

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

GUILLERMO ORTIZ,

Claimant,

vs.

JBS USA, LLC,

Employer,

and

ZURICH AMERICAN INSURANCE
COMPANY,

Insurance Carrier,
Defendants.

FILED

JUN 02 2016

WORKERS COMPENSATION

File No. 5049541

ARBITRATION DECISION

Head Note Nos.: 1802; 1804;
2500; 4000

STATEMENT OF THE CASE

Claimant Guillermo Ortiz ("Ortiz") filed a petition in arbitration on November 25, 2014, alleging he sustained an injury to his back arising out of and in the course of his employment on November 29, 2012. Defendants JBS USA, LLC ("JBS") and Zurich American Insurance Company ("Zurich") filed an answer on December 23, 2014, admitting a work-related injury occurred. On October 7, 2015, Ortiz filed a motion to amend petition, alleging he sustained an injury to his back and mental health sequela. The motion to amend was granted. JBS and Zurich filed an answer to the amended petition on November 23, 2015, denying Ortiz suffered mental health sequela as a result of the alleged work injury.

An arbitration hearing was held on February 24, 2016, at the Division of Workers' Compensation in Des Moines. Attorney Matthew Milligan appeared with his client, Ortiz. Ernest Niño-Murcia was sworn in as the interpreter for the proceeding. Attorney Kent Smith represented JBS and Zurich. Exhibits 1 through 23, and A through I were admitted into the record. Due to the late submission of Exhibit I, Ortiz was given the opportunity to supplement the record. Ortiz submitted Exhibit 24, which was admitted into the record. The record was left open until March 25, 2016, for the receipt of post-hearing briefs. At that time the record was closed.

STIPULATIONS

Before the hearing, the parties completed a hearing report listing stipulations and issues to be decided by the deputy commissioner. JBS and Zurich withdrew any affirmative defenses they may have had available. The parties' stipulations are:

1. An employer-employee relationship existed at the time of the alleged injury;
2. Ortiz sustained an injury on November 29, 2012, which arose out of and in the course of his employment;
3. The injury caused a permanent disability;
4. Ortiz was off work from December 11, 2013 through October 1, 2014;
5. The disability is an industrial disability;
6. At the time of Ortiz's alleged injury his gross earnings were \$931.18 per week, he was married, he was entitled to 4 exemptions, and the weekly benefit rate is \$624.52;
7. Although medical expenses are disputed, the fees or prices charged by providers are fair and reasonable, and the medical providers would testify as to the reasonableness of their fees and/or treatment set forth in the listed expenses and JBS and Zurich are not offering evidence to the contrary.
8. Prior to the hearing, Ortiz was paid 60 weeks of compensation, at the rate of \$619.87 per week.

ISSUES

1. What is the nature of the injury?
2. What is the extent of the injury?
3. Did Ortiz reach maximum medial improvement related to the alleged work injury on November 1, 2013 or October 1, 2014?
4. Is Ortiz entitled to additional healing period benefits?
5. Is Ortiz entitled to payment of medical expenses?
6. Is Ortiz entitled to penalty benefits?
7. Should costs be taxed to either party?

FINDINGS OF FACT

Ortiz was born on June 25, 1968, in Galeana, Michoacán, Mexico. (Transcript, pages 16-17) At the time of the hearing he was 47. (Tr., p. 16) Ortiz has a history of kidney disease and hypertension unrelated to work. (Exhibits 3, p. 37; A, p. 5) He does not have a history of smoking. (Ex. A, p. 6)

Ortiz attended school in Mexico through the fourth grade, until he was 11. (Tr., p. 17; Ex. F, p. 53) He moved to the United States as a teenager in 1985. (Tr., p. 17) Since moving to the United States Ortiz has not completed a GED or other schooling. (Tr., p. 17) Ortiz can read and write in Spanish. (Tr., p. 17) Ortiz reports he can speak "very little" English, but understands it better than he speaks it. (Tr., pp. 17-18) To become a United States citizen, Ortiz had to pass an English test. (Tr., p. 59)

Ortiz has worked as a fruit harvester where he picked oranges and cherries, and as a waterer of crops. (Tr., pp. 18-19; Ex. 17, pp. 171-172) To pick oranges Ortiz climbed a ladder to pick fruit off a tree and placed the fruit in a sack slung around his chest. (Tr., p. 19) Ortiz's work picking cherries was similar to picking oranges, but was lighter because he placed the cherries in smaller containers instead of a sack. (Tr., p. 19) As a waterer, Ortiz moved aluminum pipes to water potatoes, alfalfa, barley, and wheat. (Tr., p. 19) Ortiz testified he did not sustain any injuries when he worked as a fruit harvester, or as a waterer. (Tr., pp. 18-19)

Ortiz worked for JBS on two occasions, from 1994 through 1998, when it was known as Monfort, and from 2002 through December 10, 2013. (Tr., p. 22) Ortiz lived in Idaho from 1998 through 2002. (Tr., p. 20)

During the second time Ortiz worked for JBS he worked in the "Kill Department." (Ex. 16) Ortiz was hired to open pigs' bellies. (Tr., p. 21) Ortiz testified the position required him to be on his feet all day. (Tr., p. 21) Ortiz reported the pigs hang upside down from their rear legs on chains, and come down the line, 19 to 20 per minute. (Tr., p. 21)

At the time of his injury in 2012, Ortiz was assigned to open pigs' chests. (Tr., p. 23) Ortiz testified the chest is lower than the belly because each pig hangs from its feet. (Tr., p. 24) When opening a pig's chest, Ortiz used a hydraulic and electric saw. (Tr., pp. 23-24) As each pig passed by on the line, Ortiz would pull the intestines with his hand and trim a section at the back of the animal's abdominal cavity with a 9-inch curved knife to release the intestines. (Ex. 10, p. 112) After removing the intestines, Ortiz would put the intestines in a tray. (Ex. 10, p. 112) Ortiz reported the intestines weighed an average of 25 pounds, but could weigh up to 45 pounds. (Ex. 10, p. 112) After each pig passed by, Ortiz dipped the saw in hot water. (Tr., p. 24) Ortiz estimated that he spent 65 percent of his day working waist to shoulder, and 35 percent of his day working below waist level. (Ex. 10, pp. 112-113)

