

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PAULA T. JACKSON,

Claimant,

VS.

NSK CORPORATION,

Employer,

and

SOMPO JAPAN INSURANCE CO.
OF AMERICA,

Insurance Carrier,
Defendants.

File No. 5032634

REVIEW-REOPENING

DECISION

Head Note Nos.: 1402.20, 1402.30,
1402.40, 2905

Claimant Paula Jackson filed a petition in arbitration on March 22, 2010, alleging she sustained an injury to her low back while working for the defendant, NSK Corporation (“NSK”), on October 8, 2008. NSK and its insurer, the defendant, Sompo Japan Insurance Co. (“Sompo”), filed an answer on March 30, 2010, admitting Jackson sustained a work injury. An arbitration hearing was held on January 20, 2011. Exhibits 1 through 12 and A through D were admitted into the record. On March 29, 2011, a deputy workers’ compensation commissioner issued an arbitration decision finding Jackson had sustained a sixty percent industrial disability, and awarding her 300 weeks of permanent partial disability benefits at the rate of \$389.23 per week, commencing on May 26, 2009. NSK and Sompo appealed the decision to Workers’ Compensation Commissioner Christopher Godfrey. Commissioner Godfrey affirmed and adopted the arbitration decision on appeal without additional comment. The decision became final agency action.

On February 15, 2017, Jackson filed a review-reopening petition, alleging she had sustained a change of condition warranting an award of additional benefits. NSK and Sompco filed an answer on April 12, 2017, denying Jackson had sustained a change of condition warranting an award of additional benefits.

A hearing on the review-reopening petition was held on June 17, 2019, at the Division of Workers' Compensation, in Des Moines, Iowa. Attorneys Laura and T.J. Pattermann represented Jackson. Jackson appeared and testified. Attorney Bill

Lamson represented NSK and Sampo. Joint Exhibits ("JE") 1 through 14, and Exhibits 1 through 13 and A and B were admitted into the record. The record was held open through August 21, 2019, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

At the start of the hearing the parties prepared a hearing report, listing stipulations and issues to be decided. NSK and Sampo waived all affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed at the time of the alleged work injury.
2. Jackson sustained an injury on October 8, 2008, which arose out of and in the course of her employment with NSK.
3. The alleged injury is a cause of temporary disability.
4. Temporary benefits are no longer in dispute.
5. The alleged injury is a cause of permanent disability.
6. The disability is an industrial disability.
7. The commencement date for permanent partial disability benefits is March 24, 2015.
8. At the time of the alleged injury Jackson's gross earnings were \$546.20 per week, she was married and entitled to six exemptions, and the parties believe the weekly rate is \$389.23.
9. Prior to the hearing Jackson was paid 304.5 weeks of compensation at the rate of \$389.23 per week.
10. Costs have been paid.

ISSUES

1. Has Jackson sustained a change of medical condition warranting an award of additional industrial disability benefits?
2. If Jackson has sustained a change of medical condition warranting an award of additional industrial disability benefits, what is the extent of disability?
3. Has Jackson established she is permanently and totally disabled under the statute or under the common law odd-lot doctrine?

4. Is Jackson entitled to recover the cost of an independent medical examination?
5. Is Jackson entitled to alternate medical care?
6. Should costs be assessed against either party?

FINDINGS OF FACT

At the time of the review-reopening hearing Jackson was living in Shenandoah with her husband, mother-in-law, and two of her dependent children. (Transcript, pages 7-8) Jackson graduated from high school in 1990, earning A and B grades. (Arbitration Decision, p. 2) At the time of the review-reopening hearing Jackson was forty-seven. (Tr., p. 11)

Jackson testified during the original hearing she had no back pain from high school until the October 8, 2008 work injury. (Arb. Dec., p. 2) The deputy workers' compensation commissioner found Jackson's medical records indicated she had a prior compression fracture at L1, but she had no recollection of the condition. (Arb. Dec., p. 2)

During high school Jackson worked as a secretary and as a fast food employee. (Arb. Dec., p. 2) After high school Jackson enlisted in the United States Navy for eighteen months until she became pregnant. (Arb. Dec., p. 2) Jackson received an honorable discharge in 1994. (Arb. Dec., p. 2)

After leaving the Navy Jackson worked as a secretary for multiple employers, at a casino, as a customer service representative for the United State Chamber of Commerce, as a cashier for a furniture store, and as a factory worker. (Arb. Dec., p. 2)

In May 2007, NSK hired Jackson to work as an assembly operator. (Arb. Dec., p. 2) NSK manufactures ball bearings for use in tractors, ceiling fans, and other devices. (Arb. Dec., p. 2) Jackson passed a pre-employment physical examination and reported no problems with her back. (Arb. Dec., p. 2) The assembly operator position required some lifting with weight no less than ten pounds, but not more than thirty-five pounds. (Arb. Dec., p. 2) Jackson put ball bearings on pallets for shipping, which involved bending, twisting, and forward flexion. (Arb. Dec., p. 2)

NSK assigned Jackson to the grind department where she ran two machines that ground ball bearings. (Arb. Dec., p. 2) Some of the parts Jackson worked with ranged from thirty to sixty-five pounds, and the grind wheels weighed between eighty and ninety pounds. (Arb. Dec., p. 2) On occasion Jackson had to change the grind wheels by herself. (Arb. Dec., p. 2)

On March 8, 2008, Jackson lifted a grind wheel weighing ninety pounds and she felt pain in her lower back. (Arb. Dec., p. 2) Jackson completed her shift, but the next morning she could not get out of bed. (Arb. Dec., p. 2)

Jackson's back pain persisted and she sought medical treatment from Bonnie Muller, PA-C, her family medical provider, on October 9, 2008. (Arb. Dec., p. 2) Muller restricted Jackson from working until October 13, 2008. (Arb. Dec., p. 2)

On October 27, 2008, Jackson attended an appointment with Wendy Spangler, M.D., a neurosurgeon. (Arb. Dec., p. 2) Dr. Spangler ordered magnetic resonance imaging and x-rays, imposed a ten pound lifting restriction, and recommended Jackson not engage in bending, stooping, or lifting. (Arb. Dec., p. 2) Following the arbitration hearing the deputy workers' compensation commissioner found the magnetic resonance imaging showed a compression fracture. (Arb. Dec., p. 2) Dr. Spangler did not recommend surgery, and prescribed pain medication and physical therapy. (Arb. Dec., pp. 2-3)

Jackson was placed on light duty work until October 30, 2008. (Arb. Dec., p. 3) NSK contacted Jackson and told her not to return to work until future notice. (Arb. Dec., p. 3)

NSK and Sompco transferred Jackson's care to Christopher Anderson, D.O., a physiatrist. (Arb. Dec., p. 3) Dr. Anderson examined Jackson, took x-rays, and prescribed pain medication and additional physical therapy. (Arb. Dec., p. 3)

