

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

YOELBYS PIRE-JUSTAFRE,

Claimant,

vs.

TYSON FRESH MEATS, INC.,

Employer,
Self-Insured,
Defendant.

File No. 1665078.01

ARBITRATION DECISION

Headnotes: 1801, 1803, 2907

Claimant Yoelbys Pire-Justafre filed a petition in arbitration on March 31, 2020, alleging he sustained an injury to his low back while working for Defendant Tyson Fresh Meats, Inc. ("Tyson") on October 1, 2018. Tyson filed an answer on April 9, 2020.

An arbitration hearing was held *via* CourtCall video conference on May 21, 2021. Attorney Mary Hamilton represented Pire-Justafre. Pire-Justafre appeared and testified. Patricia Hillock provided Spanish interpretation services during the hearing. Irene Perez-Zantana and Sara Huddleston were present on behalf of Pire-Justafre, but did not testify. Attorney Jason Wiltfang represented Tyson. Joint Exhibits ("JE") 1 through 7, and Exhibits 1 through 9, and A through I were admitted into the record. The record was held open through July 1, 2021, for the receipt of post-hearing briefs and Exhibits J and K. Exhibits J and K were received and admitted into the record, the briefs were received, and the record was closed.

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

STIPULATIONS

1. An employer-employee relationship existed between Tyson and Pire-Justafre at the time of the alleged injury.
2. Pire-Justafre sustained an injury, which arose out of and in the course of his employment with Tyson on October 1, 2018.
3. The alleged injury is a cause of temporary disability during a period of recovery.
4. Although entitlement to temporary benefits cannot be stipulated, Pire-Justafre was off work from November 11, 2018 through January 29, 2019.
5. The alleged injury is a cause of permanent disability.

6. If the injury is found to be a cause of permanent disability, the disability is an industrial disability.

7. The commencement date for permanent partial disability benefits, if any are awarded, is April 27, 2019.

8. At the time of the alleged injury Pire-Justafre's gross earnings were \$798.00 per week, he was single and entitled to two exemptions, and the parties believe the weekly rate is \$511.28.

9. Prior to the hearing Pire-Justafre was paid 25 weeks of compensation at the rate of \$511.28 per week.

10. Costs have been paid.

ISSUES

1. What is the extent of disability?

2. Is Pire-Justafre entitled to temporary benefits from November 11, 2018 through January 29, 2019?

3. Is Pire-Justafre entitled to recover the cost of the independent medical examination?

4. Should costs be assessed against either party?

FINDINGS OF FACT

Pire-Justafre lives in Storm Lake. (Transcript, page 9) Pire-Justafre graduated from high school in Cuba in 2005. (Exs. D, p. 3; 7, p. 40; Tr., p. 9) Pire-Justafre can read and write in Spanish, but he cannot read and write in English. (Tr., pp. 10-11) Pire-Justafre moved to the United States from Cuba in 2016. (Tr., p. 8) At the time of the hearing he was 34. (Tr., p. 8)

While living in Cuba, Pire-Justafre was self-employed as a carriage driver, transporting people by a horse and carriage. (Exs. D, p. 4; 7, p. 41; Tr., p. 13) In October 2016, Pire-Justafre moved to Florida, where he worked as a laborer polishing granite. (Exs. D, p. 4; 7, p. 41)

In 2017 Pire-Justafre moved to Iowa to work for Tyson. Pire-Justafre commenced full-time employment with Tyson Foods in 2017. (Ex. 4, p. 26) As part of his hiring, Pire-Justafre underwent a physical, which he passed. (JE 1, pp. 2-3; Tr., p. 11) Pire-Justafre worked as a reject butcher for Tyson where he was responsible for picking up and washing contaminated products in the plant, including fallen carcasses. (Tr., pp. 12-13)

Pire-Justafre reported he injured his right hand/arm while handling a wheelbarrow with a hog carcass on September 6, 2018. (Ex. D, p. 6) Pire-Justafre felt a sharp pain and reported the pain to his supervisor and received treatment from the Tyson nurse. (Ex. D, p. 6) The September 6, 2018 injury is not the subject of this case.

