

**EDUARDO NUNEZ VARELA,**

**Claimant,**

**vs.**

**IOWA SELECT FARMS, LLP,**

**Employer,**

**and**

**ZURICH, N.A.,**

**Insurance Carrier,**

**Defendants.**

**File No. 5049403**

**1/1/2016**

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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ARBITRATION DECISION

Head Note Nos.: 1801; 1803; 2502; 2907

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STATEMENT OF THE CASE

Eduardo Varela, claimant, filed a petition for arbitration against Iowa Select Farms as the employer and Zurich North America Claims as the insurance carrier. An in-person hearing occurred on January 25, 2016.

The evidentiary record includes Claimant's Exhibits 1 through 8 and Joint Medical Exhibits 1A through 1H. Claimant testified on his own behalf and called his wife, Maria Padilla de Nunez, to testify. Both claimant and his wife testified through an interpreter, Rafael Geronimo. Defendants called the employer's chief financial officer, William Foley, to testify.

Defendants offered exhibit A. Claimant objected to Exhibit A. Exhibit A was excluded from the evidentiary record and is not considered as part of this decision. Pursuant to a

ruling of the undersigned at the time of hearing, defendants were not permitted to ask questions pertaining to claimant's immigration status. However, defendants were allowed to make an offer of proof. Defendants' offer of proof was completed after the undersigned exited the hearing room and is contained at the end of the transcript. None of the testimony offered during the offer of proof is considered as part of this decision.

The parties filed a hearing report. In that hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

Counsel for the parties requested the opportunity to file post-hearing briefs. The parties were given until February 19, 2016 to file their post-hearing briefs, at which time the case was considered fully submitted to the undersigned.

## ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant is entitled to temporary disability, or healing period, benefits.
2. Whether claimant is entitled to permanent disability benefits and, if so, the extent of claimant's entitlement to permanent disability benefits.
3. The proper commencement date for permanent disability benefits, if any are awarded.
4. Whether claimant is entitled to reimbursement of an independent medical evaluation fee and mileage to attend the evaluation.
5. Whether costs should be assessed against either party.

## FINDINGS OF FACT

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

Eduardo Varela is a 45-year-old man, who resides in Clarion, Iowa. He was born in Mexico, where he attended school through the seventh grade. He took some English classes in Clarion, Iowa, but last took such a class a few years ago. Despite these efforts, Mr. Varela speaks and reads very little English. He is not able to write in English. Mr. Varela is able to read and write in Spanish.

Claimant's employment history is summarized in Exhibit 6, page 3. Claimant has worked as laborer in lawn care and as a landscaper. He has worked as a dishwasher in a restaurant. He worked as a custodian and kitchen worker in a restaurant. He has worked as a cook. Mr.

Varela worked for a short period of time as a laborer on an assembly line assembling tables for farm buildings.

He started with Iowa Select Farms' predecessor in 1997, continued as an employee when Iowa Select Farms purchased the business, and worked as a farm technician for Iowa Select Farms through November 3, 2014. As a farm technician, claimant was required to perform manual duties, including cleaning, moving hogs, feeding and vaccinating hogs, and performing artificial insemination on sows. Claimant's job duties at Iowa Select Farms are more thoroughly detailed in the job description contained at claimant's Exhibit 4. According to Exhibit 4, claimant was required to lift up to 40 pounds, though claimant's description of the job duties suggests he would have to exceed that amount from time to time.

On May 14, 2013, claimant was attempting to move hogs when a coworker startled one of the hogs. The startled hog ran at claimant and struck him, pushing him into a steel post and causing injuries to claimant's low back. Mr. Varela experienced immediate symptoms in his low back and into both legs. In spite of the pain, claimant completed his assigned shift on May 14, 2013. (Claimant's testimony)

Following the injury, claimant had difficulty sleeping and required a few days off work. Mr. Varela saw his personal physician and notified Iowa Select Farms of his injury. Iowa Select Farms elected to exercise its right to select a physician and directed claimant to see Daniel C. Miller, D.O. (Claimant's testimony)

Dr. Miller evaluated claimant on May 30, 2013. At that time, claimant reported symptoms in his low back, left hip and down his left leg. Claimant also reported numbness in his left leg down to his toes. (Exhibit 1B, page 1) Dr. Miller ordered an MRI of claimant's lumbar spine. (Ex. 1B, p. 2)

The MRI took place on June 4, 2013 and revealed some changes in claimant's lumbar spine since a prior MRI taken in 2009. Specifically, the radiologist noted, "Interval findings compatible with a left L4-5 anterior lateral disk protrusion versus small extrusion." (Ex. 1C, p. 2) The radiologist recommended, "Clinical correlation for a left L5 radiculopathy . . . ." (Ex. 1C, p. 2)

