

## BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BALLARDO CALDERON,

Claimant,

vs.

TYSON FRESH MEATS, INC.,

Employer,  
Self-Insured,  
Defendant.File Nos. 19700558.02  
20013453.01

ARBITRATION DECISION

Head Note Nos.: 1803, 4000

Claimant Ballardo Calderon filed two petitions in arbitration on June 8, 2021, File Numbers 19700558.02 and 20013453.01. In File Number 19700558.02, Calderon alleges he sustained an injury to his right shoulder and body as a whole while working for Defendant Tyson Fresh Meats, Inc. ("Tyson") September 4, 2019 from repetitively dumping bones and meat into a blender by hand. In File Number 20013453.01, Calderon alleges he sustained an injury to his low back and body as a whole while working for Tyson on August 29, 2020. Tyson filed answers to the petitions on July 13, 2021.

An arbitration hearing was held *via* Zoom video conference on August 30, 2022. Attorney Mark King represented Calderon. Calderon appeared and testified. Attorney Dillon Carpenter represented Tyson. Patricia Hillock provided Spanish interpretation services during the hearing. Joint Exhibits ("JE") 1 through 8, and Exhibits 1 through 4 and A through J were admitted into the record. The record was held open through October 7, 2022, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

Before the hearing the parties submitted Hearing Reports for the cases, listing stipulations and issues to be decided. Tyson waived all affirmative defenses. The Hearing Report Orders were entered at the conclusion of the hearing adopting the parties' stipulations and issues to be decided.

**FILE NUMBER 19700558.02****STIPULATIONS**

1. An employer-employee relationship existed between Tyson and Calderon at the time of the alleged injury.

2. Calderon sustained an injury, which arose out of and in the course of his employment with Tyson on September 4, 2019.

3. The alleged injury is a cause of temporary disability during a period of recovery.
4. Temporary benefits are no longer in dispute.
5. The alleged injury is a cause of permanent disability.
6. If the injury is found to be a cause of permanent disability, the disability is a scheduled member disability to the shoulder.
7. The commencement date for permanent partial disability benefits, if any are awarded, is July 20, 2020.
8. At the time of the alleged injury Calderon's gross earnings were \$731.63 per week, he was married and entitled to three exemptions, and the parties believe his weekly rate is \$497.58.
9. Medical benefits are no longer in dispute.
10. Prior to the hearing Calderon was paid 13 weeks of compensation at the rate of \$497.58 per week.
11. Costs have been paid.

### **ISSUES**

1. What is the extent of disability?
2. Should costs be assessed against either party?

### **FILE NUMBER 20013453.01**

### **STIPULATIONS**

1. An employer-employee relationship existed between Tyson and Calderon at the time of the alleged injury.
2. Calderon sustained an injury, which arose out of and in the course of his employment with Tyson on August 29, 2020.
3. The alleged injury is a cause of temporary disability during a period of recovery.
4. Temporary benefits are no longer in dispute.
5. The alleged injury is a cause of permanent disability.
6. If the injury is found to be a cause of permanent disability, the disability is an industrial disability.

7. At the time of the alleged injury Calderon's gross earnings were \$731.63 per week, he was married and entitled to three exemptions, and the parties believe his weekly rate is \$497.58.

8. Medical benefits are no longer in dispute.

9. Prior to the hearing Calderon was paid 48.99 weeks of compensation at the rate of \$497.58 per week.

10. Costs have been paid.

### **ISSUES**

1. What is the extent of disability?

2. Is the commencement date for permanent partial disability benefits September 24, 2021?

3. Is Calderon entitled to an award of penalty benefits?

4. Should costs be assessed against either party?

### **FINDINGS OF FACT**

Calderon was born in Mexico and attended school until he was 17. (Tr.:13, 15, 32) Calderon immigrated to the United States in 1979 and lived in California. (Tr.:13; Ex. E:3) At the time of the hearing Calderon was 64. (Tr.:13) Calderon lives in Perry with his wife. (Tr.:13; Ex. E:2) Calderon is right hand dominant. (JE 1:9)