Ortiz's position description states the position involves "light work" requiring "lifting 20lbs with frequent lifting and/or carrying objects up to 10lbs." (Ex. 16, p. 166) Ortiz was required to stand one to four hours, and walk four to six hours throughout the day. (Ex. 16, p. 166) The position description states the position requires occasional climbing, stooping, reaching, and handling, and use of Whizzard knives, split saws, brisket saws, and hand skinners. (Ex. 16, pp. 166-167) The position description defines "stooping" as "[b]ending the body downward and forward by bending the spine at the waist." (Ex. 16, p. 166)

Ortiz testified he enjoyed working for JBS and earned \$900.00 through \$1,000.00 per week with overtime pay. (Tr., pp. 24-25) The parties stipulated that at the time of his injury Ortiz earned \$931.18 per week. (Hearing Report)

Ortiz reported a work injury to JBS to his low back on November 29, 2012. (Ex. 1, p. 1) Ortiz had three prior work-related lower back injuries at JBS in 2002, 2004, and 2005. (Exs. 10, p. 113; 13; B) Ortiz testified after each prior injury he returned to full duty, without restriction. (Tr., p. 25)

On April 9, 2002, Ortiz informed JBS that when he was pulling open a pig's belly with his hand he felt discomfort in his lower back and he was unable stand up straight. (Ex. 13, p. 151) The nursing notes document Ortiz was restricted from lifting, pushing or pulling more than five pounds, with "limited bending or twisting of the lower back." (Ex. 13, p. 151) Ortiz reported his back was better and he returned to full duty without restrictions on May 6, 2002. (Ex. 13, p. 151)

On April 5, 2004, Ortiz informed JBS he felt pain in his lower back when he turned to grab a brush used to mark pigs and twisted. (Exs. 13, p. 152) Ortiz was diagnosed with a low back strain, and received restrictions of no lifting exceeding 15 pounds, and to alternate sitting and standing. (Ex. A, p. 1) Ortiz received medical treatment, physical therapy, and he was assigned to restricted duty. (Exs. 13, p. 152; A, p. 1) He returned to regular duty without restrictions on May 5, 2004. (Ex. 13, p. 152)

On October 4, 2005, Ortiz informed JBS he injured his lower back while lifting a light grate at the beginning of his shift at work. (Ex. B, p. 14) Ortiz complained of lumbar pain with lateral turning and bending in both directions. (Ex. B, p. 14) JBS sent Ortiz to Michael Schnurr, PA-C, a physician assistant for Charles Mooney, M.D., who placed Ortiz on work restrictions of "[l]ight duty, no lifting, pushing, pulling over 10 pounds. No repeated bending, twisting of his back." (Ex. B, p. 15)

Ortiz received follow-up care with Dr. Mooney. (Ex. B, p. 17) Ortiz continued to complain of pain in his low back radiating into both hips and difficulty standing upright. (Ex. B, p. 17) Dr. Mooney reviewed Ortiz's prior x-rays and treatment and found "[h]e does appear to have an L4-5 spondylolisthesis. It is rather slight with anterolisthesis on his previous x-rays." (Ex. B, p. 17) On October 6, 2005, Dr. Mooney imposed restrictions of no lifting greater than 10 pounds, no repetitive bending, and to permit

Ortiz to ambulate as tolerated. (Ex. B, p. 17) On October 17, 2005, Dr. Mooney increased Ortiz's lifting restriction to 20 pounds, with no repetitive bending. (Ex. B, p. 19)

Dr. Mooney ordered lumbar spine magnetic resonance imaging, which revealed:

1. Disc degeneration at L2-3 and L3-4. Mild diffuse disc bulge at L2-3 with minimal disc bulges at L3-4 and L5-S1. There is mild disc bulge with superimposed, tiny, central disc protrusion at L1-2. There is no significant canal stenosis or foraminal compromise at any lumbar level.

2. Mild to moderate facet disease at L5-S1, greater on the right, though no foraminal compromise.

(Ex. B, p. 25) Dr. Mooney reviewed the results of the testing and noted that "the fact that he demonstrates an annular tear, multilevel minor disc changes does [*sic*] complicate the picture for his pain resolution." (Ex. B, p. 26) Dr. Mooney recommended a consultation with Arnold Parenteau, M.D., for pain management, and to continue with the same work restrictions. (Ex. B, pp. 26-28)

Ortiz saw Dr. Parenteau and received a facet block trial on December 16, 2005, which provided some pain relief. (Ex. B, pp. 30-33) Following his appointment with Ortiz on April 13, 2006, Dr. Mooney noted that Ortiz was performing all regular activities and was asymptomatic. (Ex. B, p. 30) Dr. Mooney released Ortiz from care. (Ex. B, p. 30) Ortiz testified he did not receive any treatment after he was released to regular duty in 2006 until his injury in 2012. (Tr., pp. 24-25)

Ortiz testified on November 29, 2012, he cut a pig's chest with his right hand, removed the pig's intestines with his left hand, and after removing the intestines he turned to put the intestines into a container and felt a pop in his back and he lost strength in his legs. (Tr., p. 26) Ortiz reported he had pain in the middle of his back. (Tr., p. 27) Ortiz went to the nursing station to report the injury. (Tr., p. 27; Ex. 1, p. 1) The nursing station recommended Ortiz ice his back and take ibuprofen. (Ex. 1, p. 1)

Ortiz returned to nursing on November 30, 2012. (Ex. 1, p. 2) The notes document a slight improvement, and record Ortiz was "unable to move fast" and he had a "limited range without pain." (Ex. 1, p. 2) Nursing staff scheduled an appointment for Ortiz with Daniel Miller, D.O., an occupational medical physician, on December 4, 2012. (Ex. 1, p. 3)

Dr. Miller diagnosed Ortiz with lumbar back pain and left pars interarticularis defect, and ordered lumbar spine magnetic resonance imaging. (Ex. 1, p. 3) Dr. Miller noted Ortiz had a history of back issues in 2002 and 2004, where he was treated with medications, chiropractic care, and an epidural steroid injection. (Ex. 2, p. 4) Ortiz informed Dr. Miller that after twisting and feeling something pop in his back he had

"instant pain in his back, felt his legs go weak. Pt states he has N/T in both legs. Pt states right now he has pressure around his waist. Pt points to mid low back goes outward on both sides, R worse than L. Pt states pain goes away when he lays [sic] down." (Ex. 2, p. 4) Dr. Miller prescribed methocarbamol 750 mg, at bedtime, ordered Ortiz to continue with his current job, and ordered magnetic resonance imaging. (Ex. 2, p. 5)

The radiologist who reviewed the lumbar spine magnetic resonance imaging provided the following impression:

1. Central/left paracentral disk herniation at L1-2 with caudal extension of disk material and/or epidural blood to the lower L2 level. Mild thecal sac effacement is seen.
2. Shallow central disk herniation with caudal extent at L4-5 also mildly impressing upon the thecal sac.
3. Mild disk bulge at L3-4 and L4-5.
4. Advanced degenerative facet change at L5-S1, right greater than left with minimal spondylolisthesis.

