BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MAURA MERINO, Claimant, vs. EMCO ENTERPRISES, LLC d/b/a ANDERSEN STORM DOORS, Employer, and OLD REPUBLIC INSURANCE, Insurance Carrier, Defendants.	:	File No. 5064022 ARBITRATION DECISION Head Note Nos.: 1402.30, 1802, 1803 2701, 2907

Claimant Maura Merino filed a petition in arbitration on May 30, 2018, alleging she sustained a cumulative injury to her back while working for the defendant, EMCO Enterprises, LLC, d/b/a Andersen Storm Doors ("Andersen"), on or about August 19, 2016. Andersen and its insurer, the defendant, Old Republic Insurance ("Old Republic"), filed an answer on June 13, 2018, denying Merino sustained a cumulative injury while working for Andersen Storm Doors.

An arbitration hearing was held on August 21, 2019, at the Division of Workers' Compensation in Des Moines, Iowa. Attorney Matthew Milligan represented Merino. Merino appeared and testified. Ernest Niño-Murcia provided Spanish interpretation services during the hearing. Attorney Timothy Wegman represented Andersen and Old Republic. Joint Exhibits ("JE") 1 through 4, Exhibits 1 through 6, and A through I were admitted into the record. The record was held open through October 11, 2019, for the receipt of Exhibits 7 and J, and post-hearing briefs. On September 19, 2019, the parties entered into a stipulation agreeing while entitlement to temporary disability benefits is disputed, Merino was off work from September 30, 2016 through May 8, 2017. Exhibits 7 and J were received and admitted into the record. The parties' post-hearing briefs were also received and the record was closed.

At the start of the hearing the parties submitted a hearing report, listing stipulations and issues to be decided. Andersen and Old Republic waived all affirmative defenses.

STIPULATIONS

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

2. Although entitlement to temporary disability benefits is disputed, the parties agree Merino was off work from September 30, 2016 through May 8, 2017.

3. If the injury is found to be a cause of permanent disability, the disability is an industrial disability.

4. At the time of the alleged injury Merino's gross earnings were $722.83 per week, she was married and entitled to two exemptions, and the parties believe the weekly rate is $476.20.

5. Andersen and Old Republic are entitled to a credit of $288.12 for sick pay/disability income.

6. Costs have been paid.

ISSUES

1. Did Merino sustain an injury, which arose out of and in the course of her employment with Andersen on August 19, 2016?

2. Is the alleged injury a cause of temporary disability during a period of recovery?

3. Is the alleged injury a cause of permanent disability?

4. Is Merino entitled to healing period benefits from September 30, 2016 through April 28, 2017?

5. If the injury is found to be the cause of permanent disability is the commencement date for permanent partial disability benefits September 30, 2016?

6. Is Merino entitled to payment of medical expenses?

7. Is Merino entitled to alternate medical care?

8. Should costs be assessed against either party?

FINDINGS OF FACT

Merino was born in El Salvador. (Exhibit I, page 1; Ex. 2, p. 21) Merino completed one or two years of school in El Salvador. (Ex. I, p. 1; Transcript, p. 9)

Merino moved to the United States from El Salvador in 1991, when she was twenty-three. (Tr., pp. 9, 46) Merino is married and lives in West Des Moines with her husband. (Ex. I, p. 1; Ex. 2, pp. 20-21; Tr., pp. 8-9) Merino has lived in Iowa for the past twenty-eight years. (Tr., pp. 9, 46-47) At the time of the hearing she was fifty-one. (Tr., p. 8)

Merino has taken English classes, but reported she does not speak much English. (Tr., p. 10) During the hearing Merino answered some questions in English without using the interpreter. (Tr., p. 15)

When she lived in El Salvador, Merino was a homemaker. (Tr., p. 9) After moving to the United States Merino obtained employment. From 1991 until 1994 Merino worked for a food truck/catering business performing food preparation, cooking, and food service. (Ex. C, p. 3; Tr., p. 11) In 1994 Merino moved to Iowa. From 1994 through 1995 Merino worked for Monfort Meat Packing in meat processing, line work, and meat cutting until the plant closed. (Ex. C, p. 3; Tr., p. 11) Swift and Company hired Merino in 1995 where she worked in meat processing, line work, and meat cutting. (Ex. C, pp. 3-4; Tr., p. 12) In 1997 Merino terminated her employment with Swift and Company and accepted employment with Senior Suites where she worked in food preparation, cooking, and meal service. (Ex. C, p. 4; Tr., p. 12) Merino worked for Senior Suites until 1999 when she left for a higher paying job. (Ex. C, p. 4) In 1999 a temporary staffing agency hired Merino as a laborer. (Ex. C, p. 4; Tr., p. 13)

On April 30, 2001, Andersen hired Merino. (Exs. B, p. 2; C, p. 4; Tr., p. 14) Merino assembled windows in storm doors on a conveyor. (Tr., p. 14) Merino worked on the doors slightly below waist-level, and the position required her to reach in front of her body and to the side. (Tr., p. 15) The doors were of various sizes. Andersen had Merino use a vacuum for the heaviest door, and if the vacuum was broken, Merino would have to move the door by hand. (Tr., p. 20) Merino continued to work for Andersen on the line until June 29, 2018, when she resigned. (Tr., p. 14) Shortly thereafter Merino opened her own restaurant. (Tr., p. 14)

Merino alleges she sustained a cumulative injury to her back while working for Andersen over the course of her employment. (Ex. 2, p. 23; Tr., p. 20) Merino testified she did not receive treatment for her back before her employment with Andersen. (Tr., p. 23) The first record of treatment is from 2007, six years after Merino commenced her employment with Andersen. (JE 1, p. 1)

