

## BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MACARIA VARGAS,

Claimant,

vs.

FBG SERVICE CORP.,

Employer,

and

THE PHOENIX INS. CO.,

Insurance Carrier,  
Defendants.

File No. 20700706.01

ARBITRATION DECISION

Head Note Nos.: 1402.40, 1803, 2907

Claimant Macaria Vargas filed a petition in arbitration on August 6, 2020, alleging she sustained an injury to her back while working for Defendant FBG Service Corp. ("FBG") on July 13, 2020. FBG and its insurer, Defendant Phoenix Insurance Company ("Phoenix Insurance") filed an answer on August 19, 2020, admitting, Vargas sustained an injury.

An arbitration hearing was held *via* CourtCall video conference on July 19, 2021. Attorney Andrew Bribriesco represented Vargas. Vargas appeared and testified. Steven Rhodes provided Spanish interpretation services during the hearing. Attorney James Ballard represented FBG and Phoenix Insurance. Joint Exhibits ("JE") 1 through 5, and Exhibits 1 through 8 and A through C were admitted into the record. The case was submitted based on the record at the conclusion of the hearing.

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

**STIPULATIONS**

1. An employer-employee relationship existed between FBG and Vargas at the time of the alleged injury.
2. Vargas sustained an injury, which arose out of and in the course of her employment with FBG on July 13, 2020.
3. The alleged injury is a cause of temporary disability during a period of recovery.

4. Temporary benefits are no longer in dispute.
5. If the injury is found to be a cause of permanent disability, the disability is unscheduled, but Vargas is limited to the functional loss.
6. The commencement date for permanent partial disability benefits, if any are awarded is April 9, 2021.
7. At the time of the alleged injury, Vargas' gross earnings were \$368.28 per week, she was married and entitled to two exemptions, and the parties believe the weekly rate is \$266.12.
8. Costs, including payment of the independent medical examination, have been paid.

### **ISSUES**

1. Is the alleged injury a cause of permanent disability?
2. Has Vargas sustained a functional loss.
3. Is Vargas entitled to recover the cost of the independent medical examination?
4. Should costs be assessed against either party.

### **FINDINGS OF FACT**

Vargas grew up in Mexico and left school after the second grade. (Vargas Testimony) Vargas moved to the United States and she lives in Davenport with her husband. (Vargas Testimony) Vargas has worked as a cleaning specialist for FBG at Palmer College since July 9, 2019. (Exs. 5, p. 16; 6, p. 22; Vargas Testimony) Vargas speaks Spanish, but she does not speak English well. (Vargas Testimony)

On July 13, 2020, the elevator was not working at Palmer College, so Vargas took the stairs to go downstairs. (Vargas Testimony) One of the stair steps was missing a piece and her foot went out from under her. (Vargas Testimony) As Vargas started to fall, she grabbed a pole on the stairs and kept herself from falling down the stairs. (Vargas Testimony) Vargas testified she hit herself with the bar or pole on her chest and back when she was falling. (Vargas Testimony) Vargas reported her work injury to FBG. (Vargas Testimony) Vargas testified she did not have any accidents involving her back before July 13, 2020. (Vargas Testimony)

FBG arranged for medical care for Vargas with Concentra. (JE 1) On July 16, 2020, Vargas attended an appointment with Naomi Chelli, M.D., a family medicine practitioner with Concentra, complaining of a back injury. (JE 1, p. 1) Vargas received

interpretation services during the appointment and testified she did not have any problems with the interpretation services she received. (Vargas Testimony)

Dr. Chelli documented Vargas "was walking down the stairs at work and her foot caught, she grabbed a bar, but [s]he did not fall to the ground or into the bar," and noticed pain in her back and shortness of breath due to back pain. (JE 1, pp. 1-2) Vargas relayed the pain lasts for long periods of time, "in her neck and all the way down her back, into her feet and into her fingers (arms, hands, legs, and back). When she breathes she gets a sharp pain, she thinks she has a strain." (JE 1, p. 2) During the examination, Vargas complained of "chest wall/thorax pain" in her anterior chest, bilaterally, without radiation. (JE 1, p. 2) Dr. Chelli documented Vargas complained of bilateral lower back pain and that the pain was radiating into her right buttock, her symptoms occur intermittently, and she described her pain as sharp, aching, and shooting in nature without leg weakness or numbness. (JE 1, p. 2) Vargas reported bending, climbing, stairs, lifting, standing, and walking exacerbate her pain, and taking nonsteroidal anti-inflammatory drugs relieves her pain. (JE 1, p. 2)