In his deposition Calderon testified he attended school until he was seven. (Tr.:13) In his answers to interrogatories, Calderon also reported he attended school until he was seven. (Tr.:32-33) At hearing Calderon testified he attended school until he was seven and later testified he attended school until he was 17. (Tr.:13-15, 32) Calderon testified he had one year of school left before he would have graduated in Mexico. (Tr.:15) Calderon explained the discrepancy stating he was not focused on his schooling, but rather on his damages. (Tr.:33-34) Calderon appeared alert and responsive to questions during the hearing. He did not appear to have any cognitive processing, auditory, or speech problems. The inconsistency between his answers to interrogatories, deposition testimony and hearing testimony on the basic issue of his educational training raises concerns about the veracity of his testimony.

After dropping out of high school, Calderon worked in his father's grocery store in Mexico stocking groceries and helping customers. (Tr.:15) After moving to the United States, Calderon worked for IBM repairing computer parts for 13 years. (Tr.:16-17; Ex. E:3)

Calderon owns two rental properties, a duplex in Perry and a house in California. (Tr.:18-19) The duplex has an upper and lower floor. (Tr.:19) In exchange for reduced

rent the people living on the lower floor perform the maintenance on the duplex. (Tr.:19) Calderon's daughter manages the maintenance on his home in California. (Tr.:19)

In 1993 Calderon began working for Tyson on the production line. (Tr.:17-18) At the time of his work injury in 2019, Calderon was working as a machine operator grinding meat with bones. (Tr.:18) Calderon testified his position did not require lifting more than 40 to 50 pounds, but he sometimes worked in other areas of the plant where he had to lift heavy things. (Tr.:20) The grinder was old and often plugged. (Tr.:21) When it plugged, Calderon had to remove product from the machine by hand and retrieve more bones from another area of the plant for grinding. (Tr.:21) Calderon testified he typically lifted seven boxes per hour weighing 40 to 45 pounds, but when the machine failed he would have to lift more than 50 pounds. (Tr.:22) Calderon reported the job required him to stand throughout his shift. (Tr.:29)

Calderon testified on September 4, 2019, he injured his right shoulder at work. (Tr.:23) Tyson accepted the claim and provided Calderon with treatment. On September 30, 2019, Calderon attended an appointment with Guy Sullivan, PA-C, with Iowa Ortho at Tyson, reporting he has been unable to lift his right arm above shoulder height since his work injury. (JE 1:1) Calderon relayed his pain interrupted his sleep and was worse with pressure and movement and better with rest. (JE 1:1) Sullivan examined Calderon, assessed him with acute right shoulder pain and a sprain of the right rotator cuff capsule, recommended magnetic resonance imaging, and imposed work restrictions. (JE 1:2-3)

On October 2, 2019, Calderon underwent right shoulder magnetic resonance imaging. (JE 2:1) The reviewing radiologist listed an impression of:

1. Supraspinatus and infraspinatus tendinosis with areas of intrasubstance tearing as well as mild bursal surface fraying involving the infraspinatus. There is no full-thickness rotator cuff tear.
2. Small amount of fluid within the subacromial/subdeltoid bursa in keeping with bursitis.
3. Mild acromioclavicular joint degenerative changes.

(JE 2:1)

Calderon returned to Sullivan at the Tyson plant on October 7, 2019. (JE 1:4) Sullivan documented he reviewed the imaging, assessed Calderon with right shoulder pain, bursitis, and tendinosis, and ordered physical therapy. (JE 1:5) During an appointment on November 4, 2019, Calderon complained of mild-moderate right shoulder pain aggravated by raising his arms. (JE 1:7) Sullivan documented his imaging showed AC joint arthritis and bursitis, but did not show a rotator cuff tear. (JE 1:7) Sullivan documented Calderon reported physical therapy had not helped and confirmed his exam did not show progress. (JE 1:7-8)

