity than prior to the work injury, although more recently to the date of the hearing, the frequency seems to have returned to something closer to her pre-injury status. (Tr. p. 61)

Further, claimant testified that she has had increased depression since the work injury and her symptoms are now "pretty much a daily thing." (Tr. p. 62)

I find from the evidence presented that claimant had neck pain and complaints that pre-dated the work injury. However, it appears that claimant had not had any medical treatment regarding her neck for about six months prior to the work injury. She also testified as to regular use of medication to manage her symptoms post-injury. It does not appear that prior to the May 4, 2010 work injury, that claimant required regular pain medication.

I find that Dr. Gordon assigned no impairment and no restrictions, but it is not clear to the undersigned if he was aware of claimant's continuing complaints after August, 2010 and whether or not that would have altered his opinion. Although Dr. Gordon found that claimant had "notably improved" that conclusion does not necessarily mean that claimant was symptom free. (Ex. G, p. 101) In fact, in the same office note, Dr. Gordon records that claimant "is utilizing ibuprofen and Tramadol at this time." (Id.) Therefore, it seems very unlikely that claimant's symptoms had resolved.

Dr. Hines was aware of the treatment at Ottumwa Chiropractic Clinic dating back to September 2008 and prior complaints of neck pain when he offered his opinions regarding permanency. Also, Dr. Nelson who assigned no restrictions, but assigned a five (5) percent impairment, was also aware of the medical records from the Ottumwa Chiropractic Clinic dating back to September 2, 2008, when he offered his opinion. (Ex. M, p. 154) Dr. Smith had originally assigned an impairment rating and restrictions, but retracted those upon being presented with medical records concerning claimant's prior neck complaints, which included the Ottumwa Chiropractic records beginning in September, 2008. (Ex. O, p. 214)

The parties agree that claimant sustained a work injury on May 4, 2010 and that if said injury resulted in permanent impairment, that the impairment would be an industrial disability. (Hearing Report, p. 1)

Upon a review of all the evidence and particularly the expert opinions, I find that claimant did sustain permanent impairment concerning her neck injury from the stipulated work injury of May 4, 2010. This is based on the totality of the evidence presented, including the opinions of Dr. Hines, Dr. Nelson and claimant's testimony. Further, I adopt the five percent permanent impairment assigned by Dr. Nelson, which excludes impairment for a potential mental health injury.

I find that Dr. Ascheman, a licensed psychologist, and Dr. Wadle, whose board certifications include a designation as a Diplomate of the American Board of Psychiatry and Neurology, are more specifically qualified than Dr. Hines to assess claimant's potential mental health injury. I find based on the opinions of Dr. Ascheman and Dr. Wadle, that claimant has failed to carry her burden of proof that she sustained a mental injury as a result of the May 4, 2010 work injury.

I find that only Dr. Hines related claimant's headaches to the May 4, 2010 work injury. Dr. Smith, who initially assigned a five percent impairment rating for the neck injury, found that claimant's headaches were specifically not related to the work injury at a time when he opined that the neck injury was related. There have been multiple physicians involved in this case and no one other than claimant's IME physician, Dr. Hines related the headaches to the work injury. I find from the greater weight of the evidence, that claimant has failed to carry her burden of proof concerning her headaches and their causal connection to the work injury.

I find that although Dr. Nelson did not assign any particular work restrictions, that claimant had been working without restrictions prior to the May 4, 2010 work injury, Dr. Smith, and Dr. Hines appear to indicate that some level of restriction is appropriate for claimant's current condition. It is understood that Dr. Smith assigns the need for the restrictions to her pre-existing condition and not the work injury of May 4, 2010. However, it is noteworthy that claimant was not working under permanent restrictions in the days prior to the May 4, 2010 incident. At the time of the hearing, claimant continued to work under restrictions that were contained on her "yellow/red card". (Tr. p. 54)

I find that claimant has not undergone surgery for the May 4, 2010 work injury and has had only conservative care.

I find based on claimant's age, the fact that she continues to work in a similar job that she had at the time of the injury and that her earnings have not been reduced, her continued willingness to remain employed, her ongoing symptoms, along with her education and other appropriate factors for consideration of industrial disability, that claimant sustained 10 percent industrial disability.

Claimant seeks reimbursement for an examination under Iowa Code section 85.39 on the Hearing Report and on the Hearing Report, the undersigned is directed to the "Application and Attachment." (Hearing Report, p. 2) On September 23, 2016, claimant filed a petition concerning independent medical examination for her neck and mental health claim. Claimant requested an evaluation with Brandon Davis, Ph.D. to take place on October 12, 2016 in Grinnell, Iowa, alleging that the employer had obtained from "Galles, Ascheman" an evaluation of permanent disability and claimant believed the evaluation to be too low. (Original Notice and Petition Concerning Independent Medical Examination, p. 1) The Deputy who ruled on the Petition noted that it "lacks a copy of the written report of impairment by the employer-retained physician, as required by paragraph 3 on the petition." (Ruling on IME Petition, p. 3) The deputy denied the petition and noted that "[c]laimant may still seek reimbursement for an IME at the time of hearing, if she so desires." (Id.)

