

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHAEL ORTEGA,

Claimant,

vs.

NATIONAL BEEF PACKING CO., LLC,

Employer,

and

ZURICH AMERICAN INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 20012048.01

ARBITRATION DECISION

Headnotes: 1402.40, 1803, 2907

Claimant filed a petition in arbitration on November 12, 2021, alleging he sustained an injury while working for Defendant National Beef Packing Company ("Iowa Premium Beef") on February 1, 2020. Iowa Premium Beef and its insurer, Defendant American Zurich Insurance Company ("American Zurich"), filed an answer on December 1, 2021.

An arbitration hearing was held *via* Zoom video conference on October 18, 2022. Attorney Joanie Grife represented Ortega. Ortega appeared and testified. Attorney Peter Thill represented Iowa Premium Beef and American Zurich. Jenny Mora and Roger Verhoef appeared and testified on behalf of Iowa Premium Beef and American Zurich. Joint Exhibits ("JE") 1 through 8 and Exhibits 1 through 7 and A through G were admitted into the record. The record was held open through November 28, 2022, for the receipt of post-hearing briefs. The briefs were received, and the record was closed.

Before the hearing the parties submitted a Hearing Report listing stipulations and issues to be decided. Iowa Premium Beef and American Zurich waived all affirmative defenses. The Hearing Report Order was entered at the conclusion of the hearing adopting the parties' stipulations and issues to be decided.

STIPULATIONS

1. An employer-employee relationship existed between Iowa Premium Beef and Ortega at the time of the alleged injury.

2. Ortega sustained an injury, which arose out of and in the course of his employment on February 1, 2020.

3. Entitlement to temporary disability benefits is no longer in dispute.

4. If the injury is found to be the cause of permanent disability, the commencement date for permanent partial disability benefits, if any are awarded, is December 15, 2020.

5. At the time of the alleged injury Ortega's gross earnings were \$950.00 per week, he was single and entitled to two exemptions, and the parties believe the weekly rate is \$605.05.

6. Costs have been paid.

ISSUES

1. Is the alleged injury a cause of temporary disability during a period of recovery?

2. Is the alleged injury a cause of permanent disability?

3. If the injury is found to be the cause of permanent disability what is the nature of the injury?

4. If the injury is found to be the cause of permanent disability, what is the extent of disability?

5. Is Ortega entitled to recover medical expenses set forth in Exhibit 3?

6. Is Ortega entitled to recover the cost of the independent medical examination ("IME") under Iowa Code section 85.39?

7. Should costs be assessed against either party?

FINDINGS OF FACT

Ortega is single and has one son. (Tr.:7) At the time of the hearing Ortega was 28. (Tr.:7) Ortega completed the eleventh grade before dropping out of high school. (Ex. 4:20; Tr:8) Ortega earned B and C grades in school. (Tr.:9, 43) Ortega has not attended any additional schooling since he left high school and he has not received a GED. (Tr.:9, 43) Ortega testified he has the ability to obtain a GED if he were to choose to do so. (Tr.:43)

After leaving high school Ortega worked for McDonald's full-time for four years as a crew member wrapping hamburgers on the line. (Tr.:9, 24) Ortega left McDonald's to work for Iowa Premium Beef in 2015. (Ex. E:12; Tr.:10) Ortega worked full-time for

Iowa Premium Beef from May 11, 2015 through 2018 until he was terminated. (Ex. 1:20; Tr.:10-11, 46)

On May 30, 2019, Iowa Premium Beef rehired Ortega for a chuck trim position, earning \$16.50 per hour. (Exs. 1:20, E:16-17; Tr.:10, 47-48) Ortega moved to the chuck saw operator position on July 22, 2019, and Iowa Premium Beef increased his pay to \$18.00 per hour. (Ex:17-18, 48) Ortega testified he moved to the saw operator position because the pay was better. (Tr.:28) As a chuck saw operator Ortega pulled 100-pound pieces of meat from the chest high assembly line with a hook, put the pieces on a table, cut through the middle of the pieces, and put the pieces back on the assembly line. (Tr.:11-12, 48) Each day Ortega pulled 700 pieces of meat, nine to 10 hours per day, six days per week. (Tr.:13)

