

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARIA OCHOA,

FILED

Claimant,

MAR 14 2017

File No. 5055310

vs.

WORKERS COMPENSATION

ARBITRATION

TYSON FRESH MEATS, INC.,

DECISION

Employer,
Self-Insured,
Defendant.

Head Note Nos.: 1402.40, 1802, 1803,
1804, 2501, 2502, 4100

Claimant Maria Ochoa filed a petition in arbitration on November 25, 2015, alleging she sustained an injury to her back and body as a whole while working for the defendant, Tyson Fresh Meats, Inc. ("Tyson"), on September 19, 2014. Tyson filed an answer on December 20, 2015, admitting Ochoa sustained a work injury.

An arbitration hearing was held on January 6, 2017, in Sioux City, Iowa. Attorney James Byrne represented Ochoa. Ochoa appeared and testified. Frank Gonzalez provided Spanish interpretation services during the hearing. Attorney Brian Yung represented Tyson. Exhibits 1 through 18, and A through H were admitted into the record. The record was left open through January 30, 2017, for the receipt of post-hearing briefs. At that time the record was closed.

Before the hearing the parties prepared a hearing report listing stipulations and issues to be decided. Tyson waived all affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed between Ochoa and Tyson at the time of the alleged injury.
2. Ochoa sustained an injury on September 19, 2014, which arose out of and in the course of her employment with Tyson.
3. Although entitlement to temporary benefits cannot be stipulated, Ochoa was off work from May 7, 2015 through November 9, 2016.
4. If Ochoa has sustained a permanent disability, the disability is an industrial disability.

5. At the time of the alleged injury Ochoa's gross earnings were \$420.49 per week, she was married and entitled to five exemptions, and the parties believe her weekly rate is \$301.96.
6. Credits are no longer in dispute.

ISSUES

1. Is the alleged injury a cause of temporary disability during a period of recovery?
2. Is Ochoa entitled to temporary disability benefits?
3. Is the alleged injury a cause of permanent disability?
4. If the alleged injury is a cause of permanent disability, what is the extent of Ochoa's disability?
5. If the alleged injury is a cause of permanent disability, is the commencement date for permanent partial disability benefits March 16, 2015, or November 10, 2016?
6. Is Ochoa entitled to payment of medical expenses?
7. Are the fees and prices charged by the medical providers fair and reasonable?
8. Was the medical treatment reasonable and necessary?
9. Are the listed medical expenses causally connected to the work injury?
10. Did Tyson authorize payment of the requested medical expenses?
11. Is Ochoa entitled to recover the cost of an independent medical examination?
12. Should costs be assessed against either party?

FINDINGS OF FACT

Ochoa lives in Deloit, Iowa, with her husband and three children. (Transcript, page 10) At the time of the hearing Ochoa was thirty-one. (Tr., p. 10) Ochoa attended school in Michoacán, Mexico through the sixth grade. (Exhibits 9, p. 168; F, p. 2; G, p. 9; Tr., p. 10) Ochoa has not received any additional education. (Exs. 9, p. 168; F, p. 2; G, p. 9)

Ochoa moved to the United States in 2001 and lived in California. (Tr., pp. 11, 14; Ex. F, p. 2) Ochoa speaks Spanish, but she is not able to converse or write in English. (Tr., p. 11; Ex. F, p. 2) Ochoa uses an interpreter to communicate with medical providers. (Tr., p. 11) Ochoa is able to use the internet and Facebook, but she is not skilled at typing or using a computer. (Tr., p. 12)

Ochoa did not work before coming to the United States. (Tr., p. 13) She lived with her aunt and she helped her aunt take care of her children, clean, sweep, mop, cook, and take out the trash. (Tr., p. 13) Ochoa reported the trash weighed twenty pounds, and she worked on her feet most of the day, standing. (Tr., p. 14) Ochoa testified she would not be able to work with her aunt now because of her limitations related to her back injury. (Tr., p. 14)

When Ochoa moved to the United States she was a housewife. (Tr., p. 15) Ochoa took care of her children, cooked, cleaned, vacuumed, and moved furniture in her home. (Tr., p. 15) Ochoa reported she could not perform these functions now because she cannot bend and twist like she used to, and she cannot tolerate lifting heavy things or standing for more than fifteen minutes. (Tr., p. 15)

Tyson hired Ochoa to work in its plant in Denison in August 2012. (Exs. 9, p. 169; G, p. 10; Tr., pp. 15-16) Tyson was Ochoa's first formal employer. (Tr., p. 15) Ochoa had problems with headaches and sinus issues prior to her employment with Tyson. (Ex. B) Ochoa testified she had never had any problems with her back before she worked for Tyson. (Tr., p. 16)

Ochoa worked as a bag forequarter, full-time, during her employment with Tyson. (Exs. 1, p. 35; 9, p. 169; F, p. 3; G, p. 10; Tr., p. 17) Ochoa testified she worked on cow carcasses that were split in half, weighing approximately 200 pounds, which came down a line hanging upside down from an overhead rail system. (Tr., pp. 17, 54) Ochoa worked with three other employees who rotated between bagging, taping, and trimming. (Tr., pp. 17-18; Ex. F, p. 3)