Concerning the petition for the independent medical examination to which the undersigned is directed via the Hearing Report, the documents provided do not appear to contain records of anyone named "Galles" as referred to in the petition. However, defendant clearly did obtain a report from Dr. Ascheman as described above, which was specifically for an evaluation of claimant's possible mental injury. Dr. Ascheman rendered opinions related to specific questions from defense counsel regarding whether claimant had a diagnosable mental health condition and whether that condition was caused or exacerbated by claimant's employment and whether it was work related, and whether she sustained any permanent impairment as a result. (Ex. p. 217) Dr. Ascheman responded to those inquiries. The fact that Dr. Ascheman responded in the negative does not eliminate claimant's opportunity for reimbursement of an IME under Iowa Code section 85.39. However, the undersigned is unable to locate any record related to Brandon Davis, Ph.D. in the documents provided by the parties. There is no evidence of an examination ever occurring and no evidence of any payment made for such an examination. Therefore, claimant cannot be reimbursed for an expense that she has not incurred.

CONCLUSIONS OF LAW

Concerning the employer-employee relationship, and as stated above, claimant did not assert a claim that she was employed by joint employers at the time of the injury. The evidence presented indicated that the ownership and/or name of the company where claimant worked changed while she continued to work at the same facility. No

evidence was presented to support a finding that claimant was employed on May 4, 2010, by any employer other than Cargill Meat Solutions and the parties stipulated to such on the Hearing Report. I conclude that claimant was employed only by Cargill Meat Solutions on May 4, 2010, and that the remaining defendants should be dismissed without prejudice.

The primary disputed issue in this case is the extent of industrial disability.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 593; 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man." Functional impairment is an element to be considered in determining industrial disability, which is the reduction of earning capacity. However, consideration must also be given to the injured worker's medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured workers' qualifications intellectually, emotionally and physically; the worker's earning before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted. Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616 (Iowa 1995); McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 654 (App. February 28, 1985).

Assessments of industrial disability involve a viewing of loss of earning capacity in terms of the injured workers' present ability to earn in the competitive labor market without regard to any accommodation furnished by one's present employer. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 158 (Iowa 1996); Thilges v. Snap-On Tools Corp., 528 N.W.2d 614 (Iowa 1995).

Apportionment of disability between a preexisting condition and an injury is proper only when some ascertainable portion of the ultimate industrial disability existed independently before an employment-related aggravation of disability occurred. Bearce v. FMC Corp., 465 N.W.2d 531 (Iowa 1991); Varied Enterprises, Inc. v. Sumner, 353 N.W.2d 407 (Iowa 1984). Hence, where employment is maintained and earnings are not reduced on account of a preexisting condition, that condition may not have produced any apportionable loss of earning capacity. Bearce, 465 N.W.2d at 531. Likewise, to be apportionable, the preexisting disability must not be the result of another injury with the same employer for which compensation was not paid. Tussing v. George A. Hormel & Co., 461 N.W.2d 450 (Iowa 1990).

The burden of showing that disability is attributable to a preexisting condition is placed upon the defendant. Where evidence to establish a proper apportionment is absent, the defendant is responsible for the entire disability that exists. Bearce, 465 N.W.2d at 536-537; Sumner, 353 N.W.2d at 410-411.

As stated above and for the reasons there given, I conclude that claimant has sustained 10 percent industrial disability.

Concerning the claim for reimbursement of an examination under Iowa Code Section 85.39, defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

I found no evidence of an IME exam ever having occurred with Brandon Davis, Ph.D., and no evidence of the extent of any potential cost incurred by claimant. The request is therefore denied.

Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. I therefore exercise my discretion and assess $100.00 in costs against the defendants for claimant's filing fee.

ORDER

THEREFORE, IT IS ORDERED:

Cargill Incorporated and Cargill Animal Protein – Wapello County Facility are dismissed without prejudice based on claimant's failure to establish by a preponderance of the evidence an employer-employee relationship at that time of the alleged work injury.

Defendants shall pay claimant industrial disability benefits of fifty (50) weeks, beginning on the stipulated commencement date of May 4, 2010, until all benefits are paid in full.

Defendants shall be entitled to credit for all weekly benefits paid to date. The parties have stipulated that defendants are entitled to a credit of twenty-five (25) weeks.

All weekly benefits shall be paid at the stipulated rate of four hundred forty one and 56/100 dollars ($441.56) per week.

All accrued benefits shall be paid in a lump sum.

Defendants shall pay interest on any accrued weekly benefits pursuant to Iowa Code section 85.30

Defendants shall pay costs to claimant in the sum of one hundred and 00/100 dollars ($100.00).

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

Signed and filed this 6th day of November, 2017.

TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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 in writing and received by the commissioner's office 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 a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.