On exam, Dr. Chelli found Vargas' lumbosacral spine appeared normal, she had tenderness in the right sciatic notch, right sacroiliac joint, right facet joints and left facet joints, with limited range of motion "Flexion AROM of 70 degrees and painful. Extension AROM of 0 degrees and painful. Left Thoracolumbar Sidebending AROM of 20 degrees and painful. Right Thoracolumbar Sidebending AROM of 20 degrees and painful," with negative leg raises. (JE 1, pp. 2-3) Dr. Chelli ordered x-rays, administered a Depo-Medrol injection, assessed Vargas with lumbar pain and chest wall discomfort, prescribed ibuprofen 800 milligrams, Tizanidine HCl 4 milligrams, a moist heating pad, and recommended physical therapy. (JE 1, p. 3) Dr. Chelli released Vargas to return to work with restrictions of lifting up to 10 pounds frequently, pushing/pulling up to 20 pounds frequently, standing occasionally, walking occasionally, no climbing ladders, sitting 60 percent of the time, no bending, and climbing up to five stairs. (JE 1, p. 4)

Vargas attended a follow-up appointment with Dr. Chelli on July 21, 2020. (JE 1, p. 13) Vargas reported her back was hurting more, especially at work and that her employer was not following her restrictions and was making her bend. (JE 1, p. 13) Vargas relayed the physical therapy was causing her pain and was not helping. (JE 1, p. 13) Dr. Chelli examined Vargas, prescribed gabapentin 100 milligrams and prednisone 20 milligrams, and continued her work restrictions. (JE 1, pp. 14-15)

On July 28, 2020, Vargas returned to Dr. Chelli regarding her back injury. (JE 1, p. 16) Vargas complained of radiating back pain and that she was very sore after therapy, reported she was taking her medication, and relayed she was not doing much bending at work. (JE 1, p. 16) Dr. Chelli documented Vargas' symptoms were improving and she was tolerating therapy well. (JE 1, p. 17) Dr. Chelli examined Vargas and noted she had tenderness in her right and left facet joints with limited range of motion, finding "Flexion AROM of 70 degrees and painful. Extension AROM of 5 degrees and painful. Left Thoracolumbar Sidebending AROM of 20 degrees and

painful. Right Thoracolumbar Sidebending AROM of 20 degrees and painful.” (JE 1, p. 17) Dr. Chelli assessed Vargas with lumbar pain and chest wall discomfort, administered a Ketorolac Tromethamine injection and Depo-Medrol and continued her restrictions. (JE 1, pp. 17-18)

Vargas attended a recheck with Dr. Chelli on August 4, 2020, complaining of pain radiating from her upper back to her lower back and that she has been very sore after therapy. (JE 1, p. 19) Dr. Chelli documented Vargas’ symptoms were improving, found her range of motion the same, assessed her with lumbar pain, lumbosacral spondylolysis, and anterolisthesis, referred Vargas to an orthopedic surgeon, and imposed restrictions of lifting up to 10 pounds frequently, pushing/pulling up to 20 pounds frequently, bending occasionally, standing occasionally, walking occasionally, and sitting 80 percent of the time. (JE 1, pp. 19-21) Dr. Chelli noted Vargas’ current medications included Advil, gabapentin 100 milligrams, Ibuprofen 800 milligrams, prednisone 20 milligrams, and tizanidine. (JE 1, p. 28)