NSK called Jackson back to work and assigned her to the ALH line, which Jackson reported required her to forward flex and twist, and she experienced pain. (Arb. Dec., p. 3)

NSK and Sompco referred Jackson to John McClellan, M.D., an orthopedic surgeon. (Arb. Dec., p. 3) A computerized tomography scan showed a chronic L1 fracture. (Arb. Dec., p. 3) Dr. McClellan recommended lumbar fusion surgery, but recommended Jackson lose weight and quit smoking first. (Arb. Dec., p. 3) Jackson reduced her smoking, but she did not quit smoking. (Arb. Dec., p. 3)

Jackson refused to undergo surgery. (Arb. Dec., p. 3) Jackson testified when her third child was born by caesarian section the anesthesia did not provide relief and she experienced terrible pain during the procedure and she did not want to undergo voluntary surgery again. (Arb. Dec., p. 3)

During the original arbitration hearing Jackson testified she had severe pain from her low back down her right leg with numbness from her toes up. (Arb. Dec., p. 3) Jackson reported pain medication did not alleviate her pain. (Arb. Dec., p. 3)

Dr. McClellan referred Jackson to James Devney, D.O., for pain therapy. (Arb. Dec., p. 3) Dr. Devney prescribed a TENS unit and brace on February 24, 2009, and

released Jackson to return to work with a twenty pound lifting restriction. (Arb. Dec., p. 3)

Jackson returned to the ALH line, and again experienced pain. (Arb. Dec., p. 3) Jackson stopped wearing her back brace at work because it limited her mobility, and reported she was unable to tuck in her shirt while wearing the brace, which was against company policy. (Arb. Dec., p. 3)

NSK assigned Jackson to a light duty job of sitting and boxing ball bearings. (Arb. Dec., p. 3) Jackson's low back pain returned. (Arb. Dec., p. 3) In April 2009, NSK imposed a plant wide layoff. (Arb. Dec., p. 3)

Jackson underwent a functional capacity evaluation on April 24, 2009. (Arb. Dec., p. 4) The evaluation found Jackson was capable of working in the light-medium category. (Arb. Dec., p. 4)

During her layoff, Jackson enrolled in and completed truck driving school. (Arb. Dec., p. 4) At that time Jackson had restrictions from the functional capacity evaluation of no forward bending, stooping, crawling, twisting, or overhead work. (Arb. Dec., p. 4)

In June 2009 NSK recalled Jackson to work and placed her on the ALH line. (Arb. Dec., p. 4) Jackson's job required her to engage in forward bending and constant twisting, which caused her pain, which was worse at the end of her shift. (Arb. Dec., p. 4) Jackson performed the job until December 2009, testifying she was in so much pain by the end of the workday she was in tears and she could hardly lift her legs to get into her car, so she quit. (Arb. Dec., p. 4)

When Jackson left NSK she completed an exit interview. (Arb. Dec., p. 5) The exit interview form does not indicate Jackson left NSK due to her back pain, but Jackson claimed during the original arbitration hearing she told Judy O'Grady with NSK that on other occasions. (Arb. Dec., p. 5) The form indicates Jackson was leaving NSK for a better job. (Arb. Dec., p. 5) Jackson testified she did not report her back problem was the reason for her resignation because she did not want to give NSK the satisfaction of knowing "they won." (Arb. Dec., p. 5)

O'Grady testified Jackson filled out a resignation slip stating she was leaving NSK to drive trucks on April 15, 2010. (Arb. Dec., p. 6) O'Grady reported on her last day Jackson found out the truck driving job had fallen through and Jackson believed it would not be a problem because she would find another job because she had worked several places. (Arb. Dec., p. 6) O'Grady testified Jackson did not rescind her resignation or ask for her old job back and that if she had, NSK would have given her job back to her. (Arb. Dec., p. 6) O'Grady reported Jackson never indicated her physical condition was her reason for leaving, and noted Jackson indicated she would be making more money with her new job. (Arb. Dec., p. 6)

Jackson applied for an assembly job in late 2009 believing the work would be easier and she asked Dr. Devney to release her from her work restrictions. (Arb. Dec., p. 4) Dr. Devney declined to release Jackson from her work restrictions, so she went to her family provider to obtain a release. (Arb. Dec., p. 4)

Jackson started a new job and found she could not wear her TENS unit because of the oil and kerosene in the environment and her perspiration caused the attachments to peel off her back, and her back brace would not allow her to bend or twist to perform her job. (Arb. Dec., p. 4) Jackson's back pain increased and she experienced numbness in her right leg. (Arb. Dec., p. 4) Jackson performed the assembly job from March 2010 to April 15, 2010, and she left the assembly job because she could not handle the pain. (Arb. Dec., p. 4)

A truck driving company hired Jackson, but she did not commence her employment because she could not pass the physical. (Arb. Dec., p. 4) A second trucking company hired Jackson, but withdrew the offer. (Arb. Dec., p. 4)

Jackson attempted to work as a trucker driver for a greenhouse, but found she could not load and unload the plants as they were too heavy and exceeded her permanent restrictions from the functional capacity evaluation. (Arb. Dec., p. 4) Jackson hauled pig manure from farm fields for a farmer for nine days, but found by the end of her shift she could not move. (Arb. Dec., p. 5) Jackson reported the farmer laid her off when he saw she could not do the job. (Arb. Dec., p. 5)

Jackson applied for many positions, including truck driving, secretarial, accounting, fast food, and construction. (Arb. Dec., p. 5) Jackson did not receive any job offers. (Arb. Dec., p. 5)

During the original arbitration hearing Jackson reported her pain was worse than before and she was having difficulty driving a car due to her pain. (Arb. Dec., p. 5) Jackson's mother-in-law was living with Jackson and helped her with her children. (Arb. Dec., p. 5) Jackson reported she could not sleep more than ninety minutes at a time before having to get up and adjust herself and she was taking medication for pain and spasms. (Arb. Dec., p. 5) Jackson continued to use a TENS unit and testified she had to increase the setting from 200 to 230, from 230 to 250, and from 250 to 300 at the time of the original hearing. (Arb. Dec., p. 5) Jackson reported she was losing sensation in her back and she was wearing her back brace twelve hours per day while she was awake. (Arb. Dec., p. 5)

The deputy workers' compensation commissioner found only Dr. McClellan had recommended surgery and three other doctors saw Jackson's problem as a mechanical problem and surgery was not an option. (Arb. Dec., p. 5) Jackson was opposed to surgery. (Arb. Dec., p. 5)

During cross-examination Jackson acknowledged she discontinued physical therapy because it made her condition more painful. (Arb. Dec., p. 5) Jackson had reduced her smoking from three to one pack of cigarettes per day, she had tried to lose weight, but she had not been successful losing weight or quitting smoking. (Arb. Dec., p. 5)

Jackson's husband testified they had been married for six years and her condition had worsened since her injury and she was more irritable than before and woke up nightly with back pain. (Arb. Dec., p. 6)

Thomas DiStefano, M.D., adopted the functional capacity report restrictions in his September 24, 2009 report, and assigned Jackson a five percent permanent partial impairment rating. (Arb. Dec., p. 7) Drs. Devney and McClellan also assigned a five percent permanent partial impairment rating. (Arb. Dec., p. 7) The deputy workers' compensation commissioner found Jackson had sustained a sixty percent industrial disability. The decision was affirmed on appeal and became final agency action.