(Ex. 2, p. 7)

Ortiz returned to Dr. Miller on December 10, 2012. (Ex. 2, p. 8) Dr. Miller noted "Lumbar MRI: Advanced degenerative facet arthritis L5-S1 minimal disc bulges. No pars defect appreciated." (Ex. 2, p. 9) Dr. Miller diagnosed Ortiz with back pain, and prescribed methylprednisolone 4 mg, and methocarbamol 750 mg, twice per day. (Ex. 2, p. 9) Dr. Miller ordered Ortiz to continue with his current job. (Ex. 2, p. 9) A note dated December 11, 2012, provides Ortiz could return to modified work with restrictions on October 11, 2012, working 55 minutes each hour and then sitting for five minutes. (Ex. 2, p. 10)

Following his appointment on December 28, 2012, Dr. Miller documented Ortiz's back pain had improved a "little bit," but was worse at the end of the day, and noted Ortiz was not taking five minute breaks as recommended. (Ex. 2, p. 11) Dr. Miller ordered work hardening and placed Ortiz on full duty. (Ex. 2, p. 11)

On January 11, 2013, Ortiz returned to Dr. Miller, complaining of constant back pain that bothers him all day. (Ex. 2, p. 14) Ortiz informed Dr. Miller he was not taking pain medication and he did not want to attend physical therapy for work hardening. (Ex. 2, p. 14) Ortiz reported he has to kneel before getting out of bed in the morning and he has trouble getting up from his knees, and loses feeling in his legs in the morning only. (Ex. 2, p. 14) Ortiz also reported he has tingling in his legs during the day, with the right worse than the left. (Ex. 2, p. 14) Dr. Miller referred Ortiz to Thomas Kline, M.D., for a possible facet injection or an epidural steroid injection. (Ex. 2, p. 14)

Ortiz saw Dr. Klein on February 6, 2013, and reported he has pain down his right leg mainly to the thigh and down to his knee area, and that toward the end of the day he has fatigue and weakness in his legs. (Ex. 3, p. 36) Ortiz described the pain as "numbness, burning, deep, and squeezing," and reported the pain is continuous and intermittent with varying intensity, and is worse when he tries to lean back or lean to the side. (Ex. 3, p. 36) Dr. Klein diagnosed Ortiz with lumbar pain and spondylosis. (Ex. 3, p. 39) Dr. Klein ordered physical therapy, and noted "the arthritis was there for quite some time and obviously his job did not cause the arthritis." (Ex. 3, p. 37) Ortiz attended physical therapy three times per week to work on core stabilization, lower extremity strength and endurance exercise, and lumbar and lower extremity flexibility. (Ex. 5)

Dr. Klein believed Ortiz's pain was due to spondylosis, but believed there could be a possible radicular component to Ortiz's pain, and he performed bilateral lumbar facet diagnostic branch blocks on May 3, 2013. (Ex. 3, pp. 40, 43) Ortiz did not receive any relief from the injections. (Ex. 3, p. 45) Dr. Klein recommended a lumbar epidural steroid injection, and that Ortiz perform daily exercises at home. (Ex. 3, p. 45)

Dr. Klein performed a lumbar epidural steroid injection on Ortiz on July 22, 2013, after diagnosing Ortiz with lumbar radiculitis. (Ex. 3, p. 48) Ortiz did not receive any relief from the injection and reported his pain was "still constant [*sic*] bothering him all day." (Ex. 2, p. 17) As recommended by Dr. Klein, Dr. Miller prescribed Gabapentin 300 mg three times a day, and found Ortiz was "fit for full duty" on August 6, 2013. (Exs. 2, pp. 18-19; 3, p. 45)

Dr. Miller saw Ortiz on August 20, 2013, and Ortiz reported his pain is the same as the last visit, and constant when standing. (Ex. 2, p. 20) Ortiz reported the pain radiates down his right lower extremity to his calf. (Ex. 2, p. 20)

During his August 30, 2013 appointment with Dr. Klein, Ortiz reported he had not received any relief from the injection, physical therapy was not helping, and that he recently had to leave work by wheelchair because he was in so much pain. (Ex. 3, p. 49) Dr. Klein's assessment notes Ortiz presented with a displaced lumbar disk and lumbar radiculitis. (Ex. 3, p. 49) Dr. Klein concluded he did not have any additional treatment to offer Ortiz, discontinued the physical therapy, recommended Ortiz continue with daily exercises, and recommended Ortiz undergo a surgical consultation. (Ex. 3, p. 49)

On September 23, 2013, Ortiz attended an appointment with Cassim Igram, M.D., an orthopedic surgeon. (Ex. 4, p. 51) Dr. Igram's assessment notes Ortiz has a history of right leg radiculopathy, lumbosacral radiculitis, low back pain, and he is overweight. (Ex. 4, p. 53) Dr. Igram reviewed Ortiz's lumbar spine magnetic resonance imaging and believed he was not a surgical candidate, but recommended repeat magnetic resonance imaging, and that Ortiz perform activity as tolerated. (Ex. 4, p. 53) The magnetic resonance imaging was completed and Dr. Igram found the imaging

revealed degenerative changes that did not suggest a need for surgical intervention. (Ex. 4, pp. 57-58)

Ortiz returned to Dr. Miller on November 1, 2013, complaining of "throbbing in both legs" and reporting he could not work because of his back pain. (Ex. 2, p. 32) Dr. Miller found he had no further treatment to offer Ortiz, discharged Ortiz, and recommended a functional capacity evaluation to determine Ortiz's work capabilities. (Ex. 2, p. 33)

