

## BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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 PEDRO MERO BUSTOS,

Claimant,

vs.

TYSON FOODS, INC.,

Employer,  
Self-Insured,  
Defendant.

File No. 19700550.01

## ARBITRATION DECISION

Head Note Nos.: 1400, 1402, 1800, 1802,  
1803, 2200, 2500, 2700, 2701, 3800

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**STATEMENT OF THE CASE**

The claimant, Pedro Mero Bustos, filed a petition for arbitration seeking workers' compensation benefits from self-insured employer Tyson Foods, Inc. ("Tyson"). Mary Hamilton appeared on behalf of the claimant. Chris Scheldrup appeared on behalf of the defendant.

The matter came on for hearing on November 8, 2021, before Deputy Workers' Compensation Commissioner Andrew M. Phillips. Pursuant to an order of the Iowa Workers' Compensation Commissioner related to the COVID-19 pandemic, the hearing occurred via CourtCall. The hearing proceeded without significant difficulty.

The record in this case consists of Joint Exhibits 1-11, Claimant's Exhibit 1-7, and Defendant's Exhibits A-S. The claimant testified on his own behalf. Also testifying were Tim Steffen, and the claimant's wife, Rafaela Mero. Jeanne Strand was appointed the official reporter and custodian of the notes of the proceeding. Alina Salvat was sworn in as the interpreter. The evidentiary record closed at the end of the hearing, and the matter was fully submitted on December 20, 2021, after briefing by the parties.

The defendant objected to the admission of Claimant's Exhibit 6, the claimant's Social Security Disability Award paperwork. The objection was overruled, and the evidence is considered based upon its relevance.

**STIPULATIONS**

Through the hearing report, as reviewed at the commencement of the hearing, the parties stipulated and/or established the following:

1. There was an employer-employee relationship at the time of an alleged low back injury.

2. That the claimant sustained an injury to his low back that arose out of, and in the course of employment on May 1, 2019.
3. That the alleged injury is a cause of temporary disability during a period of recovery.
4. That the alleged injury is a cause of permanent disability.
5. The claimant's gross earnings were seven hundred ninety one and 42/100 dollars (\$791.42) per week. He was married, and entitled to three exemptions. This resulted in a weekly compensation rate of five hundred thirty and 57/100 dollars (\$530.57).
6. With regard to disputed medical expenses:
  - a. That, although disputed, the medical providers would testify as to the reasonableness of their fees and/or treatment set forth in the listed expenses and defendants are not offering contrary evidence.
7. That, the defendant is entitled to credit under Iowa Code section 85.38(2) for payment of medical and hospitalization expenses in Defendant's Exhibit C.

The defendants waived one affirmative defense.

The parties are now bound by their stipulations.

### **ISSUES**

The parties submitted the following issues for determination:

1. Whether the claimant sustained a work related shoulder injury, or whether the shoulder injury was a sequelae of the admitted back injury.
2. Whether the claimant is entitled to either temporary total disability, temporary partial disability, or healing period benefits for either February 3, 2020, to September 23, 2021, or February 3, 2020, to May 6, 2020.
3. Whether the claimant was off work during the disputed period of time.
4. The extent of permanent disability, if any is awarded.
5. Whether the disability is an industrial disability, or whether Iowa Code section 85.34(2)(v) applies.
6. Whether the proper commencement date for permanent partial benefits (should any be awarded) is May 7, 2020, as contended by the defendant, or September 24, 2021, as contended by the claimant.

7. Whether an affirmative defense pursuant to Iowa Code section 85.26 applies to an alleged left shoulder injury from 2018.
8. Whether an affirmative defense of lack of timely notice pursuant to Iowa Code section 85.23 applies to an alleged left shoulder injury from 2018.
9. Whether the claimant undertook unauthorized medical care pursuant to an August 10, 2020, alternate medical care decision.
10. Whether the claimant is entitled to payment of medical expenses, as noted in Claimant's Exhibit 3.
11. With regard to the disputed medical expenses:
  - a. Whether the fees or prices charged by the providers are fair and reasonable.
  - b. Whether the treatment was reasonable and necessary.
  - c. Whether the listed expenses are causally connected to the work injury.
  - d. Whether the listed expenses are at least causally connected to the medical condition(s) upon which the claim of injury is based.
  - e. Whether the requested expenses were authorized by the defendant.
12. Whether the claimant is entitled to alternate medical care pursuant to Iowa Code section 85.27.
13. Whether the defendant is entitled to credit for 50 weeks of compensation, paid as permanent partial disability benefits, at the rate of five hundred thirty and 57/100 dollars (\$530.57) per week, as the claimant alleges that he did not achieve maximum medical improvement ("MMI") until September 23, 2021.

### **FINDINGS OF FACT**

The undersigned, having considered all of the evidence and testimony in the record, finds:

Pedro Mero Bustos, the claimant, was 58 years old at the time of the hearing. (Testimony). He is originally from Mexico, and came to the United States of America in 1982. (Testimony). He attended primary school and high school in Mexico. (Testimony). Since arriving in the United States of America, he has had no formal education. (Testimony).

Being from Mexico, Mr. Mero Bustos is a native Spanish speaker. (Testimony). He does not read or write in English. (Testimony). He also does not understand spoken English. (Testimony). As such, his testimony was taken with the assistance of an interpreter.

Upon entering the United States of America, Mr. Mero Bustos first settled in Los Angeles, California. (Testimony). He worked at a clothing factory, sewing blouses. (Testimony). He then moved on to Bilt-Well Roofing, where he worked as a roofer. (Testimony). Roofing was a highly physical job, in which he removed and replaced roofs, used ladders, and lifted shingles weighing up to 60 pounds. (Testimony). Mr. Mero Bustos took a job with Franklin Brass where he fetched certain parts. (Testimony).

From 1990 to 1996, Mr. Mero Bustos was self-employed. (Testimony). He continued working in roofing, he cleaned yards, and he recycled tires. (Testimony). This involved moving tires, picking them up, and loading them into a pickup truck several times per day. (Testimony). He also collected garbage, cleaned up leaves, and cleaned various yard wastes. (Testimony).

In 1996, the claimant moved to Iowa for a job with Sara Lee/Hillshire in Storm Lake. (Testimony). He worked in the killing department at a turkey plant. (Testimony). He then worked as a floater where he helped in various positions when other employees were out sick. (Testimony). He moved to the EVIS position where he hung and gutted turkeys. (Testimony). He also trussed turkeys and handled containers. (Testimony). He eventually left Sara Lee/Hillshire. (Testimony).

He subsequently worked for Champion Roofing as a roofer. (Testimony). He also worked for Campos Tires. (Testimony). At Campos Tires, he picked up tires and brought tires for recycling. (Testimony).

From November of 2015 to the present, Mr. Mero Bustos worked for Tyson at a turkey plant. (Testimony). He took the stomachs out of turkeys and also attempted to salvage certain portions of defective inspected turkeys. (Testimony). He also worked a short stint as a floater. (Testimony).

For a time, Mr. Mero Bustos also worked as a cropper. (Testimony). This was a position that required standing in order to remove the stomach area and neck of the turkey. (Testimony). This position required twisting, walking, and following the line. (Testimony). He worked with his hands above his waist on a regular basis. (Testimony). He pulled down on turkeys with his arms and his body. (Testimony).

On May 1, 2019, Mr. Mero Bustos was working in a salvage position at the Tyson plant. (Testimony). He worked the night shift, from 8:15 p.m. to 5:30 a.m. (Testimony). He took turkeys from the line that were marked "bad" by the government inspectors. (Testimony). He then cleaned them, cut them, and if possible, put them back on the line. (Testimony). If they could not be salvaged, he would throw the turkey carcass into a container. (Testimony). The turkeys weigh 38 to 50 pounds. (Testimony). This job requires twisting, turning, reaching, and then cleaning the turkey. (Testimony).

He grabbed a turkey from the line to clean. (Testimony). He felt pain in his lower back. (Testimony). At the time the pain occurred, he was close to his lunch break. (Testimony). He left the line for his dinner break. (Testimony). He felt pain in his right

lower back. (Testimony). Tyson has nurses on staff, but they do not work during the night shift, so he could not see a nurse immediately. (Testimony). He returned to work after his break. (Testimony). About one and a half hours after his injury, he had “a lot of pain” and a jumpy leg, and he was able to see a nurse. (Testimony). The nurse provided him with a “calming pill,” and returned him to his department. (Testimony). He was later removed from the line and put on plucking duty. (Testimony).

On May 2, 2019, the claimant reported to UnityPoint Buena Vista where David Archer, M.D., examined him. (Joint Exhibit 1:1-3). Mr. Mero Bustos complained of right sided lower back pain. (JE 1:2). The record describes the claimant as limping into the office, and the doctor encountered him “laying down on the exam table with two pillows under his legs and one pillow on his right side.” (JE 1:2). The claimant described his injury consistent with his testimony noted above. (JE 1:2). An x-ray was done of the lumbar spine, which showed mild spondylosis of the lumbar spine, especially at L5-S1. (JE 1:1). Dr. Archer opined that the x-rays were within normal limits. (JE 1:3). He diagnosed the claimant with a work-related lumbar strain. (JE 1:3). He recommended physical therapy, and prescribed Naprosyn and Flexeril. (JE 1:3). Dr. Archer also provided work restrictions of lifting no more than 5 pounds, only occasional bending, and sitting and standing as needed. (JE 1:3). Mr. Mero Bustos could return to limited duty work after his appointment. (JE 1:3).

Mr. Mero Bustos reported to Tyson Occupational Health on May 5, 2019, where Julie Meth, R.N., examined him. (Claimant’s Exhibit 4:51). He described his pain as though something was grinding in his back. (CE 4:51). He felt “much better” than the previous week, though he described constant pain radiating down his right leg. (CE 4:51). The nurse observed grimacing while Mr. Mero Bustos repositioned himself in a chair, and while he rose from the chair to a standing position. (CE 4:51).

The claimant began a course of physical therapy at BVM Physical Therapy on May 10, 2019. (JE 2:39). Mr. Mero Bustos could work and walk with minimal pain. (JE 2:39). He continued to have mild tenderness to the right L5-S1 region, but overall was doing “quite well.” (JE 2:39).

Mr. Mero Bustos returned to Dr. Archer’s office on May 16, 2019. (JE 1:4-5). He continued to complain to the doctor about right-sided low back pain. (JE 1:4). He now had tingling that went from his right hip to his right mid-thigh area. (JE 1:4). Dr. Archer reiterated his diagnosis of a lumbar strain. (JE 1:5). He allowed the claimant to return to limited duty work while lifting a maximum of 5 pounds and limiting his sitting and standing. (JE 1:5). He recommended that the claimant continue physical therapy, and return in two weeks. (JE 1:5).

On May 30, 2019, the claimant returned to Dr. Archer’s office with continuing complaints of right-sided low back pain. (JE 1:6-8). He felt more pain if he sat or stood in one spot for too long. (JE 1:6). When he was moving around, his pain alleviated. (JE 1:6). Dr. Archer maintained his diagnosis of a lumbar strain. (JE 1:7). Dr. Archer allowed Mr. Mero Bustos to return to limited duty work on May 30, 2019, with restrictions of a 5 pounds lifting limit and an allowance to sit or stand as needed. (JE

1:7). Dr. Archer continued his recommendation for physical therapy and ordered an MRI of the lumbar spine. (JE 1:7).

Mr. Mero Bustos had an MRI of his lumbar spine on June 6, 2019. (JE 2:40). The MRI showed mild disc degeneration at L4-5 with a “small generalized disc bulge and ligamentous and facet joint hypertrophy” that caused a severe bilateral neural foraminal compromise. (JE 2:40).