During the review-reopening proceeding the parties produced records of treatment Jackson received prior to the original arbitration hearing on January 20, 2011. The prior evidence was considered by the deputy workers' compensation commissioner following the original hearing in the decision that became final agency action and will not be considered anew in this review-reopening proceeding.

On March 18, 2011, Jackson attended an appointment with Brian Crouse, M.D. with Methodist Physicians Clinic of Red Oak, complaining of back pain and bilateral lower extremity swelling after slipping in the shower and feeling unsteady in her back. (JE 8, p. 65) Dr. Crouse assessed Jackson with chronic back pain, leg edema, and asthma, recommended Jackson undergo another functional capacity evaluation for her chronic back pain, prescribed Lyrica, and continued her tramadol and Flexeril prescriptions. (JE 8, p. 66)

Jackson attended a neuro-ophthalmologic consultation with Richard Legge, M.D., a neuro-ophthalmology specialist. (JE 9, p. 69) Dr. Legge documented he agreed Jackson had mild bilateral papilledema, she had a parapapillary nerve fiber layer hemorrhage in her left eye, Jackson had gained 100 pounds in the last year, and the likelihood of pseudotumor cerebri was quite high. (JE 9, p. 69) Dr. Legge ordered brain magnetic resonance imaging and venogram to complete the evaluation for papilledema, and noted if the tests were negative, and given Jackson's history of a low back injury he would defer a lumbar puncture. (JE 9, p. 69) Jackson testified her pseudotumor cerebri condition causes her to have "extra fluid around my brain, so my memory is going downhill." (Tr., pp. 32-33)

During an appointment on April 26, 2011, William Butz, M.D. documented Jackson had full range of motion with her back with no significant scoliosis and no

tenderness on examination, and assessed her with thrush, GERD, and asthma. (JE 8, p. 68)

After the original arbitration hearing Jackson applied for Social Security Disability Insurance ("SSDI") benefits. (Tr., pp. 31-32) In 2012 the Social Security Administration awarded Jackson SSDI benefits. (Tr., p. 32) During the review-reopening hearing Jackson continued to receive SSDI benefits.

On August 7, 2014, Jackson attended an appointment with Christopher Anderson, D.O., a physiatrist, complaining of burning lumbar spine pain, aggravated by standing, twisting, and walking. (JE 10, p. 76) Dr. Anderson documented Jackson was not compliant with her home exercise program. (JE 10, p. 76)

Jackson returned to Dr. Anderson on March 27, 2015, complaining of back pain. (JE 10, p. 77) Dr. Anderson documented Jackson was not compliant with her home exercise program and noted Jackson reported her medication was not alleviating her pain. (JE 10, p. 77) Dr. Anderson wrote Jackson reported she had been out of work for seven years and she asked whether he believed she would return to work. (JE 10, p. 77) Dr. Anderson documented since Jackson had been out of work for seven years, statistically it was not likely she would return to work in the future. (JE 10, p. 77)

Jackson continued to complain of back pain to Dr. Anderson. (JE 10, p. 82) During an appointment on June 25, 2015, Dr. Anderson increased Jackson's Trileptal, refilled her tramadol and Flexeril, directed her to avoid tobacco products, and ordered her to continue daily home exercises. (JE 10, p. 84)

During an appointment with Dr. Anderson on January 7, 2016, Jackson complained of worsening, aching, stabbing, and shooting back pain radiating into her right thigh, right knee, left thigh, left knee, and left foot, aggravated by standing, walking, and driving with numbness and paresthesias. (JE 10, p. 88) Dr. Anderson documented Jackson reported her pain had increased in intensity over the last month and that she was experiencing new symptoms with increased numbness in her right leg, her pain medication was not providing relief, and she felt like her legs were going to give out. (JE 10, p. 88) Dr. Anderson listed chronic low back pain and left lumbar radiculitis, prescribed medication, directed Jackson to avoid tobacco products, and ordered lumbar spine magnetic resonance imaging. (JE 10, p. 89)

On February 4, 2016, Dr. Anderson documented Jackson was complaining of lumbar spine pain radiating to her left thigh, left knee, left foot, right thigh, right knee, and right foot with the left leg greater than the right, with associated bladder incontinence, numbness, and paresthesias. (JE 10, p. 89) Dr. Jackson noted the new magnetic resonance imaging did not appear to explain Jackson's worsening symptoms, and he referred her to neurosurgery. (JE 10, p. 90)

Christopher Mascott, M.D., a neurosurgeon, examined Jackson on February 8, 2016. (JE 10, p. 93) Jackson reported she was experiencing increasing back pain going down into her sacrum for the past month, and pain in both legs below the knee bilaterally and in the thigh on the right. Jackson reported she had sharp pain in her left shin that would wake her up at night and problems with bowel and bladder control, but she had not soiled or wet herself. (JE 10, p. 93) Dr. Mascott reviewed Jackson's January 2015 magnetic resonance imaging, which he noted showed multilevel degenerative changes, kyphosis at L1 related to probable old compression fracture, mild multilevel foraminal stenosis, and no significant canal stenosis. (JE 10, p. 95) Dr. Mascott diagnosed Jackson with chronic low back pain and diffuse leg pain with unspecified laterality, noted there was no radiological explanation for her leg pain, weakness, numbness, or autonomic symptoms, and recommended a referral to Tyrus Soares, M.D., an anesthesiologist specializing in pain management, for facet joint blocks/rhizotomies. (JE 10, pp. 94-95)

On March 14, 2016, Jackson attended an appointment with Dr. Soares. (JE 10, pp. 98-01) Dr. Soares assessed Jackson with lumbar spondylosis and lumbar radicular pain, and recommended she discuss medical branch blocks and electromyography with Dr. Anderson. (JE 10, p. 101)

Jackson returned to Dr. Anderson on March 28, 2016. (JE 10, p. 102) Dr. Anderson ordered electromyography of Jackson's bilateral lower extremities, and recommended consideration of the University of Nebraska Medical Center Pain Program. (JE 10, p. 104) Jackson underwent electromyography on April 14, 2016, which was normal and negative for neuropathy and radiculopathy. (JE 11, pp. 109-10)

