

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

OSMAN KAGO,

Claimant,

vs.

TYSON FRESH MEATS, INC.,

Employer,
Self-Insured,
Defendant.

File No. 1650789.01

ARBITRATION DECISION

Head Notes: 1800; 1803; 2907

STATEMENT OF THE CASE

The claimant, Osman Kago, filed a petition for arbitration seeking workers' compensation benefits from self-insured employer Tyson Fresh Meats, Inc. ("Tyson"). Christopher Spaulding appeared on behalf of the claimant. Dillon Carpenter appeared on behalf of the defendant.

The matter came on for hearing on January 26, 2022, before Deputy Workers' Compensation Commissioner Andrew M. Phillips. Pursuant to an order of the Iowa Workers' Compensation Commissioner related to the COVID-19 pandemic, the hearing occurred via CourtCall. The hearing proceeded without significant difficulty.

The record in this case consists of Joint Exhibits 1-6, Claimant's Exhibit 1-5, and Defendant's Exhibits A-H. The claimant submitted an exhibit 6, which was initially admitted to the record; however, at the conclusion of the hearing, it was determined that it was unnecessarily duplicative. Accordingly, the claimant agreed to withdraw Claimant's Exhibit 6. The exhibits were received into the record without objection.

The claimant testified on his own behalf. Buffy Nelson was appointed the official reporter and custodian of the notes of the proceeding. Jam Duany was sworn in as the interpreter. The evidentiary record closed at the end of the hearing, and the matter was fully submitted on February 25, 2022, after briefing by the parties.

STIPULATIONS

Through the hearing report, as reviewed at the commencement of the hearing, the parties stipulated and/or established the following:

1. There was an employer-employee relationship at the time of the alleged injury.

2. That the claimant sustained an injury which arose out of, and in the course of employment on December 18, 2017.
3. That the alleged injury is a cause of temporary disability during a period of recovery.
4. That the alleged injury is a cause of permanent disability.
5. That the permanent disability is an industrial disability.
6. That the commencement date for permanent partial disability benefits, if any are awarded, is September 27, 2021.
7. The claimant's gross earnings were six hundred thirty-seven and 74/100 dollars (\$637.74) per week. He was married and entitled to seven exemptions. This resulted in a weekly compensation rate of four hundred fifty-two and 90/100 dollars (\$452.90).
8. With regard to disputed medical expenses:
 - a. That, although disputed, the medical providers would testify as to the reasonableness of their fees and/or treatment set forth in the listed expenses and defendant is not offering contrary evidence.
9. That prior to the hearing, the claimant received five weeks of compensation at the rate of four hundred fifty-two and 90/100 dollars (\$452.90) per week.

Entitlement to temporary disability and/or healing period benefits is no longer in dispute. The defendant waived their affirmative defenses.

The parties are now bound by their stipulations.

ISSUES

The parties submitted the following issues for determination:

1. The extent of permanent disability, if any is awarded.
2. Whether the claimant is entitled to payment of medical expenses, as listed in Claimant's Exhibit 5.
3. With regard to the requested medical expenses:
 - a. Whether the fees or prices charged by the providers are fair and reasonable.
 - b. Whether the treatment was reasonable and necessary.
 - c. Whether the listed expenses are causally connected to the work injury.

- d. Whether the listed expenses are at least causally connected to the medical condition(s) upon which the claim of injury is based.
 - e. Whether the requested expenses were authorized by the defendant.
4. Whether the claimant is entitled to an assessment of costs.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Osman Kago, the claimant, was 57 years old at the time of the hearing. (Testimony). He currently resides in Waukee, Iowa. (Testimony). He is married to Hanan Koko and has six children. (Testimony). Only one child still lives at home. (Testimony).

Mr. Kago is originally from Omdurman, Sudan. (Testimony). Mr. Kago speaks the Nubian language. (Testimony). He cannot read or write in the Nubian language. (Testimony). He lived there from birth to 2007. (Testimony). In Sudan, he worked as a builder. (Testimony). He also worked with his father on a farm. (Testimony). In 2007, he, and his family moved to Cairo, Egypt, in an attempt to afford his children a better life. (Testimony). In Egypt, he sold watches and perfumes in the marketplace. (Testimony).

In 2014, Mr. Kago arrived in the United States of America as a refugee. (Testimony). He initially arrived in Spokane, Washington. (Testimony). He began working in a hotel. (Testimony; Defendant's Exhibit A). Upon arrival, he took some English as a second language classes; however, outside of his name and address, he does not speak, write, or read English. (Testimony). When he meets with his attorney, much like at the hearing, he requires an interpreter. (Testimony). On the other hand, Mr. Kago was able to respond to certain questions both at hearing and during his discovery deposition without interpretation. (Testimony; Defendant's Exhibit A:5). This indicates at least a very basic understanding of some degree of English.

Mr. Kago moved to Iowa and began a job with Tyson in September of 2017. (Testimony). At Tyson, Mr. Kago broke up cardboard boxes. (DE E:5). He had to lift, bend, push and pull, and climb stairs during his shift. (DE E:5). He earned fifteen and 55/100 dollars (\$15.55) per hour upon commencement of employment with Tyson. (Testimony).

On, or about, December 18, 2017, Mr. Kago broke down boxes and went up and down stairs as part of his job with Tyson. (Testimony). He alleges that he injured his foot when he was breaking down boxes. (Testimony). This contradicts his discovery responses wherein he alleges that repetitive work activities over time caused the claimant to have neck pain, right shoulder pain, back pain, right hip pain, and right leg pain. (DE E:5).

He treated for three and one-half years before having a hip surgery. (Testimony). The surgery helped his right hip condition to some extent, but he continued to claim pain in the right hip. (Testimony).

The claimant presented to Iowa Ortho on January 29, 2018. (Joint Exhibit 1:1-3). Mr. Kago told the provider that he was “breaking down combos” and climbing stairs which caused him pain. (JE 1:1). Kurt Smith, D.O. examined the claimant for complaints of right hip pain and right shoulder pain. (JE 1:1). Climbing and descending stairs aggravated Mr. Kago’s pain. (JE 1:1). Movement in his shoulder also aggravated his pain. (JE 1:1). As of this appointment, he worked 50 percent of his regular duties. (JE 1:1). Dr. Smith diagnosed Mr. Kago with a right shoulder strain and a right hip strain. (JE 1:3). Dr. Smith recommended that Mr. Kago take Tylenol, work 50 percent of his regular duty, attend physical therapy, and return in two weeks. (JE 1:3).

On February 19, 2018, Mr. Kago returned to Iowa Ortho. (JE 1:4-5). Mr. Kago told Dr. Smith that his right hip issue was improved and had achy pain. (JE 1:4). Dr. Smith opined that Mr. Kago’s right hip symptoms resolved. (JE 1:4). Dr. Smith also concluded that Mr. Kago’s right shoulder pain resolved. (JE 1:4). Dr. Smith discharged Mr. Kago to full duty work, and also recommended discontinuation of physical therapy. (JE 1:5). Finally, Dr. Smith placed Mr. Kago at maximum medical improvement (“MMI”). (JE 1:5).