On October 5, 2007, Merino attended an appointment with Jose Angel, M.D., her family physician, complaining of low back pain, right sacroiliac pain, and left ankle pain. (JE 1, p. 1; Tr., p. 28) Dr. Angel documented Merino complained of “some back pain with work.” (JE 1, p. 1) Dr. Angel assessed Merino with chronic right sacroiliac hip and back pain. (JE 1, p. 1)

During an appointment with Dr. Angel on May 19, 2008, Merino reported she was experiencing right back sacroiliac pain. (JE 1, p. 2) Dr. Angel noted if Merino did not improve within two months he would perform a cortisone injection. (JE 1, p. 2)

On June 5, 2010, Merino went to the Mercy Medical Center Emergency Department, complaining of low back pain. (JE 2, p. 73) L. Smits, M.D., discharged Merino, imposed a restriction of no lifting over thirty pounds, and released her to return to work in one week. (JE 2, p. 74)

On June 10, 2010, Merino returned to Dr. Angel. (JE 1, p. 3) Dr. Angel noted Merino developed acute back pain with twisting at work, noting no acute trauma caused the pain. (JE 1, p. 3) Dr. Angel noted Merino went to the emergency room for treatment and received prescriptions for Flexeril and hydrocodone. (JE 1, p. 3) Merino reported the pain was excruciating and severe in her mid-back, low L4-5 area, and went into her left thigh and buttock. (JE 1, p. 3) Dr. Angel assessed Merino with low back pain/spondylolisthesis and prescribed a Medrol Dosepak. (JE 1, p. 3) Dr. Angel ordered lumbar spine x-rays and the reviewing radiologist listed an impression of normal segmentation pattern and lordosis, degenerative disc disease with irregularity of the endplates and small Schmorl's node formation at L1-L2 and T12-L1, and no compression fracture deformity. (JE 1, p. 4) During an appointment on August 27, 2010, Dr. Angel noted Merino's low back pain was much better. (JE 1, p. 5)

Merino attended an appointment with Dr. Angel on August 16, 2013, complaining of chronic low midline back pain radiating into her legs. (JE 1, p. 6) Dr. Angel documented the pain was worse in 2010 and Merino had spondylolisthesis, noting she is physically active and stands at work pushing heavy carts and performing overhead work. (JE 1, p. 6) Dr. Angel recommended repeat x-rays and an "over-the-counter back support." (JE 1, p. 8)

On November 25, 2013, Merino went to the Mercy Medical Center Emergency Department reporting the night before she moved a bed, heard a crack, and she was experiencing lower left lumbar pain. (JE 2, p. 75) Merino received a lumbar spine x-ray. (JE 1, p. 78) The reviewing radiologist noted Merino had multiple levels of degenerative disc disease manifested by Schmorl's nodes, and frank disc space narrowing at L4-L5, grade 1 and anterolisthesis of L4 on L5 secondary to hypertrophic facet arthropathy. (JE 1, p. 78) Meredith Brown, M.D., examined Merino, diagnosed her with low back pain, discharged her, and recommended she follow up with her primary care provider. (JE 2, p. 76)

On June 4, 2014, Merino received a lumbar spine x-ray after complaining of pain for three or four years with no known injury. (JE 2, p. 79) The reviewing radiologist listed an impression of stable-appearing degenerative changes of the lumbar spine, without vertebral body height loss, and stable minimal anterior subluxation L4 on L5. (JE 2, p. 79)

Merino underwent lumbar spine magnetic resonance imaging on June 10, 2014. (JE 2, p. 80) The reviewing radiologist listed an impression of "[m]ild disc degeneration at L4-L5 with mild spondylolisthesis secondary to facet disease, in combination resulting in mild central canal narrowing. There is asymmetric narrowing of the left exiting neural foramina due to lateral extension of disc bulging with possible irritation of exiting left L4 nerve root." (JE 2, p. 80)

On July 8, 2014, Merino attended an appointment with Dr. Angel complaining of low back pain radiating down her legs. (JE 1, p. 9) Dr. Angel noted Merino had chronic low back pain that began at work three years before and magnetic resonance imaging showed a L4 disc herniation, degenerative joint disease, and mild nerve impingement. (JE 1, p. 9) Dr. Angel assessed Merino with degenerative spondylolisthesis and lumbar radiculopathy, noting she had a disc herniation and "likely nerve impingement," and recommended physical therapy and weight loss. (JE 1, p. 11) Dr. Angel prescribed phentermine for weight loss, nabumetone, and dexamethasone. (JE 1, p. 12)

Merino returned to Dr. Angel on July 28, 2014, to follow up regarding her left disc herniation at L4-5, back pain, left radiculopathy, and spondylolisthesis. (JE 1, p. 13) Dr. Angel noted Merino had experienced good improvement with her left L4 disc herniation from steroids and Relafen, noting if she deteriorated he would refer her to neurosurgery. (JE 1, pp. 15-16)

On April 13, 2015, Merino went to Urgent Care and was examined by Ernesto Vazquez, M.D. (JE 3, p. 82) Merino complained of a gradual onset of constant episodes of moderate symmetrical and bilateral lower back pain she described as dull and non-radiating. (JE 3, p. 82) Dr. Vazquez documented Merino reported the symptoms were caused by a motor vehicle accident and the episodes started five years ago. (JE 3, p. 82) Dr. Vazquez documented Merino reported her symptoms were worse with standing, sitting, lifting, bending, and twisting. (JE 3, p. 82) Dr. Vazquez assessed Merino with degenerative spondylolisthesis, low back pain, and lumbar radiculopathy, and recommended conservative therapy and consideration of epidural injections if her symptoms did not improve. (JE 3, pp. 83-84) Merino testified she did not recall being in a motor vehicle accident before 2016. (Tr., pp. 26-27, 58) There was no record evidence other than Dr. Vazquez's report documenting the alleged car accident.