On April 22, 2016, Jackson attended an appointment with Todd Isaacson, M.D., her family medicine provider, complaining of headaches. (JE 14, pp. 142-46) Dr. Isaacson assessed Jackson with a pseudotumor cerebri, low back pain, heavy caffeine use, and tobacco abuse. (JE 14, pp. 145-46) Dr. Isaacson advised Jackson to stop drinking caffeine and smoking and noted he planned to speak to radiology to see if she was a candidate for a steroid injection. (JE 14, pp. 145-46)

Dr. Anderson issued an opinion letter at the request of NSK and Sompco on September 6, 2016. (JE 10, pp. 105-06) Dr. Anderson diagnosed Jackson with chronic low back pain, multilevel lumbar spondylosis, and a history of a work-related low back injury on October 8, 2008. (JE 10, p. 105) Dr. Anderson noted Jackson's low back injury was work related, since that time she has had chronic ongoing low back pain that has limited her function and required chronic pain management, she had preexisting multilevel lumbar spondylosis, and the work injury "set off or exacerbated her preexisting condition and has since been causing her chronic low back pains." (JE 10, p. 105) Dr. Anderson noted Jackson's prognosis is poor given she had "not been able to return to work over the last eight years' timeframe" and she continued to require chronic pain medication over an eight year period. (JE 10, p. 105) Dr. Anderson did not recommend any additional diagnostic studies or therapeutic interventions, and noted

Jackson would continue to require chronic pain medication as she had since 2008, which was causally related to her work injury. (JE 10, p. 105) Dr. Anderson noted while Jackson has preexisting multilevel lumbar spondylosis and facet arthropathy, he did not believe these conditions were disabling factors in her ability to return to gainful employment and that she "is limited by her work-related injury which occurred on 10/08/2008, and this should continue to be considered her disabling factor." (JE 10, p. 106) Dr. Anderson opined Jackson reached maximum medical improvement on March 29, 2013, she received permanent work restrictions following a functional capacity evaluation in April 2009 that placed her in the light-medium physical demand level of activity with no lifting or carrying over thirty pounds on an occasional basis and limited prolonged forward bending, and the x-ray results from June 27, 2016 are unrelated to her work injury and are "preexisting wear-and-tear type changes." (JE 10, p. 106)

Jackson underwent a lumbar spine computerized tomography scan on September 12, 2016. (JE 14, p. 147) The reviewing radiologist listed an impression of advanced degenerative disc disease at L1-L2 and L2-L3, moderate-severe spinal canal stenosis at L1-L2, noting Jackson might benefit from a lumbar epidural steroid injection, mild/moderate foraminal narrowing, and mild dextroscoliosis. (JE 14, pp. 147-48)

On September 14, 2016, Jackson attended an appointment at Shenandoah Medical Center with Dr. Woods, complaining of back pain following a visit to the emergency room on September 12, 2016. (JE 14, pp. 149-52) Dr. Woods documented September 12, 2016 "[Jackson] bent over to change the sheets on her bed and felt a big pop in her back. The pain was in her back and down both legs. She states that the pain initially started about 8 years ago after an injury at work." (JE 14, p. 152) Jackson complained of numbness in her feet, and a feeling of needles sticking her all over her back when sitting. (JE 14, p. 152) Jackson relayed she did not do any heavy lifting and had stopped working. (JE 14, p. 152) Dr. Woods recommended Jackson see a back specialist, John Hain, M.D., a neurosurgeon. (JE 14, p. 152)

On October 3, 2016, Jackson attended an appointment with Dr. Hain. (JE 12, pp. 111-15) Dr. Hain examined Jackson, assessed her with kyphoscoliosis and scoliosis, thoracic radiculitis, transitional L5-S1 segment, radicular pain right T-12, L1 roots, foraminal compromise T12-L1, L1-2, and kyphoscoliosis at T12-L2, dextroscoliotic curve. (JE 12, pp. 114-15) Dr. Hain recommended a T12-L2 fusion and a right decompression of the T12 and L1 roots. (JE 12, p. 115) Jackson sought approval for payment of the surgery through Medicare. (Tr., pp. 37-38)

On October 3, 2016, Jackson's attorney sent a letter to the attorney for NSK and Somo, reporting Jackson had seen Dr. Hain that day and he "diagnosed that her L1, L2 and L3 are collapsed and that Ms. Jackson is going to have to have surgery." (Ex. 1) Jackson's attorney asked NSK and Somo to authorize the surgery and her visits with Dr. Hain, and to select a new provider to authorize her pain medication given Dr. Anderson has left the community. (Ex. 1) The attorney for NSK and Somo responded to the letter on October 6, 2016, noting he would be requesting medical records from Dr.

Hain, but also requesting Jackson's attorney produce the records from the recent appointments so Dr. Hain's recommendations could be evaluated. (Ex. B, p. 12)

On October 9, 2016, Jackson's attorney responded, noting she was not aware of the appointment with Dr. Hain until after Jackson called on October 3, 2016, when Jackson informed her surgery had been scheduled. (Ex. 2) Jackson's attorney sent a second letter on October 9, 2016, indicating surgery had been scheduled for October 13, 2016 and requesting NSK and Sompo authorize the surgery and select a physician to refill her medication. (Ex. 3) The attorney for NSK and Sompo responded on October 9, 2016, stating his clients were not made aware in advance of any appointments with Dr. Hain or with Jackson's regular physician and they would not be approving any treatment by either doctor, including surgery because neither was an authorized treating physician, noting they had not received any medical records from Jackson's attorney from the appointments, and indicating Jackson's care was being transferred to Dr. Wampler. (Ex. B, pp. 10-11)

On October 13, 2016, Dr. Hain performed a posterolateral instrumented fusion from T12 through L2, transforaminal lumbar interbody arthrodesis at L1-2, a right-sided decompression, facetectomy, hemilaminectomy at L1-2 for nerve root decompression, and a partial correction of sagittal and coronal imbalance at T12 to L1. (JE 13, p. 139) Dr. Hain listed a postoperative diagnosis of disc loss/collapse with bone-on-bone contact T12-L1 and L1-2, sagittal coronal imbalance due to asymmetric disc collapse and bone-on-bone contact at T12-L1 and L1-2, and right radicular pain at L1-2. (JE 13, p. 139)

Following surgery Jackson returned to Dr. Hain. (JE 12, p. 116) Dr. Hain noted Jackson appeared as expected postoperatively, he ordered physical therapy, and refilled her pain medication. (JE 12, p. 116) Jackson returned to Dr. Hain on December 5, 2016, noting her physical therapy had not been approved by insurance and she needed to work on core strengthening. (JE 12, p. 117)

Jackson underwent a lumbar spine computerized tomography scan on December 5, 2016. (JE 14, p. 154) The reviewing radiologist compared the scan to a scan performed on September 12, 2016, and noted Jackson now had a "[p]ostoperative fusion at L1-L3, hardware intact" and a stable degenerative change within her lumbar spine. (JE 14, p. 154)