On February 1, 2020, three pieces of meat were stacked on top of the line. (Tr.:14) Ortega stopped the line and pulled the first piece from the top and flipped it over with his hook. (Tr.:14) As he flipped over the meat, he heard a pop and felt pain in his low back and down his left and right legs. (Tr.:14-15) Ortega reported his work injury to his supervisor. (Tr.:15) At the time of his work injury Ortega was earning \$18.00 per hour. (Ex. F:39-43) Ortega testified he had not received treatment for his back before the work injury. (Tr.:40)

Ortega went to the emergency room the Sunday after his injury. (Tr.:15) His employer sent him for medical treatment on February 5, 2020 with Sherri Vesely, DNP. (Tr.:15) Ortega reported he felt a pop in his back with sharp pain after lifting meat at work and relayed he was experiencing pain in his lumbar spine radiating to his left knee with weakness. (JE 1:1) Vesely documented Ortega exhibited decreased range of motion, tenderness, swelling, and pain on exam, including tenderness with palpation and swelling over the SI joint. (JE 1:2) Vesely diagnosed Ortega with a low back strain, prescribed physical therapy, administered a Toradol injection, and prescribed diclofenac and tizanidine. (JE 1:3) During his IME with John Kuhnlein, D.O., Ortega denied reporting he had symptoms in his left lower extremity, stating most of his low back pain has been on the right side. (Ex. 1:2)

Ortega returned to Vesely on February 26, 2020, reporting he no longer had pain radiating down his left leg. (JE 1:4) Vesely documented Ortega had a visible spasm from his lumbar spine up to his left scapula, which was tender to touch. (JE 1:4) Vesely continued Ortega's medication and physical therapy, prescribed lidocaine patches for pain, and imposed restrictions of no squatting, jumping or running, pushing or pulling, prolonged standing, repetitive movements, twisting/bending/pivoting, and no use of ladders or scaffolds. (JE 1:5-6) Ortega again denied reporting he had left-sided symptoms during his IME with Dr. Kuhnlein, reporting his symptoms have been on the right side. (Ex. 1:2)

On March 17, 2020, Ortega attended a follow up appointment with Vesely, complaining of lumbar and thoracic back pain on the left. (JE 1:7) Vesely documented Ortega had decreased range of motion, pain and spasm in the thoracic spine, decreased range of motion, tenderness, pain in his lumbar spine, and limited range of

motion with hip flexion on the left, but not on the right. (JE 1:8) Vesely continued his physical therapy and medications, and released him to return to work with a 15-pound lifting restriction. (JE 1:9-10) Ortega again denied reporting he had left-sided symptoms during his IME with Dr. Kuhnlein, relaying his symptoms have been in the right side. (Ex. 1:2-3)

After Ortega was placed on light-duty, Iowa Premium Beef assigned him to a position where he picked bones coming down the line, which involved standing and twisting. (Tr.:28-29) Ortega believes he could do that job if he were still employed by Iowa Premium Beef. (Tr.:29)

Ortega returned to Veseley's office on April 27, 2020 and he was examined by Christa Slagle, DNP. (JE 1:11) Slagle documented Ortega had pain in his lumbar spine that was mild, but chronic, with no leg pain, numbness, or tingling. (JE 1:11) On exam, Slagle found Ortega had tenderness and pain in his lumbar spine and normal range of motion. (JE 1:12) Slagle documented Ortega had completed physical therapy and she increased his lifting restriction to 50 pounds. (JE 1:12)

On May 11, 2020, Ortega attended an appointment with Slagle, reporting he was wearing a back brace and taking his medications as directed, but his back pain had increased after his lifting restriction was increased to 50 pounds. (JE 1:14) Slagle decreased his lifting restriction to 15 pounds, continued his medication, and stated she believed he may need magnetic resonance imaging. (JE 1:14-15)