When bagging Ochoa would bend down and pull a bag around a carcass, and stretch up to pull up the bag. (Tr., p. 18) The carcasses had to be bagged before they were put in trailers. (Tr., p. 18) Ochoa would stand the entire time she was bagging carcasses. (Tr., p. 18) Ochoa reported she could no longer bag carcasses because the position required bending, twisting, and standing. (Tr., p. 19)

Ochoa taped carcasses to keep the bag in place. (Tr., p. 19) Ochoa reported that she had to twist to put the tape on, and sometimes the carcasses would stick together, so she would have to pull them apart. (Tr., p. 20) Ochoa relayed she could no longer perform the taping duties because she cannot twist, bend or stand for long periods. (Tr., p. 20)

When trimming carcasses Ochoa used a Whizzard knife to remove the hair and fat off the carcasses, which required her to stand, twist, and turn. (Tr., p. 21) Ochoa testified she would not be able to do the position now due to her impairment. (Tr., p. 21)

Ochoa testified on September 19, 2014, "I was standing up front, and there was a coworker behind me. And there were two cows that were stuck together, and he was pulling them apart. Then he pushed it very hard, and the carcass hit me in the back." (Tr., p. 21) Ochoa noted the carcasses were frozen and sometimes the workers would have to use a lot of force to separate them. (Tr., pp. 23-24) Ochoa testified the impact was very hard, and moved her, but it did not knock her to the ground. (Tr., pp. 24, 55) Ochoa noted she had a lot of pain in her lower back, the pain brought tears to her eyes, and it knocked the wind out of her. (Tr., p. 24)

Ochoa reported the incident to her supervisor and he told her to go to the nurses' station. (Tr., p. 26) The incident happened on a Friday and the nurses' station was closed, so Ochoa continued working. (Tr., p. 26)

When she returned to work on Monday Ochoa went to the nurses' station and reported she had injured her lower back. (Tr., p. 27; Ex. 1, p. 1) The nurses provided her with ibuprofen. (Tr., p. 27) Ochoa continued to work for Tyson, but she had pain in her lower back. (Tr., pp. 25, 27) Ochoa continued to go to the nurses' station to report the pain, and around October 2014 she was placed on light duty where she only performed trimming while sitting. (Tr., pp. 27-29)

On October 14, 2014, Ochoa attended an appointment with Todd Woollen, M.D., a family practitioner, for a workers' compensation evaluation. (Ex. 2, p. 70) Ochoa reported a coworker had hit her in the back with a piece of meat and complained of "stabbing" pain in her low back that is worse with standing, sitting, and lying down. (Ex. 2, p. 70) Ochoa also reported that while she was trimming meat the day before she developed pain in her left shoulder and could not move it. (Ex. 2, p. 70) Dr. Woollen documented Ochoa was "significantly overweight" and noted her weight could be contributing to her back problems. (Ex. 2, p. 70) Dr. Woollen listed an impression of acute low back pain and left shoulder pain, and imposed a ten pound lifting restriction. (Ex. 2, p. 71)

Ochoa returned to Dr. Woollen on October 28, 2014 and reported her left shoulder pain had resolved, but she continued to have back pain at the L3 level, and noted it "sometimes shoots down the lateral thighs bilaterally, occasionally to the front of the ankle." (Ex. 2, p. 72) Dr. Woollen recommended magnetic resonance imaging of the lumbar spine, which was conducted. (Exs. 2, pp. 72-73; 3, p. 77) The reviewing radiologist listed an impression of "[m]inimal disc bulging at the L4/L5 and L5/S1 levels. There are posterior element degenerative changes in the spine. There is lateral recess narrowing from the L3/4 through L5/S1 levels which is most pronounced on the left at the L4/5. There is also neural foraminal narrowing at L4/5." (Ex. 3, p. 78)

Dr. Woollen reviewed the imaging results with Ochoa on November 5, 2014, and documented the imaging showed no evidence of an acute injury, but showed "neural foraminal narrowing at L4/5 and the transversing left L5 nerve root abuts the facet," which he believed was the likely source of her pain. (Ex. 2, p. 74) Dr. Woollen explained that Ochoa's morbid obesity was likely contributing to her problem, and he recommended a neurosurgical consultation. (Ex. 2, p. 74) Ochoa also received physical therapy. (Ex. 3, pp. 79-88)

In response to a letter inquiry from Tyson, on November 11, 2014, Dr. Woollen opined, "[i]t is possible that work exacerbated the problem, but the arthritis [and] obesity were there at baseline." (Ex. A, p. 2) Dr. Woollen stated he did not believe the injury altered the underlying findings, and he recommended a neurosurgical referral for a disability rating. (Ex. A, pp. 2-3)

Ochoa attended an appointment with Ric Jensen, M.D., a neurosurgeon, on December 3, 2014, complaining of ongoing low back pain. (Ex. 4, p. 96) Dr. Jensen ordered physical therapy, imposed a ten pound lifting restriction, and prescribed Zanaflex. (Ex. 4, pp. 98-100)

Dr. Jensen sent a letter to Dr. Woollen on December 17, 2014, following his examination of Ochoa, noting he had diagnosed her with:

1. Lumbosacral spinal degenerative disc disease/spondylosis focusing dominantly a: the L4-5 and L5-S1 lumbosacral segments (in association with annular tears within the discs at these locations).
2. Adverse biomechanics associated with said discogenic disease within the lumbosacral spine. No evidence of a focal radiculopathy at this time.
3. Probably musculo-ligamentous muscle strain within the lumbosacral spine.