On October 6, 2020, Vargas attended an appointment with Myles Luszczyk, D.O., an orthopedic surgeon. (JE 2, p. 30) Dr. Luszczyk documented Vargas reported she slipped on some stairs at work, “falling down and hurting her back. She fell on the second stair when she grabbed the rail,” and since that time “she has noted quite a bit of discomfort radiating down the left lower extremity and prior to this, she really reports that she had no specific issues.” (JE 2, p. 30) Dr. Luszczyk examined Vargas, noted she had been taking Advil, but she had not received any injections. (JE 2, p. 30) Vargas complained of a burning sensation down her leg that is constant and radiating, but does not wake her from sleep, and that standing, twisting, and bending exacerbate her symptoms and rest improves her symptoms. (JE 2, p. 30) Dr. Luszczyk documented Vargas had “decreased range of motion of the lumbar spine with paraspinal muscle tenderness” and “some diminished reflexes at S1 bilaterally.” (JE 2, p. 31) Dr. Luszczyk assessed Vargas with isthmic spondylolisthesis L5-S1, possible sacralized segment, ongoing symptoms of radicular symptoms down the left lower extremity, aggravated by a fall at work. (JE 2, p. 31) Dr. Luszczyk wrote he expressed to Vargas he did not believe the injury created her isthmic spondylolisthesis, which was a pre-existing condition, but “by falling down the stairs, this may have flared up the radicular symptoms down the lower extremity, as she really reported prior to this she had no symptoms,” and recommended magnetic resonance imaging and a computerized tomography scan of her lumbar spine. (JE 2, p. 31)

Counsel for FBG and Phoenix Insurance asked Vargas at hearing why she did not report any leg symptoms until her appointment with Dr. Luszczyk when she was taking Advil to relieve her pain. Vargas responded her medications had calmed her pain and when they ran out her pain was worse. (Vargas Testimony) The record reflects Dr. Chelli prescribed several medications for Vargas following her work injury.

On October 27, 2020, Vargas underwent lumbar spine magnetic resonance imaging. (JE 2, p. 32) The reviewing radiologist listed an impression of “[b]ilateral L5 spondylolysis with associated anterolisthesis of L5 on S1 by 7 mm,” and “[m]ild bilateral foraminal narrowing at L5-S1 due to anterolisthesis and disc bulging.” (JE 2, p. 33)

Vargas returned to Dr. Luszczyk to discuss the imaging on November 3, 2020. (JE 2, p. 34) Dr. Luszczyk noted he told Vargas there is evidence of isthmic spondylolisthesis which “is measured as a grade 2 and creates severe, if not complete obliteration of the foramen bilaterally at the L5-S1 levels,” which he stated he believed was contributing to her left-sided radicular symptoms. (JE 2, p. 34) Vargas relayed she had done heavy labor her entire life and really had not had much of an issue with her spine. (JE 2, p. 34) Dr. Luszczyk documented he discussed conservative treatment with injections and surgery with Vargas and gave her time to think about her options at home. (JE 2, p. 34)

On January 7, 2021, Vargas attended an appointment with Dr. Luszczyk. (JE 2, p. 35) Dr. Luszczyk documented he told Vargas surgery will most likely not improve her back pain and that he believed she would continue to have numbness and residual discomfort as a result of chronic nerve compression and nerve damage that may have occurred, noting she could become worse after surgery, and discussed narcotics management with a pain specialist following surgery. (JE 2, pp. 36-37) Dr. Luszczyk released Vargas to return to work with a restriction of no use of a large heavy mop, noting it is fine for her to use a “[S]wiffer style light mop.” (JE 2, p. 38) On March 8, 2021, a representative for FBG and Phoenix Insurance authorized the recommended surgery to be performed by Dr. Luszczyk. (Ex. 4, p. 13)

On March 31, 2021, Dr. Luszczyk documented due to Vargas not proceeding with surgery she would be deemed to be at maximum medical improved, and he released her to return to light duty at work on April 9, 2021, with restrictions of no repetitive bending, twisting, or lifting greater than 25 pounds. (JE 2, p. 39) Vargas testified she received a back brace or band to wear while working, which she continued to use at the time of the hearing. (Vargas Testimony)