On November 11, 2019, Calderon attended an appointment with Steven Aviles, M.D., an orthopedic surgeon with Iowa Ortho, complaining of stable, constant, aching, and sharp right shoulder pain aggravated by movement. (JE 1:9) Dr. Aviles reviewed his magnetic resonance imaging, noting it showed evidence of bursitis, impingement at the anterolateral acromion, but not at the distal clavicle, arthritis in the AC joint, and tendinosis at the rotator cuff. (JE 1:10) Dr. Aviles noted physical therapy had failed and he administered an injection. (JE 1:11)

Dr. Aviles performed a right shoulder arthroscopy, subacromial decompression, and distal clavicular co-plane on Calderon on March 19, 2020. (JE 4:1) Dr. Aviles listed a postoperative diagnosis of right shoulder impingement, bursitis. (JE 4:1)

On April 1, 2020, Calderon attended a follow-up appointment with Dr. Aviles. (JE 1:15, 17) Dr. Aviles noted Calderon's motion was terrible, he was using a sling exclusively, and he was not doing any home exercises. (JE 1:15) Calderon returned to Dr. Aviles on May 27, 2020, reporting constant right shoulder symptoms. (JE 1:17)

Calderon attended an appointment with Dr. Aviles on July 22, 2020. (JE 1:19) Dr. Aviles documented Calderon relayed he had improved significantly, but he still had some pain. (JE 1:19) Dr. Aviles noted Calderon had some limited motion in internal rotation, found he had reached maximum medical improvement, and released him to return to work without restrictions. (JE 1:20) Calderon testified when Dr. Aviles released him he was not ready to return to work. (Tr.:24)

On August 17, 2020, Dr. Aviles issued an impairment rating for Tyson. (Ex. B) Using Tables 16-40 and 16-46 of the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Aviles assigned Calderon a permanent impairment of three percent of the right upper extremity. (Ex. B)

On August 19, 2020, Tyson sent Calderon's attorney a letter stating Dr. Aviles found Calderon reached maximum medical improvement on July 22, 2020, and he had recently issued an impairment rating. (Ex. G) Tyson agreed to pay Calderon 12 weeks of permanent partial disability benefits based on the rating, plus interest from the date he reached maximum medical improvement, for a total of \$1,992.44.

Calderon performed his normal duties for approximately three months until he injured his back. (Tr.:24-25) Calderon reported on August 29, 2020, he injured his back while lifting product weighing between 40 and 45 pounds for grinding. (Tr.:25) Tyson also accepted this second injury. (Tr.:25-26)

On September 21, 2020, someone from Iowa Ortho examined Calderon at the Tyson plant. (JE 1:22) Calderon complained of low back pain radiating to his left buttock and noted his symptoms were aggravated by bending and lifting his left leg and relieved by sitting and standing still. (JE 1:22) The treating medical provider noted while Calderon denied radiculopathy, his exam showed positive radiculopathy in the left lower extremity. (JE 1:22) Someone from Iowa Ortho reexamined Calderon on October 5, 2020, at the Tyson plant. (JE 1:23) The record documented Calderon had been

prescribed a Medrol Dosepak during his last appointment and Calderon relayed his left lower extremity pain had improved and his pain was more localized to his left lower back. (JE 1:23) During a follow-up appointment at the Tyson Plant, the provider documented Calderon reported he was doing well until his back “seized up” at home on October 11, 2020, when he slightly bent to pick up a brush, and now he had sharp pain. (JE 1:24)

Calderon underwent lumbar spine magnetic resonance imaging on October 27, 2020. (JE 2:2) The reviewing radiologist listed an impression of:

1. Left paracentral disc herniation with caudal extent at L3-L4. Left lateral recess stenosis may affect the left L4 nerve root. Moderate asymmetric left neural foraminal narrowing is also seen at this level.
2. Multilevel mild disc bulging.