Pire-Justafre testified on October 1, 2018, he picked a hog up off the floor and he was carrying it to the sink to clean it when he felt something in his back and his feet did not respond. (Tr., p. 19) Pire-Justafre reported the injury to the Tyson nurse. (Tr., pp. 19-20) The Tyson nurse provided treatment to Pire-Justafre, noting he had limited flexion/extension at his waist and that he was walking in a guarded fashion with a facial grimace with movement. (Ex. 2, p. 15) Pire-Justafre returned to the nurse complaining of pain on October 2, 2018, and October 5, 2018. (Ex. 2, p. 15) Tyson eventually made an appointment for Pire-Justafre to see a physician. (Tr., p. 20)

On October 25, 2018, Pire-Justafre attended an appointment with David Archer, M.D., a family medicine practitioner, complaining of low back pain. (JE 2, p. 14) Pire-Justafre reported he felt a pop in his back at work when picking up a hog half carcass from a cart while working as a reject butcher. (JE 2, p. 14) Pire-Justafre denied having previous problems with his back. (JE 2, p. 14) Dr. Archer examined Pire-Justafre, assessed him with acute midline low back pain without sciatica, and imposed restrictions of no lifting over 20 pounds, sitting and standing as tolerated, and occasional bending. (JE 2, p. 14)

The parties stipulated Pire-Justafre has been off work from Tyson since November 11, 2018. On November 19, 2018, Tyson terminated his employment for receiving three written warnings and a written warning with a suspension within 12 months. (Ex. C, p. 1)

Pire-Justafre continued to treat with Dr. Archer. (JE 2, pp. 15, 17) Dr. Archer noted Pire-Justafre had limited range of motion in his back. (JE 2, pp. 15-18) Dr. Archer released Pire-Justafre to return to full duty with a 25 percent pace on November 26, 2018, and a 50 percent pace on December 11, 2018. (JE 2, pp. 16-17)

Dr. Archer ordered physical therapy for Pire-Justafre. (JE 3) Pire-Justafre attended 10 sessions of physical therapy, reporting he believed he was worse from the physical therapy exercises. (JE 3, pp. 19-38)

Following his termination from Tyson, Pire-Justafre applied for unemployment benefits. (Ex. H, p. 11) Iowa Workforce Development ("IWD") issued two decisions finding Pire-Justafre was not eligible for unemployment benefits because he had been discharged for misconduct and he was not able and available for work, which he appealed. (Ex. H, pp. 11-14, 17-20) IWD issued a third decision finding Pire-Justafre was overpaid unemployment benefits. (Ex. H, pp. 15-16) Pire-Justafre again appealed the decision. (Ex. H, p. 15) Pire-Justafre failed to provide a telephone number for the three hearings and his appeals were dismissed. (Ex. H, pp. 11-20)

On January 14, 2019, Pire-Justafre attended an appointment with Stephen Liddiard, PA-C, a physician's assistant working with Wade Jensen, M.D. with CNOS, complaining of ongoing low back pain with leg radiculopathy following a work injury while lifting a hog. (JE 4, pp. 39-40) Liddiard examined Pire-Justafre. (JE 4, p. 39) Pire-Justafre reported physical therapy had not resulted in any improvement and made his symptoms worse. (JE 4, p. 39) Liddiard assessed Pire-Justafre with lumbar back pain with radiculopathy affecting the left lower extremity, and ordered x-rays and magnetic resonance imaging. (JE 4, p. 40)

Pire-Justafre underwent lumbar spine magnetic resonance imaging. (JE 5) The reviewing radiologist listed findings of:

1. Very small L5-S1 disc bulge accompanied by mild ligamentous and facet joint hypertrophy causing no significant central spinal stenosis but moderate left neural foraminal compromise.
2. Despite the presence of mild ligamentous and facet joint hypertrophy at L4-L5 there was no neural foraminal or thecal sac compromise noted.