On April 16, 2021, Sunil Bansal, M.D., an occupational medicine physician, conducted an independent medical examination for Vargas and issued his report on May 14, 2021. (Ex. 2) Dr. Bansal reviewed Vargas’ medical records and examined her. (Ex. 2) On exam, Dr. Bansal observed Vargas had a positive left straight leg raise, flexion of 70 degrees, extension of 25 degrees, left lateral flexion of 32 degrees, right lateral flexion of 29 degrees, tenderness to palpation over the lumbar back, with guarding, no loss of sensory discrimination in the right lower extremity, but loss of sensory discrimination over the posterolateral lower leg, and lower extremity strength of 5/5 for the right lower extremity for ankle dorsiflexion, plantar flexion, and quadriceps, and lower extremity strength of 5/5 ankle dorsiflexion and quadriceps and 4/5 plantar flexion for the left lower extremity. (Ex. 2, pp. 8-9)

Dr. Bansal diagnosed Vargas with aggravation of L5-S1 ischemic spondylolisthesis, grade II, caused by the July 13, 2020 work injury. (Ex. 2, p. 9) Dr. Bansal documented Vargas was injured at work when she was walking down the stairs and slipped on a step and twisted suddenly, but she managed to catch herself and did not fall. (Ex. 2, p. 9) Dr. Bansal noted she had back pain at the time of the incident, which was much worse the next day. (Ex. 2, p. 9) Dr. Bansal opined, "the violent twisting of her back from her near fall aggravated her underlying lower lumbar spondylolisthesis," citing to published authority. (Ex. 2, pp. 9-10) Dr. Bansal found Vargas has advanced spondylolisthesis with clinically relevant radiculopathy, she is a candidate for a lumbar fusion, and under the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), she meets the criteria, under Table 15-3 for a DRE Category III impairment, and he assigned a 12 percent whole person impairment. (Ex. 2, p. 10) Dr. Bansal recommended permanent restrictions of no lifting greater than 20 pounds occasionally, 10 pounds frequently, no frequent bending or twisting, no prolonged sitting greater than 30 minutes at a time, and to avoid multiple stairs. (Ex. 2, p. 10)

On May 17, 2021, Vargas was seen and treated in the emergency department at Trinity UnityPoint Health, following a motor vehicle accident, complaining of neck pain, back pain, and right elbow pain. (JE 5, pp. 57-58) Vargas was discharged with an impression of a motor vehicle collision, acute cervical myofascial strain, and acute thoracic myofascial strain, and she was released to return to work on May 20, 2021, by Rhonda Sowards, M.D. (JE 5, pp. 57-62) Vargas testified she did not receive any follow-up care after the accident. (Vargas Testimony)

Pursuant to a request from counsel for FBG and Phoenix Insurance, on July 5, 2021, Dr. Luszczuk issued a letter stating, in part,

[a]s you know, Ms. Vargas does have evidence of an isthmic spondylolisthesis. In my consultation with Ms. Vargas, we did state that I did not believe that her isthmic spondylolisthesis was caused by her injury that she sustained on July 13, 2020. In my discussion with Ms. Vargas, she has elected not to proceed with surgical intervention.

I have not received any further correspondence from her, and at this point I would deem her maximal medical improvement as of April 9, 2021. She has elected not to proceed with surgical intervention, and it appears from my records that she has not pursued any further treatment for her injury. I would put her at a permanent partial impairment rating of 0.

(JE 3, p. 40)

## 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 an injury occurring after 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 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. Again, given this case concerns an injury occurring after July 1, 2017, the new provision on interest applies to this case.

### II. Nature and Extent of Disability

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of and in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment, and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs "in the course of employment" when:

it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's

departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of his employer.

Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174, 177 (Iowa 1979).

The question of medical causation is “essentially within the domain of expert testimony.” Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must “weigh the evidence and measure the credibility of witnesses.” Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert’s education, experience, training, and practice, and “all other factors which bear upon the weight and value” of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

It is well-established in workers’ compensation that “if a claimant had a preexisting condition or disability, aggravated, accelerated, worsened, or ‘lighted up’ by an injury which arose out of and in the course of employment resulting in a disability found to exist,” the claimant is entitled to compensation. Iowa Dep’t of Transp. v. Van Cannon, 459 N.W.2d 900, 904 (Iowa 1990). The Iowa Supreme Court has held,

a disease which under any rational work is likely to progress so as to finally disable an employee does not become a “personal injury” under our Workmen’s Compensation Act merely because it reaches a point of disablement while work for an employer is being pursued. It is only when there is a direct causal connection between exertion of the employment and the injury that a compensation award can be made. The question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause.