(Ex. 4, p. 103) Dr. Jensen recommended conservative treatment with physical therapy. (Ex. 4, p. 104)

Dr. Jensen sent a second letter to Dr. Woollen on January 20, 2015, noting that "it is clear that [Ochoa] harbors a rather significant back pain syndrome which has resulted in a degree of back pain which adversely affects her functioning in the workplace." (Ex. 4, p. 107) Dr. Jensen noted Ochoa was working without restrictions, and that she could be considered for a two-segment lumbosacral spinal arthrodesis and stabilization procedure focusing to her L4-L5 and L5-S1 lumbosacral segments. (Ex. 4, p. 107) Dr. Jensen documented Ochoa had significant degenerative disc disease and an annular tear of the L4-L5 and L5-S1 segments without radiculopathy, and her pain had produced a significant reduction in her overall functional capacity. (Ex. 4, p. 107)

Dr. Jensen recommended Ochoa undergo a computerized tomography scan of her lumbosacral spine. (Ex. 4, p. 107)

On January 30, 2015, Ochoa received a computerized tomography scan of her lumbar spine. (Ex. 3, p. 89) The reviewing radiologist listed an impression of:

1) Evidence for mild disc protrusions L4-5 and L5-S1. There is also evidence for ligamentum flavum hypertrophy to varying degrees of each level and early facet arthritis. There is suggestion of mild spinal canal compromise L4-5 and into a lesser degree L5-S1. This can be better assessed by MRI or CT myelogram.

2) Mild sacroiliac arthritis.

(Ex. 3, p. 90) A bone scan was also completed the same date, and the reviewing radiologist listed an impression of "[m]ild to moderate bilateral sacroiliac uptake" and "[n]egative for significant uptake of the lumbar spine." (Ex. 3, p. 91)

Based on Ochoa's tolerance of three to four hour workdays, on March 5, 2015, Dr. Jensen found she could return to an eight hour work shift "with her current activity restriction level." (Ex. 4, p. 113) Dr. Jensen imposed restrictions of lifting up to ten pounds frequently and eleven to thirty pounds occasionally, no lifting over thirty pounds, pushing and pulling up to twenty pounds frequently and twenty-one to fifty pounds occasionally, no pushing and pulling over fifty pounds, occasional climbing, balancing, stooping, and kneeling, no crouching or crawling, occasional lifting above shoulder, and frequent reaching at waist level, reaching below waist level, handling, fingering, and feeling. (Ex. 4, p. 114) Dr. Jensen opined during a work day Ochoa could sit for thirty minutes for a total of one hour per day, stand for fifteen to thirty minutes for five to six hours per day, walk for ten to fifteen minutes for a total of one hour per day, and drive one hour per day. (Ex. 4, p. 114)

Dr. Jensen sent Dr. Woollen a letter on March 24, 2015, noting the computerized tomography scan and bone scan imaging study indicated "evidence of spondylosis and degenerative change at the L4-5 and L5-S1 lumbosacral segments." (Ex. 4, p. 112) Dr. Jensen made a tentative diagnosis of:

1. Annular disc wall tears of the L4-5 and L5-S1 lumbosacral segments.

2. Mild-to-moderate spondylosis of the L4-5 and L5-S1 lumbosacral intersegmental levels (with associated facet arthropathy bilaterally).

3. Chronic, recurrent discogenic/mechanical back pain thought secondary to the adverse mechanics associated with discogenic injury/disease and associated spondylosis/facet arthropathy, as noted.

4. Subjective complaints of bilateral lower extremity paresthesias and pain which are partially confirmed with sensory abnormalities on neurological examination, as noted. No focal weakness in either lower extremity.

(Ex. 4, pp. 112-113) Dr. Jensen recommended bilateral lower extremity electrophysiologic studies to rule out occult peripheral neuropathy versus occult lumbar radiculopathy. (Ex. 4, p. 113)

Marvin Hurd, M.D., performed electromyography on Ochoa on April 27, 2015. (Ex. 5, p. 134) Dr. Hurd listed an impression that the study was normal and "[t]here is no electrodiagnostic evidence of neuropathy or acute lumbosacral nerve root irritation involving the bilateral lower extremity nerves and muscles examined." (Ex. 5, p. 135)

During a follow-up appointment on May 6, 2015, Dr. Jensen noted Ochoa did not appear to be capable of performing her workplace activities "due to her overall pain syndrome and functional capacity limitation." (Ex. 4, p. 117) Dr. Jensen recommended Ochoa be taken off work and engage in physical and aquatic therapy, and discussed treatment options with Ochoa, including operative arthrodesis and decompression of her lumbar spine. (Ex. 4, p. 117) Dr. Jensen diagnosed Ochoa with a lumbar disc wall annular tear, discogenic back pain, and lumbar spondylosis, and recommended a posterior lumbar fusion. (Ex. 4, p. 118-119) Ochoa has not returned to work since May 2015. (Tr., p. 35; Exs. 9, p. 169; G, p. 10)

Following an appointment on August 5, 2015 with Ochoa, Dr. Jensen sent a letter to Dr. Woollen, providing in part,

Maria has undergone extensive conservative treatment measures relative to her current back pain syndrome. She has been maintained in an off work status for at least the past 4 months. She has undergone treatments to the extent of back strengthening exercises and improving range of motion within her lumbosacral spine. Steroidal and non-steroidal pain medications have been utilized as well. Suffice that Maria feels that she has now reached a point where her functional capacity has become significantly restricted and that she is having difficulties performing at least a portion of her activities of daily living. Certainly, her functional capacity has been limited to the extent that employment at her prior workplace tasks would be considered impossible. This information has been communicated to Tyson Industries as well. Today's letter is intended to further establish Maria's status and to put forth Maria's request to undergo operative stabilization and decompression of her lumbosacral junctional region.