(JE 2:2-3)

On November 25, 2020, Calderon attended an appointment with Trevor Schmitz, M.D., an orthopedic surgeon with Iowa Ortho. (JE 1:25) Calderon relayed he injured his back while lifting a heavy box at work. (JE 1:25) Calderon reported physical therapy provided no relief. (JE 1:25) Calderon stated his pain was primarily in his lower back and worse with activity at work and standing. (JE 1:25) Dr. Schmitz documented Calderon was walking with an antalgic gait. (JE 1:26) Dr. Schmitz reviewed his magnetic resonance imaging, noting the imaging demonstrated mild narrowing at L2-L3, a left paracentral disc herniation with mild caudal extrusion at L3-L4, left-sided lateral recess stenosis with moderate left and mild right-sided foraminal stenosis, a disc bulging endplate osteophyte formation lateralizing to the right with mild spinal canal neuroforaminal stenosis at L4-L5, and mild to moderate degenerative facet arthropathy with mild to moderate bilateral foraminal stenosis at L5-S1. (JE 1:27) Dr. Schmitz assessed Calderon with intervertebral disc disorders with myelopathy, lumbar region, lumbar foraminal stenosis, and lumbar degenerative disc disease, and discussed treatment options with him. (JE 1:27) Calderon told Dr. Schmitz he wanted to consider his options.

Calderon returned to Dr. Schmitz on January 13, 2021, reporting his back pain had become worse since his last appointment and he had told his employer he could not work and he was not working. (JE 1:29) Dr. Schmitz documented Calderon had an antalgic gait and he was walking with a cane. (JE 1:30) Dr. Schmitz noted Calderon had a large left L3-L4 disc herniation causing left-sided subarticular stenosis and he recommended surgery. (JE 1:31)

On February 25, 2021, Calderon underwent a left-sided hemilaminectomy and partial medial facetectomy at L3-L4, and a left-sided L3-L4 partial discectomy. (JE 8:1) Dr. Schmitz listed postoperative diagnoses of lumbar spinal stenosis, subarticular, left L3-L4, herniated nucleus pulposus, left paracentral, L3-L4, and severe back and left leg radicular pain with numbness, tingling, and associated weakness. (JE 8:1, 4)

On May 5, 2021, Calderon attended an appointment with Dr. Schmitz following left L3-L4 decompression and discectomy surgery, reporting he had not regained all of his strength in his left leg, but he was improving. (JE 1:32) Dr. Schmitz documented Calderon's gait was non-antalgic. (JE 1:33) Dr. Schmitz ordered work hardening. (JE 1:33)

Calderon returned to Dr. Schmitz on June 2, 2021, reporting his left leg pain was better, but physical therapy was not helping and he was not improving. (JE 1:34) Calderon relayed he had helped his wife pull weeds in the garden for 30 to 40 minutes over the weekend and he did not have any strength in his back. (JE 1:34) Dr. Schmitz examined Calderon, assessed him with bilateral low back pain without sciatica, noted he has several findings consistent with a nonanatomic source for his pain, and recommended work conditioning after Calderon returned from a wedding in California. (JE 1:35)

On July 14, 2021, Calderon attended a follow-up appointment with Dr. Schmitz, reporting his light-duty job was too much for him and he did not believe he could return to his normal job. (JE 1:36) Dr. Schmitz examined Calderon, assessed him with low back pain at multiple sites and status post lumbar spine surgery decompression of the spinal cord, and recommended work conditioning given he had been on vacation for one month. (JE 1:37)

During a return visit on August 18, 2021, Calderon complained of low back pain and reported it was not where the surgery was performed. (JE 1:38) Calderon relayed he had been slowly progressing with his work conditioning program at Tyson, but he believed something was off. (JE 1:38) Dr. Schmitz ordered magnetic resonance imaging. (JE 1:39)

On September 9, 2021, Calderon underwent lumbar spine magnetic resonance imaging. (JE 2:4) The reviewing radiologist listed an impression of multilevel spondylosis with no significant disc herniation, spinal canal stenosis, or neural foramina narrowing. (JE 2:4)