On July 30, 2018, Mr. Kago returned to Dr. Smith’s office at Iowa Ortho. (JE 1:6-8). Mr. Kago complained of lower back pain that fluctuated. (JE 1:6). The pain radiated to the right thigh and right buttock, and Mr. Kago described it as an ache and discomfort. (JE 1:6). Sitting aggravated his symptoms. (JE 1:6). Mr. Kago noted that work did not increase his symptoms, and that he changed jobs since being seen by Dr. Smith in February of 2018. (JE 1:6). Dr. Smith observed that Mr. Kago demonstrated “good range of motion” in the lumbar spine, and that Mr. Kago’s subjective symptoms were not supported by Dr. Smith’s objective findings. (JE 1:8). Dr. Smith recommended that Mr. Kago obtain an x-ray of his lumbar spine and continue to take Tylenol. (JE 1:8). He also allowed Mr. Kago to return to work full duty and prescribed physical therapy. (JE 1:8).

Tyson terminated Mr. Kago’s employment on August 8, 2018. (DE D:1). Mr. Kago acknowledges that Tyson terminated him for having attendance issues and incurring “14 points.” (Testimony; DE D:2-6). The reason for Mr. Kago’s termination was listed as “job abandonment.” (DE D:1). In a written report, it was clarified that Mr. Kago was terminated due to “excessive absenteeism;” however, the remainder of the report is largely illegible. (DE D:2). The records provided by Tyson paint a picture of chronic unexcused absences prior to Mr. Kago’s termination. (DE D:2-6). At the time of his termination from Tyson, he earned sixteen and 75/100 dollars (\$16.75) per hour. (Testimony). Mr. Kago speculated that he would make more than sixteen and 75/100 dollars (\$16.75) per hour if he continued to work at Tyson. (Testimony).

Mr. Kago continued his care with Dr. Smith at Iowa Ortho on September 11, 2018. (JE 1:9-11). He complained of persistent achy discomfort in his low back. (JE 1:9). Fatigue aggravated his symptoms, while rest alleviated them. (JE 1:9). Dr. Smith

reviewed x-rays of the lumbar spine, which showed very mild degenerative changes of the lumbar disc spaces, as well as the posterior articular facets. (JE 1:10-11). There were no acute fractures observed on the examination. (JE 1:11). Dr. Smith again noted that Mr. Kago's subjective lower back pain is not supported by objective findings. (JE 1:11). Dr. Smith further observed that the mild degenerative changes seen on the x-rays were "not a work-related condition." (JE 1:11). Dr. Smith recommended physical therapy and that Mr. Kago return in two weeks. (JE 1:11).

On September 26, 2018, Mr. Kago returned to Dr. Smith's office at Iowa Ortho. (JE 1:12-14). Mr. Kago continued to complain of lower back pain that was aggravated by changing positions, extending his lower back, and lifting. (JE 1:12). Mr. Kago denied that anything alleviated his pain. (JE 1:12). Mr. Kago noted minimal changes with physical therapy. (JE 1:12). He told Dr. Smith through an interpreter that he worked full time at Panchero's where he washed dishes and assisted with cooking. (JE 1:12). Dr. Smith diagnosed Mr. Kago with chronic right-sided low back pain without sciatica, and lumbar facet arthropathy. (JE 1:14). Upon examination, Dr. Smith observed no evidence of radiculopathy. (JE 1:14). Dr. Smith concluded that Mr. Kago's low back symptoms were a "temporary exacerbation of degenerative changes." (JE 1:14). Dr. Smith again noted that Mr. Kago was able to work full duty, and recommended that he complete two additional weeks of physical therapy. (JE 1:14).

Dr. Smith saw Mr. Kago again on October 15, 2018, at Iowa Ortho. (JE 1:15-17). Mr. Kago continued to complain of persistent low back pain radiating to the right buttock. (JE 1:15). Mr. Kago described his pain as achy discomfort. (JE 1:15). Again, fatigue aggravated Mr. Kago's pain, while rest alleviated the pain. (JE 1:15). Dr. Smith diagnosed the claimant with chronic right-sided lower back pain without sciatica. (JE 1:16). Dr. Smith again made a note that Mr. Kago's subjective pain was not supported by objective findings. (JE 1:16). Dr. Smith observed that Mr. Kago worked 40 hours per week at Panchero's without an increase in his symptoms. (JE 1:17). Dr. Smith allowed Mr. Kago to work full duty and discharged him at MMI. (JE 1:17).

On December 4, 2018, Mr. Kago presented to CIA Urbandale FM for an examination by Marc Molis, M.D. (JE 2:36-43). Mr. Kago complained of low back, right hip, and right leg pain. (JE 2:42). Mr. Kago described a labor intensive job to Dr. Molis, which included climbing up and down stairs. (JE 2:42). Mr. Kago indicated that his pain was more persistent over the last two to three months, especially on the right side. (JE 2:42). Mr. Kago displayed pain to palpation around L4-5 and had a positive straight leg raise that reproduced symptoms on the right side. (JE 2:42). He had a full range of motion in his right hip with no pain to palpation. (JE 2:42). Dr. Molis opined that the claimant's story was "consistent with potential disc pathology causing right radiculopathy." (JE 2:42). Dr. Molis recommended an MRI due to Mr. Kago failing conservative measures. (JE 2:42).

Mr. Kago had an MRI at UnityPoint Radiology on December 17, 2018. (JE 2:41). Aaron Hurlbut, M.D., interpreted the results of the MRI. (JE 2:41). Dr. Hurlbut opined that the lumbar MRI showed no lumbar disc herniation, spinal canal stenosis, or neural foraminal stenosis. (JE 2:41). Dr. Hurlbut observed mild degenerative endplate marrow space findings at multiple levels in the lumbar spine. (JE 2:41). Finally, Dr. Hurlbut

noted that Mr. Kago had “4 [*sic*] nonrib-bearing lumbar-type vertebral segments with small S1-S2 disc space.” (JE 2:41).

On January 28, 2019, Dr. Molis again examined Mr. Kago. (JE 2:44). Mr. Kago indicated that he completed additional physical therapy and now localized the pain in his right hip. (JE 2:44). He noted that his back “seems to have calmed down.” (JE 2:44). Upon physical examination, Mr. Kago showed a negative straight leg test and displayed difficulty with range of motion in his right hip. (JE 2:44). He also told Dr. Molis that he had pain with hip flexion, hip adduction, internal and external rotation. (JE 2:44). Dr. Molis reviewed a right hip x-ray, which showed “some mild arthritic changes as well as a possible pincher-type deformity.” (JE 2:44). Dr. Molis went on to recommend an MR arthrogram of the right hip, and that Mr. Kago continue to utilize anti-inflammatories and an icing regimen. (JE 2:44).