Musselman v. Cent. Tel. Co., 261 Iowa 352, 359-60, 154 N.W.2d 128, 132 (1967).

Iowa Code section 85.34(2) governs compensation for permanent partial disabilities. The law distinguishes between scheduled and unscheduled disabilities. The Division of Workers Compensation evaluates disability using two methods, functional and industrial. Simbro v. Delong’s Sportswear, 332 N.W.2d 886, 887 (Iowa 1983).

The Division applies the functional method for a scheduled injury to each part of the body listed in the statute, including: (1) a thumb; (2) a first finger; (3) a second finger; (4) a third finger; (5) a fourth finger; (6) a first or distal phalange of the thumb or



any finger; (7) loss of more than one phalange of the thumb or a finger; (8) a great toe; (9) one of the toes other than the great toe; (10) a first phalange of any toe; (11) loss of more than one phalange of any toe; (12) a hand; (13) an arm; (14) a shoulder (added in 2017); (15) a foot; (16) a leg; (17) an eye; (18) “loss of an eye, the other eye having been lost prior to the injury;” (19) hearing, other than occupational loss; (20) occupational hearing loss; (21) “loss of both arms, or both hands, or both feet, or both legs, or both eyes, or any two thereof, caused by a single accident;” and (22) disfigurement of the face or head. Iowa Code § 85.34(2)(a)-(u); Westling v. Hormel Foods Corp., 810 N.W.2d 247, 252 (Iowa 2012). Each of these subsections provides a maximum number of weeks of compensation for the complete loss of a scheduled member or body part.

Since 2017, compensation or functional loss for scheduled injuries is determined by taking the number of weeks allowed for a complete loss of the body part or scheduled member, multiplied by a percentage of impairment determined using the AMA Guides. Iowa Code § 85.34(2)(x). The Division uses the industrial method for “all cases of permanent partial disability other than those” set forth in Iowa Code section 85.34(a) through (u). All other cases are classified as “unscheduled injuries.” Westling, 910 N.W.2d at 252-53. Compensation for unscheduled injuries is determined examining the reduction of earning capacity. Id. at 53. However, the statute now requires compensation be awarded for functional loss if an employee returns to work or is offered work “for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury.” Iowa Code § 85.34(2)(v). The parties stipulated Vargas returned to work receiving the same or greater wages she received at the time of the injury and if she has sustained a loss, she is entitled to compensation for functional loss at this time. Certainly, should her employment with FBG end, Vargas may be entitled to additional benefits for an industrial loss.

Two physicians have provided opinions in this case, Dr. Luszczyk, a treating orthopedic surgeon, and Dr. Bansal, an occupational medicine physician who conducted an independent medical examination for Vargas. Dr. Luszczyk has superior training to Dr. Bansal and he also treated Vargas, however, he did not reference in the AMA Guides, as required by the statute and rules in rendering his opinion, and I find his opinion equivocal. I find Dr. Bansal’s opinion to be the most persuasive.

During Vargas’ first appointment on October 6, 2020, Dr. Luszczyk assessed Vargas with isthmic spondylolisthesis L5-S1, possible sacralized segment, ongoing symptoms of radicular symptoms down the left lower extremity, aggravated by a fall at work. (JE 2, p. 31) Dr. Luszczyk wrote he expressed to Vargas he did not believe the injury created her isthmic spondylolisthesis, which was a pre-existing condition, but “by falling down the stairs, this may have flared up the radicular symptoms down the lower extremity, as she really reported prior to this she had no symptoms,” and recommended magnetic resonance imaging and a computerized tomography scan of the lumbar spine. (JE 2, p. 31) Vargas returned to Dr. Luszczyk on November 3, 2020, and he opined her condition “flared up after her work incident and since that time, she has developed

incapacitating pain down the left lower extremity. (JE 2, p. 34) When Vargas declined surgery, Dr. Luszczyk found Vargas reached maximum medical improvement and he assigned her permanent restrictions. (JE 2, p. 39)

On July 5, 2021, Dr. Luszczyk issued an opinion letter stating he did not believe the work injury caused Vargas' isthmic spondylolisthesis. (JE 3, p. 40) He did not offer an opinion whether the work injury lighted up or aggravated her condition. (JE 3, p. 40) In his earlier opinions, Dr. Luszczyk documented the work injury aggravated her condition.