Merino received lumbar spine x-rays at Mercy West on April 13, 2015. (JE 2, p. 81) The reviewing radiologist compared her images to images from June 4, 2014, and listed an impression of grade 1 L4-L5 spondylolisthesis that had increased or progressed with associated moderate facet joint arthritis, mild disc space narrowing at L4-L5 due to degenerative disc disease, which was stable, and mild disc degeneration that was "not significant[ly] changed, at L1-L2 and L2-L3." (JE 2, p. 81)

On August 18, 2015, Merino attended an appointment with Dr. Angel, complaining of radiculopathy down her lateral thighs with the left worse than the right

with low back pain that is chronic and persistent and worse with exercise. (JE 1, p. 17) Dr. Angel noted Merino's lumbar radiculopathy with low back pain related to activity was not disabling, and recommended diclofenac. (JE 1, p. 19)

Merino returned to Dr. Angel on July 6, 2016, reporting her back pain had been worse in the last twelve months with standing and walking, and that she was experiencing intermittent left leg pain. (JE 1, p. 21) Dr. Angel documented when Merino does not take her diclofenac her pain prevents her from engaging in normal activities. (JE 1, p. 21) Dr. Angel assessed Merino with degenerative spondylolisthesis with degenerative disc disease, facet disease, left leg radiculopathy, left thigh and leg weakness, and "perceptive paresthesia left leg greater than right right [*sic*] leg without a demonstrable sensory deficit," and recommended magnetic resonance imaging. (JE 1, p. 23)

Merino underwent lumbar spine magnetic resonance imaging on July 25, 2016. (JE 1, p. 25) The reviewing radiologist listed an impression of:

> 1. Multilevel degenerative disc disease visualized in the lower thoracic, lumbar levels.
>
> 2. Mild spondylolisthesis progressed at L4-L5 level secondary to facet disease. In combination with diffuse disc bulging mild to moderate central canal narrowing at this level with possible irritation of existing left L4 nerve root.
>
> 3. No significant abnormality other lumbar levels.

(JE 1, p. 26)

On August 4, 2016, Merino attended an appointment with Dr. Angel, complaining of back, leg, and hip pain. (JE 1, p. 27) Dr. Angel documented Merino had spinal stenosis with lumbar sacral pain and abnormal magnetic resonance imaging with progressive disease, noting she received "tremendous benefit in the past from a [*sic*] injection of steroids." (JE 1, pp. 29-30) Dr. Angel administered a Kenalog injection and noted that if she was not better the next day he would refer her to the Mercy Spine Center for consideration of epidural steroids or a neurosurgical evaluation. (JE 1, p. 30)

Merino alleges she sustained an injury to her back on August 19, 2016. Merino testified in August 2016, "I felt I couldn't work anymore. I felt like I couldn't do my job anymore like I had before." (Tr., p. 23) Merino reported she did not believe her back would hurt for the rest of her life before August 2016. (Tr., p. 24)

On August 24, 2016, Merino attended a follow-up appointment with Dr. Angel regarding her back pain. (JE 1, p. 31) Dr. Angel recommended a referral to physical therapy and to the Spine Center, and imposed restrictions of minimizing twisting,

bending, and squatting, and to limit "lifting to less than 40 pounds and 10 pounds less than 50% of the time." (JE 1, pp. 33-34)

Merino testified she took Dr. Angel's restrictions to Andersen, and Andersen assigned light duty work making boxes "[f]or a few days, yes, but after that [she] continued doing the same thing." (Tr., pp. 29-30) Merino stated she was not feeling well and asked for time off. (Tr., p. 30) Merino reported she did not work for ten months, and while she felt better, her pain did not completely go away. (Tr., p. 30) Merino did not receive any pay while she was off work, other than a few checks of short-term disability. (Tr., pp. 30-31)

Merino attended an appointment with Dr. Angel on September 14, 2016, complaining of back pain with weakness in her legs. (JE 1, p. 35) Dr. Angel assessed Merino with lumbar radiculopathy, degenerative spondylolisthesis, and spinal stenosis of the lumbosacral region, recommended referral to Mercy Spine, prescribed prednisone, and imposed restrictions bending occasionally, twisting, squatting, and pushing and pulling rarely, never climbing, reaching above shoulder occasionally, reaching to the front or side rarely, lifting up to ten pounds frequently, lifting up to twenty pounds rarely, and never lifting above thirty pounds. (JE 1, pp. 36-38)

On September 27, 2016, Merino returned to Dr. Angel, noting she had not been working for several days due to pain and reporting she was nervous about returning to work because Andersen was not respecting her restrictions. (JE 1, p. 39) Dr. Angel recommended a referral to neurosurgery and restricted Merino from working until she had been seen by neurosurgery. (JE 1, pp. 39-41)

Merino attended an appointment with Troy Munson, M.D., a neurosurgeon, on September 29, 2016. (JE 4, p. 85) Dr. Munson documented Merino reported she developed "sudden significant lower back pain in 2010 after lifting a heavy object." (JE 4, p. 85) Merino stated she went to the emergency room, she received a "pain shot," and she has had increasing lower back pain ever since that occasionally radiates up her spine, and causes tingling down both of her legs, and is worse with heavy lifting, bending, twist, and excessive activity. (JE 4, p. 85) Dr. Munson reviewed Merino's imaging which he found showed a grade 1 degenerative spondylolisthesis L4-5 with mild foraminal stenosis bilaterally, slightly worse on the left, mild central canal stenosis, increased fluid in the facet joints bilaterally, and no significant change in the grade 1 spondylolisthesis when going from supine to standing. (JE 4, p. 86) Dr. Munson assessed Merino with degenerative spondylolisthesis, recommended physical therapy and a referral to a rehabilitation clinic for medication management or to a pain clinic for an epidural steroid injection, and noted if the suggested options failed he would discuss surgical intervention with her. (JE 4, pp. 86-87)

During the appointment Merino inquired about work restrictions and her employment with Andersen with Dr. Munson. (JE 4, p. 87) Dr. Munson documented,