On September 6, 2019, Mr. Kago reported to Dr. Smith’s office at Iowa Ortho. (JE 1:18-20). The claimant complained of persistent low back pain that radiated to his right buttock. (JE 1:18). Mr. Kago described his pain as aching and burning. (JE 1:18). Bending and changing position aggravated the pain, and there were no relieving factors. (JE 1:18). Mr. Kago told Dr. Smith that he continued to work, and he presented Dr. Smith with x-rays of the right hip and an MRI of the lumbar spine. (JE 1:18). Upon physical examination, Dr. Smith found Mr. Kago to have a normal back and spine, and normal strength in his lower extremities. (JE 1:19). Dr. Smith reviewed the MRI performed on December 17, 2018, and noted that it showed no lumbar disc herniation, spinal canal stenosis, or neural foraminal stenosis. (JE 1:20). He noted that the MRI showed mild degenerative endplate marrow space findings at multiple levels in the lumbar spine. (JE 1:20). The x-ray performed on January 28, 2019, showed “slight osseous hypertrophy of the superior margin of the femoral head neck junction bilaterally could reflect femoral acetabular impingement in the appropriate clinical setting.” (JE 1:20). Dr. Smith diagnosed Mr. Kago with chronic right-sided low back pain without sciatica. (JE 1:20). Dr. Smith opined that the claimant’s examination was “normal and not changed from previous examination of 10/15/2018.” (JE 1:20). Dr. Smith continued to place Mr. Kago at MMI, and recommended no additional treatment related to the work injury. (JE 1:20).

Kirby Singleton, P.A., examined Mr. Kago at MercyOne Waukee Family Medicine Clinic on September 23, 2019. (JE 3:45-47). Mr. Kago described chronic low back and hip pain that radiated down his right leg into his foot and toes. (JE 3:45). Mr. Kago did not provide any information to Mr. Singleton with regard to any alleged traumatic incident. (JE 3:45). Mr. Kago complained of pain to the lumbar area upon palpation. (JE 3:46). However, his right hip and knee examinations were normal. (JE 3:46). Mr. Singleton diagnosed Mr. Kago with chronic low back pain without sciatica. (JE 3:46). He prescribed cyclobenzaprine and meloxicam and recommended that the claimant return in two weeks. (JE 3:46).

On October 22, 2019, Mr. Kago returned to MercyOne Waukee Family Medicine Clinic for an examination by Mr. Singleton. (JE 3:49-50). Mr. Kago complained of right hip and leg pain. (JE 3:49). Mr. Kago also had numbness in his feet and toes. (JE 3:49). Mr. Singleton diagnosed Mr. Kago with iliotibial band syndrome of the right side,

and numbness and tingling. (JE 3:50). Mr. Singleton opined that Mr. Kago suffered an overuse injury to his IT band on the right side. (JE 3:50). Mr. Singleton recommended meloxicam to treat the symptoms. (JE 3:50).

Mr. Kago returned to MercyOne Waukee Family Medicine Clinic on December 23, 2019, complaining of continued right hip pain. (JE 3:51-52). Physical examination revealed 5 out of 5 strength with hip flexion, and no anterior hip pain with bilateral hip flexion. (JE 3:52). Laura Bowshier, M.D., diagnosed Mr. Kago with low back pain with right-sided sciatica. (JE 3:52). She recommended that he have a lumbar MRI, and a trial of physical therapy. (JE 3:52).

On February 20, 2020, the claimant returned to MercyOne Waukee Family Medicine Clinic. (JE 3:53-54). Dr. Bowshier examined Mr. Kago for complaints of right hip and lower back pain. (JE 3:53). Dr. Bowshier became aware of the previously performed MRI, which she reviewed with the claimant. (JE 3:53). She continued to provide a diagnosis of low back pain with right-sided sciatica. (JE 3:54). She referred the claimant to a pain clinic. (JE 3:54).

Jolene Smith, D.O., examined Mr. Kago at Pain Specialists of Iowa on March 5, 2020, for his complaints of lumbar pain, right buttock pain, and right leg pain. (JE 4:55-56). Dr. Smith noted, "this is not a workmans [sic] comp" matter. (JE 4:55). Sitting and sleeping triggered pain in the claimant's lumbar and right buttock, which the claimant rated 6 out of 10. (JE 4:55). Dr. Smith diagnosed Mr. Kago with myalgia and piriformis syndrome of the right side. (JE 4:56). Dr. Smith reviewed the referral notes, and reviewed the results of the lumbar MRI. (JE 4:56). She recommended a right piriformis muscle injection. (JE 4:56).

On March 6, 2020, Mr. Kago returned to Dr. Smith's office for a right piriformis injection. (JE 4:57). The injection was performed without significant difficulty. (JE 4:57).

Mr. Kago's counsel arranged for an independent medical examination ("IME") with Jeffrey Pederson, D.O., F.A.A.P.M.R., C.I.M.E., at Mid-Iowa Independent Medical Evaluations, on October 16, 2020. (Claimant's Exhibit 1:1-6). Dr. Pederson promulgated a report based upon his findings on October 19, 2020. (CE 1:1-6). Mr. Kago reported that he worked at Tyson and injured his right shoulder and right hip due to repetitive lifting and other work activities. (CE 1:1). He indicated that his job was to break down boxes previously used to carry meat. (CE 1:1). He would then place the boxes into an elevator, walk up one flight of stairs, and retrieve the 25-pound boxes. (CE 1:1). Dr. Pederson reviewed Mr. Kago's medical history and applicable records. (CE 1:1-4). Mr. Kago described achy, dull low back pain greater on the right side than the left. (CE 1:2). He rated the pain 3 out of 10. (CE 1:2). Walking for 15 to 30 minutes helped alleviate his pain, while sitting or standing for long periods of time and driving for over two hours caused him increased pain. (CE 1:2). Mr. Kago also noted difficulty with sleeping on his right side and associated numbness in his right foot. (CE 1:2). At the time of the examination, Mr. Kago was working for Quad Graphics where he did not have any lifting duties. (CE 1:2).

Upon physical examination, Dr. Pederson found tenderness to palpation over the right lower lumbar paraspinals, right sacroiliac joint, and right superior gluteal musculature. (CE 1:5). Mr. Kago could bend forward and touch his toes with no issues. (CE 1:5). When he rotated to the left and extended his lumbar spine, he felt mild right lumbar paraspinal pain. (CE 1:5). Piriformis stretching on the right caused right-sided gluteal pain and tightness. (CE 1:5). Based upon his examination and review of the medical records, Dr. Pederson diagnosed Mr. Kago with right sacroiliac joint pain, an aggravation of underlying degenerative lumbar disc disease, myofascial gluteal pain, and piriformis syndrome. (CE 1:5). Dr. Pederson opined that Mr. Kago sustained a cumulative injury from his employment with Tyson. (CE 1:5). Dr. Pederson further noted that examination showed no hip impingement. (CE 1:5).