JBS and Zurich sent Dr. Miller a questionnaire that he completed on November 25, 2013. (Ex. 2, p. 35) Dr. Miller opined Ortiz had a "[p]reexisting condition exacerbated by [his] injury" of November 29, 2012, and assigned Ortiz a two percent permanent impairment rating to the whole body, noting under "Table 15-3, 5th Edition AMA Guidelines worker between DRE Category I & III." (Ex. 2, p. 35) Following a subsequent request for from JBS and Zurich, Dr. Miller found Ortiz reached maximum medical improvement on November 1, 2013, he needed no additional treatment, and he could return to work. (Ex. 1, pp. 1-2)

After his discharge from Dr. Miller, Ortiz sought medical care through his personal healthcare provider, Sarah Renze, M.D. (Ex. 6, p. 63) Dr. Renze reviewed Ortiz's medical records and reported that she had nothing else to offer him, other than continuing with exercises and a trial of Neurontin, or similar medication. (Ex. 6, p. 63)

Ortiz informed Dr. Renze his pain was interfering with his ability to work. (Ex. 6, p. 66) Dr. Renze noted Ortiz had tried Lyrica and Neurontin in the past with no improvement. (Ex. 6, p. 67) Ortiz told Dr. Renze he could sit, stand, or walk more than ten minutes without severe pain, and received the most relief while lying down. (Ex. 6, p. 69) Dr. Renze prescribed Lyrica, 75 mg twice a day, diclofenac twice per day, and Vicodin, as needed. (Ex. 6, p. 69)

Dr. Renze referred Ortiz to Bradley Wargo, D.O., a pain specialist. (Ex. 6, pp. 67-69) Dr. Wargo informed Dr. Renze he did not have anything to offer Ortiz. (Ex. 6, p. 72) Ortiz told Dr. Renze he was unable to sit, stand or walk for prolonged periods. (Ex. 6, p. 72) Dr. Renze told him she would increase his Lyrica to 150 mg twice a day, but beyond that she had nothing to offer him. (Ex. 6, p. 72)

Ortiz was referred to Robert Federhofer, M.D., a pain specialist. (Ex. 7) During an appointment on May 21, 2014, Ortiz complained of pain, 70 percent from his back, 15 percent in his right lateral lower leg, and 35 percent in his neck. (Ex. 7, p. 84) Dr. Federhofer recommended repeat magnetic resonance imaging. (Ex. 7, p. 85) During his August 6, 2014 appointment with Ortiz, Dr. Federhofer discussed the magnetic resonance imaging results, noting:

At the L2-3 level there is a right-sided disk protrusion. Appears there may be a disk tear at this level, small hyperintensity zone, and axial sagittal

views. This is not the location of the patient's pain. The remainder of the exam shows at the following:

L4-5 disk protrusion centrally. Some mild displacement of the dura although there is no marked contact with the S1 or L5 nerve roots.

L5-S1 – no significant evidence of disk pathology. Throughout the lower lumbar spine starting at L4-5 through 5-S1 there is arthropathy that is more prominent at L5-S1.

(Ex. 7, p. 90) Dr. Federhofer diagnosed Ortiz with back pain without radiation, arthropathy of lumbar facet joint, and lumbar degenerative disc disease. (Ex. 7, p. 90) Dr. Federhofer prescribed ibuprofen 800 mg three times a day, Robaxin four times a day as needed, and acetaminophen 650 mg tablet up to three times per day for additional pain relief. (Ex. 7, p. 90)

Dr. Federhofer performed bilateral L4-5 and 5-S1 facet joint injections as medial branch blocks on September 16, 2014. (Ex. 7, p. 91) Ortiz reported his pain decreased following the procedure for about six hours, but then increased to the original pain level after five to six days. (Ex. 7, p. 94)

Ortiz returned to Dr. Renze on October 6, 2014, complaining his back pain was interfering with his quality of life and ability to work. (Ex. 6, p. 73) Dr. Renze prescribed Cymbalta. (Ex. 6, p. 73) During an appointment with Dr. Renze a month later, Dr. Renze noted Ortiz had "continued symptoms of depression" and hopelessness. (Ex. 6, p. 75) Ortiz reported the symptoms were interfering with his sleep, and he had decreased libido. (Ex. 6, p. 75)

JBS terminated Ortiz's employment on December 11, 2014. (Ex. G., p. 70) JBS sent Ortiz a letter stating he had been terminated because he had not worked since December 10, 2013, and he had exhausted all medical leave. (Ex. G, p. 70)

Dr. Renze referred Ortiz to Center Associates for mental health counseling. (Ex. 8, p. 98) During his initial assessment with Kevin Duncan, M.A., a licensed mental health counselor, on March 13, 2015, Ortiz reported he felt like a failure and worthless because following his 2012 back injury he had to discontinue employment and he could not provide for his family financially. (Exs. 8, p. 98; 12, p. 149) Ortiz relayed that prior to his injury he enjoyed biking, running, going for walks, and helping around the house, which are now a challenge for him. (Ex. 8, p. 98) Ortiz reported he was frequently tearful, sad, and withdraws emotionally. (Ex. 8, p. 98) Duncan diagnosed Ortiz with major depressive disorder, resulting from his 2012 work injury, and recommended psychotherapy. (Exs. 8, pp. 99-101; 12, p. 149) Ortiz attended psychotherapy with Duncan on April 14, 2015, and he was discharged on April 15, 2015. (Ex. 8, pp. 100-101)

JBS and Zurich did not authorize the functional capacity evaluation recommended by Dr. Miller. Ortiz scheduled a functional capacity evaluation at Work Well with Tim Vander Wilt, P.T., in June 2015. (Ex. 9, pp. 102-103) The results indicated Ortiz can work just above the light category in the low medium range category of physical demands. (Ex. 9, p. 103). Vander Wilt opined Ortiz is capable of: (1) lifting 25 pounds occasionally (6 to 33 percent of the work day) and 15 pounds frequently (34 to 66 percent of the work day) from waist to floor, waist to crown, and front carry; (2) forward bending while standing rarely (1 to 5 percent of the work day); (3) and engaging in standing trunk rotation, sitting, standing, and squatting occasionally (6 to 33 percent of the work day). (Ex. 9, p. 104) Vander Wilt also concluded Ortiz is capable of walking, crouching, kneeling, and climbing stairs frequently (34 to 66 percent of the work day). (Ex. 9, p. 104)

JBS and Zurich retained John Kuhnlein, D.O., to perform an independent medical examination of Ortiz on November 9, 2015. (Ex. 10, p. 112) Dr. Kuhnlein reviewed Ortiz's medical records, including the functional capacity evaluation, and examined Ortiz. (Ex. 10, p. 112) Dr. Kuhnlein diagnosed Ortiz with chronic musculoskeletal low back pain and concluded Ortiz had no preexisting back pain before November 29, 2012. (Ex. 10, p. 119) Dr. Kuhnlein noted,

The MRI findings do not explain his examination, which does not suggest any problems with nerve root impingement. His poor response to facet injections indicates that the facets are not primary pain generators. His poor response to epidural injections suggests that his discs are not also a primary pain generator regardless of their appearance on MRI scan [sic]. He has had multiple surgeons who say that he is not a surgical candidate, which would also suggest that neither the facets nor the discs are primary pain generators.