Ortega underwent lumbar spine magnetic resonance imaging on May 27, 2020. (JE 3:53) The reviewing radiologist listed an impression of disc disease at L5-S1 with a posterior annular tear, no significant osseous central canal narrowing, and a contact point with the exiting left L5 nerve root in the intervertebral foramen. (JE 3:54)

On June 2, 2020, Ortega attended an appointment with Trevor Schmitz, M.D., an orthopedic surgeon, complaining of stabbing low back pain exacerbated by lifting and twisting, and pain radiating down his right lower extremity with right posterior thigh numbness and tingling. (JE 4:55-56) Dr. Schmitz documented Ortega ambulated with a nonantalgic, nonataxic gait, and observed he had diffuse tenderness throughout his mid and lower back, worse over the right SI joint, with no palpable spasm, pain with right hip range of motion, pain with simulated trunk rotation of his low back, and a positive Patrick's test on the right. (JE 4:57) Dr. Schmitz reviewed Ortega's magnetic resonance imaging and a computerized tomography scan of his pelvis from July 2018, noting his imaging showed a small annular tear at L5-S1, retrolisthesis at L5-S1, with no obvious evidence of central or foraminal stenosis or neural impingement. (JE 4:57) Dr. Schmitz documented Ortega had some findings on exam consistent with a nonanatomic source of his pain, continued his tizanidine and lidocaine patches, encouraged him to use over-the-counter anti-inflammatories, ordered physical therapy, recommended a right sacroiliac injection, opined he did not recommend surgery, and imposed restrictions of no lifting over 15 pounds and to avoid repetitive bending, lifting, and twisting. (JE 4:57-59)

Ortega attended an appointment with Tork Harman, M.D., a pain management specialist, on June 18, 2020 on referral from Dr. Schmitz. (JE 5:67) Dr. Harman listed diagnoses of chronic bilateral low back pain with right-sided sciatica and spinal enthesopathy of the lumbar region, administered lumbar epidural steroid and bilateral lumbar trigger point injections, and prescribed cyclobenzaprine to help with his sleep problems. (JE 5:67, 70)

On August 10, 2020, Ortega returned to Dr. Harman reporting his pain improved 40 percent following the injections, and noting he was attending physical therapy twice per week and remained on light duty at work. (JE 5:71) Dr. Harman administered additional injections. (JE 5:74-75)

During a follow-up appointment on October 6, 2020, Ortega relayed he was sleeping better, he continued to attend physical therapy, but he continued to have continuous pain in his low back with some slight radiation into the right buttock and occasional pain in the right posterior thigh. (JE 5:76) Dr. Harman administered additional injections and found Ortega did not need to return to his clinic. (JE 5:79)

Ortega attended a follow-up appointment with Dr. Schmitz on December 15, 2020. (JE 8) Dr. Schmitz found Ortega had reached maximum medical improvement and he continued his 15-pound lifting restriction pending a functional capacity evaluation ("FCE"). (JE 8)

On January 12, 2021, Ortega attended a FCE with E3. (JE 6; Tr.:20) The physical therapist determined the test was invalid due to Ortega's inconsistent performance and failure to give maximum effort, but opined Ortega met the material handling demands for a medium demand vocation. (JE 6, p. 81)

Dr. Schmitz released Ortega to return to work without restrictions on January 29, 2021. (JE 4:61) At the time he was released to return to work without restrictions, Ortega was earning \$20.00 per hour. (Ex. G:47-48)

After Dr. Schmitz released Ortega without restrictions, Iowa Premium Beef had him return to his prior position as a saw operator. (Tr.:29) Ortega testified he told the nurse he could not perform the position. (Tr.:30) Iowa Premium Beef assigned Ortega to work on a small table saw where he cut smaller pieces coming down the line. (Tr.:30) Ortega picked up bones weighing five pounds and cut the sides off. (Tr.:30) Ortega relayed he could perform that position with the restrictions imposed by Dr. Kuhnlein. (Tr.:30)