(Ex. 4, p. 124) Dr. Jensen reported he believed it was rational to consider surgical therapy, and ordered Ochoa to remain off work. (Ex. 4, p. 125)

Ochoa attended an independent medical examination with Jonathan Fuller, M.D., an orthopedic spine surgeon, on October 6, 2015. (Exs. 6; C) Dr. Fuller examined Ochoa and reviewed Ochoa's radiographs, magnetic imaging results, computerized tomography scan, and nuclear medicine scan. (Exs. 6, p. 141; C, p. 6) Dr. Fuller listed functional diagnoses of low back pain, paresthesia/numbness, bilateral lower and upper extremities, cervicalgia, bilateral arm pain, and bilateral leg pain. (Exs. 6, p. 141; C, p. 6) Dr. Fuller's report provides, in part,

I am asked to describe the underlying lumbar condition. Mrs. Ochoa has mechanical back pain. She may have a component of sacroilitis although she has no symptoms specifically referable to this diagnosis or any physical exam findings that would strongly suggest it. She does show increased uptake in the sacroiliac joints but that may simply represent the increased volume of bone at that location on her nuclear medicine scan.

The surgery recommended is not related to Mrs. Ochoa's work injury.

Work at Tyson has not aggravated an underlying condition. Mrs. Ochoa evidently had no prior complaints of back pain until her injury but I do not believe the current complaints of back pain can be attributed to the work place injury, which, in any event, was mild and did not leave any measureable physical derangement.

I vehemently disagree with Dr. Jensen's proposed surgical procedure of a two level spinal fusion. There is absolutely no indication for this and this would be extremely harmful to this unfortunate young woman. She has no detectable derangement in the anatomy of her lumbar spine. A spinal arthrodesis would certainly not be in her interest.

I do not believe that there is any reasonable further treatment for Mrs. Ochoa. I believe that she will continue to complain of pain into the indefinite future and I believe that any further treatment directed at this pain would be futile.

I believe Mrs. Ochoa is at maximum medical improvement on March 15, 2015.

(Exs. 6, p. 142; C, p. 7)

On November 23, 2015, Stephanie Warren with Tyson sent Ochoa a letter, notifying Ochoa that Dr. Fuller had opined her back pain was not caused or aggravated by her work activities at Tyson, and that her claim was being denied as of the date of the letter. (Exs. 1, p. 68; 12, p. 184)

Dr. Jensen sent Dr. Woollen a letter on February 3, 2016, recommending a discogram study to determine whether or not surgical intervention should be

considered. (Ex. 4, p. 126) Ochoa underwent a lumbar discogram on May 3, 2016. (Ex. 7, p. 144)

On June 19, 2016, Ochoa was a passenger in a vehicle that was involved in a car accident. (Tr., p. 42) A deer came out in front of the driver, she slammed on the brakes, and a tractor trailer hit the car from behind, pushing the car off the road. (Tr., p. 42; Ex. D, p. 1) Ochoa reported she felt pain in her back and in her head and she was taken to the hospital and treated by Dr. Woollen. (Tr., p. 42; Ex. D, p. 1) Ochoa's back pain increased for approximately two weeks, and then it returned to the level it was before the accident. (Tr., p. 43)

On August 24, 2016, Ochoa underwent a L4-L5 posterior lumbar fusion. (Tr., pp. 44-45; Exs. 7, p. 145A; 17, p. 208-11) Ochoa reported the surgery helped calm the pain in her legs, but she continues to have low back pain below the belt line. (Tr., pp. 46, 52) Ochoa had pain in her right leg, which was relieved by the surgery. (Tr., p. 51) Ochoa received physical therapy after her surgery for three or four weeks, but reported the therapy did not help her and made her pain worse. (Tr., p. 52)

Ochoa's attorney sent Dr. Jensen a letter on August 30, 2016, requesting he provide opinions regarding Ochoa's condition based on his review of Ochoa's medical records, his clinical interviews, and his examinations. (Ex. 4, pp. 128-133) Dr. Jensen responded to the form letter indicating he agreed with all the contentions, but did not provide any personal comments, as follows:

1. Is it correct that your medical diagnosis of Ms. Ochoa's 9/19/14 work injury to her low back is Discogenic back pain syndrome with lumbar radiculitis at the L5 nerve root level, caused by her 9/19/14 traumatic work injury when she was struck in the back by an animal carcass, which substantially aggravated an underlying degenerative condition in her low back, and which (conclusion(s)) is/are supported by your several examinations of her, as well as her lumbar MRI, her lumbar CT, and her discogram?
2. Is it correct that it is your medical conclusion that Ms. Ochoa's 9/19/14 workplace injury (noted in No. 1 above) resulted in the need for the medical care she has received from you, Dr. Jensen, since her 9/19/14 workplace injury, coming forward to the present, including but not limited to the surgery you performed earlier this month, August of 2016?
3. While Ms. Ochoa remains under your care at present, is it correct that you believe she will likely have permanent impairment, and will likely need permanent restrictions, in connection with her 9/19/14 workplace injury to her back?