On June 26, 2019, Matthew Johnson, M.D., examined Mr. Mero Bustos upon referral from Dr. Archer. (JE 3:107-109). Mr. Mero Bustos reported to Dr. Johnson that he turned to put a turkey back on a hook, when he felt a pop or pinch in his back with a sudden onset of pain in the PSIS region that radiated down his right lower extremity. (JE 3:107). His pain worsened when he sat. (JE 3:107). He worked light duty, “but he would like to be able to move around a little more at work. (JE 3:107). He had no left-sided symptoms. (JE 3:107). There is no mention in his history of left shoulder issues, pain, or an injury. (JE 3:107-109). Upon physical examination, Dr. Johnson observed that Mr. Mero Bustos was “exquisitely tender” over the right iliac crest. (JE 3:108). Dr. Johnson reviewed the imaging performed to date, and observed mild degenerative changes on x-rays at L5-S1. (JE 3:108). The MRI showed “some degenerative changes” at L5-S1, including a slight bulge on the right side and lateral recess and foraminal stenosis on the right side. (JE 3:108). Dr. Johnson noted that Mr. Mero Bustos did not have a clear disk herniation or other significant problem shown on the MRI. (JE 3:108). Dr. Johnson diagnosed the claimant with a low back sprain and lumbar radiculopathy. (JE 3:109). Dr. Johnson referred Mr. Mero Bustos to Siouxland Pain Clinic for a right S1 transforaminal epidural injection along with injections around the PSIS region. (JE 3:109). Dr. Johnson also requested that the claimant return in six weeks. (JE 3:109).

At the direction of Dr. Johnson, Mr. Mero Bustos began treatment at Siouxland Pain Clinic with Jeremy Poulsen, D.O., on July 12, 2019. (JE 4:129-132). The claimant complained of right-sided lower back pain and right buttock pain. (JE 4:129). Mr. Mero Bustos avoided exercise and housework over the previous month due to his pain. (JE 4:129). Dr. Poulsen observed tenderness to palpation over the bilateral facet joint regions of the lumbosacral spine. (JE 4:131). Pain was also elicited upon passive and active side bending. (JE 4:131). Dr. Poulsen diagnosed the claimant with sacroiliitis, enthesopathy of the pelvic region and thigh, and possible lumbar radiculopathy. (JE 4:131). Dr. Poulsen prescribed Gabapentin, and provided the claimant with a right sacroiliac injection. (JE 4:131-132). Dr. Poulsen recommended that Mr. Mero Bustos return in two weeks for another injection, and consider an injection in a different location depending on the findings of an upcoming MRI. (JE 4:132).

On July 26, 2019, Mr. Mero Bustos returned to Dr. Poulsen’s office with continued complaints of lower back pain and leg pain. (JE 4:135-140). The claimant also complained of left hip pain. (JE 4:135). The pain was severe with sitting. (JE 4:135). He indicated that the previous injections on July 12, 2019, provided good relief. (JE 4:135). Upon examination, Dr. Poulsen observed that Mr. Mero Bustos’ lumbosacral spine exhibited an abnormal appearance. (JE 4:136). Additionally, the

lumbosacral spine showed tenderness and muscle spasms. (JE 4:136). Dr. Poulsen performed another corticosteroid injection into the right sacroiliac joint. (JE 4:138-139).

The claimant returned to Dr. Johnson's office on August 21, 2019. (JE 3:110-111). Mr. Mero Bustos reported three to four days of relief from the SI joint injection. (JE 3:110). He continued to have pain in the right PSIS and sacroiliac region. (JE 3:110). Twisting, bending forward, and sitting on hard surfaces aggravated his lower back pain. (JE 3:110). Dr. Johnson reiterated his diagnosis of a low back sprain, and noted a new diagnosis of right sacroiliitis. (JE 3:111). Dr. Johnson opined that a surgical decompression, or any surgery, would not help. (JE 3:111). Dr. Johnson recommended that the claimant return to Dr. Poulsen to discuss a sacroiliac rhizotomy. (JE 3:111).

Subsequent to the visit of August 21, 2019, Dr. Johnson wrote a letter to Dr. Archer. (JE 3:112). Dr. Johnson noted that Mr. Mero Bustos has a low back strain with a potential component of sacroiliitis. (JE 3:112). Dr. Johnson reiterated his recommendation that the claimant return to Dr. Poulsen to consider another injection or rhizotomy. (JE 3:112). Dr. Johnson deferred on work restrictions to Dr. Archer, or occupational medicine. (JE 3:112). Finally, he concluded that the MRI provided him with no indication that surgery was necessary. (JE 3:112).

Dr. Archer re-examined Mr. Mero Bustos on August 27, 2019. (JE 1:9-11). The claimant continued to complain of right-sided lower back pain. (JE 1:9). He worked within the restrictions previously provided by Dr. Archer. (JE 1:9). He had two SI injections by Dr. Poulsen which alleviated his pain. (JE 1:9). Mr. Mero Bustos told Dr. Archer that he felt that he could begin a return to work effort. (JE 1:9). Dr. Archer diagnosed the claimant with sacroiliitis, and allowed him to transfer to a cropping job with work hardening as tolerated. (JE 1:10). He continued to prescribe Naprosyn and Gabapentin for the claimant and requested that the claimant return in two weeks. (JE 1:10).

On September 11, 2019, the claimant continued his care with Dr. Archer. (JE 1:12-14). Mr. Mero Bustos worked his new position for 5 minutes at a time with a 5 minute break. (JE 1:12). This arrangement was "going well." (JE 1:12). He reporting feeling a little better since his previous visit. (JE 1:12). Dr. Archer's diagnosis of sacroiliitis remained unchanged. (JE 1:12). Upon physical examination, Dr. Archer noted tenderness in the right SI area. (JE 1:12). Dr. Archer allowed the claimant to return to work full duty as of September 11, 2019, and noted he could "advance as tolerated." (JE 1:13). Dr. Archer requested that the claimant return in two weeks and consider another SI joint injection. (JE 1:13).

The claimant continued his follow-up care with Dr. Archer on September 25, 2019. (JE 1:15-16). As of that visit, the claimant worked 10 minutes on and 5 minutes off at a time. (JE 1:15). Upon examination, Mr. Mero Bustos displayed pain with motion and tenderness in the right SI area. (JE 1:15). Dr. Archer continued to diagnose the claimant with sacroiliitis. (JE 1:15). He recommended that the claimant continue working as tolerated, and taking Naprosyn, Gabapentin, and Flexeril. (JE 1:15). He

also recommended that Mr. Mero Bustos have a repeat SI injection and return in two weeks. (JE 1:16).

On September 27, 2019, Mr. Mero Bustos reported to MercyOne Cherokee Family Medicine, with a report of lower back pain due to a work injury. (JE 5:158-159). He previously had physical therapy, medication, and injections, none of which helped with his pain. (JE 5:158). The provider observed that the claimant ambulated with a short stance phase on the right and a potential hip drop. (JE 5:158). The provider opined “[s]eems like a disc but MRI is so unimpressive that we need to look further.” (JE 5:158).

The claimant began therapy at Sports Rehab & Professional Therapy Associates in Cherokee, Iowa, on October 2, 2019, due to complaints of pain in the low back related to bending and twisting. (JE 6:184-186). His pain was constant and severe and included posterior thigh pain with markedly restricted mobility. (JE 6:184). The therapist diagnosed Mr. Mero Bustos with low back pain and bilateral lower extremity radiculopathy and severe L4-5 neuroforaminal compromise. (JE 6:186).

On October 9, 2019, the claimant continued his physical therapy at Sports Rehab & Professional Therapy Associates. (JE 6:187).

Mr. Mero Bustos returned to Dr. Poulsen’s office on October 11, 2019. (JE 4:141-143). Dr. Poulsen performed another corticosteroid injection into the right sacroiliac joint. (JE 4:141).

On October 14, 2019, the claimant continued therapy with Sports Rehab & Professional Therapy Associates. (JE 6:188). The therapist noted that the pain was localized to the right SI joint and right posterolateral thigh; however, he was moving better. (JE 6:188). He reported having injections, which only provided relief for one or two days. (JE 6:188).

The claimant had fairly severe pain and impaired mobility upon reporting to Sports Rehab & Professional Therapy Associates. (JE 6:189). Upon examination, the therapist noted that the claimant displayed no right SI joint dysfunction, and no significant change in pain or mobility. (JE 6:189).

Mr. Mero Bustos continued his care with MercyOne Cherokee Family Medicine on November 1, 2019. (JE 5:160-161). He continued to complain of lower back pain and reported that he had foot drop on the right along with weakness in his right great toe. (JE 5:160). The claimant felt that everything progressively worsened. (JE 5:160). The provider speculated that the claimant had a subluxation of the right SI compensating for pain. (JE 5:160). The provider observed that Mr. Mero Bustos could not sit or stand for very long due to severe pain. (JE 5:160). The provider recommended that Mr. Mero Bustos see a surgical specialist. (JE 5:160).

On October 17, 2019, Dr. Archer saw the claimant again. (JE 1:17). Physical examination showed tenderness to the right SI area with “palpable spasm” to the right lower lumbar area. (JE 1:17). Dr. Archer maintained his diagnosis of sacroiliitis, and



allowed Mr. Mero Bustos to work for 20 minutes at a time with a 5 minute break. (JE 1:17). Dr. Archer recommended that the claimant continue to take Naprosyn, Flexeril, and Gabapentin. (JE 1:17). Dr. Archer also recommended that the claimant visit "Dr. Fuller" in Omaha. (JE 1:17).

Dr. Archer responded to a "check box" letter from Tyson on November 11, 2019. (Defendant's Exhibit E:1). He indicated that his referral to Dr. Fuller was inadvertent, as he was unaware that a spine surgeon previously evaluated the claimant. (DE E:1). He also agreed that a return to Dr. Poulsen for pain management was appropriate. (DE E:1).

The claimant presented to the BVM emergency department on November 12, 2019, for the third time in three days. (JE 2:42-43). He complained of abdominal pain that prevented him from eating or drinking. (JE 2:43). He previously had treatment for constipation in the ER, but a CT from the day prior was "unremarkable." (JE 2:43).

Dr. Poulsen responded to a "check box" type letter from Tyson on December 12, 2019. (JE 4:144). The updated plan of care section is illegible. (JE 4:144). Dr. Poulsen indicated that Mr. Mero Bustos could not gradually increase his time performing full duty work due to severe pain with sitting and standing. (JE 4:144).

Dr. Poulsen examined Mr. Mero Bustos again on December 18, 2019. (JE 4:145-151). The claimant complained of lower back pain "going down" his right leg. (JE 4:145). His right leg pain appeared to be at the L4 and L5 dermatomal levels according to Dr. Poulsen. (JE 4:145). Mr. Mero Bustos reported that he could work, but could only stand for 10 to 15 minutes at a time. (JE 4:145). He noted that the last injection worked for "about" five days, but that the pain has since recurred and significantly disrupted his quality of life. (JE 4:145). Walking and standing also significantly aggravated his radicular pain. (JE 4:145). Dr. Poulsen reviewed the MRI and noted that it showed a mild disc degeneration at L4-5. (JE 4:147). The disc reached into the bilateral neural foramen. (JE 4:147). Finally, Dr. Poulsen observed ligamentous and facet joint hypertrophy contributing to severe bilateral neural foraminal compromise. (JE 4:147). Dr. Poulsen conducted another injection at the right L4-5 and L5-S1. (JE 4:147). Dr. Poulsen also recommended a second opinion due to the severity of the pain and neural foraminal compromise at L4-5. (JE 4:147).

Mr. Mero Bustos continued his care at MercyOne Cherokee Family Medicine on January 2, 2020. (JE 5:162-163). Mr. Mero Bustos told the doctor that his lawyer would like work restrictions for Mr. Mero Bustos. (JE 5:162). The provider reviewed the June of 2019 MRI, and reviewed his history. (JE 5:162). The claimant reported that work hardening increased his pain in his lumbosacral region with it extending down his right leg. (JE 5:162). The provider continued to express that Mr. Mero Bustos should have a second opinion. (JE 5:162).

On January 9, 2020, Mr. Mero Bustos had another MRI of the lumbar spine, as ordered by Dr. Poulson. (JE 2:44). The MRI was compared to the June 6, 2019, MRI, and in the opinion of Ingrid E. Franze, M.D., showed stable mild disc degeneration at

L4-5 with “a stable small generalize [sic] disc bulge and ligamentous and facet joint hypertrophy causing severe bilateral neural foraminal compromise without significant central spinal stenosis.” (JE 2:44).