Mr. Varela returned to Dr. Miller for evaluation on June 10, 2013. Dr. Miller noted the disc protrusion and referred claimant to a pain specialist for a possible epidural injection. (Ex. 1B, pp. 5-6) Christian P. Ledet, M.D. evaluated claimant in his pain clinic on July 12, 2013. Dr. Ledet diagnosed claimant with lumbar radiculopathy and L5 nerve root weakness. He recommended and performed an L4-5 translaminal epidural steroid injection. (Ex. 1D, pp.1-2) Dr. Ledet ordered claimant off work from July 12, 2013 through July 14, 2013. (Ex. 1D, p. 4)

The initial injection was partially beneficial so Dr. Ledet provided a second epidural injection on July 26, 2013. (Ex. 1D, p. 5) Claimant was ordered off work on July 26, 2013. (Ex. 1D, p. 7) On his return to Dr. Miller, claimant reported improvement of some symptoms

following the two injections. However, Dr. Miller recommended claimant be evaluated by a neurosurgeon. (Ex. 1B, pp. 14-15)

Dr. Miller again ordered claimant off work on August 19, 2013. (Ex. 1B, p. 16) Mr. Varela then submitted to an orthopaedic evaluation performed by Cassim M. Igram, M.D. on September 9, 2013. Dr. Igram diagnosed claimant with a possible disk herniation at the L4-5 level. He continued claimant's modified work duty status and recommended an EMG of claimant's left leg. (Ex. 1F, p. 3)

Claimant submitted to the recommended EMG testing on September 19, 2013. The EMG demonstrated an "Axonal loss in Lt. L5 innervated muscles including proximal TFL but could not localize to the spine with EMG study." (Ex. 1E, p. 1) The EMG identified no peripheral neuropathy. (Ex. 1E, p. 1) After receiving the EMG results, Dr. Igram reviewed the MRI again and concluded that there was "a very small herniated disk which is barely deflecting the LEFT L5 root." (Ex. 1F, p. 7) Dr. Igram recommended against surgical intervention. (Ex. 1F, p. 7)

Mr. Varela's symptoms did not improve and he returned for further examination by Dr. Igram on October 11, 2013. Dr. Igram again noted the small disk herniation, as well as the failure of epidural injections and physical therapy to resolve claimant's symptoms. Dr. Igram recommended referral for a second surgical consultation. (Ex. 1F, p. 12)

Defendants authorized a second opinion with a neurosurgeon, Sandeep S. Bhangoo, M.D. Dr. Bhangoo evaluated claimant on October 17, 2013. Dr. Bhangoo concluded that conservative care was an option, but recommended surgical intervention for claimant's disc herniation. (Ex. 1G, pp. 1-2) Dr. Bhangoo performed a left L4-5 hemilaminotomy and discectomy on November 13, 2013. (Ex. 1H, pp. 1-4)

Dr. Bhangoo released claimant from work from October 17, 2013 through February 10, 2014 while post-operative care was provided. (Ex. 1G, pp. 3, 7) Dr. Bhangoo declared claimant to be at maximum medical improvement on April 21, 2014. He assigned an eight percent permanent impairment of the whole person as a result of claimant's May 14, 2013 work injury. (Ex. 1G, p. 8)

Mr. Varela returned to his same job at Iowa Select Farms and continued to perform his normal job duties until November 6, 2014. On November 6, 2014, claimant was issued a written corrective action by his supervisor. Claimant testified that there was a misunderstanding regarding some vacation time he took. Claimant initially took vacation to travel to California for a family emergency. However, he testified that his symptoms prevented him from traveling and he decided to take the day off anyway due to those symptoms. Upon returning to work, claimant's supervisor fired him. (Claimant's testimony; Ex. 7, p. 1)

Despite this disciplinary action, the employer wanted to retain Mr. Varela. The company contacted claimant and offered him employment shortly after the November 6, 2014 incident

at a different farm location. (Claimant's testimony; William Foley testimony) Claimant declined the employment offer and testified that he did so because of his low back injury and resulting symptoms.

After his employment with Iowa Select Farms ended, claimant remained off work for six to seven months. He did not submit any job applications during that period of time. He then returned to work for a contractor performing the hog insemination duties at one of the Iowa Select Farms. He testified his job with the contractor was much less physically demanding and did not include all of the prior job duties such as cleaning, moving hogs and lifting gates. He worked, at most, four hour shifts for the contractor and worked seven days per week. (Claimant's testimony)

Mr. Varela testified he quit working for the contractor after about 3 or 4 months because his pain increased with time. He testified he was earning about \$20.00 less per week with the contractor than he made with Iowa Select Farms.