(Ex. 4, pp. 132-33)

Sunil Bansal, M.D., an occupational medicine physician, performed an independent medical examination of Ochoa on November 9, 2016. (Ex. 8) Dr. Bansal reviewed Ochoa's medical records and examined her. (Ex. 8, pp. 146-55) Dr. Bansal diagnosed Ochoa with "[a]ggravation of L4-L5 and L5-S1 spondylosis, with disc bulging and annular tearing. Status post surgical arthrodesis." (Ex. 8, p. 157) Dr. Bansal placed Ochoa at maximum medical improvement on November 9, 2016, the date of his exam. (Ex. 8, p. 157)

With respect to causation, Dr. Bansal opined the mechanism of Ochoa's injury, being struck by a carcass onto the lower back, coupled with her immediate clinical presentation, is consistent with her aggravation of lumbar spondylosis with disc bulging and annular tearing.

While it is accurate that her structural lumbar spondylosis was pre-existing prior to September 19, 2014, it is equally accurate that it was symptomatically aggravated by the work injury on September 19, 2014. The very fact that she was able to engage in such physically demanding work at Tyson for an extended period of time implies that any pre-existing lumbar spine condition was clinically quiescent.

Pathophysiologically, the mechanism by which this spondylosis is aggravated may include an initial destabilizing of the disc from the traumatic impact. There are intradiscal receptors in discs. Damage to these receptors may result in an uncoupling of important biomechanical feedback loops, operating through both intrinsic paraspinal and gross postural muscles. Immunochemical mediators that are released are also responsible, irritating the nerve fibers.

In response to mechanical stimulation of the nociceptors (pain receptors) in the disc from the impact, the somatosensory system may increase its sensitivity, resulting in a nonfunctional response. In other words, normally innocuous stimuli may generate an amplified response (peripheral sensitization). Both nociceptive and neuropathic pain can be modulated at higher centers, both at the spinal and the supraspinal levels (central sensitization). The altered magnitude of perceived pain is often referred to as neural plasticity, and is considered to play a critical role in the evolution of chronic pain.

(Ex. 8, pp. 157-58)

Using Table 15-3 of the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Bansal opined, "based on her current symptomatology and physical examination, she meets the criteria for a DRE Category IV impairment. She has had lumbar surgical arthrodesis. She continues to have pain.

Therefore, she is assigned an impairment at the higher end of the DRE Category IV, at 22% of the whole person." (Ex. 8, p. 159) Dr. Bansal recommended restrictions of "no lifting over 10 pounds occasionally," no frequent bending, squatting, climbing, or twisting, and sitting, standing and walking as tolerated. (Ex. 8, p. 159) Dr. Bansal opined Ochoa should avoid sitting for more than thirty minutes, and she should not stand or walk for more than fifteen minutes, and recommended she continue to use a cane to prevent herself from falling. (Ex. 8, p. 159)

Tyson sent Dr. Fuller a copy of Dr. Bansal's opinion, and he responded:

[i]t is still my opinion based on my IME evaluation of Ms. Ochoa on October 6, 2015 as well as my review of Dr. Bansal's IME, discogram records, and the operative note that Ms. Ochoa had no indication for surgery. I further believe that her work place injury did not create a need for surgery. The discography should never have been performed. The discogram was normal at L3-4 and L5-S1, abnormal at L4-5 but the abnormality at L4-5 has little meaning in the face of a radiographically normal disc. Her L4-5 disc was well hydrated, tall, and without annular tear on her MRI of October 30, 2014. There was no reason to suspect a diagnosis of discogenic pain in this patient and as Carragee has demonstrated, discography results may be positive in asymptomatic individuals and such a study should not constitute an indication for surgery.

I am asked whether I agree with Dr. Bansal's opinions expressed in his IME concerning Ms. Ochoa's causation for her lumbar condition, his opinion regarding her need for surgery, his date of maximum medical improvement, his impairment rating, and his permanent restrictions. Given that Ms. Ochoa underwent an unnecessary two level spine fusion, she has sustained an alteration of motion segment integrity which under the AMA Guides to the Evaluation of Permanent Impairment, fifth edition does yield a 22% impairment of the whole person. Notwithstanding this fact, Dr. Bansal is incorrect concerning his opinion on causation of Ms. Ochoa's condition. She had a trivial work place injury that did not result in any structural damage to her spine. She had no appropriate indication for a lumbar fusion and such a fusion should not have been performed. I stand by my recommended date of maximum medical improvement of March 15, 2015. Permanent restrictions should have been assigned on the basis of a functional capacity assessment and such an assessment was not done. For this reason Dr. Bansal's permanent restrictions are based on no data and should only be applied on the basis of an impartial functional capacity assessment. In any event, Ms. Ochoa did not sustain an injury that should be expected to lead to significant permanent restriction.