(Ex. 10, p. 119)

Dr. Kuhnlein opined Ortiz had reached maximum medical improvement as of September 16, 2014, the date of Dr. Federhofer's last injection, noting that since that date, treatments had not benefitted him significantly. (Ex. 10, p. 120) Dr. Kuhnlein assigned Ortiz an eight percent whole person impairment using the Diagnosis-Related Estimates ("DRE") method, DRE Lumbar Category II of the Guides to the Evaluation of Permanent Impairment, p. 384 (AMA Press, 5th Ed. 2001) ("AMA Guides"). (Ex. 10, p. 120)

Dr. Kuhnlein noted Ortiz has multiple barriers to returning to work, including deconditioning, his education level, potential culture issues, and the length of time he has been off work. (Ex. 10, p. 120) Dr. Kuhnlein recommended a work hardening program. (Ex. 10, p. 120) Dr. Kuhnlein opined:

It is difficult to estimate under what physical restrictions Mr. Ortiz would be successful returning to work because of these barriers to return to work. Based on the examination, Mr. Ortiz should be capable of lifting 20 pounds from floor to waist, 30 pounds from waist to shoulder, and 20 pounds over the shoulder, but his pain is a significant disabling factor, as is his deconditioning and the other barriers as described above. I doubt that any functional capacity evaluation would be of any benefit, as I doubt that these would be objective estimates of his long-term function, given all the confounding factors as well. The FCE would be measuring more of the barrier to return to work rather than true long-term functional ability.

From a nonmaterial handling standpoint, Mr. Ortiz should be able to sit, stand or walk on an as needed basis, changing positions for comfort. He could stoop or squat rarely. He could bend or crawl rarely. He could kneel occasionally. At this point I would not have him work on ladders or off ground level because of his medication use. He can go up and down stairs. He could work occasionally at or above shoulder height because of the "moment arm" phenomenon in the lumbar spine with such activities. He could grip and grasp without restrictions below shoulder height, and occasionally above shoulder height. There are no lower extremity restrictions.

There are no vision or hearing restrictions. His communication is limited by his Spanish limitations, but while leaving the clinic, his English actually appeared to be fairly good. He could travel but would need to take frequent breaks to stretch. He could use manual tools below shoulder height, at this point I would not ask him to work with vibratory or power tools. He can work in different environments as long as he dresses for cold weather, if necessary. He can work on uneven surfaces as long as he wears good footwear.

As with his material handling functions, it is difficult to estimate his nonmaterial handling functions because of the barriers to return to work that do exist in this case. Based solely on the physical examination, he should be capable of returning to work within these restrictions as outlined.

(Ex. 10, pp. 120-121)

On February 1, 2016, Dr. Miller reviewed Dr. Kuhnlein's independent medical evaluation report. (Ex. 14, p. 157) Dr. Miller deferred to Dr. Kuhnlein's opinion regarding Ortiz's current diagnosis, impairment rating, and need for permanent restrictions given Dr. Kuhnlein evaluated Ortiz more recently than Dr. Miller. (Ex. 14, p. 157)

Sunil Bansal, M.D., performed an independent medical evaluation of Ortiz on October 9, 2015. (Ex. 11, p. 124) Dr. Bansal diagnosed Ortiz with a L1-L2 disc extrusion and aggravation of lumbar spondylosis. (Ex. 11, p. 140) Dr. Bansal noted, "[t]here has been reluctance or hesitation by at least one of his examiners to attribute his lower leg radiculopathic symptoms to his MRI findings. This is inaccurate." (Ex. 11, p. 142) Dr. Bansal concluded Ortiz's clinical symptomatology and examination is consistent with "a clinically active L1-L2 disc herniation." (Ex. 11, p. 143)

Dr. Bansal placed Ortiz at maximum medical improvement on October 1, 2014, the date of his last appointment with Dr. Federhofer. (Ex. 11, p. 144) With reference to the AMA Guides, Dr. Bansal found Ortiz meets the criteria for a DRE Category III impairment, with a L1-L2 disc herniation and assigned Ortiz a ten percent whole person impairment. (Ex. 11, p. 144)

Dr. Bansal agreed with the restrictions assigned by the functional capacity evaluation performed on June 9, 2015, with the following modification, "[s]itting, standing, and walking as tolerated. Being in any one position for too long causes him discomfort. Specifically, he should avoid sitting for more than 20 minutes, no standing for more than 20 minutes, and no walking for more than 30 minutes at a time." (Ex. 11, pp. 144-145) Dr. Bansal opined Ortiz does not meet the physical demands required to return to his former work. (Ex. 11, p. 145)

Dr. Miller later reviewed the functional capacity evaluation dated June 9, 2015, and the reports from Drs. Kuhnlein and Bansal and on March 2, 2016, he responded to questions from Ortiz's attorney stating he agreed with Drs. Kuhnlein and Bansal that Ortiz is in need of permanent work restrictions because of his workplace injury on November 29, 2012. (Ex. 24, p. 223) Dr. Miller noted the restrictions include "the lifting restrictions consistent with the FCE as well as giving Mr. Ortiz the opportunity to sit, stand, or walk on an as needed basis, changing positions for comfort." (Ex. 24, p. 223) Dr. Miller agreed while Ortiz had preexisting degenerative condition of his lumbar spine, "the work injury of 11-29-12 caused a flare-up of his symptoms, as he did not have pain prior to the date of his injury. It is my opinion that the injury did significantly contribute to his back symptoms." (Ex. 24, p. 224)

On January 2, 2016, Carma Mitchell, M.S., C.D.M.S., C.R.C., completed a vocational evaluation of Ortiz. Mitchell interviewed Ortiz and reviewed his medical records, including his functional capacity evaluation and the reports from Drs. Kuhnlein and Bansal. (Ex. 15) Mitchell found based on his education, work history, functional abilities, and limitations Ortiz has lost access to 100 percent of the jobs he had access to prior to his November 29, 2012 work injury, as well as 100 percent of his earnings. (Ex. 15, p. 161)