> [w]e had a very long and frustrating conversation for all 3 people involved regarding the treatment options going forward. The patient is wondering about returning to work which she has done for many years and involves frequent heavy lifting. She tells me she could financially afford to quit working because her husband works and she really does not need to. She also tells me that she loves her job and does not want to quit. She also admits that work causes her significant back pain. She brings with her a very specific work release form asking for specific time periods and percentages of the day that she could complete various and very specific different activities and also very specific lifting restrictions. My advice to her is very simple, she should refrain from any activity that causes her pain. She seems unwilling to consider a different line of work but also wants me to give her specific restrictions to have at her current job. Unless I accompanied her to work and evaluated her in that setting, I would not be able to give her the specific recommendations that her form is asking for. Her spine is not unstable and she is not at risk for any impending neurological injury and certainly is not at risk for any paralysis. If she can continue to work without pain, then she can continue to work. If she can tolerate the amount of pain that work causes her, then she can continue to work. Continuing to work in manual labor job may cause her symptoms to worsen. Her degenerative condition may in fact progress anyway simply with aging, but may slow down if she stops working or changes her line of work. I explained all of this to her many different times, and she will have to decide this issue as she really wants to keep working in her current line of work but is worried about the pain it causes her.

(JE 4, p. 87)

Merino attended an appointment with Dr. Angel on November 7, 2016. (JE 1, p. 43) Dr. Angel noted Merino was attending physical therapy with minimal benefit. (JE 1, p. 45)

On December 12, 2016, Andersen and Old Republic sent Merino a letter stating they were denying her claim for workers' compensation benefits because they had determined there was insufficient evidence the injury to her low back arose out of and in the course of her employment. (Ex. A, p. 1) The letter informed Merino she alleged she sustained a low back injury at work in 2010 and she did not report the injury to Andersen and sought care on her own for multiple years, and that no change or new incident occurred which could have substantially aggravated her condition on or about August 19, 2016. (Ex. A, p. 1)

During an appointment with Dr. Angel on January 13, 2017, Merino reported the radicular pain in her legs had improved after she received an injection. (JE 1, pp. 49-50) Dr. Angel noted Merino had degenerative spondylolisthesis and that it was his medical opinion she could not perform heavy physical labor involving standing or lifting over twenty pounds, but she could perform physical labor that includes sitting, noting upper body lifting, twisting, and squatting would cause progressive problems. (JE 1, p. 50)

Merino's attorney responded to the denial letter on January 27, 2017, stating Merino has sustained a cumulative injury, and while she underwent treatment as a result of her work in 2010, her back pain worsened in 2016, due to the repetitive nature of her job duties, to the point where she could no longer perform her job. (Ex. 4, p. 32) Merino's attorney noted Merino had restrictions, Andersen had not allowed her to return to her job, and he requested Andersen accommodate of her restrictions. (Ex. 4, p. 32)

On February 27, 2017, Merino attended an appointment with Dr. Angel complaining of low back pain. (JE 1, p. 53) Dr. Angel released Merino to return to work with a twenty pound weight restriction. (JE 1, p. 54)

During an appointment on April 28, 2017, Dr. Angel noted Merino has persistent pain, but she was stable and much improved. (JE 1, p. 58) Dr. Angel documented he and Merino discussed returning to work without restrictions. (JE 1, p. 58) Merino testified she wanted to return to work because she was afraid she would lose her job. (Tr., p. 32) Dr. Angel released Merino to return to full duty without restrictions. (Tr., p. 54) Counsel for Andersen and Old Republic sent Merino's counsel an electronic mail message on May 5, 2017, notifying him Merino was being called back to work on Monday. (Ex. 4, p. 33) Merino returned to her regular job at Andersen and she continued to perform her normal duties for Andersen until she resigned in June 2018. (Tr., pp. 32, 36) Merino testified after she returned to work she would cry in pain. (Tr., p. 36)

On June 13, 2018, Merino voluntarily terminated her employment with Andersen effective June 29, 2018. (Exs. B, p. 2; C, pp. 4-5; D, p. 1; Tr., p. 36) Merino completed a voluntary termination notice stating she was quitting "due to my back problems that have been ongoing. I can't perform my job like before and I feel the pres[s]ure everyday to perform and also I'm seeking self-employmen[t]." (Ex. D, p. 1) From April 2017, until she resigned in June 2018, Merino did not have any work restrictions from a physician. (Tr., p. 54)

In July 2018 Merino purchased El Buen Sabor Latino, a restaurant in Des Moines, with her husband. (Ex. C, pp. 4-5; Tr., pp. 37-38, 51) Merino's restaurant is open six days per week from 9:00 a.m. to 9:00 p.m. and is closed on Tuesday. (Tr., p. 52) The restaurant seats eighty to eighty-five people. (Tr., p. 38) Merino does not work the entire day or have a set schedule. (Tr., pp. 39-40) Merino pays herself $800.00 every two weeks. (Tr., p. 40) Merino testified the restaurant had a loss reported on the

2018 taxes. (Tr., p. 40) In 2018, the restaurant reported gross receipts of $198,888.00, gross profit of $92,270.00, $12,024.00 in compensation for officers, and a loss of taxable income after all deductions of $16,722.00. (Ex. J)

Merino supervises the five employees and runs the restaurant. (Tr., pp. 37, 52) Merino seats patrons, puts out menus, runs the cash register, and serves as a waitress or server. (Tr., pp. 38, 51) Merino reported she does not carry trays, but she will take customers a fork or plate. (Tr., pp. 38) Merino testified she does not do the dishes. (Tr., p. 38) Merino reported she sometimes purchases product, "but wherever I go they load it for me, and when I get to the business, the girls help me unload it." (Tr., p. 39)

Merino's customers speak English and she is able to read street signs while driving. (Tr., p. 47) When she seats customers, operates the cash register, and when she purchases product she has to interact with people who are speaking English. (Tr., p. 53)

Andersen and Old Republic conducted video surveillance of Merino in August 2018, Exhibit E, and in December 2018, Exhibit F. The surveillance from August 17, 2018, at 13:40 shows Merino opening the back door of her SUV with her right hand and lifting items out that she carries into the restaurant with her left arm. At 15:55 she opens the rear door again to her SUV and removes a box she is carrying at waist level and closes the door with her right hip, walks up to the restaurant and balances the box on her left hip and the glass window, while opening the door with her right hand. Merino does not appear to be grimacing or struggling to walk or carry the box.