The claimant returned to Dr. Johnson’s office on January 15, 2020. (JE 3:113-115). Mr. Mero Bustos reported that over the previous several months, his pain developed into what Dr. Johnson described as “a full S1 radiculopathy with pain, numbness, and tingling radiating down the posterior calf and into the bottom of his foot.” (JE 3:113). Prolonged sitting and standing increased the pain, and an epidural steroid injection at L4-5, L5-S1 helped his pain but only for a few days. (JE 3:113). Dr. Johnson reviewed the January 9, 2020, MRI, and opined that it showed lateral recess stenosis on the right at L4-5. (JE 3:114). Dr. Johnson suspected that the disc referred to as L4-5 is actually the L5-S1 disc, as the S1 nerve root would be in the lateral recess around the medial aspect of the S1 pedicle. (JE 3:114). Dr. Johnson opined as follows: “Pedro has some facet hypertrophy with a bulging disk that contributes to some lateral recess stenosis, and I suspect that he has a clinical S1 radiculopathy. His radiculopathy is actually quite clear and repeatable.” (JE 3:114). Dr. Johnson recommended a lumbar laminectomy, to which Mr. Mero Bustos agreed. (JE 3:114). Dr. Johnson allowed the claimant to return to work full duty with no restrictions pending surgery. (JE 3:116).

On January 28, 2020, the claimant had a preoperative appointment at Dunes Surgical Hospital. (JE 7:190-192). Upon physical examination, the nurse practitioner found low back pain with numbness, tingling, and weakness in the right leg. (JE 7:191). The nurse practitioner cleared the claimant for an L4-5 foraminotomy. (JE 7:192).

Mr. Mero Bustos had surgery on February 3, 2020, at Dunes Surgical Hospital. (Testimony; JE 7:193-194). Dr. Johnson performed the surgery. (JE 7:193-194). Dr. Johnson completed a right L4-5/L5-S1 microlaminotomy and foraminotomy to treat Mr. Mero Bustos’ right L4-5 lateral recess stenosis with radiculopathy. (JE 7:193-194). The surgery provided him no relief to the pain in his back and calf. (Testimony). He continued to have pain radiating down his leg to his toes. (Testimony). He described the pain as cramping. (Testimony).

Ms. Mero testified that her husband had some improvement immediately after the surgery, but she noted that after time, his condition worsened. (Testimony). For a time, he would help wash pots and pans, and mop floors. (Testimony). Eventually, he wanted to sit all the time, and complained about his pain. (Testimony).

Mr. Mero Bustos returned to Dr. Johnson’s office on March 4, 2020, for a post-surgical follow-up. (JE 3:119-120). The claimant reported some improvement in his pain, but had tightness around his calf including pain down the back of his calf. (JE 3:119). His pain increased when sitting on a hard chair, when he moves around, or when he lifts anything heavy. (JE 3:119). Dr. Johnson ordered an ultrasound of the venous duplex to rule out a DVT. (JE 3:120). If he did not have DVT, then Mr. Mero Bustos could return to light duty within a week. (JE 3:120).

On March 11, 2020, the claimant had an evaluation with a physical therapist following his surgery. (JE 2:47-48). Mr. Mero Bustos complained of burning pain into his calf and heel/toes in the right foot. (JE 2:48). He also reported issues with walking and lingering pain since his surgery. (JE 2:48). Upon physical examination, the therapist noted point tenderness throughout the right lumbar spine with mild hypertonicity. (JE 2:48).

The claimant had another session of physical therapy on March 13, 2020, with noted complaints of lower back pain. (JE 2:49). He also claimed radicular pain down his right leg. (JE 2:49). At the time of the session, Mr. Mero Bustos worked 5 minutes on and 5 minutes off while standing. (JE 2:49). The claimant returned to MercyOne Cherokee Family Medicine on the same date for his complaints of persistent postoperative back pain that radiated down his right leg. (JE 5:164-165). He recounted having a surgery in early February of 2020, which provided no relief. (JE 5:164). The provider told Mr. Mero Bustos that his nerves needed time to heal after the surgery. (JE 5:164). The provider further noted that the claimant should be off work for six weeks because his work aggravated his pain. (JE 5:164).

Therapy continued on March 20, 2020, wherein the claimant told the therapist that he still had “a lot” of numbness in his right leg. (JE 2:52). He also felt that his right leg was weak, and that therapy only provided minimal relief. (JE 2:52).

On March 23, 2020, the claimant returned to physical therapy with complaints of pain in his right lower back. (JE 2:53). Mr. Mero Bustos walked with an antalgic gait. (JE 2:53). The claimant could not walk well, and did not have much relief with certain positions. (JE 2:53).

Mr. Mero Bustos continued his treatment with MercyOne Cherokee Family Medicine on March 25, 2020. (JE 5:166-167).

The claimant’s physical therapy continued on March 26, 2020 for continued issues with lower back pain. (JE 2:55-56). He told the therapist that the pain wrapped around his hip and into his groin. (JE 2:55). The therapist observed that the claimant walked with an antalgic gait and was “very guarded” with his range of motion. (JE 2:56).

After speaking with Stephen Veit, M.D., Dr. Johnson ordered another lumbar MRI, which was completed on March 26, 2020. (JE 2:57; JE 3:122). Dr. Franze interpreted the MRI, and compared its results to the MRI of January 9, 2020. (JE 2:57). There was some granulation present subsequent to the laminotomy. (JE 2:57). The granulation caused mild compression and posterior displacement at the L5 nerve root. (JE 2:57). A small, generalized disc bulge with a small right posterolateral focal disc protrusion at the right neural foramen. (JE 2:57). This small disc bulge was stable. (JE 2:57).

Dr. Johnson saw Mr. Mero Bustos again at the request of Dr. Veit on March 27, 2020. (JE 3:124-125). Mr. Mero Bustos described weakness in his right leg, which Dr. Johnson ascribed to a decreased ability to use his right leg because of pain when he

does certain activities and movements. (JE 3:124). Dr. Johnson reviewed an MRI and opined that he did not see any compressive lesion around the L5 nerve root; however, he did note some enhancing granulation tissue. (JE 3:125). Upon examination, Dr. Johnson opined that Mr. Mero Bustos had an inflammatory radiculopathy of the nerve, and that it would calm down over time. (JE 3:125). Dr. Johnson authored a missive to Dr. Veit regarding his findings. (JE 3:128). Dr. Johnson noted that the MRI did not show any compressive lesion, and that most of the other findings were due to the claimant's pain issues. (JE 3:128). Dr. Johnson prescribed gabapentin and encouraged Mr. Mero Bustos to complete therapy and stretching exercises. (JE 3:128). The letter also contained a handwritten note from an unknown provider that states, "I spoke with his wife, Rafaela, I am very pleased with results of MRI & Dr. Johnson's visit. I rec [sic] no work for 1 month & see me again in one month." (JE 3:128).

On April 1, 2020, Mr. Mero Bustos reported ongoing numbness in his calf. (JE 2:59). He felt weak in his leg and told the therapist that he felt his leg would buckle. (JE 2:59). His pain worsened with walking and standing. (JE 2:59).

The claimant continued therapy on April 3, 2020, with complaints of poor sleeping, and more back pain than leg pain. (JE 2:60). He continued "to demonstrate significant antalgia with ambulation." (JE 2:60).

By April 7, 2020, Mr. Mero Bustos reported to his therapist that his pain worsened with prolonged sitting and walking. (JE 2:61). He also continued to display an antalgic gait. (JE 2:61). The therapist recommended limiting the use of his treadmill at home to 5 minutes per session of slow ambulation. (JE 2:61).

On April 9, 2020, the claimant continued to have pain in his leg. (JE 2:62). He showed some mild improvement in hip flexion after passive range of motion. (JE 2:62). The therapist recommended a 5 minute walking session at home, and limiting bending, lifting, and twisting. (JE 2:62). He also visited MercyOne Cherokee Family Medicine for continued back pain follow-up. (JE 5:168-169). Mr. Mero Bustos told the provider that he took gabapentin without relief, and that despite being off work for two weeks his pain did not dissipate. (JE 5:168). The provider observed that the claimant continually moved around the room and rested on a countertop in order to alleviate discomfort. (JE 5:168). The provider gave Mr. Mero Bustos another four weeks off work. (JE 5:168).

Therapy continued on April 14, 2020. (JE 2:63). Mr. Mero Bustos indicated that therapy helped for a short time, but that the results did not last. (JE 2:63). The claimant located pain in his right lower back, which then traveled down his right leg behind his knee and calf. (JE 2:63). He opined that it was a nerve pain or muscle pain. (JE 2:63). The claimant noted that he stood more which caused his lower back pain to flare up. (JE 2:63).

On April 16, 2020, the claimant went to therapy. (JE 2:65). He complained of increased pain after his last physical therapy visit. (JE 2:65). He walked about four blocks, which caused increased pain in his right buttock. (JE 2:65).

Mr. Mero Bustos continued therapy on April 21, 2020. (JE 2:67). He moved slowly, and reported constant pain in his back running down his leg. (JE 2:67). The therapist noted that the claimant had poor tolerance to any activity. (JE 2:67).

On April 23, 2020, the claimant reported to the therapist that therapy helped with the pain. (JE 2:68). However, when he rose and walked, his pain returned. (JE 2:68). The pain radiated down the claimant's leg when he sat or walked for more than 15 minutes. (JE 2:68).

Mr. Mero Bustos rated his pain 3 out of 10 during an April 28, 2020, therapy visit. (JE 2:69). His pain increased when he walked and sat down. (JE 2:69). He still had numbness and tingling in the right leg. (JE 2:69). He opined that his pain was worse than prior to the surgery. (JE 2:69). The therapist observed "near buckling" in the right lower extremity. (JE 2:69).

On April 30, 2020, the claimant had another round of physical therapy. (JE 2:70). He reported mild improvement, but that he had pain in the right glute and right lower extremity. (JE 2:70).

The claimant returned to work for two weeks in April of 2020. (Testimony). He attempted to work in salvage, but had difficulty standing. (Testimony). His leg "didn't cooperate" with working. (Testimony).

On May 4, 2020, Mr. Mero Bustos returned to MercyOne Cherokee Family Medicine for his low back and right leg pain. (JE 5:170-171). He told the provider that coughing, sneezing, urinating, and defecating caused his lower back and right leg radicular pain to flare up. (JE 5:170). He also claimed that his right leg was progressively weakening. (JE 5:170). Despite being off work for four weeks, his pain worsened. (JE 5:170). The provider opined that the claimant had severe back pain and functional impairment from a probable L4-5 posterior protruding disc with severe bilateral foraminal encroachment. (JE 5:170).

Mr. Mero Bustos' complained of continued or increased lower back pain with radicular pain into the right groin during a May 5, 2020 physical therapy visit. (JE 2:71). Physical therapy provided temporary relief. (JE 2:71).

On May 6, 2020, Dr. Johnson examined the claimant again. (JE 3:126-127). Mr. Mero Bustos reported severe right lower extremity radiculopathy that was worse than before his surgery. (JE 3:126). He told Dr. Johnson that he had pain all of the time into his back, right leg, and calf. (JE 3:126). He was on Lyrica for the pain. (JE 3:126). Dr. Johnson opined that the claimant displayed "significant exaggerated pain responses" with give way-type weakness in both lower extremities. (JE 3:127). The weakness was "not explainable by his pain description and by his radiographic findings." (JE 3:127). Dr. Johnson did not recommend further surgical intervention and opined that Mr. Mero Bustos reached MMI. (JE 3:127). Dr. Johnson suggested that the claimant return to Dr. Archer's office to start a return to work process. (JE 3:127).

Tyson issued a letter to claimant (via his counsel) on May 11, 2020, in which they indicated that Dr. Johnson placed Mr. Mero Bustos at MMI effective May 6, 2020, and that they would commence “PPD payments.” (DE K:1). They agreed to voluntarily pay a 2 percent body as a whole impairment rating. (DE K:1).

In a “check box” letter dated May 13, 2020, Dr. Johnson opined that the claimant sustained a 10 percent impairment of the body as a whole based upon the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Table 15-3, DRE III. (DE F:1).