(Ex. C, pp. 9-10)

Dr. Bansal later received a copy of a letter from Dr. Fuller dated December 20, 2016, and responded,

I have reviewed the above letter and stand by my opinions as stated in my original IME. I am surprised that Dr. Fuller classifies a mechanism of a large frozen carcass striking the back as a trivial injury. This traumatic impact is certainly capable of aggravating a discogenic spinal condition. Furthermore, Ms. Ochoa's particular case not only shows structural damage on the imaging of the lumbar spine, but also has a study (discogram) indicating clinical significance of that structural damage, necessitating the fusion operation. Dr. Fuller also seems to imply that Ms. Ochoa should be assigned no restrictions since she has not had an FCE even though she has had a two level spinal fusion and continues to have back related deficits as well as being predisposed to adjacent segment disease. Taken [*sic*] the above into consideration as well as her exam and my training and experience of a Board Certified Occupational Medicine Physician performing fit for duty evaluations for 17 years, I reaffirm the restrictions I assigned in my original IME.

(Ex. 8, pp. 160A-160B)

After surgery Ochoa received OxyContin and oxycodone for pain. (Ex. 4, pp. 127C-127D) At the time of the hearing she was still taking OxyContin and oxycodone for the pain. (Tr., p. 47) Ochoa noted that she has pain with all activities and movement. (Tr., p. 46) Dr. Jensen prescribed a single point cane in October 2016, which Ochoa uses for ambulation. (Ex. 4, p. 127H)

Ochoa has not applied for work since she stopped working at Tyson. (Tr., p. 48) Ochoa reported she has checked jobs in local newspapers, but she has not applied for any jobs. (Tr., p. 49) Ochoa has tried to lose weight. In September 2014 she weighed 220 pounds, and at the time of the hearing she weighed 190 pounds. (Tr., pp. 53-54)

CONCLUSIONS OF LAW

I. NATURE AND EXTENT OF THE INJURY

A. Permanent Impairment

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. Cihra, 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. Willis, 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 the employer.

Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979). The parties stipulated Ochoa sustained an injury on September 19, 2014, which arose out of and in the course of her employment with Tyson. Ochoa asserts she has sustained a significant permanent impairment as a result of her work injury. Tyson alleges the injury did not result in a permanent impairment.

The claimant bears the burden of proving the claimant's work-related injury is a proximate cause of the claimant's disability and need for medical care. Ayers v. D & N Fence Co., Inc., 731 N.W.2d 11, 17 (Iowa 2007); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 153 (Iowa 1997). "In order for a cause to be proximate, it must be a 'substantial factor.'" Ayers, 731 N.W.2d at 17. A probability of causation must exist, a mere possibility of causation is insufficient. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997). The cause does not need to be the only cause, "[i]t only needs to be one cause." Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60, 64 (Iowa 1981).

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 deputy commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

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

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

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

Tyson retained Dr. Fuller, an orthopedic surgeon, to perform an independent medical examination of Ochoa. (Exs. 6; C) Dr. Fuller opined Ochoa's work at Tyson did not aggravate an underlying condition. (Exs. 6, p. 142; C, p. 7) He also disagreed with Dr. Jensen's decision to perform a two level spinal fusion and opined the procedure would be harmful to Ochoa. (Exs. 6, p. 142; C, p. 7) Dr. Jensen, the treating neurosurgeon, responded to a form letter from Ochoa's counsel agreeing he had diagnosed Ochoa with discogenic back pain syndrome with lumbar radiculitis at the L5 nerve root level caused by her work injury. (Ex. 4, p. 132)

Dr. Bansal, an occupational medicine physician retained by Ochoa to perform an independent medical examination, opined Ochoa's work injury symptomatically aggravated her pre-existing structural lumbar spondylosis. (Ex. 8, p. 157) Using the AMA Guides, Dr. Bansal assigned a permanent impairment rating of twenty-two percent of the whole person under DRE Category IV, and he imposed restrictions. (Ex. 8, p. 159)

Dr. Fuller disagreed with Dr. Bansal's opinion, finding Ochoa sustained a "trivial work place injury that not result in any structural damage to her spine" and concluding Ochoa underwent an unnecessary two level spine fusion. (Ex. C, pp. 9-10) He also challenged Dr. Bansal's restrictions because a functional capacity evaluation was not performed. (Ex. C, p. 10) Dr. Bansal responded he was "surprised that Dr. Fuller classifies a mechanism of a large frozen carcass striking the back as a trivial injury," and noted the traumatic impact "is certainly capable of aggravating a discogenic spinal condition," and noted imaging of the lumbar spine showed structural damage and she underwent a discogram "indicating clinical significance of that structural damage." (Ex. 8, pp. 160A-160B) Dr. Bansal disagreed with Dr. Fuller's opinions regarding restrictions, finding based on his exam, training, and experience Ochoa needs restrictions. (Ex. 8, p. 160B)