On January 31, 2017, Jackson called Dr. Hain's office reporting she felt like something was shifting in the area of the fusion, she was experiencing popping, and she felt similar to how she felt before surgery. (JE 12, p. 118) Jackson relayed she had been experiencing numbness in her right buttock since surgery and that it seemed to be increasing. (JE 12, p. 118) During her appointment with Dr. Hain on February 10, 2017, Jackson reported she was continuing to experience tingling, numbness, right leg pain, and right buttock pain. (JE 12, p. 119) Dr. Hain listed an impression of right flank pain, sacroiliitis, and postsurgical arthrodesis, ordered a computerized tomography scan

from T12 to the sacrum, recommended sacroiliac joint injections with Dr. Rakes, ordered physical therapy, and recommended a home exercise program. (JE 12, pp. 121, 124)

Dr. Hain sent a letter to Todd Isaacson, M.D. on February 10, 2017, noting:

[p]atient was seen today for complaints of right buttock pain and numbness. She is also 4 months S/P T12-L2 fusion and decompression. She describes her pain as "pinching and her spine popping and shifting." She also has complaints of numbness around her incision, right flank and buttock. She is not taking any pain medication other than [T]ylenol. On exam the pain is appreciated at the right SI joint area. She was given a script for physical therapy but can not afford to go and workman's [sic] comp will not approve. She has been doing her own home exercises with no improvement.

It was discussed with her in great detail the need for formal physical therapy for targeted home exercise program for core strengthening. She agreed to at least 1 visit for direction. Dr. Hain recommended SI joint injection series and pain management for hyperactive nerves also. A CT scan was ordered for evaluation of fusion and she will follow up in 1 month.

(JE 12, p. 123)

On February 15, 2017, Jackson filed a review-reopening petition, alleging she had sustained a change of medical condition warranting an award of additional benefits. NSK and Sompco contend Jackson has not sustained a change of medical condition warranting an award of additional benefits.

Jackson underwent lumbar spine and pelvis computerized tomography scans on March 2, 2017. (JE 14, p. 156) For the lumbar spine scan, the reviewing radiologist listed an impression of:

1. Fusion changes from L1-L3. No findings for loosening or other complication of the metallic hardware.
2. Severe degenerative disc disease is redemonstrated at L1-L2 and L2-L3. No obvious focal disc protrusion, although this would be better assessed with MRI.
3. Mild-moderate spondylitic changes, similar compared to the prior exam.
4. Mild bony neural foraminal stenosis at L1-L2.

5. Moderate left bony neural foraminal stenosis at L1-L2 and L2-L3.
6. Mild dextroscoliosis with the apex at the level of the L2-L3 disc, similar to the prior exam.
7. Minimal arteriosclerotic changes. . . .

(JE 14, p. 156) For the pelvis scan, the reviewing radiologist noted no acute abnormality at the bony pelvis and symmetric mild degenerative changes at the sacroiliac joints bilaterally. (JE 14, p. 157)

Jackson attended a follow-up appointment with Dr. Hain on March 6, 2017, reporting she was experiencing burning, shooting, and sharp pain with numbness that had not changed since her last visit. (JE 12, p. 130) Jackson relayed the pain was isolated more in the lumbosacral region rather than in the area of her previous surgery. (JE 12, p. 130) Dr. Hain noted the computerized tomography scan “shows stability of her previous surgical construct with beginning arthrodesis seen in the left posterior-lateral location and interbody space at the lower level,” “multilevel lumbar spondylosis with facet degeneration,” and “bilateral severe SI joint degeneration.” (JE 12, p. 131) Dr. Hain listed an impression of sacroiliitis and lumbar spondylosis without myelopathy or radiculopathy, and recommended Jackson follow up with Dr. Rakes for pain management services, noting she may be a good candidate for a spinal cord stimulator in the future. (JE 12, p. 131)

On July 14, 2017, Jackson attended an appointment with Brian Rowan, M.D., an orthopedic surgeon, reporting she developed left knee pain after her knee gave way while stepping up into her truck. (JE 3, p. 21) Dr. Rowan assessed Jackson with left knee pain, administered an injection, and ordered physical therapy. (JE 3, p. 22)

On September 17, 2018, Jackson attended a follow-up appointment with Todd Isaacson, M.D., for her chronic low back pain. (JE 14, p. 158) Jackson reported she had slipped while walking down the stairs several days ago and landed on her right side, and complained of a recurrence of chronic low back pain. (JE 14, pp. 158-59) Dr. Isaacson listed an impression of no acute osseous abnormality and upper lumbar degenerative disc disease with multilevel posterior spinal stabilization hardware without evidence of complications, and recommended Jackson use warm packs, heating pads, or a topical treatment such as Aspercreme to help relieve her pain and stiffness. (JE 14, p. 161)

On September 20, 2018, Jackson spoke with Cindy Sedlak, PA-C with the Nebraska Spine and Pain Center, reporting she had fallen downstairs. (JE 4, p. 48) Sedlak advised Jackson to make an appointment. (JE 4, p. 48)

Dr. Hain wrote an opinion letter on April 18, 2019, as follows:

1. The last time I saw Ms. Jackson was March 2017. At that time, she was 5 months status post L1-3 fusion with selective decompression on the right for radicular pain into the upper right lower extremity. Previously, I had stated the levels to be T12-L2 due to transitional anatomy at the lumbosacral level. However, all other records refer to these same levels to be L1-3, so I will use that nomenclature to avoid any confusion.

2. When I saw her last, much of the thoracolumbar pain had improved, as had the proximal right leg pain. Her main concern was pain I thought was originating from the SI joint on the right. She also noted this pain on her previous visit in February 2017. My recommendation at that time was for pain management evaluation and treatment. Options included SI injections vs. consideration for spinal stimulation. She has CT documented evidence of severe SI joint degeneration.

3. A CT scan of her surgical site, performed 5 months after surgery, showed developing fusion, although absorption of bone grafting would be a concern for risk of pseudarthrosis. As her pain in the area was improved and there was no evidence of hardware loosening, the objective was to see how she progressed over time. Unfortunately, her kyphosis could not be corrected, however any coronal deformity was stabilized.

My present diagnosis, based on our last clinic appointment is SI joint derived pain and multilevel spondylosis contributing to low back pain. To my knowledge, there is no objective diagnosis regarding any distal leg pain or leg weakness she may note.

At this time, I do not have her on any work restrictions, however, as she has had a spinal fusion procedure, I would recommend avoiding repetitive heavy lifting activities. Permanent work restrictions should be evaluated via a properly performed functional capacity examination.

I expect, at some point, a CT scan to confirm fusion (or pseudarthrosis) may need to be performed regarding her prior surgery. However, if she continues to note minimal to no pain in the region, there is no active recommendation for the scan.