Mr. Mero Bustos continued his follow-up care with MercyOne Cherokee Family Medicine on June 1, 2020. (JE 5:172-173). The claimant reported being incapacitated and in constant pain. (JE 5:172). He continued to report weakness on his right side only despite what the provider notes is symmetrical imaging results. (JE 5:172). The provider observed the claimant moving with “extreme difficulty.” (JE 5:172). The provider recommended that the claimant seek a second opinion, as Dr. Johnson discharged the claimant. (JE 5:172). The provider also recommended consideration of a trial of epidural steroid injections, and prescribed additional Lyrica to assist with the claimant’s sleep. (JE 5:172).

On June 2, 2020, Mr. Mero Bustos returned to Dr. Archer’s office. (JE 1:18). He moved gingerly and shifted frequently in his chair when sitting. (JE 1:18). Dr. Archer examined the claimant’s back and found that he had an antalgic gait, limited range of motion, pain with motion, and tenderness in the L5 area. (JE 1:18). Dr. Archer opined that the claimant’s pain response seemed exaggerated. (JE 1:18). Dr. Archer reviewed the results of the MRI from March 26, 2020, and diagnosed the claimant with chronic right-sided low back pain with right-sided sciatica. (JE 2:73). Dr. Archer opined that this was a work-related injury, and the claimant was unable to return to duty as of June 2, 2020, due to his pain. (JE 2:73).

Mr. Mero Bustos again reported to MercyOne Cherokee Family Medicine on June 4, 2020, with complaints of left shoulder pain. (JE 5:174-175). He noted that he fell in 2018 at work, and had no issues for over a year with his left shoulder before it flared up three weeks prior to the visit. (JE 5:174). He indicated no knowledge of an acute reason for his left shoulder hurting when he rolled over in bed. (JE 5:174). The provider diagnosed the claimant with left shoulder acute subacromial bursitis. (JE 5:174).

On June 8, 2020, claimant’s attorney e-mailed defendant’s attorney alleging that the back injury aggravated a 2018 left shoulder injury sustained by the claimant. (CE 4:55). Claimant’s counsel stated, “...we believe that this is therefore a work related condition.” (CE 4:55).

On June 11, 2020, the claimant returned to MercyOne Cherokee Family Medicine for a re-check of his left shoulder. (JE 5:176-177). When he kept his left arm in an immobilizer, his left arm felt “okay.” (JE 5:176). He could not work above shoulder height. (JE 5:176). The provider recommended that Mr. Mero Bustos avoid prolonged immobilization of the left arm. (JE 5:176).

Mr. Mero Bustos continued his follow-up care with MercyOne Cherokee Family Medicine on June 23, 2020. (JE 5:178-179). His left shoulder continued to cause issues, despite immobilization. (JE 5:178). The provider opined that the shoulder pain was secondary in nature, and that the claimant needed to get his back and right lower extremity “fixed” first. (JE 5:178). He could not bear weight on his right lower extremity due to pain. (JE 5:178). Coughing and transitioning caused his pain. (JE 5:178). The provider recommended either an EMG and/or an “urgent” epidural steroid injection and/or surgery. (JE 5:178). The provider noted, “I consider this patient to be completely disabled and have written for him to be off work for an additional 2 months.” (JE 5:179).

On June 25, 2020, Ric Jensen, M.D., P.D., of Neurosurgical Associates of Nebraska, drafted a missive to Dr. Archer. (JE 8:195-197). Dr. Jensen’s letter was based upon an examination performed on June 10, 2020. (JE 8:195). Dr. Jensen outlined the claimant’s treatment to date. (JE 8:195). Dr. Jensen opined that the surgery performed by Dr. Johnson provided a “modicum” of relief until one month post-surgery. (JE 8:195). At that time, the claimant “began to experience a recurrence of right lower extremity radicular symptoms and new-onset back pain” which progressed. (JE 8:195). Dr. Jensen opined that Mr. Mero Bustos had sensory changes in his right lower extremity that indicated a recovering L5 lumbosacral nerve root. (JE 8:196). He also demonstrated a mild nerve root tension sign in his right lower extremity while in a seated position. (JE 8:196). Dr. Jensen further observed that the claimant’s gait capacity and duration were limited. (JE 8:196). Dr. Jensen presented Mr. Mero Bustos with his options, which was to continue conservative treatment measures with physical therapy for back strengthening. (JE 8:197). However, he felt that Mr. Mero Bustos would worsen over time, and that eventually a functional capacity evaluation should be performed. (JE 8:197).

Dean Wampler, M.D., of CompChoice, examined Mr. Mero Bustos on July 2, 2020, for his complaints of left shoulder pain. (DE O:1-2). Dr. Wampler found Mr. Mero Bustos difficult to interview, insofar as he did not answer direct questions through the interpreter. (DE O:1). The claimant first told Dr. Wampler that his left shoulder pain was caused by his back surgery, and was present for “a couple of weeks.” (DE O:1). He later amended this statement and told Dr. Wampler that his left shoulder pain began “three months ago.” (DE O:1). The claimant presented to his examination wearing a shoulder immobilizer. (DE O:1). He told Dr. Wampler that his pain was in the anterior shoulder and AC joint. (DE O:1). Upon physical examination, Dr. Wampler found the left AC joint to be “different in appearance than the right.” (DE O:1). Mr. Mero Bustos winced when Dr. Wampler lightly palpated the left shoulder. (DE O:1). Dr. Wampler diagnosed Mr. Mero Bustos with a possible left AC joint separation. (DE O:1). Dr. Wampler opined that the left shoulder pain was from sleeping on his left shoulder incorrectly. (DE O:1). Dr. Wampler noted, “[h]e believes that since he had to sleep on his side because of his back pain, his shoulder pain should be connected to his back injury claim.” (DE O:2). Dr. Wampler found no causal connection from the back injury to the claimant’s left shoulder injury as the claimant “could have slept in a bad position at any time.” (DE O:2). Dr. Wampler concluded that Mr. Mero Bustos’ left shoulder condition was not related to his work. (DE O:2).

A note signed by a medical provider on July 2, 2020, noted that the claimant had a possible AC joint separation or impingement. (CE 4:52). The Tyson form indicated that the injury occurred on May 1, 2019. (CE 4:52). The provider recommended that Mr. Mero Bustos not use his left arm. (CE 4:52).

The claimant had an EMG on July 15, 2020, which was interpreted by Todd Troll, M.D. (JE 9:216-218). Dr. Troll noted that the claimant showed "marked pain behavior and guarding" upon examination. (JE 9:216). Further, Dr. Troll observed that the claimant had normal strength and reflexes in his bilateral lower extremities. (JE 9:216). After completing the EMG, Dr. Troll opined that Mr. Mero Bustos had a normal study with no electrodiagnostic evidence of neuropathy, plexopathy or radiculopathy that involved the bilateral lower extremities. (JE 9:216).

Dr. Poulsen saw Mr. Mero Bustos again on July 22, 2020. (JE 4:152-157). Mr. Mero Bustos complained of a recurrence of his low back pain that extended along the entirety of his lower back into his bilateral hip regions. (JE 4:152). He also complained about right-sided radicular pain extending into the anterior calf region. (JE 4:152). He noted that the previous injection provided "reasonable relief," but that the pain was now also across his left side. (JE 4:152). Upon physical examination, Dr. Poulsen observed tenderness to palpation on the right side of the iliolumbar region and sciatic notch. (JE 4:153). Dr. Poulsen diagnosed Mr. Mero Bustos with lumbar spondylosis, lumbar radiculopathy, and connective tissue and disc stenosis of the intervertebral foramina of the lumbar. (JE 4:153-154). Dr. Poulsen performed another set of bilateral transforaminal epidural steroid injections at L4-5, and refilled Mr. Mero Bustos' gabapentin. (JE 4:154).

The claimant continued to see Dr. Archer on July 29, 2020. (JE 1:19-20). Dr. Archer observed that the claimant appeared to "be in a lot of pain, bending forward over the exam table and shifting position frequently." (JE 1:19). Mr. Mero Bustos told Dr. Archer that the injections from Dr. Poulson helped for only several hours. (JE 1:19). He complained about feeling groggy when taking gabapentin. (JE 1:19). Mr. Mero Bustos displayed an antalgic gait, limits range of motion, and tenderness at the L5, sacroiliac joints, and sciatic notches. (JE 1:19). Dr. Archer diagnosed Mr. Mero Bustos with chronic right-sided low back pain and right-sided sciatica. (JE 1:20). Dr. Archer recommended that the claimant have a functional capacity evaluation, and noted that Dr. Johnson placed him MMI for his injury. (JE 1:20). Finally, Dr. Archer noted, "[h]e got temporary relief from transforaminal epidural steroid injections which helps to establish the pain generator but in the absence of EMG evidence of radiculopathy he is not a surgical candidate." (JE 1:20).

On July 31, 2020, Dr. Veit, reviewed an EMG, which showed "no electrodiagnostic evidence of neuropathy, plexopathy or radiculopathy involving bilateral lower extremities." (JE 5:181). Dr. Veit recommended surgery based upon his previous care provided to the claimant. (JE 5:181).



Dr. Johnson responded to another “check-box” letter from Tyson on August 7, 2020. (DE G:1). He indicated no change to his prior opinion as indicated in his notes. (DE G:1). He further indicated that he recommended an FCE in order to address a return to work process. (DE G:1). He also opined that the claimant was at MMI for his May 1, 2019, complaints. (DE G:1).

Mr. Mero Bustos returned to Dr. Veit at MercyOne Cherokee Family Medicine on August 10, 2020. (JE 5:182-183). He continued to report severe lower back pain all day. (JE 5:182). He also continued to claim that his condition was worsening including weakening of the right lower extremity. (JE 5:182). He noted that his right knee occasionally buckled. (JE 5:182). Mr. Mero Bustos told Dr. Veit that the epidural steroid injections did not help. (JE 5:182). Dr. Veit recommended proceeding to surgery. (JE 5:182).

On August 19, 2020, the claimant reported to Athletico Physical Therapy for an FCE. (DE P:1-6). The examiner found that Mr. Mero Bustos provided an invalid or inconsistent performance. (DE P:1). This determination was due to several factors, including, an inconsistent range of motion of the affected body parts during the evaluation, and material handling testing and postures were inconsistent with the results of the physical examination and functional testing. (DE P:1). Further, the examiner, found that the claimant displayed subjective complaints of pain that were out of proportion with the objective findings. (DE P:1). For example, Mr. Mero Bustos showed an antalgic gait, which improved with distraction. (DE P:1). The examiner also opined that Mr. Mero Bustos frequently exaggerated his pain behaviors. (DE P:1). Finally, the examiner found that the claimant displayed less than maximal effort. (DE P:1). This included self-limitation on lifting tasks secondary to subjective complaints of pain without objective findings of mechanical changes. (DE P:1). The examiner found that Mr. Mero Bustos appeared “safe to function at significantly higher levels than he demonstrated during this exam.” (DE P:1).

Upon physical examination of the claimant’s lower back, the examiner found diffuse tenderness with “over-reactive pain behaviors” upon palpation. (DE P:2). Lumbar motion was limited, but improved with distraction. (DE P:2).

Dr. Archer examined the claimant again on September 2, 2020. (JE 1:21-22). He also wanted to discuss the results of the FCE. (JE 1:21-22). Dr. Archer indicated that the FCE showed that the claimant could return to work safely. (JE 1:21). Mr. Mero Bustos reported to Dr. Archer that he saw Dr. Jensen for an opinion. (JE 1:21). Dr. Archer observed that Mr. Mero Bustos was in “mild to moderate distress,” and was standing with a forward bent. (JE 1:21). He further observed that the claimant’s pain behavior was out of proportion to objective findings. (JE 1:21). A physical examination revealed an antalgic gait, limited range of motion, and tenderness at the L4, SI joint, and sciatic notches. (JE 1:22). Dr. Archer’s diagnosis of chronic right-sided low back pain with right sided sciatica remained unchanged. (JE 1:22). Dr. Archer concluded that Mr. Mero Bustos was at MMI and was not a surgical candidate. (JE 1:22). He opined that since the FCE was invalid and showed evidence of symptoms magnification, it was safe for the claimant to return to work. (JE 1:22).

On September 2, 2020, Dr. Archer responded to a “check-box” letter from Tyson. (DE H:1). He checked “yes” indicating that Mr. Mero Bustos achieved MMI. (DE H:1). Additionally, he agreed that based on the results of an FCE, Mr. Mero Bustos could return to regular duty work in the position of cropper. (DE H:1). He concluded by agreeing that the claimant could use a “lung gun.” (DE H:1).