I find the opinions of Dr. Jensen, the treating neurosurgeon, and Dr. Bansal most convincing. Dr. Jensen treated Ochoa over the course of many months, and he performed multiple tests to confirm whether she was a surgical candidate. Ochoa worked for Tyson for over two years before her work injury and performed her normal duties without incident. (Exs. 9, p. 169; G, p. 10; Tr., pp. 15-16) There is no evidence in the record Ochoa complained of or received treatment for back pain prior to her work injury. While a functional capacity evaluation is helpful in many cases to determine appropriate work restrictions, a functional capacity evaluation is not mandatory before restrictions are imposed. Ochoa has chronic pain and uses a cane for ambulation. The record supports her work injury aggravated her pre-existing structural lumbar spondylosis. While Dr. Fuller disagrees with Dr. Bansal on causation, he agreed that under the AMA Guides, Ochoa has sustained an alteration of motion segment integrity which yields a twenty-two percent impairment of the whole person. (Ex. C, p. 9)

B. 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 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). When considering the extent of disability, the deputy commissioner considers all evidence, both medical and nonmedical. Evenson v. Winnebago Indus., Inc., 818 N.W.2d 360, 370 (Iowa 2016).

Ochoa contends she is permanently and totally disabled; Tyson disagrees. In Iowa, a claimant may establish permanent total disability under the statute, or through the common law odd-lot doctrine. Michael Eberhart Constr. v. Curtain, 674 N.W.2d 123, 126 (Iowa 2004) (discussing both theories of permanent total disability under Idaho law and concluding the deputy's ruling was not based on both theories, rather, it was only based on the odd-lot doctrine). Under the statute, the claimant may establish the claimant is totally and permanently disabled if the claimant's medical impairment together with nonmedical factors totals 100 percent. Id. The odd-lot doctrine applies when the claimant has established the claimant has sustained something less than 100 percent disability, but is so injured that the claimant is "unable to perform services other than 'those which are so limited in quality, dependability or quantity that a

reasonably stable market for them does not exist.” Id. (quoting Boley v. Indus. Special Indem. Fund, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997)).

“Total disability does not mean a state of absolute helplessness.” Walmart Stores, Inc. v. Caselman, 657 N.W.2d 493, 501 (Iowa 2003) (quoting IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 633 (Iowa 2000)). Total disability “occurs when the injury wholly disables the employee from performing work that the employee’s experience, training, intelligence, and physical capacity would otherwise permit the employee to perform.” IBP, Inc., 604 N.W.2d at 633.

At the time of the hearing Ochoa was thirty-one. (Tr., p. 10) Ochoa attended school through the sixth grade in Mexico. (Exs. 9, p. 168; F, p. 2; G, p. 9; Tr., p. 10) Ochoa has not received any additional education. (Exs. 9, p. 168; F, p. 2; G, p. 9) Ochoa speaks Spanish and she is unable to converse or write in English. (Tr., p. 11; Ex. F, p. 2) Ochoa is able to use the internet and Facebook, but she is not skilled at typing or using a computer. (Tr., p. 12)

Ochoa has a limited work history. Ochoa’s first and only formal employment was with Tyson. (Tr., p. 15) Before coming to the United States she helped her aunt care for her children, and she cooked and cleaned her aunt’s home. (Tr., p. 13) When Ochoa moved to the United States she was a housewife. (Tr., p. 15) Ochoa cared for her children, cooked, cleaned, vacuumed, and moved furniture in her home. (Tr., p. 15)

Neither Ochoa nor Tyson submitted a vocational expert report or other evidence of the labor market Ochoa resides in. Ochoa has not applied for any employment since her work injury. Ochoa has not demonstrated she is motivated to work. Ochoa testified she could not return to work for her aunt and she struggles with her household chores.

Dr. Bansal has imposed restrictions of “no lifting over 10 pounds occasionally,” no frequent bending, squatting, climbing, or twisting, and sitting, standing and walking as tolerated. (Ex. 8, p. 159) Dr. Bansal opined Ochoa should avoid sitting for more than thirty minutes, and she should not stand or walk for more than fifteen minutes, and recommended she continue to use a cane to prevent herself from falling. (Ex. 8, p. 159)

Dr. Jensen removed Ochoa from work at Tyson on May 6, 2015. (Ex. 4, p. 117) She has never returned to work. Ochoa has not met her burden of establishing she is permanently and totally disabled under the statute or under the odd-lot doctrine. She has presented no vocational evidence or labor market information to support her contention. Ochoa has not applied for any positions since she left Tyson. Ochoa has sustained a significant industrial disability. Considering her age, education, qualifications, experience, and all other factors of industrial disability, I conclude Ochoa has sustained a seventy percent industrial disability.

In Evenson, the Iowa Supreme Court held that the healing period lasts until the claimant has returned to work, has reached maximum medical improvement, or until the

claimant is medically capable of returning to substantially similar employment, "whichever occurs first." 881 N.W.2d at 372-74. Ochoa did not return to work at Tyson after Dr. Jensen restricted her from working on May 6, 2015. Ochoa has not returned to any employment since May 7, 2015. Thus, her healing period ends when she reached maximum medical improvement. Dr. Bansal placed Ochoa at maximum medical improvement on November 9, 2016, the date of his exam. (Ex. 8, p. 157) The commencement date for permanent partial disability benefits is November 10, 2016.