As of the time of the IME, Dr. Pederson indicated that the claimant had yet to achieve maximum medical improvement ("MMI"). (CE 1:6). Dr. Pederson felt that there was not appropriate treatment or evaluation performed since Mr. Kago's work injury. (CE 1:6). Dr. Pederson continued, by providing impairment ratings pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, which would apply if the claimant chose to forgo further evaluation or treatment. (CE 1:6). Due to a lack of specific injury, Dr. Pederson utilized the range of motion evaluation method rather than the DRE method. (CE 1:6). Dr. Pederson opined that lumbar flexion and extension impairments were 3 percent and 5 percent respectively. (CE 1:6). Right and left-sided bending range of motion deficits provided a 2 percent whole person impairment to each side. (CE 1:6). Taking these all into consideration, Dr. Pederson arrived at a 12 percent whole person impairment for the lumbar spine. (CE 1:6). Finally, Dr. Pederson assigned a 2 percent impairment for internal rotation issues with the right hip. (CE 1:6). Using the combined values chart on page 604 of the Guides, Dr. Pederson arrived at a 14 percent whole person impairment. (CE 1:6).

Dr. Pederson then recommended a litany of treatments for Mr. Kago prior to Mr. Kago achieving MMI. (CE 1:6). The additional treatment recommended by Dr. Pederson includes a right sacroiliac joint injection, repeat piriformis injection, and/or a right gluteal trigger point injection. (CE 1:6). If the numbness in his right leg persisted, Dr. Pederson recommended electrodiagnostic testing. (CE 1:6). Dr. Pederson continued by recommending additional physical therapy and a prescription for gabapentin. (CE 1:6). Finally, Dr. Pederson recommended right lumbar medial branch blocks at L4-S1 for both therapeutic and diagnostic purposes. (CE 1:6).

Dr. Pederson indicated that Mr. Kago should be allowed to frequently change positions. (CE 1:6). Mr. Kago should also limit climbing or descending stairs frequently, and limit lifting to no more than 30 pounds from the floor to the waist. (CE 1:6). Mr. Kago should also limit pushing and pulling to no more than 60 pounds. (CE 1:6). Finally, Dr. Pederson recommended a functional capacity evaluation in order to provide more objective physical restrictions. (CE 1:6).

Mr. Kago had a telemed visit with Alohalani Taylor, A.R.N.P., of Pain Specialists of Iowa on April 17, 2020. (JE 4:59-61). Mr. Kago reported a 50 percent improvement in right buttock pain initially; however, for the previous two weeks, his pain relief was only 25 percent. (JE 4:59). Sitting continued to trigger pain over the right sacroiliac

joint, for which he took ibuprofen. (JE 4:59). Ms. Taylor provided a prescription for a TENs unit and Aspercreme with lidocaine. (JE 4:60).

Mr. Kago went to Mercy Physical Medicine & Rehabilitation on November 10, 2020, based upon a referral by Dr. Smith. (CE 2:7-10). Al Huong Phu, D.O., examined Mr. Kago. (CE 2:10). Mr. Kago complained of ongoing low back pain and leg pain on the right. (CE 2:7). Mr. Kago noted that he used a TENS unit, Aspercreme, and ibuprofen, with some mild improvement. (CE 2:7). He had not continued performing home exercises. (CE 2:7). He reported working 10 hours per day, and told the provider that while he worked he felt better as he was walking and moving around. (CE 2:7). Dr. Phu diagnosed Mr. Kago with chronic low back pain without sciatica, iliotibial band syndrome of the right side, and low back pain with right-sided sciatica. (CE 2:7). Upon physical examination, Dr. Phu noted that Mr. Kago had tenderness over the right sacral border, and mild tenderness over the L5 transverse process bilaterally. (CE 2:9). Dr. Phu told Mr. Kago that this type of pain could be chronic in nature, so the plan was to keep Mr. Kago functional and help reduce his pain severity. (CE 2:9). Dr. Phu offered additional trigger point injections, and to refer him to physical therapy. (CE 2:9).

On December 21, 2020, Dr. Phu responded to a check-box letter from the claimant's attorney. (CE 2:11-12). Dr. Phu agreed that Mr. Kago's work-related job duties were a substantial factor in bringing about Mr. Kago's back and gluteal injuries. (CE 2:11). He also agreed that the work activities necessitated the treatment that Dr. Phu provided. (CE 2:11). Of note, Dr. Phu provided no additional explanation as to his opinions.

On March 9, 2021, the claimant reported to DMOS, where he was examined by Christopher Nelson, D.O. (JE 5:62-66). Mr. Kago complained of pain in his right hip, which he had since 2018 when he noted an injury to his right leg. (JE 5:62). Dr. Nelson found that Mr. Kago's pain was located mostly in his lower back. (JE 5:62). Mr. Kago told Dr. Nelson that a previous injection provided relief for only one week. (JE 5:62). Driving and lying down exacerbated his pain. (JE 5:62). X-rays were taken of the pelvis, which showed some mild impingement in various poses with the right hip. (JE 5:63). Dr. Nelson reviewed results of an MRI of the right hip, which showed a tear of the labrum. (JE 5:63). Dr. Nelson associated the right hip labral tear and pain to a work-related injury, as Mr. Kago told Dr. Nelson that he had no hip pain prior to the 2018 incident. (JE 5:63). Dr. Nelson opined that Mr. Kago could benefit from a right hip arthroscopic surgery. (JE 5:63).

On May 20, 2021, Dr. Aviles performed a right hip arthroscopy. (JE 6:67-68). Dr. Aviles diagnosed Mr. Kago with a labral tear to the right hip along with impingement. (JE 6:67). After the surgery, a provider from Iowa Ortho issued a status report. (JE 1:21). The report indicated that Mr. Kago was unable to work, and it was anticipated that he would return to modified duty in five days. (JE 1:21). He was allowed to work only desk duties. (JE 1:21). Steven Aviles, M.D. indicated that Mr. Kago should be in a hip arthroscopy rehab protocol. (JE 1:22). The diagnosis indicated was a right hip labral repair and acetabular osteoplasty. (JE 1:22).

Dr. Aviles examined Mr. Kago again on June 2, 2021. (JE 1:23-25). Dr. Aviles noted that Mr. Kago's symptoms began three years prior, and that they were mild. (JE 1:23). His symptoms were aggravated by prolonged sitting and bracing. (JE 1:23). Dr. Aviles performed a right hip arthroscopy, labral repair, and osteoplasty of the acetabulum on May 20, 2021. (JE 1:23). Mr. Kago told Dr. Aviles that he could already tell the difference in his pain levels from prior to the surgery. (JE 1:23). Dr. Aviles "reinstucted" the claimant on his protocol and recommended that he return in four weeks. (JE 1:25). Finally, Dr. Aviles restricted the claimant to working only while seated. (JE 1:25-26).