Surveillance from August 18, 2018, at 8:18 a.m. shows Merino walking down past the business and returning with a shopping cart at 8:27 a.m. Merino opens the door with her right hand, and then returns at 8:31 a.m. with a full cart and walks down the front of the building and walks back into the restaurant. At 8:51 a.m. Merino carries a board that extends from her waist to near her ankle with her right hand only away from the restaurant down the front of the building.

On August 19, 2018, 9:48 a.m. the surveillance shows Merino opening the back of her SUV. Merino takes three sacks of produce with her left arm and two sacks with her right arm, and closes the door with the right side of her arm. In the video Merino is walking normally.

Video surveillance from December 12, 2018, at 9:34 a.m., shows Merino in front of a store, pushing a cart with a metal bowl that is full on the top next to a cardboard box, with a plastic tub in the middle. Merino opens the door with her right hand, pulls the cart with her left hand and holds the door open with the right side of her body and pulls in the cart with some difficulty over the threshold of the business. At 10:02 a.m. Merino is depicted pushing the cart at her restaurant. The cart contains a plastic tub on top, a box in the middle, and a metal bowl on bottom. On December 13, 2018, the

surveillance shows Merino carrying papers and a medium sized black bag, she then switches the black bag to her left arm, and opens the door with her right arm.

The surveillance showed Merino carrying in groceries and produce. Merino reported those are activities she sometimes does for the restaurant, but "[n]ot always." (Tr., p. 43) Merino testified the heaviest things she lifts include a box of tomatoes or five pounds of meat if her order runs out and she has to go to the store. (Tr., p. 43) The surveillance did not show Merino lifting heavy objects.

Sunil Bansal, M.D., an occupational medicine physician, conducted an independent medical examination for Merino on September 5, 2018, and he issued his report on February 8, 2019. (Ex. 1) Dr. Bansal reviewed Merino's medical records and examined her. (Ex. 1) Dr. Bansal diagnosed Merino with an aggravation of lumbar spondylosis. (Ex. 1, p. 11) Dr. Bansal opined the repetitive lifting, bending, and twisting Merino engaged in on a cumulative basis aggravated degenerative changes in her spine, which waxed and waned, reaching a permanent state around August 2016. (Ex. 1, pp. 11-13)

Dr. Bansal opined Merino had not reached maximum medical improvement and he agreed with Dr. Munson she is a surgical candidate and recommended further treatment with a pain specialist for trial epidurals and physical therapy. (Ex. 1, p. 14) Dr. Bansal further opined if surgery is not indicated or Merino elects not to undergo the procedure, he would place her at maximum medical improvement on September 29, 2019, at the time of her consultation with Dr. Munson. (Ex. 1, p. 14)

Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Bansal opined under Table 15-3, Merino meets the criteria for a "DRE Category II impairment and some from Category III. She has radicular complaints, guarding, and loss of range of motion. She has an MRI showing considerable disc pathology at L4-L5, and she has continued pain," and he assigned her an eight percent whole person impairment. (Ex. 1, p. 14) Dr. Bansal recommended permanent restrictions of no lifting over twenty pounds occasionally, no lifting over ten pounds frequently, no frequent bending or twisting, and no prolonged standing or walking greater than sixty minutes at a time. (Ex. 1, p. 14)

On December 10, 2018, Merino attended an appointment with Dr. Angel, reporting she was experiencing ongoing back pain and her medication was not helping. (JE 1, p. 66) Merino relayed she could not sleep or walk, and she was having trouble taking a shower and when she recently dropped the soap in the shower she had excruciating back pain for two days after bending over. (JE 1, p. 66)

During an appointment on December 28, 2018 with Dr. Angel, Merino reported her pain had increased with breakaway weakness and progressive weakness in her legs. (JE 1, p. 69) Merino relayed after climbing three or four steps she felt lateral thigh pain and gluteal pain and had been avoiding stairs. (JE 1, p. 69) Merino stated her

pain becomes worse if she quickly bends or twists and when she tries to wash pots or pans or tries to clean something she cannot bend at the waist and clean or bend forward to turn on a faucet without severe pain going down her right leg into her buttock and thigh. (JE 1, p. 69)

On January 15, 2019, Merino attended an appointment in Dr. Munson's clinic with Danielle Horgen, P.A., complaining of worsening back pain along the midline "slightly above the intercrestal line and extends to her buttocks bilaterally and into her posterior lateral thighs," noting her buttock and leg pain is worse than her back pain and relieved slightly when she bends forward, and is better when sitting, although she experiences numbness in her legs, and is worse when moving from sitting to standing, and when walking. (JE 4, p. 89) Horgen assessed Merino with lumbar radiculopathy and low back pain, and recommended magnetic resonance imaging. (JE 4, pp. 91-92) Merino underwent the imaging, and the reviewing radiologist listed an impression of "[s]table grade 1 degenerative spondylolisthesis at L4-L5 with disc degeneration progressed. There continues to be moderate to moderately severe central canal stenosis at this level. Stable mild to moderate left neural foraminal narrowing at this level with possible irritation of exiting left L4 nerve root." (JE 4, p. 95) Merino testified she understood the imaging from 2019 did not show any change from 2016. (Tr., pp. 57-58)