From my standpoint, I noted in the past that a work injury in 2008 was likely the initial etiology for the pain I treated. She stated in her initial appointment that an injury involving heavy lifting in 2008 started the increased pain scores. Imaging at that time indicated chronicity regarding the issue at L1-2, causing her thoracolumbar pain. However, she stated the 2008 injury at work severely increased her pain scores. That said, subsequent injury was certainly possible that also worsened her condition.

Admittedly, I do not have a wealth of time-dated information regarding how much pain increase could be attributed to the 2016 event.

Ms. Jackson qualifies for Lumbar DRE Category IV with 23% impairment based on her prior fusion surgery.

(JE 12, pp. 137-38)

On April 18, 2019, Michael O'Neil, M.D., an orthopedic surgeon, conducted an independent medical examination for NSK and Sompco and issued his report on May 1, 2019. (Ex. A) Dr. O'Neil examined Jackson and reviewed her medical records. (Ex. A) Dr. O'Neil reported he agreed with the original five percent permanent partial impairments given by Drs. Devney, Taylon, McClellan, and DiStefano and that the October 8, 2008 work injury resulted in an aggravation of pre-existing and advanced degenerative disc disease with anterior wedging of L1. (Ex. A, p. 6) Dr. O'Neil further opined:

[i]t is also my opinion, with a reasonable degree of medical certainty, that Ms. Jackson's current increasing low back pain is the result of her severe morbid obesity, her excessive nicotine dependency and osteoporosis and not to her original work injury on October 8, 2008. It is further my opinion that the surgery performed by Dr. John Hain on October 13, 2016, was not necessary as a result of her initial work injury on October 8, 2008, but rather the natural progression of her pre-existing conditions, including her morbid obesity and nicotine dependence.

(Ex. A, p. 6)

On May 10, 2019, Charles Taylon, M.D., a neurosurgeon and surgery professor at Creighton University, conducted an independent medical examination for Jackson and issued his report on May 13, 2019. (Ex. 10) Dr. Taylon reviewed Jackson's medical records and examined her. (Ex. 10) Dr. Taylon noted he had previously examined Jackson in 2009. (Ex. 10, p. 12) Dr. Taylon opined "I do not have the answer to the L1 issue and its relationship to her work injury," noting if it is work-related he agreed with Dr. Han's twenty-three percent permanent impairment rating, but if it is not work-related, then his opinion from June 11, 2009 stands, noting "[t]he only surgery she had was the L1 region, she was otherwise treated for a mechanical musculoligamentous problem which waxed and waned and progressed through the years." (Ex. 10, p. 12)

Jackson has made inconsistent statements concerning the effectiveness of the surgery. She testified it did not help, and later testified it helped her. Her inconsistent statements are troubling. Jackson explained "[a]nd it would have helped even more if I could have gotten the proper care that he wanted me to have afterwards. He wanted

me to do therapy and be seen by another pain management to discuss possibly – as he explained it, it's like a TENS unit but implanted.” (Tr., p. 37)

Jackson did not request Medicare pay for her physical therapy. (Tr., p. 78) Jackson reported she did not use Medicare to pay for the physical therapy because her dependents had been overpaid and she did not want to end up having to pay back Medicare for the therapy. (Tr., pp. 40, 91) Jackson stated her copayment through Medicare is twenty percent. (Tr., pp. 79, 90) Jackson did request Medicare to pay for the surgery.

Jackson lives in Shenandoah, a town of 5,000 people. (Tr., p. 44) Jackson reported within fifty miles of her home there are factories, fast food establishments, and grocery stores that hire employees. (Tr., p. 44) Jackson testified she has not worked since the first arbitration hearing. (Tr., p. 42) Jackson reported she has been looking for work but she has not applied for work because she does not believe she would be hired, or she is not qualified for the positions she sees. (Tr., pp. 43-44) Jackson testified she would not be able to work in a fast food restaurant or a grocery store because of “[t]he constant standing or the – any bending or twisting or being able to lift.” (Tr., p. 44) Jackson reported she did not believe she could perform any job at this time because she cannot control her pain, which causes her to be irritable and affects her demeanor. (Tr., p. 62)

Jackson testified if she sits or stands too long or she lifts her legs out of the bath she now feels a pinching in her back. (Tr., p. 58) Jackson is no longer able to wear tennis shoes unless her husband or children tie her shoes for her. (Tr., p. 58) Jackson relayed at the time of the original arbitration hearing she was able to tie her shoes. (Tr., p. 58) Jackson reported her pain is not manageable and she requested a referral to a pain management specialist at hearing. (Tr., p. 61) Jackson reported she sleeps when she is home because she has less pain versus standing, walking, or sitting. (Tr., p. 69)

Jackson and her husband own a Can-Am Spyder three wheel motorcycle they purchased after the original arbitration hearing. (Tr., p. 68) Jackson reported it is the only enjoyment she has without “massive pain.” (Tr., p. 68) Jackson’s husband reported he rides his motorcycle with her and they will ride between twenty to thirty miles. (Tr., p. 108) Jackson’s husband obtained a loan for the purchase of the motorcycle.

Jackson’s husband testified his wife’s condition has worsened since 2011 and she yells and screams more because she hurts. (Tr., pp. 103-04)

CONCLUSIONS OF LAW

I. Applicable Law

Jackson filed a review-reopening petition, alleging she has sustained a change of medical condition. This case involves several issues, including whether Jackson has established a change of medical condition, causation for surgery, extent of disability, recovery of medical bills, alternate medical care, recovery of the cost of an independent medical examination and interest under Iowa Code sections 85.34, 86.14 86.40, and 535.3. In March 2017, the legislature enacted changes (hereinafter “Act”) relating to workers’ compensation in Iowa. 2017 Iowa Acts chapter 23 (amending Iowa Code sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.45, 85.70, 85.71, 86.26, 86.39, 86.42, and 535.3). Under 2017 Iowa Acts chapter 23 section 24, the changes to Iowa Code sections 85.34 and 85.39 apply to injuries occurring on or after the effective date of the Act. This case involves a work injury occurring before July 1, 2017, therefore, the provisions of the new statute involving the nature and extent of disability under Iowa Code section 85.34 do not apply to this case. The calculation of interest is governed by Sanchez v. Tyson, File No. 5052008 (Ruling on Defendant’s Motion to Enlarge, Reconsider, or Amend Appeal Decision Re: Interest Rate Issue), which holds interest for all weekly benefits payable and not paid when due which accrued before July 1, 2017, is payable at the rate of ten percent; all interest on past due weekly compensation benefits accruing on or after July 1, 2017, is payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

II. Review-Reopening

Iowa Code section 86.14 governs review-reopening proceedings. When considering a review-reopening petition, the inquiry “shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded.” Iowa Code § 86.14(2). The deputy workers’ compensation commissioner does not re-determine the condition of the employee adjudicated by the former award. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 391 (Iowa 2009). The deputy workers’ compensation commissioner must determine “the condition of the employee, which is found to exist subsequent to the date of the award being reviewed.” Id. (quoting Stice v. Consol. Ind. Coal Co., 228 Iowa 1031, 1038, 291 N.W. 452, 456 (1940)). In a review-reopening proceeding, the deputy workers’ compensation commissioner should not reevaluate the claimant’s level of physical impairment or earning capacity “if all of the facts and circumstances were known or knowable at the time of the original action.” Id. at 393.