On June 30, 2021, Mr. Kago had another post-operative visit with Dr. Aviles at Iowa Ortho. (JE 1:27-30). Mr. Kago reported mild chronic symptoms. (JE 1:27). Prolonged walking, sitting, and activity aggravated his pain. (JE 1:27). Mr. Kago told Dr. Aviles that he was improving, but still had some pain. (JE 1:27). The claimant expressed a desire to be kept off work, but Dr. Aviles noted, "I am not going to do that for him. I need to just protect his hip." (JE 1:29). Dr. Aviles allowed the claimant to continue working while seated. (JE 1:29-30).

Dr. Aviles allowed Mr. Kago to return to work with a 10-pound lifting restriction. (JE 1:31). He also was to avoid repetitive squatting. (JE 1:31).

On September 27, 2021, Dr. Aviles re-examined Mr. Kago at Iowa Ortho. (JE 1:32-35). Mr. Kago continued to report mild pain in his right hip. (JE 1:32). Prolonged driving and sitting aggravated his pain, while "mobility" alleviated his pain. (JE 1:32). Mr. Kago told Dr. Aviles that he felt about 75 percent improved four and a half months out from his surgery. (JE 1:32). Dr. Aviles opined, "I do think that this is enough to return him back to work without restrictions and place him at maximal [*sic*] medical improvement. He states that the only pain that has been bothering him is around his back and he points to the paraspinal lumbar muscles." (JE 1:34). Dr. Aviles recommended that Mr. Kago call his nurse case manager regarding any lumbar complaints. (JE 1:34). Dr. Aviles allowed Mr. Kago to return to work with no restrictions. (JE 1:35).

Dr. Aviles issued a letter to Tyson on September 28, 2021. (DE B:1). In that letter, he reiterated his opinion that the claimant achieved MMI on September 27, 2021. (DE B:1). He also opined that Mr. Kago incurred a two percent permanent impairment to his "lower extremity." (DE B:1). Dr. Aviles issued another letter on the same date. (DE H:1-2). He indicated that Mr. Kago sustained a one percent permanent impairment to the whole person. (DE H:1).

Irving Wolfe, D.O. examined the claimant for an IME on January 18, 2022, at Central Iowa Neurology, P.C. (CE 3:41-55). He issued a report on the same day. (CE 3:41-55). Dr. Wolfe proceeded to review all of Mr. Kago's medical records related to the alleged injuries. (CE 3:41-47). Mr. Kago related to Dr. Wolfe that he began to have right hip area pain after about three months of working for Tyson. (CE 3:47). He indicated that he told his supervisor at Tyson about his pain, but that he continued working as a janitor at Tyson. (CE 3:47). Then, on December 18, 2017, while working, Mr. Kago reported an injury to his right shoulder and right hip. (CE 3:47). Mr. Kago told

Dr. Wolfe that his job duties at Tyson required repetitive lifting, pushing, and walking up and down stairs. (CE 3:47). He walked up and down steps or a ladder up to 30 times per day. (CE 3:47). Mr. Kago then reiterated his medical history and concluded by telling Dr. Wolfe that his symptoms “were not well controlled” as indicated in Dr. Aviles’ records. (CE 3:47-50). At the time of his examination, Mr. Kago took ibuprofen to control his pain. (CE 3:50).

The claimant told Dr. Wolfe that he had pain in his right upper buttocks and right hip with intermittent radiation of the pain down the lateral aspect of his right leg into his foot. (CE 3:50). Mr. Kago had no pain in his back or right shoulder. (CE 3:50). Due to his pain, Mr. Kago had difficulty sitting for more than 10 minutes, lifting anything over 10 pounds, and bending. (CE 3:50). Mr. Kago also could not drive for more than 20 to 30 minutes before his right buttock and hip pain flared up. (CE 3:50). Mr. Kago also expressed difficulty completing other activities of daily living. (CE 3:50).

Upon physical examination, Mr. Kago did not frequently shift positions or postures, nor did he demonstrate a slowness of movement. (CE 3:51). He also did not sit with a rigid posture. (CE 3:51). Mr. Kago had normal pin sensation of the right and left lower extremities. (CE 3:51). Motor strength testing was normal. (CE 3:51). Palpation of the paralumbar musculature showed no muscle spasms, trigger points, or tender areas. (CE 3:51). However, Mr. Kago did have tenderness over the right sacroiliac joint and the right piriformis muscle. (CE 3:51). Dr. Wolfe used a goniometer to test the claimant’s lumbar range of motion. (CE 3:51). He found that Mr. Kago had flexion of 72 degrees, extension of 20 degrees, lateral flexion to the right and left of 25 degrees. (CE 3:51). Dr. Wolfe found right hip flexion of 45 degrees, extension of 0 degrees, abduction of 25 degrees, adduction of 18 degrees, internal rotation of 20 degrees, and external rotation of 40 degrees. (CE 3:51).

Dr. Wolfe then endeavored to provide an impairment rating based upon the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (CE 3:52-53). Dr. Wolfe opined that Mr. Kago suffered no injury or permanent impairment to his back based upon the objective findings and lack of pain during his evaluation. (CE 3:52). Mr. Kago also did not suffer any injury or impairment to the right shoulder or neck. (CE 3:52). Dr. Wolfe concluded, based upon his examination of Mr. Kago, that he had no injury to the right lower extremity, and that Mr. Kago’s right leg symptoms stem from piriformis syndrome. (CE 3:52). Dr. Wolfe opined that Mr. Kago had yet to achieve MMI and thus he was not prepared to assign a permanent functional impairment rating. (CE 3:52). Rather, Dr. Wolfe, at the behest of claimant’s counsel, provided an impairment rating based upon the Guides should Mr. Kago have achieved MMI as of the examination date. (CE 3:52). Dr. Wolfe noted that Chapter 17 of the Guides provided him guidance to provide the impairment rating. (CE 3:52). Mr. Kago displayed right hip flexion of 45 degrees, which equated to an 8 percent impairment of the whole person. (CE 3:52). Mr. Kago had right hip extension of 0 degrees, which equated to zero percent impairment to the whole person. (CE 3:52). Mr. Kago demonstrated right hip abduction of 25 degrees, which equated to a two percent impairment of the whole person. (CE 3:52). Mr. Kago displayed right hip adduction of 18 degrees, which was a zero percent whole person impairment. (CE 3:52). Finally, Mr. Kago displayed right hip

internal rotation of 20 degrees which equated to a 2 percent whole person impairment. (CE 3:51). Combining all of these impairment ratings, Dr. Wolfe arrived at a 12 percent impairment of the whole person related to the right hip. (CE 3:52).

Dr. Wolfe continued his impairment rating of the claimant by noting that Mr. Kago had a right-sided sacroiliac joint dysfunction. (CE 3:52). Dr. Wolfe used Chapter 18 of the Guides and an algorithm for pain-related impairment to arrive at a 3 percent impairment of the whole person due to Mr. Kago's pain causing an "increased functional burden." Due to Mr. Kago's right-sided gluteal pain due to piriformis syndrome, Dr. Wolfe assigned a 3 percent of the whole person impairment. (CE 3:53). Using the combined values chart on pages 604-606 of the Guides, Dr. Wolfe arrived at an 18 percent impairment of the whole person. (CE 3:53).