Merino returned to Dr. Munson on March 7, 2019, complaining of back and bilateral leg pain that worsens with standing and walking. (JE 4, p. 96) Dr. Munson documented he reviewed her magnetic resonance imaging, assessed her with degenerative spondylolisthesis, noted she had failed conservative treatment and he believed she is a candidate for surgery, recommending an oblique lateral interbody arthrodesis at the L4-5 level with lateral plating. (JE 4, pp. 96-97) Merino testified she is afraid to have the surgery recommended by Dr. Munson. (Tr., p. 45) Merino reported Dr. Munson told her that her condition will become worse if she does not have the surgery, so she believes she will have the surgery. (Tr., p. 45)

On July 1, 2019, Dr. Munson issued an opinion letter stating he was "unable to determine by any reasonable degree of certainty if patient Maura Merino's (DOB . . .) medical condition is work related." (JE 4, p. 99)

In her answers to interrogatories Merino reported she was involved in a single car motor vehicle accident in 2016 following her work injury when the front end of her car became stuck over a curb in the parking lot of Mercy physical therapy. (Ex. C, p. 9) Merino reported she sustained no injuries as a result of the motor vehicle accident. (Ex. C, p. 9)

Merino has not applied for any employment since the date of injury. (Ex. C, p. 7; Tr., p. 46)

Merino testified at hearing "[t]he pain is more intense" than it was before she left Andersen. (Tr., pp. 43, 55) Merino corrected her testimony and said the pain is "the same. I haven't had any relief from 2016 until now, that's why the doctor says that I have to have surgery." (Tr., p. 55) Merino reported the pain in her whole lower back, and her legs cramp up. (Tr., p. 43) Merino testified she cannot wear shoes with heels or brush her teeth because she feels pain in her back when she brushes her teeth, "[f]or everything." (Tr., p. 44)

Merino reports since her work injury she is unable to carry laundry at home, and she is slower with cleaning and picking up things from floor level. (Ex. 2, p. 25) Merino reported she cannot sit for long periods and "feels like her back gets stuck with bending movements." (Ex. 2, p. 25) Merino relayed she has to request help from her staff at her restaurant with carrying trays and lifting tasks, and cashiering, due to her inability to stand for long periods of time. (Ex. 2, p. 25) Merino reports she needs to change positions frequently to avoid increased pain. (Ex. 2, p. 25)

CONCLUSIONS OF LAW

I. Applicable Law

This case involves several issues, including causation, temporary benefits, extent of disability, commencement date for permanency, recovery of medical bills, alternate medical care, and interest under Iowa Code sections 85.27, 85.33, 85.34, and 535.3. In March 2017, the legislature enacted changes (hereinafter "Act") relating to workers' compensation in Iowa. 2017 Iowa Acts chapter 23 (amending Iowa Code sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.45, 85.70, 85.71, 86.26, 86.39, 86.42, and 535.3). Under 2017 Iowa Acts chapter 23 section 24, the changes to Iowa Code sections 85.33 and 85.34 apply to injuries occurring on or after the effective date of the Act. These cases involve a work injury occurring before July 1, 2017, therefore, the provisions of the new statute involving Iowa Code sections 85.33 and 85.34 do not apply to this case. The calculation of interest is governed by Sanchez v. Tyson, File No. 5052008 (Ruling on Defendant's Motion to Enlarge, Reconsider, or Amend Appeal Decision Re: Interest Rate Issue), which holds interest for all weekly benefits payable and not paid when due which accrued before July 1, 2017, is payable at the rate of ten percent; all interest on past due weekly compensation benefits accruing on or after July 1, 2017, is payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

II. Arising Out of and in the Course of Employment

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of and in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal

relationship exists between the employment and the injury. Quaker Oats v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment, and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs "in the course of employment" when:

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

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

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

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The deputy commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

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

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

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

At hearing Merino alleges she sustained a cumulative injury to her lumbar spine, which arose out of and in the course of her employment with Andersen. Andersen denies Merino sustained a work injury. A cumulative injury is an occupational disease that develops over time, resulting from cumulative trauma in the workplace. Baker v. Bridgestone/Firestone, 872 N.W.2d 672, 681 (Iowa 2015); Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842, 851 (Iowa 2009); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368, 372-74 (Iowa 1985). "A cumulative injury is deemed to have occurred when it manifests – and 'manifestation' is that point in time when 'both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person.'" Baker, 872 N.W.2d at 681.

It is necessary to determine whether Merino sustained a cumulative injury, and if so, when her injury manifested. Two expert witnesses prepared causation opinions in this case, Dr. Munson, a treating neurosurgeon, and Dr. Bansal, an occupational medicine physician who conducted an independent medical examination for Merino. I find Dr. Bansal's opinion to be most persuasive.

Andersen did not provide treatment to Merino. She sought treatment through Drs. Angel and Munson on her own. Dr. Munson personally examined Merino on two occasions, September 26, 2016, and March 7, 2019, and a physician's assistant in his office examined her on January 15, 2019. Dr. Bansal conducted an independent medical examination for Merino on September 5, 2018, and issued his report on February 8, 2019. (Ex. 1) Dr. Munson's training as a neurosurgeon is superior to Dr. Bansal's training.

Dr. Bansal diagnosed Merino with an aggravation of lumbar spondylosis. (Ex. 1, p. 11) Dr. Bansal opined the repetitive lifting, bending, and twisting Merino engaged in

on a cumulative basis aggravated degenerative changes in her spine, which waxed and waned, reaching a permanent state around August 2016. (Ex. 1, pp. 11-13)

Following his first appointment with Merino on September 26, 2016, Dr. Munson prepared a lengthy note, documenting his discussion with Merino concerning her job and work restrictions. (JE 4, p. 87) Dr. Munson documented,

> [u]nless I accompanied her to work and evaluated her in that setting, I would not be able to give her the specific recommendations that her form is asking for. Her spine is not unstable and she is not at risk for any impending neurological injury and certainly is not at risk for any paralysis. If she can continue to work without pain, then she can continue to work. If she can tolerate the amount of pain that work causes her, then she can continue to work. Continuing to work in manual labor job may cause her symptoms to worsen. Her degenerative condition may in fact progress anyway simply with aging, but may slow down if she stops working or changes her line of work. I explained all of this to her many different times, and she will have to decide this issue as she really wants to keep working in her current line of work but is worried about the pain it causes her.