The claimant bears the burden of proving, by a preponderance of the evidence that, “subsequent to the date of the award under review, he or she has suffered an *impairment or lessening of earning capacity proximately caused by the original injury.*”

Simonson v. Snap-On Tools Corp., 588 N.W.2d 430, 434 (Iowa 1999) (emphasis in original).

On March 29, 2011, the deputy workers' compensation commissioner issued an arbitration decision finding Jackson had sustained a sixty percent industrial disability, and awarding her 300 weeks of permanent partial disability benefits at the rate of \$389.23 per week, commencing on May 26, 2009. NSK and Sompco appealed the decision to Commissioner Godfrey. Commissioner Godfrey affirmed and adopted the arbitration decision on appeal without additional comment. The decision became final agency action.

In this review-reopening action Jackson alleges she has sustained a change of medical condition based on a worsening of original lumbar spine injury, causing the need for surgery which was performed by Dr. Hain. NSK and Sompco reject Jackson's assertion and contend she has not established causation for the surgery, the surgery was not authorized, and that she has not established a worsening of her physical condition caused by the original work injury.

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

it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of his employer.

Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174, 177 (Iowa 1979) (quoting Bushing v. Iowa Ry. & Light Co., 208 Iowa 1010, 1018, 226 N.W. 719, 723 (1929)).

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

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

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

After the original arbitration hearing Jackson continued to receive medical treatment for her lumbar spine condition with Dr. Anderson. (JE 10) Jackson complained of low back and diffuse leg pain, weakness, numbness, and autonomic symptoms. (JE 10, p. 89) Dr. Anderson referred Jackson to Dr. Mascott, a neurosurgeon who diagnosed her with chronic low back pain and diffuse leg pain with unspecified laterality, and noted there was not a radiological explanation for her leg

pain, weakness, numbness or autonomic symptoms. (JE 10, pp. 94-95) Jackson returned to Dr. Anderson and he ordered electromyography, which was normal and negative for neuropathy and radiculopathy. (JE 10, p. 102)

Dr. Anderson issued an opinion letter on September 6, 2016 before Dr. Hain recommended surgery, diagnosing Jackson with low back pain, multilevel lumbar spondylosis, and a history of a work-related low back injury on October 8, 2008. (JE 10, p. 105) Dr. Anderson opined Jackson's low back pain was work-related and that the work injury "exacerbated her preexisting condition and has since been causing her chronic low back pains." (JE 10, p. 105) Dr. Anderson found Jackson's prognosis was poor given she has not returned to work and continued to require chronic pain medication. (JE 10, p. 105) Dr. Anderson found Jackson had reached maximum medical improvement on March 29, 2013 for chronic pain management. (JE 10, p. 106) Dr. Anderson did not recommend any further diagnostic studies or therapeutic interventions and noted Jackson "will continue to require chronic pain medications as she has since 2008. It is felt that these chronic pain medications are causally related to her work injury and will continue ongoing for an undetermined length of time," noting her current medications included tramadol, Cymbalta, Flexeril, and tizanidine. (JE 10, p. 105) Dr. Anderson further opined "within a reasonable degree of medical certainty that the x-ray results from 06/27/2016 are unrelated to her work injury of 10/08/2008. These are preexisting wear-and-tear type changes." (JE 10, p. 106)

Jackson sought treatment with Dr. Woods on September 14, 2016, following a visit to the emergency room on September 12, 2016. (JE 14, pp. 149-52) Dr. Woods documented September 12, 2016 "[Jackson] bent over to change the sheets on her bed and felt a big pop in her back. The pain was in her back and down both legs. She states that the pain initially started about 8 years ago after an injury at work." (JE 14, p. 152) Jackson complained of numbness in her feet, and a feeling of needles sticking her all over her back when sitting. (JE 14, p. 152) Jackson relayed she did not do any heavy lifting and had stopped working. (JE 14, p. 152) Dr. Woods referred Jackson to Dr. Hain, a neurosurgeon. (JE 14, p. 152)

On October 3, 2016, Jackson attended an appointment with Dr. Hain. (JE 12, pp. 111-15) Dr. Hain examined Jackson, assessed her with kyphoscoliosis and scoliosis, thoracic radiculitis, transitional L5-S1 segment, radicular pain right T-12, L1 roots, foraminal compromise T12-L1, L1-2, and kyphoscoliosis at T12-L2, dextroscoliotic curve. (JE 12, pp. 114-15) Dr. Hain recommended a T12-L2 fusion and a right decompression of the T12 and L1 roots. (JE 12, p. 115) Jackson requested approval for the surgery from NSK and Sompco on October 3, 2016. NSK and Sompco requested Jackson produce medical records from Dr. Hain regarding the treatment she had received from Dr. Hain. (Ex. B, p. 12) There is no evidence Jackson produced the records to NSK and Sompco. She elected to proceed with the surgery, which was not authorized on October 13, 2016. (JE 13, p. 139) Dr. Hain's records do not provide he determined Jackson's condition required emergency surgery. Jackson sought approval

for payment of the surgery through Medicare. (Tr., pp. 37-38) Jackson continued to complain of symptoms following the surgery. (JE 12)

Dr. Hain, the neurosurgeon who operated on Jackson, issued an opinion letter on April 18, 2019, listing a diagnosis of “SI joint derived pain and multilevel spondylosis contributing to low back pain.” (JE 12, p. 137) Dr. Hain noted “[t]o my knowledge, there is no objective diagnosis regarding any distal leg pain or leg weakness she may note.” (JE 12, p. 137) Dr. Hain further opined,

[f]rom my standpoint, I noted in the past that a work injury in 2008 was likely the initial etiology for the pain I treated. She stated in her initial appointment that an injury involving heavy lifting in 2008 started the increased pain scores. Imaging at that time indicted [*sic*] chronicity regarding the issue at L1-2, causing her thoracolumbar pain. However, she stated the 2008 injury at work severely increased her pain scores. That said, subsequent injury was certainly possible that also worsened her condition. Admittedly, I do not have a wealth of time-dated information regarding how much pain increase could be attributed to the 2016 event.