On March 16, 2021, Ortega returned to Dr. Schmitz complaining of sharp low back pain. (JE 4:62) Dr. Schmitz documented he had last seen Ortega in December 2020, when he placed him at maximum medical improvement. (JE 4:62) Ortega relayed after he was taken off light duty, he had been working with a saw and he was required to engage in frequent bending and twisting motions, and he was taking ibuprofen, but not experiencing much relief. (JE 4:62) Ortega continued to complain of right-sided low back pain. (JE 4:62) Dr. Schmitz documented he reviewed his magnetic resonance

imaging, which showed some retrolisthesis at L5-S1 with a slight annular tear and stated he considered his imaging to show normal age-related changes. (JE 4:63) Dr. Schmitz advised Ortega the best thing he could do for his pain was to stop smoking, he did not have a good explanation for current clinical examination and he believed his imaging and findings on exam were consistent with a non-anatomic source of his pain, documented he did not need restrictions. (JE 4:64-65)

On March 18, 2021, Dr. Schmitz responded to a letter from Defendants' representative, opining Ortega had sustained a zero percent permanent impairment of the whole person under Table 15-3 of the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"). (JE 4:66) Dr. Schmitz stated Ortega reached maximum medical improvement in December 2020, and he had been released to full duty. (JE 4:66)

Ortega attended a second FCE with WorkWell on April 8, 2021. (JE 7) The physical therapist found Ortega's job description did not include specific physical demands and that she was unable to determine the physical demand level he is capable of working in. (JE 7:95) The physical therapist noted his "[p]hysical problems other than referred diagnosis prevents a match between [his] physical abilities and job demands," and that his physical limitations represent a barrier to return to work unless the work is modified. (JE 7:95)

Iowa Premium Beef terminated Ortega's employment on June 7, 2021, for having too many points. (Ex. 7:26; 1:1; Tr.:31) At the time of his termination Ortega was working on the small saw and he earned \$23.00 per hour. (Exs. 7:26, E:23, G:67; Tr.:30, 52)

On June 9, 2021, John Kuhnlein, D.O., an occupational medicine physician, conducted an IME for Ortega. (Ex. 1) Dr. Kuhnlein reviewed Ortega's medical records and examined him. (Ex. 1) Ortega told Dr. Kuhnlein he could not play with his son or perform chores around the house. (Ex. 1:6)

Dr. Kuhnlein diagnosed Ortega with chronic low back pain caused by a lumbar strain on February 1, 2020 at work. (Ex. 1:7) Dr. Kuhnlein found Ortega reached maximum medical improvement on or about December 3, 2020, and he recommended conservative future care with stretching and core strengthening exercises, Tylenol, and ice. (Ex. 1:7) Using Table 15-3 of the AMA Guides, Dr. Kuhnlein found Ortega falls into DRE Lumbar Category II and he assigned him a five percent permanent impairment. (Ex. 1:7-8) Dr. Kuhnlein recommended permanent restrictions of lifting 25 pounds occasionally from floor to waist, 30 pounds occasionally from waist to shoulder, and 25 pounds occasionally over the shoulder, stooping, squatting, bending at the waist, crawling, and kneeling occasionally, and working at or above shoulder height occasionally. (Ex. 1:9) Dr. Kuhnlein found Ortega could frequently climb stairs and work at ladders and height while maintaining a three-point safety stance. (Ex. 1:8)

In August 2021, the attorney for Iowa Premium Beef and Zurich American sent Dr. Schmitz a copy of Dr. Kuhnlein's IME and asked him to respond to the IME. (Ex. A)

On September 10, 2021, Dr. Schmitz sent a response letter. (Ex. B) Dr. Schmitz stated he disagreed with Dr. Kuhnlein's finding Ortega falls into DRE Lumbar Category II, stating "I did not feel as though he had any significant clinical findings other than several findings consistent with a nonanatomic source for his pain. He certainly had no alteration in the structural integrity of his spine," based on "essentially negative imaging findings." (Ex. B:3) Dr. Schmitz opined he believed Ortega could be released to full duty because he had no findings on magnetic resonance imaging indicating he has any impairment related to an injury and he has a stable spine and can do anything he wishes to do in life. (Ex. B:3)