Calderon testified the surgery improved, but did not completely alleviate his back problems. (Tr.:26) Calderon reported that prior to the surgery he had pain in his left leg and the surgery improved his pain. (Tr.:27)

Calderon left Tyson on September 24, 2021. (Ex. D) On the exit form Calderon stated he was leaving Tyson for "retirement/personal injury." (Ex. D)

On September 29, 2021, Dr. Schmitz issued an impairment rating for Tyson stating Calderon had reached maximum medical improvement. (Ex. C) Under Table 15-3, page 384 of the AMA Guides, Dr. Schmitz assigned Calderon a 10 percent permanent impairment rating. (Ex. C) Dr. Schmitz documented Calderon presented with a non-antalgic gait during his treatment following surgery. (Ex. 1)

Calderon testified within a few days of returning to full duty things were not "right" and Tyson allowed him to work light duty, but a few days later returned him to full duty.

(Tr.:28) Calderon reported he decided to retire because he did not want to injure himself more. (Tr.:28) Calderon retired on September 24, 2021. (Tr.:34-35)

Calderon relayed he had planned to work three to five more years until he was 65 or 67 years old. (Tr.:29) Tyson's counsel noted Calderon testified in his deposition he decided to retire when Dr. Schmitz released him to full duty and inquired whether Calderon decided to retire when Dr. Schmitz released him to full duty. (Tr.:35) Calderon responded, stating, "I don't remember the exact date, but when they sent me back to full-duty work that I couldn't do, that's when I decided to retire." (Tr.:35) Calderon reported after Dr. Schmitz released him to return to work he tried to work, but he could not. (Tr.:36) Calderon retired after working for Tyson for 28 years. (Tr.:46)

Calderon's attorney ordered a functional capacity evaluation with WorkWell, which was valid. (Ex. 2) No physician ordered the functional capacity evaluation.

Sunil Bansal, M.D., an occupational medicine physician conducted an independent medical examination for Calderon on July 19, 2022, and issued his report on July 29, 2022. (Ex. 1) Dr. Bansal diagnosed Calderon with aggravation of right shoulder impingement and bursitis, status post right shoulder arthroscopy with subacromial decompression and distal clavicular co-plane, L3-L4 disc herniation, and status post left-sided hemilaminotomy and partial medial facetectomy at L3-4, subarticular and foraminal decompression of the traversing and exiting neural anatomy, and left-sided L3-L4 partial discectomy. (Ex. 1:11) Dr. Bansal agreed with Dr. Aviles Calderon reached maximum medical improvement for his right shoulder on July 22, 2020, and agreed with Dr. Schmitz Calderon reached maximum medical improvement for his back on September 4, 2021, noting Tyson had accepted both injuries, which were caused by his work activities. (Ex. 1:1)

For his right shoulder, using Figures 16-40 through 16-46 of the AMA Guides, Dr. Bansal assigned the following rating:

<b>Impairment</b>	<b>RANGE OF MOTION</b>	<b>% UE</b>
Flexion:	171 degrees	1
Abduction:	139 degrees	2
Adduction:	42 degrees	0
External Rotation:	51 degrees	1
Extension:	44 degrees	1
Internal Rotation:	42 degrees	3

**This equals an 8% upper extremity impairment, which is equal to a 5% impairment of the body as a whole.**



(Ex. 1:13) For his back, using Table 15-3 of the AMA Guides, Dr. Bansal found Calderon falls within DRE Lumbar Category III and assigned a 13 percent whole person impairment. (Ex. 1:13)

Dr. Bansal adopted the restrictions set forth in the functional capacity evaluation conducted by WorkWell. (Ex. 1:13) WorkWell found Calderon is capable of sedentary to light work up to 15 to 20 pounds on an occasional basis for his back and recommended he limit standing/walking to a combined 60 percent of the day, he be able to change positions between sitting, standing, and walking, as needed, and that he use correct lifting techniques and body mechanics when performing lifting activities, keeping loads close to his body, bending through his hips and knees and not his low back, with no bending or twisting. (Ex. 1:13) For his right shoulder, WorkWell recommended Calderon limit elevated work at head level or higher to a rare basis with material and nonmaterial handling activities and at shoulder level on an occasional basis. (Ex. 1:13)