(JE 4, p. 87) Dr. Munson noted the position "may cause her symptoms to worsen." He also noted he could not provide Merino with specific work restrictions without evaluating her at work.

The next appointment Merino attended with Dr. Munson's clinic was more than two years later, on January 15, 2019, when she was examined by Horgen, a physician's assistant. (JE 4, p. 89) Horgen noted Merino was experiencing low back, buttock, and posterior leg pain that "is worsening over time," and recommended magnetic resonance imaging. (JE 4, p. 91) After obtaining the imaging, Dr. Munson examined Merino on March 7, 2019. (JE 4, p. 97) Dr. Munson saw no significant degenerative pathology on the imaging, but recommended surgery given Merino had failed conservative treatment. (JE 4, p. 98)

On July 1, 2019, Dr. Munson issued a very brief opinion letter, as follows, "I am unable to determine by any reasonable degree of certainty if patient Maura Merino's (DOB 01/29/1968) medical condition is work related." (JE 4, p. 99) Dr. Munson did not opine Merino's condition was a personal condition, unrelated to work. He opined he could not determine by a reasonable degree of medical certainty whether her condition is work-related, without providing any additional analysis. There is no evidence Dr. Munson ever personally observed Merino performing her job, which he previously stated would be necessary to determine whether she needed work restrictions. Dr. Munson did not comment on Dr. Bansal's opinion, or address whether he considered whether Merino's work aggravated, accelerated, worsened, or "lighted up" a preexisting

condition or disability Merino had to her lumbar spine. For these reasons I do not find his brief opinion persuasive.

There is no evidence Merino complained of back pain or sought treatment for back pain before October 2007, more than six years after she started working for Andersen. The record does not support Merino's lumbar spine condition was caused by a motor vehicle accident or other incident outside of her employment with Andersen. Merino has established her work for Andersen aggravated her lumbar spondylosis, and that the injury manifested in August 2016.

III. Extent of Disability

A. Industrial Disability

The parties stipulated if the alleged injury is the cause of permanent disability, the disability is an industrial disability. "Industrial disability is determined by an evaluation of the employee's earning capacity." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 852 (Iowa 2011). In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (Iowa 2010). The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138.

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u).

Using the AMA Guides, Dr. Bansal assigned Merino an eight percent whole person impairment. (Ex. 1, p. 14) He also recommended permanent restrictions of no lifting over twenty pounds occasionally, no lifting over ten pounds frequently, no frequent bending or twisting, and no prolonged standing or walking greater than sixty minutes at a time. (Ex. 1, p. 14) The video surveillance in Exhibits E and F shows Merino lifting bags of produce and pushing a cart. Dr. Bansal did not recommend any restrictions regarding pushing. The surveillance does not support Merino was engaging in frequent lifting, or lifting items exceeding Dr. Bansal's recommended lifting restrictions, or engaging in prolonged standing or walking. I find Dr. Bansal's restrictions to be appropriate.

Merino has limited education. Merino is self-employed, and she has operated a restaurant for over a year. While Merino used an interpreter at hearing, she is able to converse with English speaking customers, and purchase goods for her business from English speaking vendors. Merino supervises five employees and she runs the

restaurant. (Tr., pp. 37, 52) Merino pays herself $800.00 every two weeks, or $10,400.00 per year. In 2018, the restaurant reported gross receipts of $198,888.00, gross profit of $92,270.00, $12,024.00 in compensation for officers, and a loss of taxable income after all deductions of $16,722.00. (Ex. J) Merino chose to be self-employed. The reduction in her income is not fully attributable to her work injury. Considering all of the factors of industrial disability, I find Merino has sustained a forty percent industrial disability, which manifested on August 19, 2016.

B. Commencement Date

Merino alleges the commencement date for permanency is September 30, 2016. Under Iowa Code section 85.34(1) an employer is required to pay healing period benefits

> until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

Merino alleges a work injury of August 19, 2016, a Friday. Merino returned to work following the work injury. She attended an appointment with Dr. Angel on August 24, 2016, and he imposed restrictions. Merino testified after her work injury she returned to work and Andersen provided her with some light duty work, but later Andersen did not honor her restrictions. Under Iowa Code section 85.34(1), Merino's healing period ended when she returned to work on August 22, 2016, the date permanency benefits commenced. Phu v. Tension Envelope Corp., File No. 5035804 (App. May 17, 2019); Evenson v. Winnebago Indus., Inc., 881 N.W.2d 360, 372 (Iowa 2016). Merino is awarded 200 weeks of permanent partial disability benefits at the stipulated weekly rate of $476.20, commencing on August 22, 2016.

IV. Healing Period Benefits

Iowa Code section 85.33 governs temporary disability benefits, and Iowa Code section 85.34 governs healing period and permanent disability benefits. Dunlap v. Action Warehouse, 824 N.W.2d 545, 556 (Iowa Ct. App. 2012).

An employee has a temporary partial disability when because of the employee's medical condition, "it is medically indicated that the employee is not capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, but is able to perform other work consistent with the employee's disability." Iowa Code § 85.33(2). Temporary partial disability benefits are payable, in lieu of temporary total disability and healing period benefits, due to the reduction in earning ability as a result of the employee's temporary partial disability, and "shall not be considered benefits payable to an employee, upon termination of

temporary partial or temporary total disability, the healing period, or permanent partial disability, because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of injury." Id.