(JE 5, p. 45)

On January 30, 2019, Pire-Justafre commenced work as a janitor for Packers Sanitation Service, cleaning the Tyson plant and operating a pressure sprayer, working four to five hours per day from Monday through Saturday, and earning \$15.00 per hour. (Ex. D, p. 4; Tr., pp. 23-24; 43-44) Pire-Justafre testified he did not inform Packers Sanitation Service he had any restrictions and he did not request an accommodation. (Tr., pp. 44-45)

Pire-Justafre returned to Liddiard on February 18, 2019, regarding his low back pain. (JE 4, p. 41) Liddiard discussed the imaging with Pire-Justafre, assessed him with a bulge of lumbar disc without myelopathy, lumbosacral radiculopathy at S1, and lumbar facet arthropathy, and recommended facet injections at L4-5 and L5-S1. (JE 4, p. 42)

CNOS referred Pire-Justafre to Siouxland Pain Clinic. (JE 6) On March 13, 2019, Pire-Justafre attended an appointment with Dustin Sorenson, M.D., complaining of left side low back pain with left leg pain. (JE 6, p. 46) Pire-Justafre reported the pain was constant, sharp, cramping, and worse with sitting, upright activity, and standing. (JE 6, p. 46) Dr. Sorenson assessed Pire-Justafre with lumbosacral spondylosis without myelopathy or radiculopathy and recommended and administered bilateral facet injections at L4-L5 and L5-S1. (JE 6, pp. 48-50)

Pire-Justafre returned to Dr. Sorenson on April 2, 2019. (JE 6, p. 51) Dr. Sorenson assessed Pire-Justafre with sacral radiculopathy at S1, and administered an injection into the sacral joint. (JE 6, pp. 52-53)

On April 26, 2019, Pire-Justafre attended an appointment with Liddiard, reporting he was continuing to have symptoms in his low back. (JE 4, p. 43) Liddiard assessed Pire-Justafre with L4-L5 and L5-S1 facet joint hypertrophy with some arthrosis associated with back pain, L5-S1 minimal disc bulge central and eccentric to the left with minimal to mild lateral recess stenosis with no impingement upon the traversing S1 nerve root on the left side, and noted Pire-Justafre received no relief following recent facet injections. (JE 4, pp. 43-44) Liddiard documented he told Pire-Justafre there was no surgical option for his symptoms and that he believed his back pain is related to facet arthrosis, which is due to an aggravation of facet arthrosis he already has, and that stretching and core strengthening exercises may be beneficial to him. (JE 4, p. 44) Liddiard placed Pire-Justafre at maximum medical improvement and released him to full

duty. (JE 4, p. 44) Pire-Justafre has not requested treatment from Tyson since his last appointment with Dr. Jensen. (Tr., p. 41)

On May 22, 2019, Dr. Jensen issued an impairment rating responding to a check-the-box letter from Tyson using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"). (Ex. B, p. 1) Dr. Jensen checked "yes" that Pire-Justafre had sustained a permanent partial impairment from the October 1, 2018 work injury, agreeing he reached maximum medical improvement on April 26, 2019. (Ex. B, p. 1) Dr. Jensen wrote he had assigned Pire-Justafre a five percent permanent impairment to the whole body based on "Table 15-3 DRE II." (Ex. B, p. 1) After receiving Dr. Jensen's rating, Tyson sent Pire-Justafre a letter on May 25, 2019, stating it was paying him 25 weeks of benefits at the weekly rate of \$511.28, totaling \$11,248.16, and three weeks of accrued benefits with interest, totaling \$1,536.26. (Ex G, p. 1)

Pire-Justafre worked for Packers Sanitation Service from January 30, 2019 until May 31, 2021, when he was terminated. (Tr., p. 23; Ex. D, p. 4) Pire-Justafre testified his girlfriend contracted Covid-19 and the company would not allow Pire-Justafre and his girlfriend to return to work until they had both tested negative for Covid-19. (Tr., p. 24) Pire-Justafre relayed after 12 days his girlfriend was still positive and he approached a security officer to let him know what was going on and the security officer said that was no problem. (Tr., p. 24) Pire-Justafre testified about 10 to 12 days later he and his girlfriend tested negative for Covid-19 and returned to work and were informed they had been fired. (Tr., pp. 24-25)

On April 16, 2021, Sunil Bansal, M.D., an occupational medicine physician, conducted an independent medical examination for Pire-Justafre. (Ex. 1, pp. 1-10) Dr. Bansal reviewed Pire-Justafre's medical records and examined him. (Ex. 1) For the October 1, 2018, work injury, Dr. Bansal diagnosed Pire-Justafre with L5-S1 disc bulge and aggravation of facet arthropathy, with left neural foraminal compromise, and noting Pire-Justafre reached maximum medical improvement on April 26, 2019. (Ex. 1, p. 8) Dr. Bansal opined, "[t]he mechanism of lifting a piece of hog carcass while bent at the waist and twisting, coupled with his acute clinical presentation, is consistent with his L5-S1 disc bulge and the aggravation of his lumbar spondylosis and facet arthropathy," citing improper lifting as a cause of his injuries and articles. (Ex. 1, p. 9) Using the AMA Guides, Dr. Bansal opined:

[w]ith reference to the [AMA Guides], based on his current symptomatology and physical examination, he meets criteria for a DRE Category II impairment. He has radicular complaints, loss of range of motion, and guarding. He has continued pain. He is assigned a **6% whole person impairment based on Table 15-3.**

(Ex. 1, p. 10) (emphasis in original) Dr. Bansal assigned permanent restrictions of no lifting over 40 pounds and no frequent bending or twisting, and noted Pire-Justafre may need future care, including intermittent epidural steroid injections, facet injections, and/or radiofrequency ablation. (Ex. 1, p. 10)

On June 18, 2021, Dr. Jensen issued a supplemental opinion, after reviewing Dr. Bansal's opinion, as follows:

I cared for this patient, and he has some mild degenerative disk disease at the L5-S1 level without disk herniation or annular strain. The patient did have some transient radiculopathy that has improved. We did get him an S1 selective nerve root block. We gave him a 5% body as a whole permanent restriction and an MMI date of 04/26/19, and we gave him no work restrictions. The patient then saw Dr. Bansal for an IME who gave him a 6% rating and a 40-pound permanent lift restriction. Dr. Bansal references the AMA Guides stating, "using your back muscle to lift heavy objects instead of your legs can cause a disk herniation. Lifting with your legs, not your back, may protect your spine." He quotes a study showing intradiskal pressure increases 1 to 400% when leaning forward. Based on this, he recommended a 40-pound permanent lift restriction. Certainly, this is not standard practice for someone with a mild degenerative disk disease to give them a 40-pound lifting restriction. Even after a microdisk type surgery, I do not give long-term lifting restrictions once the annulus has healed. In this case, the patient has had no operations, does not need an operation, does not have any objective disk herniations or annular significant abnormalities that would justify such restriction, and therefore, I do not support any sort of lifting restriction. As stated even in Dr. Bansal's report, as long as you are using proper body mechanics there is no increased risk to the back. It is only in the setting of forward bending, which has been well documented in studies, and even forward bending in the setting of a normal disk does not put one at higher risk of disk herniation as long as the lift is in reasonable restriction. I would not expect someone to be lifting with only their back forward and outstretched arms of more than 50 pounds, and I do not believe that his work description has those sorts of activities involved in it. Proper lifting mechanics I have found to be followed quite adherently in the Tyson system and have toured the plant personally and do not see these types of stressors in any sort of the jobs that patients are put into. Ultimately, I do not agree with any long-term restrictions for these minimal degenerative changes found on plain x-ray.

To address the 5 to 6% rating differences, my guess is that he is interpreting something and giving more benefit of the doubt to the patient or the maximum amount in any given chart. Therefore, the difference between 5 and 6% is probably just an interpretation of the AMA Guides.

(Ex. K, p. 2)

Pire-Justafre reported after Packers Sanitation Service terminated his employment he qualified for and received \$672.00 per week in unemployment benefits. (Tr., pp. 25, 49) At the time of the hearing Pire-Justafre was still receiving unemployment benefits. Pire-Justafre testified he has looked for work, but he has not found employment since his termination. (Tr., p. 25) Pire-Justafre submitted a work

search record and reported he has attended job fairs. (Ex. 8; Tr., pp. 33-34) No dates are listed for the contacts he made. (Ex. 8) Pire-Justafre reported VT Industries is the only company who has called him for an interview, and he did not receive the position. (Tr., p. 35)

Pire-Justafre has been self-employed, selling clothing and merchandise, both before and after his work injury. (Tr., p. 25) Pire-Justafre has purchased clothes in Florida and sold the clothes in Storm Lake and Cuba. (Tr., p. 25) He has also sold telephones and shoes in Cuba. (Tr., p. 25)