Calderon reported at the time of the hearing he had ongoing pain in his back. (Tr.:27) Calderon reported he is not able to stand for 20 to 30 minutes or lift more than 15 pounds. (Tr.:29) Calderon testified because of his limitations he could not return to production work or work in a grocery store. (Tr.:30)

Calderon testified he has not looked for work since he left Tyson because he cannot work anymore. (Tr.:31-32, 46) Calderon has not requested any additional treatment from Tyson. (Tr.:38) Calderon has not received any treatment for his shoulder since July 2020. (Tr.:38)

## **CONCLUSIONS OF LAW**

### **I. Extent of Disability – September 4, 2019 Right Shoulder Injury**

Calderon sustained an injury to his right shoulder while working for Tyson on September 4, 2019. Tyson accepted the injury and provided treatment. The parties agree claimant's disability to his right shoulder is a scheduled member disability, but disagree on the extent of disability.

An injury to the shoulder is evaluated functionally based on 400 weeks. Iowa Code section 85.34(2)(n). For functional loss determinations,

... when determining functional disability and not loss of earning capacity, the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American medical association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A. Lay testimony or agency expertise shall not be utilized in determining loss or percentage of impairment pursuant to paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity.

Iowa Code § 85.34(2)(x).

Two experts provided opinions on extent of disability, Dr. Aviles, a treating orthopedic surgeon, and Dr. Bansal, an occupational medicine physician who performed an independent medical examination for Calderon. Dr. Aviles opined Calderon sustained a three percent permanent impairment of the right shoulder. Dr. Bansal opined Calderon sustained an eight percent permanent impairment of the right shoulder. (Ex. 1:13) Dr. Bansal more recently evaluated Calderon. Dr. Aviles' training as an orthopedic surgeon is superior to Dr. Bansal's training. He also treated Calderon and performed surgery. Unfortunately, Dr. Aviles did not provide any range of motion findings when assigning permanent impairment, as directed by the AMA Guides. Dr. Bansal provided his observed range of motion findings as directed by the AMA Guides. For this reason, I find his opinion to be most persuasive. I also find the permanent restrictions Dr. Bansal assigned for the right shoulder to be Calderon's permanent restrictions. Under the statute, Calderon is entitled to 32 weeks of permanent partial disability benefits for his right shoulder injury.

## **II. Extent of Disability – August 29, 2020 Low Back Injury**

Calderon sustained an injury to his low back while working for Tyson on August 29, 2020. Tyson accepted the injury and provided treatment. The parties agree Calderon's disability to his low back is an industrial disability, but disagree on the extent of disability and the commencement date for permanent partial disability benefits.

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

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).

Two physicians have provided impairment ratings, Dr. Schmitz, a treating orthopedic surgeon, and Dr. Bansal, an occupational medicine physician who performed an independent medical examination for Calderon. Dr. Schmitz assigned Calderon a 10 percent permanent impairment using Table 15-3 of the AMA Guides, but assigned no permanent work restrictions. (Ex. C) Dr. Bansal assigned Calderon a 13 percent permanent impairment using Table 15-3 of the AMA Guides and assigned permanent work restrictions. (Ex. 1)

Both physicians found Calderon falls under DRE Lumbar Category III, based on the percentages of impairment they assigned. Dr. Schmitz's training as an orthopedic surgeon is superior to Dr. Bansal's training and he treated and performed surgery on Calderon. Dr. Bansal examined Calderon more recently than Dr. Schmitz. He also supported his opinion by noting Calderon has radicular pain, loss of range of motion, and guarding on exam, and based the restrictions he imposed on a valid functional capacity evaluation. Dr. Schmitz did not provide any comments supporting his assignment of a 10 percent permanent impairment. For these reasons I find Dr. Bansal's opinion more persuasive on extent of permanent impairment and adopt his restrictions for Calderon's back as Calderon's permanent restrictions.