Ted Stricklett, M.S., prepared a vocational evaluation report for JBS and Zurich on January 6, 2016. (Ex. F) In completing his report, Stricklett reviewed Mitchell's evaluation, reports and records from Drs. Bansal and Kuhnlein, the functional capacity

evaluation, a medical records summary, a summary of interrogatory answers, and Ortiz's deposition. (Ex. F, p. 50) Stricklett did not meet with Ortiz. Stricklett noted Ortiz had sustained two previous back injuries in 2002 and 2004. (Ex. F, p. 51)

Stricklett concluded considering his education, work history, functional abilities, and limitations, Ortiz could work in three occupations, as a buffet attendant, automobile detailer, or light office cleaner. (Ex. F, p. 55) Stricklett noted that before his injury, Ortiz was earning \$923.00 per week and that in these three positions, Ortiz could expect to earn weekly wages in the \$300.00 to \$340.00 range, representing a loss of earning capacity of 63 to 67 percent. (Ex. F, pp. 50, 55)

Mitchell reviewed Stricklett's report and found the report did not change her findings. (Ex. 15, pp. 163-64) Mitchell opined,

The Functional Capacity Evaluation completed June 9, 2015 indicated Mr. Ortiz is rarely (1-5% of the work day) able to perform forward bending while standing. Dr. Kuhnlein also indicates: "*He could stoop or squat rarely.*" The jobs of buffet attendant and automobile detailer would require frequent (34-66% of the work day) stooping and the light office cleaner job would require occasional (6-33% of the work day) stooping. The Transitional Classification of Jobs defines stooping as: bending the body downward and forward by bending the spine at the waist.

Additionally Dr. Kuhnlein states in his November 25, 2015 report: "Mr. Ortiz should be able to sit, stand or walk on an as needed basis, changing positions for comfort." The Functional Capacity Evaluation report indicates Mr. Ortiz can occasionally stand (6-33% of the work day). Mr. Ortiz would not be able to sustain full-time complete [sic] employment with the need to sit, stand and walk on an as needed basis changing positions for comfort.

When Mr. Ortiz tried returning to light duty work at JBS he had to visit the nurse and take breaks to lie down.

(Ex. 15, p. 163)

Ortiz testified at the hearing he has continued to have symptoms and pain in his lumbar spine since the November 29, 2012 injury. (Tr., p. 38) Ortiz reported that following his injury the only time he did not have symptoms was when he would lie down, and for more than a year, his back also bothers him while he lies down. (Tr., pp. 38-39) Ortiz described the pain noting "it's my lower back area that covers about 8 inches I figure, and I feel weakness through my legs, basically from my waist down." (Tr., p. 39) Ortiz testified his right leg is worse than the left because he feels a "burning" sensation, but reported he has fatigue and pain in both legs and feels "weakness." (Tr., p. 39)

During the hearing Ortiz switched positions, from standing to sitting, several times. Ortiz testified, "I mean, I can bear to stand, but for 5, 10, 15 minutes, but it's very hard. So I know that I have to be either seated, standing or laying [sic] down, but I don't do either [sic] because it's comfortable." (Tr., p. 39)

Ortiz testified that since his back injury he cannot shovel snow or mow grass at home. (Tr., pp. 41-42) Initially he could help with sweeping and mopping, but testified he cannot sweep or mop because of the pain in his back. (Tr., p. 42) Ortiz reported that before his injury he would exercise at home, run, and play with his daughters. (Tr., p. 42) Ortiz testified he cannot engage in these activities anymore. (Tr., p. 42)

Ortiz testified he has been treated for depression and that prior to his injury he had not been treated for depression. (Tr., pp. 42-43) Ortiz reported the main reason he is depressed is because he cannot work. (Tr., p. 43)

Since Ortiz was terminated from JBS he has not worked or applied for a job. (Tr., p. 43) Ortiz testified he has not applied for a job because he knows he cannot work because his back pain will not go away and before JBS terminated him "I tried doing jobs that I know are easy, that are light, and I couldn't do them." (Tr., p. 44)

Ortiz discussed his light duty work, and reported after his injury JBS had him clean the chain and the hooks that the pigs hung from because the oil from the chain sometimes drips onto the pigs. (Tr., p. 29) Ortiz cleaned the chain with either a paper or cloth towel by hand as it passed to the left. (Tr., p. 31) The chain was slightly above head height. (Tr., p. 31) Ortiz testified the work itself was not difficult, but standing on his feet was difficult. (Tr., p. 31) Ortiz testified he normally would have considered the job easy. (Tr., p. 31)

Ortiz reported he cleaned the chain for two or three weeks, and then performed seven or eight different jobs, including cleaning pigs' snouts, cutting pigs' buttocks, checking pigs' heads, and cutting any bad ears. (Tr., pp. 29, 31-32) Ortiz testified he told the supervisor he could not stand the work because of the pain in his back. (Tr., p. 29) Ortiz testified he could not cut the pigs' ears because he had to bend over to grab the ears. (Tr., p. 33)

Ortiz reported JBS returned him to opening chests, but he did not perform the job long because "it was impossible for [him] to do it." (Tr., p. 30) Ortiz stated standing was the most difficult part of his work because any movement he would make hurt his back. (Tr., p. 31) Ortiz testified JBS never gave him a job where he could be seated, and reported he would sit by the handwashing sink for five to ten minutes when he "felt like [he] couldn't bear to stand anymore," so he could finish the day. (Tr., p. 36)

Ortiz reported the only two jobs he had where he was able to sit were moving or sliding the hooks over to one side and cutting kidneys. (Tr., p. 40) When he moved the hooks, Ortiz would rest a minute or two every four to five minutes. (Tr., p. 40) When he

cut the kidneys, Ortiz would sit at the sink to rest. (Tr., p. 41) When working with the snouts, he would sometimes lean back or go to the nurses' station to lie down. (Tr., p. 41)

Ortiz testified he does not believe he would be able to perform buffet attendant, detailer, and light office cleaner jobs listed by Stricklett. (Tr., pp. 44-45) Ortiz noted that he tries to help his family with chores, including washing the dishes, but he cannot finish washing the dishes because he cannot bear it. (Tr., p. 45) Ortiz will wash the dishes, and another family member will have to rinse the dishes. (Tr., p. 45) He also does not believe he could work as a detailer because when he tries to bend over or move to the side or stand up straight he has a lot of discomfort. (Tr., p. 45) With respect to the light office cleaner position, Ortiz testified he would help out at home if he could with vacuuming or mopping, but he cannot even do that at home. (Tr., p. 45)

CONCLUSIONS OF LAW

I. Industrial Disability

The parties stipulated Ortiz sustained an injury to his lumbar spine on November 29, 2012, arising out of and in the course of his employment, which caused a permanent disability. (Hearing Report) The parties dispute whether Ortiz sustained a mental health sequela injury related to his physical injury and the extent of his disability. Ortiz contends he is permanently and totally disabled. JBS and Zurich contend Ortiz is not permanently and totally disabled and he is not entitled to any additional permanent partial disability benefits.