In July 2020, Pire-Justafre received a Covid-19 Paycheck Protection Loan in the amount of \$20,212 based on a clothing business with the assistance of an acquaintance. (Exs. H, p. 3; 9; Tr., pp. 29-30) Pire-Justafre reported the federal government has investigated the incident and Brett Lehnert, an agent with the United States Small Business Administration Office of Inspector General, informed him he may be the victim of fraud. (Tr., pp. 30-32) Pire-Justafre reported Lehnert told him not to spend the money and it is currently in his bank account. (Tr., p. 32) Pire-Justafre testified he sold merchandise in 2019 and 2020, but not in 2021. (Tr., pp. 50-52)

Pire-Justafre is the registered agent and manager of J & J Multiservices LLC, a roofing company. (Ex. H, pp. 8-10; Tr., pp. 26-27) Pire-Justafre has a friend who works in construction who he has helped in the past where he learned the roofing trade. (Tr., p. 27) Pire-Justafre handed shingles to the roofer after climbing a ladder, and installed hoses on air guns. (Tr., pp. 27, 55-56) He also removed nails with a hammer from the boards on the roof. (Tr., p. 56) Pire-Justafre testified he worked for his friend two to three days or up to seven days per month and earned \$80.00 to \$130.00 per day. (Tr., pp. 28-29)

Pire-Justafre testified he has not sustained any injuries while working in roofing. (Tr., p. 29) Pire-Justafre admitted that he performed work for his friend with roofing and siding in 2020 and 2021 and that he did not report any income from this work to IWD or on his 2020 income tax return. (Tr., pp. 49-50)

Pire-Justafre testified "I feel pain and cramping in my left leg, and I feel these cramps all the way down to my toes, and the – I have – I'm in constant pain," noting the pain is worse when carrying things he purchases from the store to the third floor, and when driving, walking, or sitting too long. (Tr., p. 36) Pire-Justafre reported he cannot stay seated very long because he cannot stand the pain and he avoids bending. (Tr., p. 36)

Pire-Justafre reported he would not be able to return to his job as a carriage driver because he had to be seated six to eight hours for the job and the vibration is constant. (Tr., p. 37) He also believes he could not return to his position finishing granite because the position required standing and constant moving from side to side while using a sander for eight to ten hours. (Tr., p. 37)

CONCLUSIONS OF LAW

I. Applicable Law

This case involves the issues of extent of disability, temporary benefits, recovery of the cost of an independent medical examination and 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 an injury occurring after July 1, 2017, therefore, the provisions of the new statute involving extent of disability, temporary benefits, and recovery of the cost of an independent medical examination under Iowa Code sections 85.34 and 85.39 apply to this case.

The calculation of interest is governed by Deciga-Sanchez v. Tyson, File No. 5052008 (Ruling on Defendant's Motion to Enlarge, Reconsider, or Amend Appeal Decision Re: Interest Rate Issue), which holds interest for all weekly benefits payable and not paid when due which accrued before July 1, 2017, is payable at the rate of ten percent; all interest on past due weekly compensation benefits accruing on or after July 1, 2017, is payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. Again, given this case concerns an injury occurring after July 1, 2017, the new provision on interest applies to this case.

II. Extent of Disability

The parties stipulated Pire-Justafre sustained a permanent impairment to his lumbar spine while working for Tyson, an industrial disability. Tyson avers Pire-Justafre is not entitled to any permanent impairment beyond Dr. Jensen's five percent rating. Pire-Justafre alleges he is entitled to additional industrial disability benefits.

"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).

Two physicians have provided impairment ratings in this case, Dr. Jensen, an orthopedic surgeon, and Dr. Bansal, an occupational medicine physician who performed an independent medical examination for Pire-Justafre. I find Dr. Bansal's opinion more persuasive than Dr. Jensen's opinion.

While Dr. Jensen has superior training to Dr. Bansal, there is no evidence Dr. Jensen ever personally examined Pire-Justafre. The records reflect Liddiard, a physician's assistant in Dr. Jensen's office, examined and treated Pire-Justafre. Physician's assistants in Iowa work under the supervision of physicians as required by statute. While Dr. Jensen supervises Liddiard, none of the medical records support that Dr. Jensen personally examined Pire-Justafre. When Dr. Jensen provided his impairment rating, he did not indicate he had personally examined Pire-Justafre or that he even reviewed his medical records. Dr. Bansal cited to published authority in his report supporting his opinions. While Dr. Jensen challenges the authority, he did not cite any professional publications supporting his opinions. For these reasons I find Dr. Bansal's opinion more persuasive, and I adopt his physical restrictions.