Dr. Jensen issued another letter to Dr. Archer dated September 11, 2020, following an August 26, 2020, examination of the claimant. (JE 8:198-199). Dr. Jensen opined that Mr. Mero Bustos had symptoms in his right lower extremity that were consistent with right L5 lumbosacral radiculopathy. (JE 8:198). Dr. Jensen continued, “Pedro understands that his best conservative measures will include persistent back strengthening efforts, maintenance of his current body weight, use of a TENS unit, and, further, use of heat/ice and potentially, a lumbar spinal inversion table.” (JE 8:199). Dr. Jensen also recommended an operative course to include a posterior lumbar decompression and fusion. (JE 8:199).

On October 23, 2020, Sabrina Martinez, M.D., performed a pre-operative evaluation for a planned lumbar fusion. (JE 1:23-28). Dr. Martinez opined that the claimant was of average preoperative risk. (JE 1:28).

The claimant reported to the University of Nebraska Medical Center in Omaha, Nebraska, on October 27, 2020. (JE 10:219-221). Dr. Jensen admitted him for a nonsegmental fixation of the lumbosacral spine from L5 to the sacrum along with a revision disectomy at L5-S1. (JE 10:219). Dr. Jensen’s postoperative diagnoses were:

1. Chronic, recurrent low back pain thought secondary to degenerative lumbosacral spinal intervertebral disk disease at the L5-S1 segment.
2. Status post lumbar disectomy procedure performed on the right at L5-S1 lumbosacral segment.
3. Recurrent disk herniation on the right at the L5-S1 lumbosacral segment (initial procedure performed by another surgeon).
4. Annular disk wall tear of the L5-S1 lumbosacral segment (with associated, bilateral facet arthropathy. [sic]
5. Failure of patient to respond to conservative treatment measures.

(JE 10:220).

On November 24, 2020, Dr. Jensen authored another letter to Dr. Archer regarding a post-operative follow-up visit with Mr. Mero Bustos. (JE 8:200). Dr. Jensen opined that the claimant was “making excellent progress in terms of improvement in his functional capacity,” and that he displayed a significant reduction in low back and lower extremity pain. (JE 8:200). Dr. Jensen recommended that Mr. Mero Bustos return in one month. (JE 8:200).

The claimant returned to the BVM Emergency Department on December 5, 2020. (JE 2:74-77). Mr. Mero Bustos complained about left shoulder pain due to an injury that he sustained in November while hanging turkeys. (JE 2:74). He claimed that he missed a hook while trying to hang a turkey, which pulled on his left shoulder. (JE 2:74). He told the doctor that the shoulder improved, but that a recent low back surgery caused him to sleep on his left side that resulted in left shoulder pain. (JE 2:74). The claimant showed decreased range of motion, tenderness, and pain in the left shoulder. (JE 2:75). X-rays of the left shoulder were normal, "except for mild degenerative changes in the left acromioclavicular joint." (JE 2:77).

Dr. Martinez examined Mr. Mero Bustos again on December 7, 2020, due to Mr. Mero Bustos' complaints of left shoulder pain. (JE 1:29). He told Dr. Martinez that he could not raise his left shoulder "very high." (JE 1:29). Mr. Mero Bustos recounted injuring his left shoulder two years prior, and that he experienced pain in that shoulder since then. (JE 1:29). Besides pain, he reported numbness and tingling in his left hand. (JE 1:30). Dr. Martinez diagnosed the claimant with acute pain of the left shoulder, prescribed meloxicam, and recommended an MRI of the left shoulder. (JE 1:31). The claimant requested a steroid injection, but the doctor informed him that this would delay his upcoming back surgery. (JE 1:31).

On December 9, 2020, Tyson sent a letter to Mr. Mero Bustos indicating that Dr. Wampler found no causal connection of the alleged left shoulder injury to the May 1, 2019, date of injury. (DE L:1). The letter noted that the claimant was sleeping on his shoulder incorrectly, which caused his pain. (DE L:1). Accordingly, Tyson denied the claimant's workers' compensation claim related to his left shoulder. (DE L:1).

Dr. Franze reviewed an MRI of the claimant's left shoulder performed on December 16, 2020. (JE 2:78). The MRI showed thickening and "extensive intrinsic stenosis" in the subscapularis tendon. (JE 2:78). The MRI also indicated that the claimant had a torn superior, posterior, and inferior glenoid labrum. (JE 2:78). Finally, Dr. Franze observed moderate degenerative hypertrophic changes in the acromioclavicular joint. (JE 2:78).

On December 21, 2020, Mr. Mero Bustos returned to Dr. Martinez's office for an injection into his left shoulder. (JE 1:32-33). Dr. Martinez indicated that the injection was necessary in order to provide the claimant symptom relief from osteoarthritis. (JE 1:32).

The claimant presented to BVM Physical Therapy on December 22, 2020. (JE 2:79). He therapist informed him that he needed to report his shoulder injury to Tyson since he claimed that it was the result of his work. (JE 2:79).

Dr. Jensen authored another letter to Dr. Archer on December 22, 2020, regarding a December 2, 2020, visit with the claimant. (JE 8:201). Mr. Mero Bustos reported that his radicular leg symptoms and back pain showed significant improvement. (JE 8:201). Dr. Jensen opined that the claimant made "good progress"

from a functional capacity standpoint. (JE 8:201). Dr. Jensen kept Mr. Mero Bustos off work for another six weeks of rehabilitation and work-hardening. (JE 8:201).

On January 13, 2021, Mr. Mero Bustos returned to BVM Physical Therapy for continued outpatient physical therapy, as ordered by Dr. Jensen. (JE 2:80-82). Despite what the claimant described as an increased benefit after the second surgery, he remained in "considerable pain" and had weakness and impaired position tolerance. (JE 2:80). The claimant also complained of left shoulder pain. (JE 2:80). He told the therapist that he could not vacuum or wash dishes, and could only lift very light objects. (JE 2:80). The therapist opined that the claimant had "extensive weakness, stiffness" and impaired activity. (JE 2:81).

The claimant continued his physical therapy on January 20, 2021. (JE 2:83-85). The claimant noted initially injuring his shoulder in 2018 while lifting turkeys at work. (JE 2:83). He told the therapist that the turkey slipped from his right hand, and he caught it with his left hand. (JE 2:83). Since that time, he had pain in his left shoulder. (JE 2:83). He claimed that laying on his left side due to his back issues exacerbated his left shoulder pain. (JE 2:83). He had therapy on his left shoulder during this visit. (JE 2:84).

On February 4, 2021, the claimant continued physical therapy for his lower back pain. (JE 2:86-87). After aquatic therapy, his pain improved. (JE 2:87).

After another session of physical therapy on February 9, 2021, the claimant noted that aquatic therapy improved his pain. (JE 2:88). He noted that dry needling helped for about one day. (JE 2:88).

On February 15, 2021, the claimant told the therapist that he felt fairly good, and over the weekend he walked three blocks to the store. (JE 2:89). On the morning of his therapy appointment, he awoke in severe pain in the left side of his back and left shoulder. (JE 2:89). His left shoulder range of motion showed improvement. (JE 2:89).

Mr. Mero Bustos continued his therapy on February 25, 2021, with complaints of localized lower back pain. (JE 2:90). The therapist opined that the claimant improved with pain and activity tolerance since beginning physical therapy. (JE 2:90). Upon palpation to the lower back, the claimant may display posterior rotation of the left ilium on sacrum. (JE 2:90). The therapist opined that this could contribute to the localized left SI joint pain. (JE 2:90).

During his March 2, 2021, therapy appointment, Mr. Mero Bustos indicated that his shoulder pain worsened when he reached above shoulder height. (JE 2:91). He continued with "fairly severe pain" at the left "PSIS." (JE 2:91). He tried to walk in order to be active. (JE 2:91).

On March 3, 2021, Mr. Mero Bustos reported to NWIA Bone, Joint & Sport Surgeons in Storm Lake, Iowa, where Seth Harrer, M.D., examined him for complaints related to the left shoulder. (JE 11:222-223). The claimant described an incident in 2008 in which he "was unhanging a turkey" and subsequently had significant pain in his

left shoulder. (JE 11:222). He indicated that the pain was deep in his anterior and posterior left shoulder and radiated down the arm. (JE 11:222). Dr. Harrer diagnosed the claimant with a left shoulder labral and rotator cuff tear with a labral cyst. (JE 11:222). He also diagnosed Mr. Mero Bustos with osteoarthritic changes at the acromioclavicular joint. (JE 11:222). Dr. Harrer recommended continued conservative management including a repeat injection and physical therapy. (JE 11:222). Dr. Harrer mentioned surgical intervention as a possibility. (JE 11:222).

In additional reports from March of 2021, the claimant noted to his therapist that he had “good days and bad days.” (JE 2:92-95). Sitting worsened his pain, and walking helped alleviate his pain. (JE 2:94).

On March 15, 2021, Dr. Martinez performed another pre-operative examination on the claimant in advance of a planned left shoulder arthroscopy. (JE 1:34-38). Dr. Martinez noted that the claimant had a labral tear in his left shoulder. (JE 1:34).

Dr. Harrer performed a left shoulder arthroscopic surgery on the claimant on March 19, 2021. (JE 2:102-103). Dr. Harrer also performed a rotator cuff repair, labral debridement, subacromial decompression, and a distal clavicle excision. (JE 2:102). Dr. Harrer’s diagnoses were: a subscapularis tendon tear, fraying around the labrum, AC joint osteoarthrosis, subacromial impingement, subacromial spurring, and a 5 mm full thickness rotator cuff tear to the supraspinatus and infraspinatus. (JE 2:102).

On March 22, 2021, Dr. Jensen wrote another letter to Dr. Archer regarding his care of Mr. Mero Bustos. (JE 8:202). Mr. Mero Bustos continued to report significant improvement to his right lower extremity and ongoing resolution of sensory loss over the distal aspect of the right L5 lumbosacral dermatome. (JE 8:202). Dr. Jensen opined that the claimant’s status was encouraging. (JE 8:202). Dr. Jensen told Mr. Mero Bustos that he should maintain his efforts in physical therapy to strengthen his paraspinal musculature. (JE 8:202). Dr. Jensen recommended that Mr. Mero Bustos have a CT scan since he was nearing six months post-surgery. (JE 8:202). Finally, Dr. Jensen noted the claimant’s ongoing left shoulder issues, which he diagnosed as left shoulder region pain syndrome. (JE 8:202). He recommended an MRI and a possible referral for an orthopedic evaluation. (JE 8:202).

Dr. Harrer examined Mr. Mero Bustos again on April 1, 2021, following the left shoulder surgery of March 19, 2021. (JE 11:224). Dr. Harrer removed the sutures, and recommended that the claimant remain in the sling. (JE 11:224). He also recommended that the claimant commence physical therapy. (JE 11:224).

Mr. Mero Bustos had a CT scan of his lumbar spine at Crawford County Memorial Hospital on April 7, 2021. (JE 8:203). The CT showed the posterior fusion at L5-S1 with no evidence of hardware complication. (JE 8:203).

On April 13, 2021, Dr. Jensen drafted his final missive to Dr. Archer. (JE 8:205-206). He examined Mr. Mero Bustos on April 7, 2021. (JE 8:205). He found that Mr. Mero Bustos continued to make acceptable progress, including improvement on a

monthly basis. (JE 8:205). Mr. Mero Bustos reported that his right leg radicular symptoms completely abated. (JE 8:205). He also told Dr. Jensen that his back pain was dramatically improved. (JE 8:205). Dr. Jensen reviewed the results of the CT scan, and indicated that the results were positive. (JE 8:205).

Rachelle Randall with Dr. Harrer's office re-examined Mr. Mero Bustos on April 29, 2021, for a six week post-operative visit. (JE 11:225). Mr. Mero Bustos continued therapy, but told Dr. Harrer that he had difficulty sleeping at night. (JE 11:225). Dr. Harrer allowed the claimant to stop using the sling, and provided a lifting restriction of less than 10 pounds at waist height. (JE 11:225).

In May of 2021, the claimant resumed his physical therapy. (JE 2:104). Mr. Mero Bustos told the therapist that his surgeon opined that the lower back pain was "likely muscle related," and that he should continue physical therapy. (JE 2:106).