Calderon dropped out of school at age 17. Calderon reported in his answers to interrogatories and in his deposition that he attended school until he was seven. Calderon explained the discrepancy stating he was not focused on his schooling, but rather on his damages. (Tr.:33-34) Calderon appeared alert and responsive to questions during the hearing. He did not appear to have any cognitive processing, auditory, or speech problems. The inconsistency between his answers to interrogatories, deposition testimony and hearing testimony on the basic issue of his educational training raises concerns about the veracity of his testimony. When I observed Calderon at hearing I did not find his reason for the errors reasonable or consistent with the other evidence I believe. I find his testimony troubling. What is certain is Calderon sustained two accepted work injuries that are the subject of his decision. The industrial disability determination only involves his low back injury.

At the time of the hearing Calderon was 64. (Tr.:13) Calderon retired from Tyson September 24, 2021. (Ex. C) Calderon testified before his work injury he planned to work until he was 65 or 57. Since he left Tyson he has not looked for any employment. I do not find Calderon is motivated to return to work. Calderon worked for Tyson for 28 years. The work he performed is not consistent with his permanent restrictions.

Considering all of the factors of industrial disability, including his lack of motivation to return to work, the number of years he planned to work before retiring, and his retirement from Tyson, I find Calderon has sustained a 25 percent industrial disability as a result of the work injury, entitling Calderon to 125 weeks of permanent partial disability benefits, commencing on September 29, 2021, the date Dr. Schmitz issued his impairment rating. Iowa Code § 85.34(2) ("[c]ompensation for permanent partial disability shall begin when it is medically indicated that maximum medical improvement from the injury has been reached and that the extent of loss or percentage of permanent impairment can be determined" under the AMA Guides).

In his post-hearing brief Calderon asserts he is permanently and totally disabled under the common law odd-lot doctrine. Calderon did not allege he was permanently and totally disabled under the statute or odd-lot doctrine on the hearing report order. I find he waived the claim by failing to do so. Even assuming he properly raised the odd-lot doctrine his claim is meritless.

In Iowa, a claimant may establish permanent total disability under the statute, or through the common law odd-lot doctrine. Michael Eberhart Constr. v. Curtin, 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.

"Total disability does not mean a state of absolute helplessness." Wal-Mart 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.

Dr. Bansal found Calderon is capable of performing sedentary to light work. Calderon lives in Perry. Perry is a short drive to the major metropolitan city of Des Moines. Calderon presented no vocational evidence at hearing. He presented no evidence the services he is able to perform are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist. I do not find Calderon is permanently and totally disabled under the odd-lot doctrine or under the statute.

### **III. Penalty – August 29, 2020 Low Back Injury**

Iowa Code section 86.13 governs compensation payments. Under the statute's plain language, if there is a delay in payment absent "a reasonable or probable cause or excuse," the employee is entitled to penalty benefits, of up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse. Iowa Code § 86.13(4); see also Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996) (citing earlier version of the statute). "The application of the penalty provision does not turn on the length of the delay in making the correct compensation payment." Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 236 (Iowa 1996). If a delay occurs without a reasonable excuse, the commissioner is required to award penalty benefits in some amount to the employee. Id.

The statute requires the employer or insurance company to conduct a "reasonable investigation and evaluation" into whether benefits are owed to the employee, the results of the investigation and evaluation must be the "actual basis" relied on by the employer or insurance company to deny, delay, or terminate benefits, and the employer or insurance company must contemporaneously convey the basis for the denial, delay, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits. Iowa Code § 86.13(4). An employer may establish a "reasonable cause or excuse" if "the delay was necessary for the insurer to investigate

the claim,” or if “the employer had a reasonable basis to contest the employee’s entitlement to benefits.” Christensen, 554 N.W.2d at 260. “A ‘reasonable basis’ for denial of the claim exists if the claim is ‘fairly debatable.’” Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 267 (Iowa 2012). “Whether a claim is ‘fairly debatable’ can generally be determined by the court as a matter of law.” Id. The issue is whether the employer had a reasonable basis to believe no benefits were owed to the claimant. Id. “If there was no reasonable basis for the employer to have denied the employee’s benefits, then the court must ‘determine if the defendant knew, or should have known, that the basis for denying the employee’s claim was unreasonable.’” Id.