After assigning permanent restrictions, Dr. Luszczyk assigned Vargas a zero percent permanent impairment rating. (JE 3, p. 40) His records do not contain any findings he made on examination when he released Vargas from care and found she had reached maximum medical improvement. Dr. Bansal included range of motion findings on examination, just as Dr. Chelli did, the original authorized treating physician. There is no evidence in the record Vargas complained of problems with her low back or that she sought treatment for her low back condition before the work injury. Vargas does not speak English and relies on interpreters for medical appointments and legal proceedings. I observed during the hearing that at times the interpreter had to clarify statements because of misunderstandings. I found Vargas to be a credible witness at hearing. Her testimony was clear, her eye contact was direct, and she did not engage in any furtive movements. I believe the work injury aggravated her underlying isthmic spondylolisthesis. I also adopt Dr. Bansal's restrictions as Vargas' permanent restrictions.

The statute requires use of the AMA Guides in assigning functional impairment. Iowa Code § 85.34(2)(x). Dr. Bansal is the only physician who provided a rating using the AMA Guides in this case. I find, based on Dr. Bansal's rating, Vargas has sustained a 12 percent functional impairment, entitling her to 60 weeks of permanent partial disability benefits at the stipulated weekly rate of \$266.12, commencing on the stipulated commencement date of April 9, 2021.

### **III. Recovery of the Cost of an Independent Medical Examination**

Vargas seeks to recover the \$1,968.00 cost of Dr. Bansal's independent medical examination. FBG and Phoenix Insurance aver Vargas is not entitled to recover the cost of an independent medical examination.

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 issued his report on May 14, 2021. No physician retained by FBG and Phoenix Insurance had rendered an impairment rating before Dr. Bansal issued his report. Under the statute, Vargas is not entitled to recover the cost of the independent medical examination.

#### **IV. Costs**

Vargas seeks to recover the \$100.00 filing fee, \$13.92 certified mail fee, \$1,436.00 cost of Dr. Bansal's report, and \$532.00 cost of Dr. Bansal's examination. 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. The administrative rule allows for the recovery of the cost of the filing fee, cost of service, and the cost of Dr. Bansal's report.

In the case of Des Moines Area Regional Transit Authority v. Young, the Iowa Supreme Court held:

[w]e conclude section 85.39 is the sole method for reimbursement of an examination by a physician of the employee's choosing and that the expense of the examination is not included in the cost of a report. Further, even if the examination and report were considered to be a single, indivisible fee, the commissioner erred in taxing it as a cost under administrative rule 876-4.33 because the section 86.40 discretion to tax costs is expressly limited by Iowa Code section 85.39.

867 N.W.2d 839, 846-47 (Iowa 2015). The statute and case law interpreting a former version of the statute and rules do not afford for the recovery of the cost of the

examination in this case. Id.; Iowa Code § 85.39; 876 IAC 4.33. The statute, rules, and case law allow for the recovery of Dr. Bansal's report only.

**ORDER**

IT IS THEREFORE ORDERED, THAT:

Defendants shall pay Claimant sixty (60) weeks of permanent partial disability benefits at the stipulated weekly rate of two hundred sixty-six and 12/100 dollars (\$266.12), commencing on the stipulated commencement date of April 9, 2021.

Defendants 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.

Defendants shall reimburse Claimant one hundred and 00/100 dollars (\$100.00) for the filing fee, thirteen and 92/100 dollars (\$13.92) for service, and one thousand four hundred thirty-six and 00/100 dollars (\$1,436.00) for the cost of Dr. Bansal's report.

Defendants 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 14<sup>th</sup> day of September, 2021.

  
\_\_\_\_\_  
HEATHER L. PALMER  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Andrew Bribriesco (via WCES)

James Ballard (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.