On May 27, 2021, Mr. Mero Bustos continued his care with Dr. Harrer's office. (JE 11:226). He complained of pain with movement and accompanying weakness. (JE 11:226). Ms. Randall recommended that the claimant continue home exercises with resistance bands. (JE 11:226).

In June of 2021, the claimant applied for Social Security Disability benefits. (Testimony). This benefit application was approved and the Social Security Administration determined that the claimant became disabled as of April 20, 2019. (CE 6:67-79). These determinations are not binding on this Agency.

According to a June 17, 2021, letter from the claimant's attorney, Mr. Mero Bustos was prepared to return to Tyson with light duty restrictions immediately. (DE M:1).

Ms. Randall examined the claimant again on July 8, 2021. (JE 11:227). Mr. Mero Bustos was exercising with resistance bands, which helped improve his range of motion and pain. (JE 11:227).

On July 17, 2021, Tim Steffen contacted the claimant. (Testimony). The claimant went to his attorney at this time to see what was occurring. (Testimony). Mr. Steffen asked why the claimant did not return to work. (Testimony).

The claimant returned to Dr. Harrer's office one final time on September 15, 2021. (JE 11:229). He told Dr. Harrer that he had full strength in his left shoulder, but also complained of "impingement-type symptoms." (JE 11:229). Dr. Harrer discussed an injection for the pain in the subacromial area, and provided the claimant with the same. (JE 11:229).

Dr. Jensen responded to a letter from claimant's counsel on September 23, 2021. (JE 8:208-209). He outlined his previous diagnoses and treatment performed on Mr. Mero Bustos. (JE 8:208). Dr. Jensen opined that the surgery that he performed as "warranted, rational, and based upon a combination of persistent, clinical neurological symptomatology and chronic back pain which Pedro was experiencing, as well as per

findings of his post-operative MRI imaging study performed 3/26/2020.” (JE 8:208). He attributed the need for the second surgery to a loss of biomechanical integrity at the surgical site causing a collapse of the L4-5 intervertebral disc. (JE 8:208). Dr. Jensen directly related this to the initial work injury and subsequent surgical therapy. (JE 8:208). Dr. Jensen placed Mr. Mero Bustos at MMI, and opined that the claimant should seek an FCE. (JE 8:208-209). The results of the FCE would dictate what, if any, permanent restrictions, may be required. (JE 8:209).

Dr. Jensen responded to another letter from claimant’s counsel on October 1, 2021. (JE 8:214-215). He continued to recommend that Mr. Mero Bustos undergo an FCE. (JE 8:214). Without providing any justification or reasoning behind his opinion, Dr. Jensen indicated that Mr. Mero Bustos required restrictions as follows:

Said restrictions will include limitation on lifting, lifting/twisting, and repetitive lifting activities. This in association with restriction on duration of time in the standing and sitting positions, as well as with regards to restrictions allowing mobilization at intervals to improve functional capacity and attenuate physical activity – associated back pain. Specifically, I believe that Pedro is capable of frequently lifting in the 1-5 pound range. Occasional lifting in the 5-10 pound range will be tolerated. Further, occasional lifting in the 10-20 pound range will also be tolerated. I recommend absolute maximum lifting weight for Pedro is 40 pounds.

(JE 8:214). Dr. Jensen also recommended restrictions including frequent pushing/pulling of up to 10 pound objects, frequent pushing and pulling up to 10 to 20 pounds, and occasional pushing and pulling up to 20 to 40 pounds. (JE 8:214). Dr. Jensen continued by indicating Mr. Mero Bustos should totally avoid climbing activities, balancing activities, and activities that require crouching or crawling. (JE 8:214). He also provided restrictions pertaining to the claimant’s upper extremities, and noted that Mr. Mero Bustos could use both of his hands with objects weighing up to 5 pounds. (JE 8:214). Finally, Dr. Jensen recommended a restriction of no repetitive use of the right or left feet. (JE 8:214). Dr. Jensen related the foregoing restrictions to the work incident and alleged injury. (JE 8:214). Dr. Jensen claimed to have used the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, to provide Mr. Mero Bustos with a whole person impairment rating of 16 percent. (JE 8:214). Dr. Jensen indicated that his rating was based upon the claimant’s work related activity, “surgical therapy, and residual paraspinal muscle pain with restricted range of motion within the lumbosacral spine” that impacted the claimant’s functional capacity. (JE 8:214).

On October 28, 2021, the claimant’s attorney wrote a letter to Dr. Jensen. (CE 7:80). Dr. Jensen opined that it was possible to experience radiating pain and paresthesia in the lumbar paraspinal muscles and thigh due to “referred mechanical pain” to the area “in the setting of disc pathology or adverse biomechanics in the lumbar spine” despite a normal EMG. (CE 7:80).

Dr. Johnson responded to a final “check-box” type letter from counsel for the defendant on November 5, 2021. (DE Q:1-2). Dr. Johnson indicated that he had no change in his previous opinions, and circled that the second surgery was “not necessary or particularly helpful.” (DE Q:2).

November 5, 2021, was the first time Mr. Mero Bustos heard from Tyson since the previous summer. (Testimony). On that date, Tyson sent a letter to the claimant regarding his potential return to work. (DE R:3). Tyson indicated an understanding that the claimant intended to return to work with restrictions imposed by his personal physician. (DE R:3). Tim Steffen from Tyson indicated that he awaited a call from the claimant in order to set up a time to return to work. (DE R:3). He also indicated that there were alternative jobs within the proposed restrictions that would provide the claimant with full time employment at the same amount of wages and benefits as the claimant earned prior to stopping work. (DE R:3).

Mr. Mero Bustos reported an injury to his left shoulder while recovering from his back surgeries. (Testimony). He was only sleeping on his left side, which caused pain on his left side. (Testimony). He testified that the nurse case manager told him that he was being treated for his back and not his shoulder. (Testimony). He saw Dr. Veit for his left shoulder. (Testimony). He had surgery on his shoulder on March 23, 2021. (Testimony). Since the surgery, his left shoulder pain improved. (Testimony).

The claimant reports significant improvement after surgery with Dr. Jensen. (Testimony). The pain on his right side also improved since the subsequent surgery. (Testimony).

Before his work injury, Mr. Mero Bustos helped his wife, did yardwork, and cooked. (Testimony). He also did gardening with flowers and vegetables. (Testimony). He built several brick items and fences around his yard. (Testimony).

After the work incident, he had difficulty doing these tasks. (Testimony). He testified that he tried to do the tasks, but he had too much pain in doing them. (Testimony). Mr. Mero Bustos also walked to try to alleviate his pain. (Testimony). He walked one to two blocks in one direction, and then one to two blocks back. (Testimony). He later changed his testimony that he could walk 5 blocks one direction and 5 blocks in another direction. (Testimony).

Since his second surgery, Mr. Mero Bustos replaced his floors, worked in his yard, and performed chores with the help of his kids. (Testimony).

Mr. Mero Bustos opined that he could “possibly” return to Tyson to work. (Testimony). He could no longer work as a floater, in salvage or as a cropper. (Testimony). He perceived that he was no longer employed by Tyson despite their efforts to discuss returning to work. (Testimony). Despite his perception of not being employed by Tyson, he never looked for work anywhere else. (Testimony).

The claimant requested alternate care via visits with Dr. Jensen. (Testimony). He opined that he had “more confidence” in Jensen’s treatment. (Testimony).



Mr. Steffen, a human resources manager for Tyson, testified on behalf of the defendant. (Testimony). He can speak, converse in, read, and write in Spanish. (Testimony). He is involved in the process of bringing injured workers back to Tyson after their injuries. (Testimony). He facilitates the ADA interactive process and submits leave of absence information. (Testimony). He testified that he assisted in returning at least 100 employees to work with Tyson over his 13 years with the company. (Testimony). He noted that Tyson will accommodate restrictions where possible in order to bring an employee back to work. (Testimony). He testified that Tyson's intent was to bring Mr. Mero Bustos back to work, and that they awaited communication from Mr. Mero Bustos as to his intentions. (Testimony). He further testified that Mr. Mero Bustos was not terminated by Tyson. (Testimony).

Mr. Steffen testified that shortly before the hearing was his first opportunity to review Mr. Mero Bustos' restrictions. (Testimony). After reviewing these restrictions, he offered the claimant his previous job. (Testimony). Since the time that the claimant stopped working at Tyson, wages have increased, so the claimant would likely return at a higher rate of pay. (Testimony). Mr. Steffen opined that there were positions at Tyson that the claimant could work based upon the restrictions of Dr. Jensen and the claimant's testimony during the hearing. (Testimony). Mr. Steffen concluded that the claimant could return to work whenever he was ready, and that Tyson would find a job within his restrictions and capabilities. (Testimony).

Mr. Steffen noted that the claimant received group health insurance through Tyson and that the claimant contributed to paying for that insurance even after his injury and leave of absence. (Testimony). The benefit eventually stopped when the claimant ceased making payments to Tyson for the insurance. (Testimony).

### **CONCLUSIONS OF LAW**

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3).

#### **Left Shoulder Sequela**

Prior to discussing the other issues in this matter, it is important to first address whether the undersigned is able to issue a decision based upon an alleged left shoulder injury. The claimant seems to indicate that they are alleging that the left shoulder injury is a sequela of the lower back injury. Tyson alleges that the claimant's left shoulder injury did not arise out of an in the course of his employment, and has not met their burden of proof regarding causation. Tyson also asserted affirmative defenses, including: that the claimant failed to provide notice pursuant to Iowa Code section 85.23 and that the claimant's left shoulder injury allegations are barred by Iowa Code section 85.26.

In their posthearing brief, the claimant indicates that they are not pursuing a claim for the left shoulder sequela injury within this proceeding. The claimant also argues that the undersigned should not issue a decision regarding the alleged left

shoulder sequela injury. In support of this contention, the claimant notes that they did not plead any alleged injuries to the left shoulder. In reviewing the petition, the claimant is correct. Paragraph 5 of the petition lists only “[l]ow back” as a part of the body affected or disabled. The petition lists the disputes in the case as “[c]ausation, nature and extent, rate, medical care, penalty; possible others.”

876 Iowa Administrative Code 4.35 applies the Iowa Rules of Civil Procedure to the contested case proceedings before this agency, unless the rules conflict with Iowa Code chapters 85, 85A, 85B, 86, 87, 17A, the administrative code, or are obviously inapplicable to the workers’ compensation commissioner. Iowa Rule of Civil Procedure 1.402 provides for notice pleading. “A ‘petition need not allege ultimate facts that support each element of the cause of action [;]’ however, a petition ‘must contain factual allegations that give the defendant ‘fair notice’ of the claim asserted so the defendant can adequately respond to the petition.’” U.S. Bank v. Barbour, 770 N.W.2d 350, 354 (Iowa 2009)(citing Rees v. City of Shenendoah, 682 N.W.2d 77, 79 (Iowa 2004)). “Fair notice” is achieved if the petition “informs the defendant of the incident giving rise to the claim and of the claim’s general nature.” Barbour, 770 N.W.2d at 354 (citing Soike v Evan Matthews & Co., 302 N.W.2d 841, 842 (Iowa 1981)).

In an administrative agency setting, charged with administering a humanitarian compensation system, only a short and plain statement of the claim is necessary. Van Meter v. Van Meter, 328 N.W.2d 497 (Iowa 1983); Hoening v. Mason & Hanger, Inc., 162 N.W.2d 188, 192 (Iowa 1968). While a claimant is allowed to conform to proof at hearing, they “cannot raise matters involving the alleged injury that could not be fairly anticipated by competent opposing counsel so as to preclude proper investigation and the asserting of possible defenses.” Wichers v. Mix-Rite, Inc., File No. 1241564 (Arb. October 29, 2002).