As a general rule, "[t]emporary 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 benefit depends on whether or not the employee has a permanent disability. Dunlap, 824 N.W.2d at 556. Based on my finding Merino sustained a permanent disability caused by the work injury, any temporary benefits Merino is entitled to are healing period benefits.

Temporary total, temporary partial, and healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986); Stourac-Floyd v. MDF Endeavors, File No. 5053328 (App. Sept. 11, 2018); Stevens v. Eastern Star Masonic Home, File No. 5049776 (App. Dec. Mar. 14, 2018). Although permanent partial disability benefits commenced on August 22, 2016, under Evenson, Merino may be entitled to payment of intermittent healing period benefits that are payable concurrently with permanent partial disability benefits. Phu v. Tension Envelope Corp., File No. 5035804 (App. May 17, 2019) (intermittent healing period benefits may be payable after the claimant has returned to work and is receiving permanent partial disability benefits if the claimant enters another healing period); Stourac-Floyd, File No. 5053328.

In her post-hearing brief, Merino seeks healing period benefits from September 30, 2016 through April 28, 2017, when Dr. Angel released Merino to full duty. Andersen and Old Republic agreed Merino was off work during this period, but dispute she is entitled to healing period benefits. Dr. Angel restricted Merino from working on September 27, 2016, until she attended a neurosurgery appointment with Dr. Munson on September 29, 2016, arguably another, intermittent healing period. During this period Merino received short-term disability benefits, as she had earlier in September 2016. During her appointment on September 29, 2016, Dr. Munson did not restrict Merino from working. She did not return to work. Dr. Bansal also found she reached maximum medical improvement on September 30, 2016, and recommended permanent restrictions as of this date.

During Merino's appointment with Dr. Angel on January 13, 2017, Dr. Angel imposed restrictions of no "heavy physical labor that involves standing or lifting over 20 pounds. She can do physical labor that include [*sic*] sitting. Upper body lifting[,] twisting[,] squatting will cause progressive problems." (JE 4, p. 50) On January 27, 2017, Merino's attorney requested Andersen accommodate Merino's restrictions. (Ex. 4, p. 32) There is no evidence Andersen offered Merino employment consistent with her restrictions before May 2017. Merino is entitled to healing period benefits from September 30, 2016 through April 28, 2017, at the stipulated weekly rate of $476.20.

V. Medical Bills and Alternate Care

Merino seeks to recover an outstanding lien with Optum for medical care for her work injury totaling $2,187.55. (Ex. 6, pp. 36-38) The bills are for treatment for her lumbar spine condition.

An employer is required to furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, hospital services and supplies, and transportation expenses for all conditions compensable under the workers' compensation law. Iowa Code § 85.27(1). The employer has the right to choose the provider of care, except when the employer has denied liability for the injury. Id. "The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee." Id. § 85.27(4). If the employee is dissatisfied with the care, the employee should communicate the basis for the dissatisfaction to the employer. Id. If the employer and employee cannot agree on alternate care, the commissioner "may, upon application and reasonable proofs of the necessity therefor, allow and order other care." Id. The statute requires the employer to furnish reasonable medical care. Id. § 85.27(4); Long v. Roberts Dairy Co., 528 N.W.2d 122, 124 (Iowa 1995) (noting "the employer's obligation under the statute turns on the question of reasonable necessity, not desirability"). The Iowa Supreme Court has held the employer has the right to choose the provider of care, except when the employer has denied liability for the injury, or has abandoned care. Iowa Code § 85.27(4); Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010).

While the employer retains the right to choose the employee's medical care under the statute, the employee is not prohibited from seeking her own care when the employer denies compensability for the injury or the employee "abandons the protections of section 85.27 or otherwise obtains his or her own medical care independent of the statutory scheme." Brewer Strong v. HNI Corp., 913 N.W.2d 235, 248 (Iowa 2018) (quoting Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010). In Brewer-Strong, the court held the employer's duty to furnish reasonable medical care includes unauthorized care if the employee is able to prove "by a preponderance of the evidence that such care was reasonable and beneficial" under the totality of the circumstances. Id. (quoting Gwinn, 779 N.W.2d at 206). The court further held "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 medical bills at issue are for medical care Merino received for her lumbar spine condition after Andersen and Old Republic denied her claim. I find the care Merino received for the work injury reasonable and beneficial. Andersen and Old Republic are responsible for the lien, and remain responsible for all causally related medical care in the future.

VI. Costs

Merino seeks to recover the $100.00 filing fee. (Ex. 5, pp. 34-35) Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Rule 876 IAC 4.33(6), provides

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

The administrative rule expressly allows for the recovery of the filing fee. Using my discretion I find Andersen and Old Republic responsible for the $100.00 filing fee.

ORDER

IT IS THEREFORE ORDERED, THAT:

Defendants shall pay the claimant two hundred (200) weeks of permanent partial disability benefits at the stipulated weekly rate of four hundred seventy-six and 20/100 dollars ($476.20), commencing on August 22, 2019.

Defendants shall pay the claimant healing period benefits from September 30, 2016 through April 28, 2017, at the stipulated weekly rate of four hundred seventy-six and 20/100 dollars ($476.20).

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, 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. Sanchez v. Tyson, File No. 5052008 (Apr. 23, 2018 Ruling on Defendant's Motion to Enlarge, Reconsider, or Amend Appeal Decision Re: Interest Rate Issue).

Defendants shall receive a credit for all benefits paid to date, including the benefits totaling two hundred eighty-eight and 12/100 dollars ($288.12), as stipulated by the parties.

Defendants are responsible for the lien in Exhibit 6, totaling two thousand one hundred eighty-seven and 55/100 dollars ($2,187.55), and are responsible for all causally related medical treatment.

Defendants shall reimburse the claimant one hundred and 00/100 dollars ($100.00) for the filing fee.

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

Signed and filed this 24th day of December, 2019.

HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Timothy Wegman (via WCES)

Matthew Milligan (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 in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.