Dr. Wolfe concluded that the above impairments were caused by Mr. Kago's employment with Tyson. (CE 3:53). Dr. Wolfe opined that a cumulative injury from Mr. Kago's manual labor caused his injury and impairment. (CE 3:53).

As noted above, Dr. Wolfe was of the opinion that Mr. Kago had yet to achieve MMI. (CE 3:54). Accordingly, Dr. Wolfe recommended that Mr. Kago return to Pain Specialists of Iowa and Dr. Smith for additional injections and prescriptions of gabapentin. (CE 3:54). Dr. Wolfe also recommended that Mr. Kago continue performing a home exercise program focusing on core strengthening and piriformis and hamstring stretching. (CE 3:54). Dr. Wolfe opined that Mr. Kago was a "willing worker," as he was working despite symptoms and impairments. (CE 3:54). Dr. Wolfe provided restrictions including alternating sitting and standing and walking as tolerated. (CE 3:54). Dr. Wolfe further recommended limitations on climbing stairs and ladders, and limiting crouching and bending at the waist. (CE 3:54). Finally, Dr. Wolfe recommended lifting a maximum of 30 pounds from the floor to the waist. (CE 3:54).

It appears from the claimant's testimony that he did not provide Dr. Wolfe with all of the relevant information regarding his job duties with Ryko. (Testimony). He also failed to inform Dr. Wolfe that he drove to Kansas City over the Thanksgiving holiday weekend. (Testimony).

After working for Tyson, the claimant got a job at a Panchero's Restaurant, where he earned twelve and 00/100 dollars (\$12.00) per hour. (Testimony). He then worked at i2 Tech, where he earned eleven and 00/100 dollars (\$11.00) per hour. (Testimony). He performed lifting at this position, but noted that the products were made of plastic, so they weighed between 15 and 25 pounds. (DE A:13). He left i2 Tech because they did not pay well. (DE A:13). Following his employment with i2 Tech, he obtained employment with Quad Graphics. (Testimony). At Quad Graphics, he earned twelve and 00/100 dollars (\$12.00) per hour. (Testimony). He made books at Quad Graphics, and did not perform any lifting. (DE A:14). He was trained on how to use a machine that performed the lifting. (DE A:14).

He currently works at Ryko, where he earns seventeen and 00/100 dollars (\$17.00) per hour. (Testimony; DE G). He works as a material handler. (Testimony; DE G). As a material handler, Mr. Kago is responsible for replenishing parts inventory. (DE F:1). Some of his job duties included operating a forklift, inspecting the forklift,

loading and unloading parts, keeping accurate account of inventory, and assisting with organization of the Ryko facility. (Testimony; DE A:15; DE F:1). The position also requires the ability to lift up to 50 pounds, perform repetitive motion with the hands including grasping, pushing, and pulling, and sitting for prolonged periods of time operating a forklift. (DE F:2). Mr. Kago had a medical examination at Mercy Occupational Medicine Jordan Creek prior to beginning employment with Ryko. (DE G). Based upon the examination, Mr. Kago was cleared to lift up to 75 pounds. (DE G).

Of note, Mr. Kago did not operate a forklift prior to his employment with Ryko. (Testimony). He had to learn how to operate a forklift when he began working at Ryko. (Testimony). He testified that he told his supervisor upon hiring that he could not sit or stand for long periods of time, nor could he bend or reach; however, there is no written documentation of this. (Testimony). He sometimes has another employee help him with his work after he complained to his supervisor. (Testimony). Again, there is no written documentation of this. He also climbs a small flight of stairs in order to tighten bolts. (Testimony). No one at Ryko informed the claimant that his work is unsatisfactory. (Testimony).

He testified that he generally works 40 hours per week at Ryko, but at times, he has to leave early or take days off due to ongoing pain. (Testimony). He has overtime available to him, but he does not take it due to his pain. (Testimony). This is contradicted by evidence in the record. (DE G:1-13). Mr. Kago worked 40 hours plus overtime from the end of October of 2021, through November of 2021. (DE G). He received some holiday and "bereavement" pay in late November of 2021, but there is no indication of his taking time off. (DE G). In December of 2021, Mr. Kago took one 8-hour personal day. (DE G). He continued working full time hours and overtime into late December of 2021. (DE G). Certain activities at Ryko, such as bending or lifting heavy things cause his pain to increase. (Testimony). He sometimes lifts 30 to 45 pounds. (Testimony).

The claimant testified that he has issues sleeping more than six hours due to his pain. (Testimony). At the time of the arbitration hearing, the claimant continued to take Tylenol and Advil for his pain. (Testimony). Mr. Kago lives in a second floor apartment. (Testimony). He descends the stairs when he leaves for work, and climbs them when he returns home. (Testimony). He testified that he does not leave his apartment after he comes home from work. (Testimony). This is contradicted by his deposition testimony wherein he noted that he walked on a treadmill at his apartment complex's gym once per week. (DE A:25-26). He also noted that he has problems with showering and putting his shoes on. (Testimony).

Mr. Kago testified that he received about two weeks of relief from injections, but that his pain would return. (Testimony).

The claimant testified for about 40 minutes without needing to stand or take a break. (Testimony). He attempted to explain this away, but I did not find his explanation persuasive. (Testimony).

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3).

Permanent Disability

The parties in this matter stipulated that the injury or injuries sustained by the claimant were a cause of permanent disability. Further, the parties stipulated that the claimant's permanent disability should be analyzed via the lens of industrial disability. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "[i]t 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 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. Consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted, and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.S.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

A loss of earning capacity due to voluntary choice or lack of motivation to return to work is not compensable. Malget v. John Deere Waterloo Works, File No. 5048441 (Remand Dec. May 23, 2018); Rus v. Bradley Puhmann, File No. 5037928 (App. December 16, 2014); Gaffney v. Nordstrom, File No. 5026533 (App. September 1, 2011); Snow v. Chevron Phillips Chemical Co., File No. 5016619 (App. October 25, 2007); Copeland v. Boone's Book and Bible Store, File No. 1059319 (App. November 6, 1997); See also Brown v. Nissen Corp., 89-90 IAWC 56, 62 (App. 1989)(no prima facie showing that claimant is unemployable when claimant did not make an attempt for vocational rehabilitation).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Iowa Code section 85.34. In this case, the parties stipulated that permanent disability benefits should commence on September 27, 2021.

Mr. Kago was 57 years old at the time of the hearing. He is originally from Sudan. He also lived in Egypt before moving to the United States of America. He speaks Nubian, but does not read or write fluently in any language. He has no formal education, but took some classes upon his arrival in the United States of America. Based upon his conduct in his evidentiary deposition, and testimony at the arbitration

hearing, it is apparent that Mr. Kago understands some rudimentary English. The extent of this understanding is unclear.