Dr. Schmitz noted individuals who smoke have lower pain thresholds and likely experience increased pain and he believed Ortega could help himself from a pain and overall health perspective by stopping smoking, noting, "I certainly would recommend this prior to recommending any permanent restrictions or aggressive treatment, particularly given the fact that he is presenting with an examination that is wholly inconsistent with any known anatomic source for pain and given the fact that he has essentially negative imaging findings." (Ex. B:3-4)

The first time Ortega worked for Iowa Premium Beef he worked on trim and threw it in a hole. (Tr.:26) Ortega reported he could perform the trim position within Dr. Kuhnlein's restrictions. (Tr.:26)

After his termination, Ortega received unemployment insurance benefits. (Tr.:34) Ortega testified he applied for employment in the fast food industry after his termination and he eventually decided to stay at home with his son who was not in school to save money while his girlfriend worked. (Tr.:34-35, 54)

In October 2021, Ortega applied for work with Iowa Premium Beef. (Tr.:74, 75) Ortega testified Iowa Premium Beef never contacted him to offer him a position. (Tr.:88) Iowa Premium Beef did not present any evidence the company spoke with Ortega and offered him a position after he submitted his application in October 2021. (Tr.:74, 76)

While he stayed at home with his son Ortega cleaned the residence, cooked, and cared for his son. (Tr.:35) Ortega testified he had a difficult time with vacuuming, doing laundry and washing dishes because the activities involved bending and twisting. (Tr.:36)

Ortega's son started school in the fall of 2022. (Tr.:37, 58) Ortega gets his son up, dresses him, and puts him on the bus every morning. (Tr.:37, 58) Ortega relayed he was planning on finding employment in the fast food industry while his son is in school. (Tr.:37)

Ortega testified he continues to have pain in his low back and sometimes a tingling pain in his left leg and right leg. (Tr.:38) Ortega takes Tylenol for pain once a week. (Tr.:40) Ortega relayed since his work injury he cannot go to the park with his son, do yardwork, or go on dates with his girlfriend. (Tr.:38) Ortega reported he can

stand for 30 minutes without needing to walk or sit. (Tr.:39) He can walk approximately one block and sit for one hour before he has pain. (Tr.:39)

CONCLUSIONS OF LAW

I. 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 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:

[i]t 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. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979).

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa 1997). When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

Defendants accepted Ortega's injury and provided treatment to him. In their post-hearing brief, Defendants agreed, "if any permanent partial disability benefits are

awarded, the mechanism is traditional industrial disability pursuant to Iowa Code section 85.34(2)(v),” which measures the employee’s loss of earning capacity. (Defendants’ Post-Hearing Brief:12) The parties disagree on whether Ortega has sustained a permanent impairment as a result of the stipulated work injury.

Two experts have provided opinions in this case, Dr. Schmitz, a treating orthopedic surgeon, and Dr. Kuhnlein, an occupational medicine physician who conducted an IME for Ortega. Dr. Schmitz opined Ortega sustained a zero percent permanent impairment. (JE 4:66) Dr. Kuhnlein opined Ortega sustained a five percent permanent impairment. (Ex. 1:7-8)

As an orthopedic surgeon, Dr. Schmitz has superior training to Dr. Kuhnlein. He also provided treatment to Ortega. I find Dr. Kuhnlein’s opinion more persuasive than Dr. Schmitz’s opinion.

Ortega is a relatively young man. At the time of the hearing he was 28. There was no evidence he complained of back pain or received treatment for back pain before the February 2020 work injury. Dr. Schmitz opined he believed Ortega could be released to full duty because he had no findings on magnetic resonance imaging indicating he has any impairment related to an injury and he has a stable spine and can do anything he wishes to do in life. (Ex. B:3)

Before the work injury Ortega was able to perform the saw operator position, which required him to lift 100 pounds with the assistance of a hook. While the first FCE was invalid, the physical therapist who conducted the FCE, determined Ortega meets the material handling demands for a medium demand vocation. (JE 6, p. 81) This finding is not consistent with the requirements of the saw operator position. Ortega testified he had to lift 100 pounds with a hook while working as a saw operator. After Dr. Schmitz released him to return to work without restrictions, Ortega could not perform the saw operator position and Iowa Premium Beef assigned him to a light small saw position. He continued to work with the small saw until he was terminated.