II. HEALING PERIOD BENEFITS

Ochoa seeks healing period benefits from May 7, 2015 through November 9, 2016. Iowa Code section 85.33 governs temporary disability benefits, and Iowa Code section 85.34 governs healing period and permanent disability benefits. Dunlap v. Action Warehouse, 824 N.W.2d 545, 556 (Iowa Ct. App. 2012). As a general rule, "temporary total disability compensation benefits and healing-period compensation benefits refer to the same condition." Clark v. Vicorp Rest., Inc., 696 N.W.2d 596, 604 (Iowa 2005). The purpose of temporary total disability benefits and healing period benefits is to "partially reimburse the employee for loss of earnings" during a period of recovery from the condition. Id. An award of healing period benefits or total temporary disability benefits is not dependent on a finding of permanent impairment. Dunlap, 824 N.W.2d at 556. The appropriate type of benefit depends on whether or not the employee has a permanent disability. Id. Ochoa has sustained a permanent impairment, therefore she is entitled to healing period benefits.

Dr. Jensen restricted Ochoa from working on May 6, 2015, and she has not worked since May 7, 2015. She did not return to work at Tyson, or to any employment. Ochoa is entitled to healing period benefits from May 7, 2016 through November 9, 2016.

III. MEDICAL EXPENSES

On November 23, 2015, Tyson sent Ochoa a letter, notifying Ochoa her claim was being denied the date of the letter because Dr. Fuller opined her back pain was not caused or aggravated by her work activities at Tyson. (Exs. 1, p. 68; 12, p. 184) Ochoa continued to seek medical care after the denial, including surgery. Ochoa seeks to recover \$10,058.00 in medical bills from Crawford County Memorial Hospital for June 19, 2016, \$135,668.42 in medical bills from Nebraska Medicine from August 29, 2016, and \$272.15 in bills from Regional West Medical Care Center, totaling \$145,998.57, set forth in Exhibit 13.

An employer is required to furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. Iowa Code § 85.27(1). As analyzed above, Ochoa sustained a

permanent impairment to her lumbar spine while working for Tyson. Thus, Tyson is responsible for all medical bills related to her work injury.

The medical bills totaling \$10,058.00, from treatment Ochoa received on June 19, 2016, are related to the automobile accident that occurred on that date. The accident is not related to the work injury. Ochoa is not entitled to recover \$10,058.00 from June 19, 2016. \$135,668.42 in medical bills from Nebraska Medicine from August 29, 2016, and \$272.15 in medical bills from Regional West Medical Care Center are for treatment and surgery for Ochoa's lumbar spine that are related to the work injury. Tyson is responsible for \$135,940.57 in medical bills for Ochoa's work injury.

IV. Independent Medical Examination and Report

Ochoa seeks to recover the \$510.00 cost of Dr. Bansal's examination, and the \$2,340.00 cost of his report. Ochoa sought an opinion from Dr. Bansal after Dr. Fuller opined she had not sustained a permanent impairment. Ochoa seeks to recover an additional \$160.00 paid to Dr. Bansal for a rebuttal report to Dr. Fuller's subsequent report.

After receiving an injury, the employee, if requested by the employer is required to submit to examination at a reasonable time and place, as often as reasonably requested to a physician, without cost to the employee. Iowa Code § 85.39. If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes the evaluation is too low, the employee "shall, upon 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 choosing." Id.

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

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

867 N.W.2d 839, 846-47 (Iowa 2015). Tyson avers Dr. Bansal is a hired gun for complaints in Iowa, but presented no evidence the fees he charges are unreasonable or beyond the standard fees charged in similar cases. Ochoa is entitled to recover the \$510.00 cost of Dr. Bansal's report under the statute.

Under rule 876 IAC 4.33(6), the cost of two reports from doctors or practitioners can be taxed as costs. Ochoa is entitled to recover the \$2,500.00 cost of Dr. Bansal's two reports. Ochoa is awarded the \$3,100.00 cost of Dr. Bansal's examination and reports.

V. COSTS

Ochoa seeks to recover the \$100.00 filing fee, two service fees totaling \$13.34, and \$185.40 for interpretation services during the independent medical examination. Rule 876 IAC 4.33 outlines the costs that can be taxed, as follows,

Costs 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, (8) costs of persons reviewing health service disputes.

The rule allows for the recovery of the filing fee and service costs totaling \$113.34. The rule does not expressly allow for the recovery of the interpretation fee for the independent medical examination. Ochoa is awarded \$113.34 in costs.

ORDER

IT IS THEREFORE ORDERED, THAT:

Defendant shall pay the claimant healing period benefits from May 7, 2015 through November 9, 2016, at the rate of three hundred one and 96/100 dollars (\$301.96).

Defendant shall pay the claimant three hundred fifty (350) weeks of permanent partial disability benefits at the rate of three hundred one and 96/100 dollars (\$301.96), commencing on November 10, 2016.

Defendant is entitled to a credit for benefits previously paid.


Defendant shall pay accrued benefits in a lump sum, with interest on all accrued weekly benefits pursuant to Iowa Code section 85.30.

Defendant is responsible for all causally related medical bills set forth in Exhibit 13, totaling one hundred thirty-five thousand nine hundred forty and 57/100 dollars (\$135,940.57).

Defendant shall reimburse the claimant one hundred and 00/100 dollars (\$100.00) for the filing fee, thirteen and 34/100 dollars (\$13.34) for service fees, and three thousand one hundred and 00/100 dollars (\$3,100.00) for Dr. Bansal's examination and reports.

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

Signed and filed this 14th day of March, 2017.


HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876 4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.