Benefits must be paid beginning on the 11th day after the injury, and “each week thereafter during the period for which compensation is payable, and if not paid when due,” interest will be imposed. Iowa Code § 85.30. In Robbennolt, the Iowa Supreme Court noted, “[i]f the required weekly compensation is timely paid at the end of the compensation week, no interest will be imposed . . . . As an example, if Monday is the first day of the compensation week, full payment of the weekly compensation is due the following Monday.” Robbennolt, 555 N.W.2d at 235. A payment is “made” when the check addressed to the claimant is mailed, or personally delivered to the claimant. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996) (abrogated by Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299 (Iowa 2005) (concluding the employer’s failure to explain to the claimant why it would not pay permanent benefits upon the termination of healing period benefits did not support the commissioner’s award of penalty benefits)).

When considering an award of penalty benefits, the commissioner considers “the length of the delay, the number of the delays, the information available to the employer regarding the employee’s injuries and wages, and the prior penalties imposed against the employer under section 86.13.” Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 336 (Iowa 2008). The purposes of the statute are to punish the employer and insurance company and to deter employers and insurance companies from delaying payments. Robbennolt, 555 N.W.2d at 237.

Calderon did not list the basis for his penalty claim on the hearing report order. In the conclusion section of his post-hearing brief he asserts he is entitled to penalty benefits based on an underpaid rate of \$.50 per week from March 16, 2022 through August 23, 2022. Tyson underpaid the rate the parties stipulated to at hearing. Tyson did not provide any explanation of why it underpaid the weekly rate. I find Calderon is entitled to an award of \$100.00 in penalty benefits.

#### **IV. Costs**

Calderon seeks to recover the two filing fees totaling \$206.00, service costs of \$7.20, and the \$950.00 cost of the WorkWell Functional Capacity Evaluation. (Ex. 3) At the time of the hearing Tyson agreed to pay the \$3,461.00 cost of the Dr. Bansal’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.

The administrative rule allows for the recovery of the filing and service fees. Dr. Bansal used the valid functional capacity evaluation from WorkWell in determining Calderon’s permanent restrictions. I find Calderon is entitled to recover the \$350.00 cost of the report only and not the cost of the evaluation, the filing fees, and the service fees under the administrative rule.

### **ORDER**

IT IS THEREFORE ORDERED, THAT:

**For File No: 19700558.02:**

Defendant shall pay claimant thirty-two (32) weeks of permanent partial disability benefits, commencing on the stipulated commencement date of July 20, 2020, at the stipulated weekly rate of four hundred ninety-seven and 58/100 dollars (\$497.58).

Defendant is entitled to a credit for all benefits paid to date.

Defendant shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

**For File No: 20013453.01:**

Defendant shall pay claimant one hundred twenty-five (125) weeks of permanent partial disability benefits, commencing on September 29, 2021, at the stipulated weekly rate of four hundred ninety-seven and 58/100 dollars (\$497.58).

Defendant is entitled to a credit for all benefits paid to date.

Defendant shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

Defendant shall pay claimant one hundred and 00/100 dollars (\$100.00) in penalty benefits.

**For Both Files:**

Defendant shall reimburse claimant two hundred six and 00/100 dollars (\$206.00) for the filing fees, seven and 20/100 dollars (\$7.20) for the cost of service, and three hundred fifty and 00/100 dollars (\$350.00) for the cost of the WorkWell report under 876 IAC 4.33(6).

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

Signed and filed this 21<sup>st</sup> day of November, 2022.

  
\_\_\_\_\_  
HEATHER L. PALMER  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Mark King (via WCES)

Dillon Carpenter (via WCES)

**Right to Appeal:** This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.