Mr. Kago worked as a builder in Sudan. He then sold watches and trinkets in the market in Egypt. When he moved to the United States of America, he worked for a short time at a hotel. He then moved to Iowa where he began working for Tyson as a janitor. He broke down cardboard boxes for disposal, and reported climbing stairs on a daily basis. Eventually, he was terminated from Tyson due to accumulating too many "points." He began work for Pancharo's where he prepped food. He left Pancharo's for i2 Tech. He worked on a plastic line and lifted items weighing 15-25 pounds. He left i2 Tech because he wanted increased pay. He reported no issues with performing this work. He next worked at Quad Graphics, where he was involved in the printing of books. He did not have any lifting in this position. He currently works for Ryko, a company that manufactures car wash parts. He operates a forklift as a material handler. He also has other requirements, including lifting up to 75 pounds. He passed a pre-employment examination which showed that he could lift that amount.

In reviewing Mr. Kago's employment history after Tyson, it is obvious that he is motivated to work. He has continued working and improved his wages over what he made when he was terminated by Tyson. Finally, he has shown the aptitude to learn new skills, insofar as he learned how to operate a forklift for his employment with Ryko. Additionally, Mr. Kago works full time at Ryko, and according to the payroll information provided in the record, was working overtime as of the end of 2021. This is despite his testimony that he left work early on occasion at Ryko. Also, Mr. Kago works without restrictions at Ryko. He testified that no one has reprimanded him for his performance or his abilities to complete his job duties at Ryko.

Mr. Kago initially had complaints of lower back pain into his right leg. Dr. Kurt Smith diagnosed Mr. Kago with chronic right-sided pain with no sciatica. Mr. Kago underwent physical therapy for his complaints. Eventually, his complaints evolved to include his right hip. He was diagnosed with a right hip labral tear with impingement. Dr. Aviles performed a right hip arthroscopic repair.

As a result of his alleged injuries, Mr. Kago claims continued pain. He indicated that he does not do much housework. He also testified that he does not climb stairs very often at his apartment complex. His testimony was that he ascends the stairs to his apartment on the second floor and then does not leave until he needs to return to work. This is contradicted by his deposition testimony wherein he noted that he worked out at the gym at the apartment complex. Additionally, Mr. Kago testified that he is able to fish on his own. He also was able to take a car trip to Kansas City over the Thanksgiving holiday in 2021. While he testified that he stopped more often, this runs counter to his claim that he can only ride in a car for short trips. Finally, Mr. Kago testified that he had pain while sitting for short periods of time. During the hearing, he sat for at least 30 minutes while testifying. He did not appear to be in any overt pain or discomfort during his testimony. He claimed to continue to have pain in his right hip since the surgery. The inconsistencies in his testimony and claims are concerning.

The inconsistencies noted above are more concerning when considering the restrictions issued by the various doctors in this case. Drs. Aviles and Smith recommended no restrictions. Dr. Pederson provided restrictions that were predicated on whether or not the claimant sought additional treatment. Since Mr. Kago sought additional care, including the surgery performed by Dr. Aviles, Dr. Pederson's restrictions are irrelevant. Dr. Wolfe provided Mr. Kago with restrictions, which the claimant urges the undersigned to adopt. Dr. Wolfe indicated that Mr. Kago should be allowed to alternate sitting, standing, and walking, as tolerated. He also should limit his climbing of stairs and ladders, and crouching or bending at the waist. Finally, Dr. Wolfe recommended that Mr. Kago limit his lifting to a maximum of 30 pounds from the floor to the waist. The difficulty that I am confronted with in this case is that Mr. Kago admitted that Dr. Wolfe was not provided with an accurate picture of Mr. Kago's work at Ryko, or his physical activities in the time period ahead of the IME in January of 2022. This included that Mr. Kago drives a forklift for most of the day, and that his job requires three to six hours of walking, sitting, and/or standing during the day, according to his job description. Mr. Kago also did not disclose his long car trip to Kansas City during the Thanksgiving holiday. Dr. Wolfe also appeared to be unaware of the claimant's pre-employment examination wherein he could lift 75 pounds, and also that the claimant lifted between 45 and 50 pounds at his job, despite the indication that he could only lift 10 pounds. As noted above, this is concerning as it relates to the claimant's credibility. This could be explained away by an issue with interpretation or a language barrier, but there is no indication that that was the case here.

Three providers have offered impairment ratings in this matter. Functional disability is one factor to consider out of many. I am disregarding the opinions of Dr. Pederson, as he opined that the claimant was not at MMI and that the impairment rating would only apply should Mr. Kago decline to seek additional care. As previously noted, Mr. Kago sought additional care subsequent to his examination by Dr. Pederson. This leaves us with the opinions of Dr. Aviles and Dr. Wolfe. Dr. Aviles was a treating physician for the claimant. He performed the arthroscopic surgical repair to the claimant's right hip. He opined that the claimant suffered a two percent lower extremity impairment, and/or a one percent whole person impairment. Dr. Aviles' opinion is a bit lacking. He presents his opinions in "check box" letters, and does not elaborate on his opinions. The opinions are presumably based upon the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, as there is a mention of the Guides in the pre-printed portion of the letter. However, Dr. Aviles does not elaborate on how he arrived at his opinion. It also is unclear from Dr. Aviles' impairment rating whether or not he took into consideration any of the claimant's back issues.

On the other hand is the impairment rating provided by Dr. Wolfe. Dr. Wolfe provided a very thorough and well thought out impairment rating. He performed measurements of range of motion in the claimant's hip, and took the claimant's subjective complaints into account. He arrived at an 18 percent impairment of the whole person. Dr. Wolfe's impairment rating is based largely on objective measurements of range of motion in the right hip. As it relates to measurements based upon pain, I have some concerns based upon the testimony of Mr. Kago and some of the inaccuracies noted herein.

Mr. Kago alleges a loss of earnings. He made sixteen and 75/100 dollars (\$16.75) when Tyson terminated his employment. He argued that his wages increased by over one and 00/100 dollars (\$1.00) per hour during his short time with Tyson. He urges the undersigned to adopt this position. However, his argument is based entirely upon speculation and circumstantial evidence that his wages would have increased if he remained at Tyson. He offered no additional evidence to support this contention. Without additional evidence, it is difficult to affirm the claimant's argument as to this point. Mr. Kago now makes seventeen and 00/100 dollars (\$17.00) per hour. This is more than he made when he left Tyson.

The defendant implies in their posthearing brief that the undersigned should apply the "nuanced" terms of Iowa Code section 85.34(2)(v) as amended in 2017. The defendant argues that the standard hearing report form utilized by the Agency "does not properly allow for nuances created by the 2017 amendments to be fully and completely addressed without significant and often-times [*sic*] confusing efforts by the defending party." (Defendant's Posthearing Brief, page 11, footnote 8). It should be noted that the parties stipulated that the claimant's work injury is a cause of permanent disability, and that the permanent disability is an industrial disability. I am bound by the parties' stipulation, as are the parties.