Dr. Schmitz focused on Ortega’s smoking as a reason for his pain. In his rebuttal opinion, Dr. Schmitz opined,

[i]n my mind, one of the easiest steps Mr. Ortega could do to help himself, both from a pain and overall health perspective, would be to stop smoking. I certainly would recommend this prior to recommending any permanent restrictions or aggressive treatment, particularly given the fact that he is presenting with an examination that is wholly inconsistent with any known anatomic source for pain and given the fact that he has essentially negative imaging findings.

(Ex. B:3-4) Many injured workers smoke cigarettes. Dr. Schmitz implies he would not assign permanent restrictions unless Ortega stopped smoking. He does not explain his reasoning. I do not find his opinion persuasive.

Based on the record evidence I find Ortega has established he sustained permanent impairment as a result of the work injury. I also adopt Dr. Kuhnlein's restrictions as Ortega's permanent restrictions. Therefore, it is necessary to consider the extent of disability.

"Industrial disability is determined by an evaluation of the employee's earning capacity." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 852 (Iowa 2011). In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (Iowa 2010). The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138. The statute also requires the factfinder "to take into account . . . the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury." Iowa Code section 85.34(2).

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u).

At the time of the hearing Ortega was 28. Ortega has not graduated from high school, but agreed he is capable of completing a GED. Ortega has experience working in fast food and in meat packing. While he is not capable of returning to the saw operator position at Iowa Premium Beef, Ortega agreed he could perform the small saw operator and trim positions with Iowa Premium Beef. Ortega conducted a brief work search while he was receiving unemployment insurance benefits in 2021, before he decided to stay at home with his son. His son went to school in the fall of 2022. At the time of the hearing on October 18, 2022, Ortega had not looked for work in 2022. I do not find he is motivated to work. Considering all of the factors of industrial disability, including his lack of motivation, I find Ortega has sustained a 10 percent industrial disability, entitling Ortega to 50 weeks of permanent partial disability benefits, commencing on December 15, 2020, at the stipulated weekly rate of \$605.05.

II. IME

Ortega seeks to recover the \$2,752.50 cost of Dr. Kuhnlein's IME. Iowa Code section 85.39(2) (2020), provides:

[i]f 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. Schmitz opined Ortega sustained a zero percent permanent impairment. Ortega disagreed with the opinion and retained Dr. Kuhnlein to conduct an IME.

In Kern v. Fenchel, Doster & Buck, P.L.C., No. 20-1206, 2021 WL 3890603 (Iowa Ct. App. Sept. 1, 2021), defendants' expert found there was no causation. Kern disagreed with the opinion and sought an IME at defendants' expense. The Commissioner found Kern was not entitled to recover the full cost of the IME. The Iowa Court of Appeals reversed, finding the "opinion on lack of causation was tantamount to a zero percent impairment rating," which is reimbursable under Iowa Code section 85.39. Under Kern, Ortega is entitled to recover the \$2,752.50 cost of Dr. Kuhnlein's IME.

ORDER

IT IS THEREFORE ORDERED, THAT:


Defendants shall pay claimant fifty (50) weeks of permanent partial disability benefits, at the stipulated weekly rate of six hundred five and 05/100 dollars (\$605.05), commencing on the stipulated commencement date of December 15, 2020.

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 two thousand seven hundred fifty-two and 50/100 dollars (\$2,752.50) for the cost of Dr. Kuhnlein's IME under Iowa Code section 85.39.

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 12th day of January, 2023.



HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Joanie Grife (via WCES)

Peter J. Thill (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.