A. Mental Health Sequela

Ortiz avers he sustained a mental health sequela injury as a result of his work-related injury on November 29, 2012. JBS and Zurich contend Ortiz has failed to prove he sustained a compensable mental health sequela injury.

An injury to one part of the body can later cause an injury to another. Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 16-17 (Iowa 1993) (holding a psychological condition can be caused or aggravated by a scheduled injury). 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); Edwards v. Carroll Cmty. Sch. Dist., File No. 1214941, 2002 WL 32125171, at *1 (App. September 12, 2002). "In order for a cause to be proximate, it must be a 'substantial factor.'" Id. 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 question of medical causation is “essentially within the domain of expert testimony.” Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must “weigh the evidence and measure the credibility of witnesses.” Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert’s education, experience, training, and practice, and “all other factors which bear upon the weight and value” of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

JBS and Zurich contend Ortiz did not report any depressive symptoms until May 21, 2014, over a year and half from his work-related injury. During her appointment with Ortiz on November 3, 2014, Dr. Renze documented Ortiz presented with “continued symptoms of depression” and he reported hopelessness “due to untreatable back pain and depression due to being unable to provide for his family,” sleep disturbance and decreased libido. (Ex. 6, p. 75) Dr. Renze prescribed Cymbalta to treat his depression. (Ex. 6, p. 76) On December 1, 2014, Dr. Renze documented Ortiz’s depression was “not controlled” and that he had experienced failed treatment with multiple antidepressants. (Ex. 6, p. 77)

In February 2015, Dr. Renze referred Ortiz to Center Associates for counseling for his major depression. (Ex. 6, p. 81) Ortiz attended an initial assessment with Duncan on March 13, 2015, and reported that after his back injury in 2012, he had to quit work and he cannot provide for his family financially, which causes him to feel like a failure and worthless. (Exs. 8, p. 98; 12, p. 149) Ortiz reported that prior to his injury he enjoyed biking, running, going for walks, and helping around the house, and now all of these things are a challenge. (Ex. 8, p. 98) Ortiz attended psychotherapy with Duncan on April 14, 2015, and he was discharged on April 15, 2015. (Ex. 8, pp. 100-101)

The record supports Ortiz’s major depression is a sequela of the work injury, but does not support Ortiz has sustained a permanent mental health impairment as a result of the work injury. Drs. Miller, Kuhnlein and Bansal have not offered opinions Ortiz has sustained a permanent mental health impairment caused by his work injury.

B. Extent of Disability

“Industrial disability is determined by an evaluation of the employee’s earning capacity.” Pease, 807 N.W.2d at 852. 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).

Ortiz contends he is permanently and totally disabled. JBS and Zurich dispute his contention. 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)). In his post-hearing brief, Ortiz contends he is permanently and totally disabled under the statute, as opposed to the odd-lot doctrine.

"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.

The results of the June 2015 functional capacity evaluation indicate Ortiz can work just above the light category in the low medium range category of physical demands. (Ex. 9, p. 103) The functional capacity evaluation indicates Ortiz is capable of: (1) lifting 25 pounds from waist to floor, waist to crown and front carry, occasionally, and 15 pounds frequently; (2) forward bending while standing rarely; (3) engaging in standing trunk rotation, sitting, standing, and squatting occasionally; and (4) walking, crouching, kneeling, and climbing stairs frequently. (Ex. 9, pp. 103-104)

Dr. Kuhnlein performed an independent medical evaluation for JBS and Zurich, and opined Ortiz should be capable of lifting 20 pounds from floor to waist, 30 pounds from waist to shoulder, and 20 pounds over the shoulder, but noted "his pain is a significant disabling factor, as is his deconditioning." (Ex. 10, p. 120) Dr. Kuhnlein further found Ortiz

[S]hould be able to sit, stand or walk on an as needed basis, changing positions for comfort. He could stoop or squat rarely. He could bend or

crawl rarely. He could kneel occasionally. At this point I would not have him work on ladders or off ground level because of his medication use. He can go up and down stairs. He could work occasionally at or above shoulder height because of the "moment arm" phenomenon in the lumbar spine with such activities. He could grip and grasp without restrictions below shoulder height, and occasionally above shoulder height. There are no lower extremity restrictions.

(Ex. 10, p. 120) Dr. Kuhnlein assigned an eight percent impairment under the AMA Guides.

Ortiz retained Dr. Bansal to perform an independent medical evaluation. Dr. Bansal agreed with the restrictions assigned by the functional capacity evaluation, with the following modification, "[s]itting, standing, and walking as tolerated. Being in any one position for too long causes him discomfort. Specifically, he should avoid sitting for more than 20 minutes, no standing for more than 20 minutes, and no walking more than 30 minutes at a time." (Ex. 11, pp. 144-145) Dr. Bansal assigned Ortiz a ten percent impairment under the AMA Guides. These additional restrictions proposed by Dr. Bansal are consistent with the restrictions proposed by Dr. Kuhnlein.

Ortiz's past relevant work includes working as a fruit harvester, watering crops, and as an offal separator. (Ex. F, p. 53) Ortiz retained Mitchell to perform a vocational evaluation, and JBS and Zurich retained Stricklett to perform a vocational evaluation. Neither vocational expert opined Ortiz can return to his past relevant work. (Exs. F; 15)

Mitchell found based on Ortiz's education, work history, functional abilities, and limitations Ortiz has lost access to 100 percent of the jobs he had access to prior to his November 29, 2012 work injury, as well as 100 percent of his earnings. (Ex. 15, p. 161) Stricklett concluded considering Ortiz's education, work history, functional abilities, and limitations, Ortiz could work in three occupations, as a buffet attendant, automobile detailer, or light office cleaner. (Ex. F, p. 55) Stricklett noted that before his injury, Ortiz was earning \$923.00 per week and that in these three positions, Ortiz could expect to earn weekly wages in the \$300.00 to \$340.00 range, supporting a loss of earning capacity between 63 and 67 percent. (Ex. F, pp. 50, 55) Both vocational opinions support Ortiz has sustained a significant loss of earning capacity.