The hearing report in this matter indicates that the claimant asserts a left shoulder injury as a sequela to his lower back injury. (Hearing Report p. 2). Furthermore, the exhibits in this matter were voluminous. The parties included records in the joint exhibits regarding the claimant’s left shoulder pain and treatment. Tyson included a number of exhibits pertaining to the claimant’s alleged left shoulder injury. The claimant included in their exhibits records pertaining to the alleged left shoulder injury, such as billing from the left shoulder surgery performed by Dr. Harrer, and e-mails from claimant’s attorney to Tyson’s attorney requesting treatment to the left shoulder. The claimant also responded to discovery from Tyson indicating that he injured his left shoulder while working at Tyson in 2018. He noted treating conservatively, and then aggravating his left shoulder “since his back injury.” (CE 5:65). The claimant also testified about his shoulder injury during his deposition and during the arbitration hearing. In fact, during the arbitration hearing, he directly attributed his shoulder injury to the May 1, 2019, date of injury. (Transcript).

While the claimant did not plead a left shoulder injury, they proceeded through the case, including presentation of medical evidence and testimony, as though the left shoulder injury was a sequela of the lower back injury. There is adequate evidence in the record for the undersigned to make a determination. Further, had the claimant

wanted to eliminate the left shoulder as a sequela, they had the opportunity while reviewing the hearing report during the arbitration hearing to indicate that it was not a claim asserted in this matter. They did not.

An employer may be liable for a sequela of an original work injury if the employee sustained a compensable injury and later sustained further disability that is a proximate result of the original injury. Mallory v. Mercy Medical Center, File No. 5029834 (App. February 15, 2012). A sequela can be an after effect or secondary effect of an injury. Lewis v. Dee Zee Manufacturing, File No. 797154 (Arb. September 11, 1989). One form of sequela of a work injury is an adverse effect from medical treatment for the original injury. Thomas v. Archer Daniels Midland Co., File No. 5064599.01 (Arb. November 2, 2021). Where treatment rendered with respect to a compensable injury itself causes further injury, the subsequent injury is also compensable. Yount v. United Fire & Casualty Co., 256 Iowa 813, 129 N.W.2d 75 (1964). For example, the death of a claimant who died on the operating table during surgery for a work injury may be compensable, since the injury caused the need for surgery. Breeden v. Firestone Tire, File No. 966020 (Arb. February 27, 1992). As another example, a claimant who fell as a result of dizziness from medication he was taking to treat a work injury is to be compensated for both the original injury and the resulting fall as a sequela of the first injury. Hamilton v. Combined Ins. of America, File No. 854465, 877068 (Arb. February 21, 1991).

A sequela can also take the form of a secondary effect on the claimant's body stemming from the original injury. For example, where a leg injury causing shortening of the leg in turn alters the claimant's gait, causing mechanical back pain, the back condition can be found to be a sequela of the leg injury. Fridlington v. 3M, File No. 788758 (Arb. November 15, 1991).

A sequela can also take the form of a later injury that is caused by the original injury. For example, where a leg injury leads to the claimant's knee giving out in a grocery store, the resulting fall is compensable as a sequela of the leg injury. Taylor v. Oscar Mayer & Co., Ill Iowa Ind. Comm. Rep. 257, 258 (1982).

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable, rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination

occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994). Supportive lay testimony may be used to buttress expert testimony, and therefore is also relevant and material to the causation question.

There is no evidence that the claimant sustained a further disability to his left shoulder. There is also conflicting and inadequate evidence as to whether or not the claimant sustained a sequela injury or whether the injury occurred in 2018 and was aggravated. There are significant causation questions that are not resolved in the claimant's favor based upon the evidence.

As noted in Mallory, a sequela involves a compensable injury (in this matter, the lower back injury) and a subsequent further disability that was a proximate result of the original injury. There is no evidence that the claimant has sustained further disability to his left shoulder, as there are no disability ratings in the record regarding the left shoulder. The claimant failed to meet his burden of proof with regard to this issue and does not appear to have sustained a permanent disability to his left shoulder. Considering this finding, it is not necessary to decide on the affirmative defenses asserted by Tyson with regard to the left shoulder.

### **Temporary Disability and/or Healing Period Benefits**

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable, rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

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to buttress expert testimony, and therefore is also relevant and material to the causation question.

The claimant alleges entitlement to temporary total disability and/or healing period benefits from February 3, 2020, through September 23, 2021. Tyson asserts that the claimant is entitled to temporary total disability and/or healing period benefits from February 3, 2020, through May 6, 2020.

As a general rule, “temporary total disability compensation benefits and healing-period compensation benefits refer to the same condition.” Clark v. Vicorp Rest., Inc., 696 N.W.2d 596 604 (Iowa 2005). The purpose of temporary total disability benefits and healing period benefits is to “partially reimburse the employee for the loss of earnings” during a period of recovery from the condition. Id. The appropriate type of benefits depends on whether or not the employee has a permanent disability. Dunlap v. Action Warehouse, 824 N.W.2d 545, 556 (Iowa Ct. App. 2012).

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury.

Iowa Code section 85.33(1) provides

[T]he employer shall pay to an employee for injury producing temporary total disability weekly compensation benefits, as provided in section 85.32, until the employee has returned to work or is medically capable of returning to employment substantially similar to the first employment in which the employee was engaged at the time of injury, whichever occurs first.

Temporary total disability benefits cease when the employee returns to work, or is medically capable of returning to substantially similar employment.

Iowa Code 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until: (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or, (3) the worker has achieved maximum medical recovery. The first of the three items to occur ends a healing period. See Waldinger Corp. v. Mettler, 817 N.W.2d 1 (Iowa 2012); Evenson v. Winnebago Indus., 881 N.W.2d 360 (Iowa 2016); Crabtree v. Tri-City Elec. Co., File No. 5059572 (App., Mar. 20, 2020). The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986). Compensation for permanent partial disability shall begin at the termination of the healing period. Id.

The parties stipulated that the claimant’s injury on May 1, 2019, caused permanent disability. Therefore, the claimant may be entitled to healing period benefits. The question is: for how long is the claimant entitled to healing period benefits? As of

the time of the hearing, Mr. Mero Bustos had not returned to work. Therefore, the undersigned needs to examine at which time the claimant was either medically capable of returning to substantially similar employment, or achieved maximum medical recovery (also known as MMI).

Several doctors issued opinions in this matter as to when the claimant achieved MMI and/or was capable of returning to substantially similar employment. The first was Dr. Johnson. Dr. Johnson performed the first surgery on the claimant. When the claimant continued to complain of pain after his first surgery, Dr. Johnson opined that the claimant needed more time to heal. On May 6, 2020, Dr. Johnson opined that the claimant achieved MMI. He reiterated this opinion via "check box" letters on several occasions. Dr. Archer, an authorized treating physician, opined on July 29, 2020, that the claimant should have an FCE, and that the claimant reached MMI. Dr. Archer noted that the claimant was not a candidate for additional surgery at that time due to absence of evidence of radiculopathy on the EMG. Again on September 2, 2020, Dr. Archer indicated that the claimant achieved MMI. Dr. Archer opined that the claimant was not a surgical candidate due to his invalid FCE. Finally, on September 2, 2020, Dr. Archer agreed that it was safe for the claimant to return to work as a cropper and use tools like a lung gun in his work.

The claimant urges reliance on the opinions of Dr. Jensen. Dr. Jensen treated the claimant subsequent to his discharge from care with Dr. Johnson. Dr. Jensen also performed the claimant's second surgery. He opined that the claimant achieved MMI as of September 23, 2021. At that time, he declined to provide permanent restrictions as he recommended that the claimant obtain a FCE.

Dr. Archer provided care to the claimant throughout his treatment with Drs. Johnson and Jensen. Dr. Archer noted that the claimant should be considered a "failed back" as of September 2, 2020. Dr. Archer also opined that the claimant could return to work effective September 2, 2020. I find the opinions of Dr. Archer to be most persuasive. According to Dr. Archer, the claimant could return to substantially similar employment as of September 2, 2020. Therefore, I conclude that the claimant is entitled to healing period benefits from February 3, 2020, to September 2, 2020.

### **Permanent Disability**

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss of use of a scheduled member under Iowa Code 85.34(2)(a)-(u) or for loss of earning capacity under Iowa Code 85.34(2)(v). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998).

An injury to a scheduled member may, because of after effects or compensatory change, result in permanent impairment of the body as a whole. Such impairment may in turn be the basis for a rating of industrial disability. It is the anatomical situs of the

permanent injury or impairment which determines whether the schedules in Iowa Code 85.34(a) – (u) are applied. Lauhoff Grain v. MacIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943); Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

In this case, the claimant suffered an injury to his lower back with pain radiating into his right lower extremity. This case involves a whole body injury and not an injury to a scheduled member. The question becomes whether or not the claimant should be compensated based upon an industrial disability analysis, or pursuant to Iowa Code section 85.34(2)(v) as amended in 2017.

Industrial disability was defined Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: “[i]t is therefore plain that the Legislature intended the term ‘disability’ to mean ‘industrial disability’ or loss of earning capacity and not a mere ‘functional disability’ to be computed in terms of percentages of the total physical and mental ability of a normal man.”

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee’s age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted, and the employer’s offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

An employee is compensated based only upon their functional impairment if they return to work, or are offered work at the same or greater salary, wages, or earnings than they received at the time of the injury. Iowa Code section 85.34(2)(v). “[T]he Iowa Legislature provided no guidance as to how or when to measure whether an employee is receiving or is being offered the same or greater salary, wages, or earnings than what he or she was receiving at the time of the injury.” McCoy v. Menard, Inc., File No. 1651840.01 (App. April 9, 2021). There is no instruction in the statute as to when to take a post-injury “snapshot” of the claimant’s salary, wages, or earnings. Id. Considering an hourly wage in isolation is not sufficient to limit a claimant’s compensation to functional disability. Id. The Commissioner previously concluded that a claimant’s hourly wage “must also be considered in tandem with the actual hours worked by that claimant or offered by the employer when comparing pre-and post-injury wages and earnings under section 85.34(2)(v).” Id.

Previous arbitration decisions, while nonbinding on this deputy, have held that “to obtain an award of industrial disability after the statutory change, claimant must establish that [they have] been terminated from employment.” DeWitt v. Crown Motor Group, File No. 20700574.01 (Arb. January 7, 2021). I do not entirely agree with this interpretation; however, it is helpful to consider in light of the language of Iowa Code section 85.34(2)(v).

In this matter, the claimant argues that it was not until three days before trial that Tyson extended an offer to the claimant to return to work. The claimant further argues that this offer was self-serving, a “sham offer,” and that the claimant had “no time to investigate the veracity of this offer.” (Claimant Posthearing Brief, Pg. 14). The claimant points to several letters sent to Tyson and/or their counsel as attempts by the claimant to return to work. In reviewing these letters, the claimant indicated on June 17, 2021, that he was prepared to return to work with light duty restrictions; however, the restrictions in question were still pending an appointment with Dr. Jensen. (DE M:1). The claimant argues that he received no follow-up to said letter until the November 5, 2021, letter from Tim Steffen. (DE R:3). The claimant argues, without a clear reason, that the claimant should be deemed terminated. I find this argument lacking.

At the time of the hearing, the claimant considered himself to be an employee of Tyson. (Testimony). Additionally, Tyson, through Mr. Steffen’s credible testimony, considered the claimant to be an employee during the duration of his medical treatment through the hearing date. (Testimony). The defendant argues that they attempted to contact the claimant on a number of occasions to offer him the opportunity to return to work. I agree. The first such occasion was September 28, 2020. (DE R:1). Tyson sent a letter to the claimant indicating that they attempted to contact him on several occasions to let him know that they had work available for him. (DE R:1). Tyson indicated that the claimant needed to participate in an interactive process in order to return the claimant to work. (DE R:1). On August 26, 2021, Tyson sent a letter to the claimant requesting proof of the claimant’s COVID-19 vaccination status, and informing him of a vaccination requirement for plant based employees. (DE R:2). The letter notes that the claimant was on an approved leave of absence at the time. (DE R:2). The letter further required a return to work certification from a healthcare provider prior to the claimant returning to work. (DE R:2).

Finally, the defendant presented a November 5, 2021, letter from Tyson, signed by Tim Steffen. (DE R:3). Within that letter, Mr. Steffen noted that he was waiting to hear from the claimant to coordinate job placement. (DE R:3). Mr. Steffen continued, “[s]ince you have remained an employee throughout, all you need to do is give me a call and we can set up a time next week to begin the process.” (DE R:3). The letter concludes, “[t]here are alternative jobs that are within restrictions that I reviewed this week. All job offerings will continue to provide you full time employment at the same amount of wages and benefits that you were paid at the time you stop [sic] working earlier.” (DE R:3). Mr. Steffen further testified that if the claimant accepted a return to work, he would likely be earning more than prior to the May 1, 2019, injury due to pay increases provided to Tyson employees since that time. (Testimony).