As to the defendant's assertion that the hearing report form used by the Agency does not allow for "nuances," I disagree, and empirical evidence proves that the defendant's assertions are baseless. First, I reviewed the hearing report, both off and on the record with the parties at the outset of the hearing (as I do with every case). The parties are given the opportunity, on the record, to state if there is any "nuance" to the case of which I should be aware. Second, the hearing report contains section 10, entitled "Additional Issues, Stipulations, and/or Explanation." When parties wish to discuss or raise the "nuances created by the 2017 amendments," it is my experience that they raise that in this section of the report. The parties had adequate opportunity to raise this issue in either the hearing report, or at the outset of the hearing.

After considering all of the factors applicable to an industrial disability analysis, I find that the claimant sustained a 15 percent industrial disability. This represents 75 weeks (15 percent x 500 weeks = 75 weeks). The benefits shall commence on the stipulated date of September 27, 2021.

Reimbursement of IME Expenses

Iowa Code 85.39(2) states:

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.

Iowa Code section 85.39(2).

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). The claimant is entitled to reimbursement for only one IME for one injury. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842, 861 (Iowa 2009). Claimant need not 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). An opinion finding a lack of causation is tantamount to a zero percent impairment rating. Kern v. Fenchel, Doster & Buck, P.L.C., 2021 WL 3890603 (Iowa App. 2021).

In this matter, the claimant seeks reimbursement for two IMEs stemming from the December 18, 2017, date of injury. The claimant argues that the undersigned should order reimbursement for the IME of Dr. Pederson and the IME of Dr. Wolfe because treating physicians provided impairment ratings to which the claimant disagreed. Had there been two distinct injuries or dates of injuries involved in this matter, I may have been more sympathetic to the claimant's argument. However, there are not. Therefore, the claimant is only entitled to reimbursement for one IME pursuant to Iowa Code section 85.39.

Dr. Kurt Smith assessed the claimant at MMI and released him to full duty. In a record dated September 27, 2018, he indicated that the claimant's low back symptoms were "a temporary exacerbation of degenerative changes." (JE 1:14). On September 12, 2018, Dr. Smith further opined that this was "not a work-related condition." (JE 1:11). Based upon these comments, I find that Dr. Kurt Smith's opinions were that there was a lack of causation, which is tantamount to a zero percent impairment rating. Accordingly, the defendant is ordered to reimburse the claimant three thousand one hundred and 00/100 dollars (\$3,100.00) for the IME performed by Dr. Pederson subsequent to Mr. Kago's discharge from care with Dr. Smith.

Costs

Claimant seeks the award of costs as outlined in Claimant's Exhibit 5. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. See 876 Iowa Administrative Code 4.33; Iowa Code 86.40. 876 Iowa Administrative Code 4.33(6) provides:

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

Pursuant to the holding in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015), only the report of an IME physician, and not the examination itself, can be taxed as a cost according to 876 IAC 4.33(6). The Iowa Supreme Court reasoned, "a physician's report becomes a cost incurred in a hearing because it is used as evidence in lieu of the doctor's testimony," while "[t]he underlying medical expenses associated with the examination do not become costs of a report needed for a hearing, just as they do not become costs of the testimony or deposition." Id. (Noting additionally that "[i]n the context of the assessment of costs, the expenses of the underlying medical treatment and examination are not part of the costs of the report or deposition"). The commissioner has found this rationale applicable to expenses incurred by vocational experts. See Kirkendall v. Cargill Meat Solutions Corp., File No. 5055494 (App. Dec., December 17, 2018); Voshell v. Compass Group, USA, Inc., File No. 5056857 (App. Dec., September 27, 2019).

The claimant requests taxation of the costs of Dr. Wolfe's report. Dr. Wolfe provided a helpful invoice in which he divided his time for each task completed as he prepared Mr. Kago's IME report. I award the claimant one thousand and 00/100 dollars (\$1,000.00) for Dr. Wolfe's IME report. The claimant may wonder how I arrived at this amount. Dr. Wolfe indicated that he spent 1.75 hours on "[r]eview and dictation of medical records," 1.5 hours interviewing and examining the claimant, 2.0 hours dictating the interview and physical examination and responses to questions posed by claimant's counsel, and 0.5 hours reviewing and revising the transcribed report prior to release. Dr. Wolfe bills his time at four hundred and 00/100 dollars (\$400.00) per hour, and added a transcription fee of eighty-six and 40/100 dollars (\$86.40). Based upon the applicable rules, the report is what can be taxed as a cost. I interpret this to mean the drafting of the report and not review of medical records in drafting the report. The Commissioner has agreed with this position in several prior decisions. See e.g. Catic v. Tyson Foods, Inc., File No. 5065604 (App. Dec., Jan. 30, 2020); Berte v. Snap-On Logistics, Co., File No. 5065025 (App. Dec., Nov. 22, 2019); Crosby v. Foodliner, Inc., File No. 5054995 (App. Dec., July 16, 2019); Kirkendall v. Cargill Meat Solutions Corp., File No. 5055494 (App. Dec., Dec. 17, 2018). This leaves us with 2.0 hours of dictating the report and 0.5 hours of reviewing and revising the report as appropriate taxable costs.

The claimant also requests a taxation of costs of one hundred and 00/100 dollars (\$100.00) for the filing fee, and one hundred fifty and 00/100 dollars (\$150.00) for the interpreter's fee. In my discretion, I also award the claimant one hundred and 00/100 dollars (\$100.00) for the filing fee. I decline to award the fee for the interpreter, as that is not a cost provided for under 876 Iowa Administrative Code 4.33(6).

ORDER

THEREFORE, IT IS ORDERED:

That the defendant shall pay the claimant seventy-five (75) weeks of permanent partial disability benefits at the agreed upon rate of four hundred fifty-two and 90/100 dollars (\$452.90) per week commencing on September 27, 2021.

That the defendant is entitled to a credit as stipulated for five (5) weeks of previously paid permanent partial disability benefits.

That the defendant shall reimburse the claimant three thousand one hundred and 00/100 dollars (\$3,100.00) pursuant to Iowa Code section 85.39 for the IME performed by Dr. Pederson.

That the defendant shall reimburse the claimant one thousand one hundred and 00/100 dollars (\$1,100.00) for costs incurred.

That the defendant shall pay accrued weekly benefits in a lump sum together with interest. All interest on past due weekly compensation benefits shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

That the defendant shall file subsequent reports of injury (SROI) as required by this agency pursuant to 876 Iowa Administrative Code 3.1(2) and 876 Iowa Administrative Code 11.7.

Signed and filed this 21st day of March, 2022.



ANDREW M. PHILLIPS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Christopher Spaulding (via WCES)

Dillon Carpenter (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.