Mitchell provided a rebuttal opinion, noting the functional capacity evaluation indicates Ortiz is rarely able to perform forward bending while standing, and Dr. Kuhnlein has indicated Ortiz can stoop or squat rarely. (Ex. 15, p. 163) Mitchell opined the jobs of buffet attendant and automobile detailer require frequent stooping, and the light office cleaner job requires occasional stooping, noting, "[t]he Transitional Classification of Jobs defines stooping as: bending the body downward and forward by bending the spine at the waist." (Ex. 15, p. 163) The definition of "stooping" used by Mitchell is also consistent with the position description for Ortiz's position with JBS,

which defines "stooping" as "bending the body downward and forward by bending the spine at the waist." (Ex. 16, p. 166) Stricklett did not provide a contrary opinion.

I find Mitchell's opinion should be afforded more weight than Stricklett's opinion. While the functional capacity evaluation indicates Ortiz is capable of low medium range category of physical demands, and Drs. Kuhnlein and Bansal assigned modest permanent impairment ratings of eight and ten percent respectively, Stricklett only found three positions he believed Ortiz is capable of engaging in. Mitchell opined all three positions require frequent or occasional stooping. The positions are inconsistent with Ortiz's restrictions. Stricklett's opinion does not address the physical requirements of the three positions, in light of Ortiz's permanent restrictions, and he has not offered a contrary opinion. Stricklett has not identified any positions Ortiz is capable of performing, consistent with his restrictions.

Ortiz was the only live witness to testify at hearing. Since Ortiz was terminated from JBS, he has not worked or applied for a job. (Tr., p. 43) Ortiz testified he has not applied for a job because he knows he cannot work because his back pain will not go away and before JBS terminated him "I tried doing jobs that I know are easy, that are light, and I couldn't do them." (Tr., p. 44) Ortiz also testified at hearing that he has difficulty performing activities of daily living at home, including washing and drying the dishes, and sweeping and mopping. (Tr., p. 45) He is unable to engage in his former hobbies of biking and running. (Ex. 8, p. 98)

When assessing witness credibility, the trier of fact "may consider whether the testimony is reasonable and consistent with other evidence, whether a witness has made inconsistent statements, the witness's appearance, conduct, memory and knowledge of the facts, and the witness's interest in the [matter]." State v. Frake, 450 N.W.2d 817, 819 (Iowa 1990). Ortiz has not shown motivation by applying for any jobs since his termination in 2013. He explained why he has not applied for jobs, describing his difficulty performing activities of daily living and while performing light duty work for JBS. While Ortiz has an obvious interest in the outcome of this case, I find Ortiz's testimony is reasonable and consistent with the evidence in this case. Ortiz has not made inconsistent statements since his 2012 injury. His memory and knowledge of the facts at hearing were consistent with his initial reports to his employer and medical providers. During the hearing, I observed Ortiz switch positions on multiple occasions, when he was uncomfortable, varying between standing and sitting. Based on the foregoing, I find his testimony credible.

At the time of hearing Ortiz was 47. Ortiz dropped out of school in Mexico after completing the fourth grade. He has not completed a GED or received any other training. Ortiz's past relevant work includes working as a fruit harvester, waterer of crops, and as an offal separator, work he is no longer capable of engaging in. Based on his limited education and work experience, I conclude Ortiz's prospects for retraining are limited. Ortiz currently suffers from chronic pain that limits his ability to work.

B. Costs

The workers' compensation commissioner has discretion to tax costs set forth in rule 876 Iowa Administrative Code 4.33. Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 262 (Iowa 1996).

1. Functional Capacity Evaluation and Vocational Evaluation

Ortiz seeks recovery of the cost of the functional capacity evaluation of nine hundred sixty and 00/100 (\$960.00), and vocational rehabilitation report of three hundred forty-four and 50/100 (\$344.50) JBS and Zurich aver that under LeGrange v. Nash Finch Co., File No. 5043316, 2015 WL 4078549 (App. July 1, 2015), Ortiz is only entitled to reimbursement for the reports and not for the underlying examinations, and due to Ortiz's failure to break down the costs, Ortiz is not entitled to reimbursement.

Iowa Administrative Code 4.33 outlines the costs that can be taxed.

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.

In LaGrange, the commissioner found rule 876 IAC 4.33 allows for taxation of costs incurred in the hearing itself rather than reimbursement of fees and expenses incurred in an examination, and while this agency has previously held that functional capacity evaluations and vocational rehabilitation evaluations fall under rule 876 IAC 4.33, under Young, 856 N.W.2d at 844, the allowable taxable costs are the reports themselves, and not the underlying examinations.

Mitchell's bill is itemized. She spent two hours preparing the report, at a cost of sixty-five and 00/100 (\$65.00) per hour. Ortiz is entitled to recover the cost of Mitchell's report.

Vander Wilt's bill is not itemized. His bill indicates he spent from 16 units for the functional capacity evaluation. His report does not indicate how many units he spent meeting with Ortiz and preparing his report. Ortiz is not entitled to recover the cost of the functional capacity evaluation under LaGrange.

2. Other Costs

Ortiz seeks recovery of the following costs:

Filing Fee	\$100.00
Service	\$ 12.96
<u>Deposition</u>	<u>\$ 80.15</u>
Total	\$203.11

These costs are expressly included in rule 876 IAC 4.33. The above costs are assessed to JBS and Zurich.

ORDER

IT IS THEREFORE ORDERED, that:

Defendants shall pay the claimant permanent total disability benefits in the amount of six hundred twenty-four and 52/100 dollars (\$624.52) per week from November 29, 2012, and into the future during the period of the claimant's continued disability.


Defendants shall receive a credit for all weekly benefits paid to date.

Defendants shall reimburse the claimant for the cost of Dr. Bansal's independent medical evaluation report as set forth above.

Defendants shall reimburse the claimant's costs as set above.

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 2nd day of June, 2016.


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.