Pire-Justafre's first language is Spanish and he does not speak English well. Pire-Justafre graduated from high school in Cuba and worked as a carriage driver before coming to the United States in 2016.

At the time of the hearing Pire-Justafre was not working. Tyson terminated Pire-Justafre for a violation of the work rules on November 19, 2018. On January 30, 2019, Pire-Justafre commenced work as a janitor for Packers Sanitation Service, cleaning the Tyson plant. (Ex. D, p. 4; Tr., pp. 22-23) Pire-Justafre worked for Packers Sanitation Service four to five hours per day from Monday through Saturday, earning \$15.00 per hour. (Tr., pp. 23-24) On May 31, 2020, Packers Sanitation Service terminated Pire-Justafre's employment. (Ex. D, p. 4) Following his termination, Pire-Justafre applied for and was approved to receive unemployment benefits.

Pire-Justafre has worked for a friend who owns a siding and roofing business and operated a personal clothing business since his termination from Tyson. His work search does not contain any dates he contacted the various employers. I do not find Pire-Justafre is motivated to work.

I do believe Pire-Justafre could return to the job as a carriage driver given the position does not require lifting, or frequent bending or twisting, consistent with Dr. Bansal's restrictions. I also believe Pire-Justafre could return to polishing granite. Pire-Justafre did not report the position required lifting, bending, or twisting. Considering all of the factors of industrial disability, including Pire-Justafre's lack of motivation to return to work since he was discharged by Packers Sanitation Service, I find Pire-Justafre has sustained a fifteen percent industrial disability, entitling Pire-Justafre to 75 weeks of permanent partial disability benefits, at the stipulated weekly rate of \$511.28.

III. Temporary Benefits

Iowa Code section 85.33 (2017) 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). Pire-Justafre seeks

temporary benefits from November 11, 2018, through January 29, 2019, until he was hired by Packers Sanitation Service. Tyson avers he is not entitled to temporary benefits because he was terminated for misconduct.

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. Pire-Justafre has sustained a permanent impairment as a result of the work injury, therefore, if he is entitled to temporary benefits, he is entitled to healing period benefits.

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

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

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

At the time of his termination, Pire-Justafre was not at maximum medical improvement.

The statute precludes an employee who refuses suitable work offered by the employer, consistent with the employee's disability, from receiving temporary or healing period benefits during the period of refusal. Iowa Code § 85.33(3); Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 520 (Iowa 2012). The employer bears the burden of providing the affirmative defense. Schutjer v. Algona Manor Care Ctr., 780 N.W.2d 549, 559 (Iowa 2010). The issue of whether an employer has offered suitable work is ordinarily an issue for the trier of fact. Neal, 814 N.W.2d at 518. The Iowa Supreme Court has held under the express wording of the statute, the offered work must be "suitable" and "consistent with the employee's disability" before the employee's refusal to accept such work will disqualify [the employee] from receiving temporary partial, temporary total, and healing period benefits." Id. at 519.

Pire-Justafre did not actually refuse an assignment; rather Tyson avers he engaged in misconduct resulting in this termination, which is a refusal to perform the offered work. For misconduct to disqualify a person from compensation, the misconduct must be tantamount to a refusal to perform offered work. Reynolds v. Hy-Vee, Inc., 2017 WL 5176028, File No. 5046203 (Oct. 31, 2017, Iowa Workers' Comp. Comm'n). "Termination by itself is not sufficient grounds to disqualify an employee from temporary benefits under Iowa Code section 85.33(3)." Gully v. Liguria Foods, Inc., 2020 WL 599659, File No. 5063429 (Jan. 30, 2020, Iowa Workers' Comp. Comm'n) (internal citations omitted). The Commissioner has held:

[t]he misconduct must be more than the type of inconsequential misconduct that employers typically overlook or tolerate. An employee working with restrictions is not entitled to act with impunity toward the employer and the employer's interests. Nevertheless, not every act of misconduct justifies disqualifying an employee from workers' compensation benefits even though the employer may be justified in taking disciplinary action.

Id. (internal citations omitted) (finding misconduct of stealing items from the employer was tantamount to a refusal to perform light duty work because the conduct was serious and the type of conduct that would reasonably cause an employer to terminate any employee).