Tyson did not terminate the claimant’s employment. As of the hearing date, the claimant had not returned to work. Thus, the issue is whether the November 5, 2021, letter suffices as an offer to work at the same or greater salary, wages, or earnings as the claimant earned at the time of the May 1, 2019, injury. The letter from Tyson requests that the claimant contact Mr. Steffen in order to discuss “alternative jobs that are within restrictions” as presented to Tyson. The letter represents that all of the jobs would provide the claimant with full time employment at the same (or greater) amount of



wages and benefits. I am concerned by the timing of the job offer; however, the plain language of the statute as it applies to the facts of this case, simply requires that the employee be offered work at the same or greater salary, wages, or earnings than the employee received at the time of the injury. Mr. Steffen further testified that the claimant could come to Tyson at any time, including immediately after conclusion of the hearing, to discuss appropriate positions at Tyson. Based upon the information in the record, the November 5, 2021, constitutes an offer of work to the claimant at the same or greater salary, wages, or earnings, as he earned on May 1, 2019. Therefore, the claimant is compensated pursuant to a functional impairment rating.

The next issue presented is which functional impairment rating to apply.

The question of medical causation is “essentially within the domain of expert testimony.” Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must “weigh the evidence and measure the credibility of witnesses.” Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert’s education, experience, training, and practice, and “all other factors which bear upon the weight and value” of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994). Supportive lay testimony may be used to buttress expert testimony, and therefore is also relevant and material to the causation question.

Iowa Code section 85.34(2)(x) states:

In all cases of permanent partial disability described in paragraphs “a” through “u”, or paragraph “v” 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 permanent impairment pursuant to paragraphs “a” through “u”, or paragraph “v” when determining functional disability and not loss of earning capacity.

Iowa Code section 85.34(2)(x).

In order to determine the extent of loss, or percentage of impairment for permanent partial disabilities, the agency has adopted the Guides to the Evaluation of Permanent Impairment, Fifth Edition, as published by the American Medical Association. 876 Iowa Administrative Code 2.4.

There are conflicting ratings between Dr. Johnson and Dr. Jensen. Both doctors treated the claimant, and both performed surgery on the claimant's lower back. Dr. Jensen provided the more recent examination and surgery. Dr. Johnson provided the first surgery.

Dr. Johnson provided an impairment rating of 10 percent to the body as a whole. He specifically references Table 15-3 of the AMA's Guides to the Evaluation of Permanent Impairment, Fifth Edition, as the basis for his impairment rating. He also referenced DRE category III as it relates to the impairment rating provided.

Dr. Jensen's impairment rating provides significant restrictions; however, it is very light on its references to the Guides. Dr. Jensen provided an impairment rating of 16 percent to the body as a whole. He noted that the rating factors considered were, "lumbar spinal pathology and gender by an [sic] resulting from work-related activity, surgical therapy, and residual paraspinal muscle pain with restricted range of motion within the lumbosacral spine, which impacts his functional capacity and overall ability to perform activities of daily living." (JE 8:214). Dr. Jensen did not provide measurements for decreased range of motion or any other of his considerations in arriving at his impairment rating.

According to the Guides, there are two methods for assessing spinal impairment. AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, page 379. The Guides recommend the DRE method as the principal methodology to evaluate an individual with a distinct injury. Id. Alternatively, the range-of-motion ("ROM") method may be utilized in certain situations. Id. Specifically as it relates to this case, the ROM method could be used "[w]hen there is multilevel involvement in the same spinal region (eg, fractures at multiple levels, disk herniations, or stenosis with radiculopathy at multiple levels or bilaterally)." Id. It could also be used "[w]hen there is recurrent radiculopathy caused by a new (recurrent) disk herniation or a recurrent injury in the same spinal region." Id.

The DRE method provides for five categories of impairment. Id. at 384. Each of the five categories of impairment, has its own criteria, and range of impairment to the whole person. Id. Potential whole person impairment ranges from zero percent to 28 percent of the whole person based upon the applicable criteria. Id.

The ROM method consists of three categories assessed by the evaluating provider. Id. at 398. The categories are, "(1) the range of motion of the impaired spine region; (2) accompanying diagnoses (Table 15-7); and (3) any spinal nerve deficit..." Id. Table 15-7 provides a number of factors to consider. Id. at 404. Each factor, or measurement is assigned a percentage of impairment to the whole person. Id.

In this case, Dr. Jensen wrote a letter to Dr. Archer in April of 2021, in which he noted treating the claimant for "significant disc disease/degeneration at [the] L5-S1 lumbosacral segment in association with a right L5 lumbosacral radiculopathic syndrome." (JE 8:205). Therefore, it appears that utilizing the DRE categories is more appropriate than using the ROM method, as the claimant had an injury to one level of

his spine. Additionally, Dr. Jensen never provided an explanation or analysis as to the specific factors or deficits in range of motion that he considered under an ROM analysis. Dr. Jensen also provided permanent restrictions with no indication as to his reasoning. It is difficult to find a basis in the Guides for Dr. Jensen's impairment rating.

Based upon the foregoing, I find Dr. Johnson's 10 percent body as a whole impairment rating more persuasive.

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Iowa Code section 85.34.

I previously determined that the claimant was entitled to healing period benefits from February 3, 2020, to September 2, 2020. Therefore, compensation for permanent partial disability would begin on September 3, 2020. A 10 percent body as a whole impairment rating equals 50 weeks. (.10 x 500 weeks = 50 weeks).

### **Payment of Medical Costs**

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Iowa Code 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening, October 1975).

Pursuant to Iowa Code 85.27, claimant is entitled to payment of reasonable medical expenses incurred for treatment of a work injury. Claimant is entitled to an order of reimbursement if he has paid those expenses. Otherwise, claimant is entitled only to an order directing the responsible defendants to make such payments directly to the provider. See Krohn v. State, 420 N.W.2d 463 (Iowa 1988).

In cases where the employer's medical plan covers the medical expenses, claimant is entitled to an order of reimbursement only if he has paid treatment costs; otherwise, the defendants are ordered to make payments directly to the provider. See Krohn, 420 N.W.2d at 463. Where medical payments are made from a plan to which the employer did not contribute, the claimant is entitled to a direct payment. Midwest Ambulance Service v. Ruud, 754 N.W.2d 860, 867-68 (Iowa 2008) ("We therefore hold that the commissioner did not err in ordering direct payment to the claimant for past medical expenses paid through insurance coverage obtained by the claimant independent of any employer contribution."). See also Carl A. Nelson & Co. v. Sloan, 873 N.W.2d 552 (Iowa App. 2015)(Table) 2015 WL 7574232 15-0323.

The employee has the burden of proof to show medical charges are reasonable and necessary, and must produce evidence to that effect. Poindexter v. Grant's Carpet Service, Iowa Industrial Commissioner Decisions, No. 1, at 195 (1984); McClellan v. Iowa S. Util., 91-92, IAWC, 266-272 (App. 1992).

The employee has the burden of proof in showing that treatment is related to the injury. Auxier v. Woodard State Hospital School, 266 N.W.2d 139 (Iowa 1978), Watson v. Hanes Border Company, No. 1 Industrial Comm'r report 356, 358 (1980) (claimant failed to prove medical charges were related to the injury where medical records contained nothing related to that injury) See also Bass v Vieth Construction Corp., File No 5044438 (App. May 27, 2016)(Claimant failed to prove causal connection between injury and claimed medical expenses); Becirevic v Trinity Health, File No. 5063498 (Arb. December 28, 2018) (Claimant failed to recover on unsupported medical bills)

Nothing in Iowa Code section 85.27 prohibits an injured employee from selecting his or her own medical care at his or her own expense following an injury. Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 205 (Iowa 2010). In order to recover the reasonable expenses of the care, the employee must still prove by a preponderance of the evidence that unauthorized care was reasonable and beneficial. Id. The Court in Gwinn concluded that unauthorized medical care is beneficial if it provides a "more favorable medical outcome than would likely have been achieved by the care authorized by the employer." Id.

The claimant requests that the undersigned order the defendant to pay for medical care undertaken after a denied petition for alternate care. Subsequent to that denial, the claimant pursued treatment on his own volition. This care was not authorized by Tyson. While Mr. Mero Bustos subjectively claims that his pain was reduced following the second surgery, I have concerns with his credibility. These concerns are based upon his performance during the failed FCE and other indications of symptom magnification. The claimant has not proven by a preponderance of the evidence that the unauthorized medical care provided a more favorable outcome than would have been achieved by care authorized by Tyson. Additionally, I found that the healing period ended on September 2, 2020. This makes it difficult to show that unauthorized care beyond that time provided a more favorable outcome than would have been achieved by the care authorized by Tyson. I also previously determined that the claimant's left shoulder complaints were not caused by May 1, 2019, work incident, thus the claimant is not entitled to reimbursement for medical expenses related to the left shoulder.

#### **Alternate Care Pursuant to Iowa Code section 85.27**

Iowa Code 85.27(4) provides, in relevant part:

For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care.... The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the

employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

Iowa Code 85.27(4).

The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Iowa Code 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening, October 16, 1975). An employer's right to select the provider of medical treatment to an injured worker does not include the right to determine how an injured worker should be diagnosed, evaluated, treated, or other matters of professional medical judgment. Assmann v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 19, 1988). Reasonable care includes care necessary to diagnose the condition and defendants are not entitled to interfere with the medical judgment of its own treating physician. Pote v. Mickow Corp., File No. 694639 (Review-Reopening, June 17, 1986).

By challenging the employer's choice of treatment - and seeking alternate care - claimant assumes the burden of proving the authorized care is unreasonable. See e.g. Iowa R. App. P. 14(f)(5); Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 209 (Iowa 2010); Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what care is reasonable under the statute is a question of fact. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that care was unduly inconvenient for the claimant. Id. Because "the employer's obligation under the statute turns on the question of reasonable necessity, not desirability," and injured employee's dissatisfaction with employer-provided care, standing alone, is not enough to find such care unreasonable. Id. Reasonable care includes care necessary to diagnose the condition, and defendants are not entitled to interfere with the medical judgement of its own treating physician. Pote v. Mickow Corp., File No. 694639 (Review-Reopening, June 17, 1986).

I previously ruled on a petition for alternate care in this matter. There is new evidence in the case since that time. The claimant requests alternate care via continued appointments with Dr. Jensen. The claimant has not proven that the care offered by Tyson was unreasonable. He has only proven a preference for care with Dr. Jensen. The claimant's request for alternate care is denied.

**Credit**

Tyson claims entitlement to a credit of 50 weeks for previous payments. Tyson is entitled to credit; however, I determined that the date of commencement for permanent disability benefits is September 3, 2020. Therefore, additional benefits are owed for healing period benefits. Tyson is entitled to 50 weeks of credit for previous payments.

**ORDER**

THEREFORE, IT IS ORDERED:

That the claimant is awarded healing period benefits from February 3, 2020, to September 3, 2020, at the stipulated rate of five hundred thirty and 57/100 dollars (\$530.57).

That the defendants shall pay the claimant fifty (50) weeks of permanent partial disability benefits at the agreed upon rate of five hundred thirty and 57/100 dollars (\$530.57) per week commencing on September 3, 2020.

That the defendants are entitled to a credit for fifty (50) weeks of previously paid

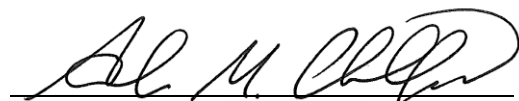
That the claimant shall take nothing by way of reimbursement for medical expenses.

That the claimant's request for alternate care is denied.

That the defendant shall pay accrued weekly benefits in a lump sum together with interest. All interest on past due weekly compensation benefits shall be 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. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

That the defendant shall file subsequent reports of injury (SROI) as required by this agency pursuant to 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 14<sup>th</sup> day of February, 2022.



ANDREW M. PHILLIPS  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Mary Hamilton (via WCES)

Chris Scheldrup (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.