(JE 12, p. 137) Dr. Hain opined it was possible Jackson’s pain increase and need for surgery was caused by the work injury, but he did not state it was the probable cause within a reasonable degree of medical certainty to support causation. Sherman v. Pella Corp., 576 N.W.2d 312, 321 (Iowa 1998) (“A preponderance of evidence exists when the causal connection is probable rather than merely possible”).

Dr. O’Neil, an orthopedic surgeon who conducted an independent medical examination of Jackson for NSK and Sompco agreed the October 8, 2008 work injury caused an aggravation of Jackson’s pre-existing and advanced degenerative disc disease and anterior wedging of L1. (Ex. A, p. 6) He also agreed with the original five percent permanent impairment rating assigned by Drs. Devney, Tylon, McClellan, and DiStefano presented in the original arbitration proceeding. (Ex. A, p. 6) He further noted,

[i]t is also my opinion, with a reasonable degree of medical certainty, that Ms. Jackson’s current increasing low back pain is the result of her severe morbid obesity, her excessive nicotine dependency and osteoporosis and not to her original work injury on October 8, 2008. It is further my opinion that the surgery performed by Dr. John Hain on October 13, 2016, was not necessary as a result of her initial work injury on October 8, 2008, but rather the natural progression of her pre-existing conditions, including her morbid obesity and nicotine dependence.

(Ex. A, p. 6)

Dr. Taylon, a neurosurgeon and surgery professor with Creighton University conducted an independent medical examination of Jackson and issued his report on May 13, 2019. (Ex. 10) Dr. Taylon opined:

I saw her in 2009 and I again saw her just recently for the purpose of this evaluation. I do not have the answer to the L1 issue and its relationship to her work injury. I can only summarize what other doctors who have dealt with her have felt. If the L1 issue is work related, she is at maximal medical improvement. I agree with the 23% permanent partial impairment rating by Dr. Hain. She should be limited to 15 pounds of lifting. She should not do bending or twisting. She should change position every two hours. If the L1 problem is not related to the work injury, then my opinion from June 11, 2009 still stands. The only surgery she had was the L1 region, she was otherwise treated for a mechanical musculoligamentous problem which waxed and waned and progressed through the years.

(Ex. 10, p. 12) As with Dr. Hain, Dr. Taylon did not definitively opine Jackson's increased pain and need for surgery were caused by the work injury.

No physician has opined Jackson's need for surgery performed by Dr. Hain is causally related to the October 8, 2008 work injury. No physician has assigned an additional permanent impairment rating or work restrictions attributable to the October 8, 2008 work injury. Jackson has not met her burden of proof that the need for surgery is causally related to the October 8, 2008 work injury, or that she has sustained a change of medical condition caused by the October 8, 2008 work injury.

III. Medical Expenses and Alternate Care

Jackson seeks to recover medical expenses set forth in Exhibit 12. An employer is required to furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, hospital services and supplies, and transportation expenses for all conditions compensable under the workers' compensation law. Iowa Code § 85.27(1). The employer has the right to choose the provider of care, except when the employer has denied liability for the injury. Id. "The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee." Id. § 85.27(4). If the employee is dissatisfied with the care, the employee should communicate the basis for the dissatisfaction to the employer. Id. If the employer and employee cannot agree on alternate care, the commissioner "may, upon application and reasonable proofs of the necessity therefor, allow and order other care." Id. The statute requires the employer to furnish reasonable medical care. Id. § 85.27(4); Long v. Roberts Dairy Co., 528 N.W.2d 122, 124 (Iowa 1995) (noting "[t]he employer's obligation under the statute turns on the question of reasonable necessity, not desirability"). The Iowa Supreme Court has held the employer has the right to choose the provider of care, except when the employer

has denied liability for the injury, or has abandoned care. Iowa Code § 85.27(4); Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010).

As analyzed above, I did not find Jackson met her burden of proof that her need for surgery is causally related to the October 8, 2008 work injury, or that she has sustained a change of medical condition caused by the October 8, 2008 work injury. Based on this finding, NSK and Sompco are not responsible for the medical expenses set forth in Exhibit 12.

Jackson also requested NSK and Sompco be required to provide care with Dr. Hain. Given my finding above, NSK and Sompco are not required to provide care for Jackson with Dr. Hain.

Dr. Anderson was the authorized treating provider. Dr. Anderson has left his practice and he is no longer treating Jackson. NSK and Sompco remain responsible for providing care to Jackson related to the work injury. In his September 6, 2016 opinion letter Dr. Anderson noted while he did not recommend any further diagnostic studies or therapeutic interventions and noted Jackson “will continue to require chronic pain medications as she has since 2008. It is felt that these chronic pain medications are causally related to her work injury and will continue ongoing for an undetermined length of time,” noting her current medications included tramadol, Cymbalta, Flexeril, and tizanidine. (JE 10, p. 105) NSK and Sompco remain responsible for all care related to the work injury, including any necessary pharmacological treatment.

IV. Cost of the Independent Medical Examination

Jackson seeks to recover the \$2,500.00 cost of Dr. Taylon’s independent medical examination. (Ex. 13) Iowa Code section 85.39, provides, in part:

[a]fter an injury, the employee, if requested by the employer, shall submit for examination at some reasonable time and place and as often as reasonably requested, to a physician or physicians authorized to practice under the laws of this state or another state, without cost to the employee; but if the employee requests, the employee, at the employee’s own cost, is entitled to have a physician or physicians of the employee’s own selection present to participate in the examination. If an employee is required to leave work for which the employee is being paid wages to attend the requested examination, the employee shall be compensated at the employee’s regular rate for the time the employee is required to leave work, and the employee shall be furnished transportation to and from the place of examination, or the employer may elect to pay the employee the reasonable cost of the transportation. . . . If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the

application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination. . . .

Dr. O'Neil conducted an independent medical examination for NSK and Somp on April 18, 2019, finding Jackson's increasing low back pain and need for surgery were the result of her severe morbid obesity, excessive nicotine dependence and the natural progression of her preexisting conditions and not her original work injury on October 8, 2018. (Ex. A) Dr. Taylon issued his opinion on May 10, 2019. Dr. O'Neil did not issue an impairment rating in the case and found no causation. Under the statute Jackson is not entitled to recover the cost of Dr. Taylon's independent medical examination.

Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Rule 876 IAC 4.33(6), provides

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

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

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

867 N.W.2d 839, 846-47 (Iowa 2015). Jackson did not produce an itemized bill from Dr. Taylon to recover the cost of the report. Jackson was not successful in proving the merits of her claim. Even if she produced an itemized bill, I find the parties should bear their own costs.

ORDER

IT IS THEREFORE ORDERED, THAT:

Claimant shall take nothing further.

Defendants remain responsible for all medical care causally related to the work injury, including pharmacological management as set forth in this decision.

The parties shall bear their own costs.

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 19th day of September, 2019.



HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Bill Lamson (via WCES)
Laura Pattermann (via WCES)