Pire-Justafre's termination notice provides that he was terminated for receiving three warnings and a written warning with a suspension within 12 months. (Ex. C, p. 1) Pire-Justafre has a long history of discipline involving differing infractions. He received a written warning for failing to help pick up his side at the end of his shift on December 28, 2017, which he signed. (Ex. 5, p. 29) He received another written warning for not being at his work station and causing the product to become piled up and tagged on July 27, 2018, and he refused to sign the disciplinary notice. (Ex. 5, p. 30) Pire-Justafre received a third written warning for being absent on August 8, 2018, which he signed. (Ex. 5, p. 31) On August 9, 2018, Tyson found Pire-Justafre had washed a glove with a 180 degree water hose over by the old cut floor office, which was a safety violation, and he signed the discipline. (Ex. 5, p. 32) Pire-Justafre received another written warning on August 16, 2018, for "TM left 30 min early off the line to safety meeting" for an unauthorized break, which he again signed. (Ex. 5, p. 33)

Tyson issued Pire-Justafre a written warning for watching a video on his cellular telephone on October 8, 2018, and he refused to sign the document. (Ex. 5, p. 34) Tyson issued Pire-Justafre a written warning for leaving for break 10 minutes early on October 15, 2018, which he refused to sign. Pire-Justafre testified on October 15, 2018, he went to take his medication in the locker room, but the Tyson medical staff gave him the wrong time, and he refused to sign the document. (Tr., p. 46; Ex. 5, p. 35) The last incident occurred in November 2018, when he was in the locker room and using his phone during production hours. (Ex. 5, p. 36) Pire-Justafre denied watching a video. (Tr., p. 45) The parties stipulated Pire-Justafre was off work from November 11, 2018, through January 29, 2019.

Certainly, Pire-Justafre was a problem employee. He was disciplined more than three times during a twelve-month period. While Tyson had a right to terminate his employment, I do not find his misconduct to be tantamount to a refusal of suitable work. I find Pire-Justafre is entitled to healing period benefits from November 11, 2018, through January 29, 2019, at the stipulated weekly rate of \$511.28.

IV. Independent Medical Examination

Pire-Justafre seeks to recover the \$2,653 cost of Dr. Bansal's examination. (Ex. 1, p. 11) Tyson avers Pire-Justafre is not entitled to the full cost of the independent medical examination because it refers to another date of injury, September 6, 2018, involving his shoulder, which was dismissed prior to the hearing.

Iowa Code section 85.39(2)(2017), provides:

2. 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. . . . An employer is only liable to reimburse an employee for the cost of an examination conducted pursuant to this subsection if the injury for which the employee is being examined is determined to be compensable under this chapter or chapter 85A or 85B. An employer is not liable for the cost of such an examination if the injury for which the employee is being examined is determined not to be a compensable injury. A determination of the reasonableness of a fee for an examination made pursuant to this subsection, shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted.

Dr. Bansal provided an impairment rating after Dr. Jensen provided an impairment rating in this case. Pire-Justafre sustained a compensable injury under the statute and is entitled to recover the cost of the independent medical examination for this injury. The report addresses two dates of injury, one of

which is compensable, and one which is not. I find Pire-Justafre is entitled to recover half the cost of the independent medical examination for this injury, or \$1,052.

ORDER

IT IS THEREFORE ORDERED, THAT:

Defendant shall pay Claimant seventy-five (75) weeks of permanent partial disability benefits at the stipulated weekly rate of five hundred eleven and 28/100 dollars (\$511.28) per week, commencing on the stipulated commencement date of April 27, 2019.

Defendant shall pay Claimant healing period benefits from November 11, 2018, through January 29, 2019, at the stipulated weekly rate of five hundred eleven and 28/100 dollars (\$511.28) per week.

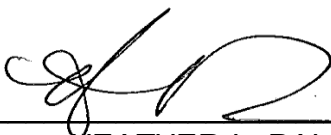
Defendant is entitled to a credit for all benefits paid to date.

Defendant shall pay accrued weekly benefits in a lump sum together with interest 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.

Defendant shall reimburse Claimant one thousand fifty-two and 00/100 dollars (\$1,052.00) for the cost of the 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 13th day of September, 2021.



HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Mary Hamilton (via WCES)

Jason Wiltfang (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.