Claimant testified that the company would not offer him additional treatment after Dr. Bhangoo released him. However, on February 25, 2015, claimant returned for evaluation by his personal physician, Shelly Wells, D.O., who recommended a repeat MRI. (Ex. 1A, p. 2) That MRI demonstrated the operative changes resulting from claimant's intervening low back surgery but no other significant pathology. (Ex. 1A, p. 5) Dr. Wells performed another epidural injection into claimant's lumbar spine on February 26, 2015. (Ex. 1A, pp. 7-8)

On April 15, 2015, Dr. Wells performed left lumbar facet block injections. Unfortunately, none of the interventions resolved claimant's complaints and symptoms. On June 24, 2015, Dr. Wells recommended a spinal cord stimulator trial. (Ex. 1A, p. 28) Claimant submitted to a spinal cord stimulator trial, which was unsuccessful. (Ex. 2, p. 4)

On September 24, 2015, Todd Schemper, DPT, performed a functional capacity evaluation (FCE) on referral from claimant's attorney. Mr. Schemper opined that claimant gave maximum effort during the FCE and considered the results of his testing to be valid. The FCE demonstrated the ability for claimant to work 8 hours per day with the ability to front carry up to 35 pounds on an occasional basis and 45 pounds on a rare basis. The FCE also demonstrated the ability to lift 30 pounds from floor to waist on an occasional basis and to lift 25 pounds from waist to crown on an occasional basis. A full listing of the FCE findings and recommendations is located at Exhibit 1, pages 4-5. Claimant testified that he had a significant increase in symptoms after the FCE for 3 to 5 days. (Tr., p. 55)

Claimant also obtained an independent medical evaluation performed by John D. Kuhnlein, D.O. on October 19, 2015. (Ex. 2) Dr. Kuhnlein diagnosed claimant with "Chronic low back pain with radicular symptoms related to postlaminectomy syndrome." (Ex. 2, p. 7) Dr. Kuhnlein directly related claimant's surgery and resulting symptoms, restrictions and impairment to the May 14, 2013 work injury. (Ex. 2, p. 7)

Dr. Kuhnlein opined that claimant obtained maximum medical improvement on September 24, 2015, the date of his FCE. Dr. Kuhnlein concurred with the 8 percent permanent impairment rating offered by Dr. Bhangoo. However, Dr. Kuhnlein imposed permanent restrictions that include a 20 pound occasional lifting restriction from floor to waist and over the shoulder. Dr. Kuhnlein opined that claimant is capable of 30 pound lifting occasionally from waist to shoulder. He specifically modified the recommendations of the FCE as a result of the residual symptoms claimant experienced after the FCE. However, Dr. Kuhnlein also opines that his restrictions “may be temporary. If he is able to work back into a workplace with more demand, he may be able to lift more in the long run.” (Ex. 2, p. 8)

Mr. Varela testified that he continues to have pain right above waist level in his back that runs down his left leg into his foot. He has numbness from the top of his left leg down to his big toe. He described experiencing cramps in the lower left leg.

Mr. Varela testified that he has difficulties lifting overhead or holding items in front of his body. He testified he has increased symptoms when kneeling or bending. He also testified that sitting in a chair increases his pain levels. He estimated that he can stand approximately one hour before he experiences extreme pain.

Claimant and his wife both testify that claimant’s activities levels at home are significantly reduced and that he needs help from his wife for many daily activities, including using the toilet on occasion, putting on socks and pants, performing housework, and snow removal. They testified that the injury and residual symptoms have changed their family life and that claimant has stopped doing his typical hobbies.

I find the eight percent permanent impairment ratings offered by Dr. Bhangoo and Dr. Kuhnlein to be representative of the level of functional disability sustained by claimant as a result of his May 14, 2013 work injury and resulting surgery. While acknowledging Dr. Kuhnlein’s current restrictions, I also find his comment about ability to work back into a higher tolerance to be reasonable and convincing. I find the physical abilities outlined in the September 24, 2015 FCE are most representative of claimant’s permanent work restrictions.

Mr. Foley testified that Iowa Select Farms has jobs available and attempts to accommodate work restrictions for its employees. He testified that claimant likely could not perform his job in the breeding facility at Iowa Select Farms given permanent restrictions outlined in the FCE or by Dr. Kuhnlein. However, Mr. Foley testified that claimant likely could perform jobs in the farrowing unit with much lighter lifting requirements. (Tr., pp. 90-99) Of course, claimant terminated his employment before any such efforts could be attempted. As of the date of hearing, claimant was not employed. He offered no evidence to suggest he is actively seeking employment.

Claimant’s tax returns demonstrate he earned \$29,834.00 the last full year before his injury. He continued to work at Iowa Select Farms after the injury. His tax returns demonstrate a reduction of his earnings to \$21,221.00 in 2013 and \$23,627 in 2014.

Considering claimant's age, limited educational background, employment history, his level of motivation, language barriers, his permanent impairment rating, his permanent work restrictions, as well as all other relevant industrial disability factors outlined by the Iowa Supreme Court, I find that claimant has proven he sustained a 55 percent loss of future earning capacity as a result of the May 14, 2013 work injury.

The parties dispute the proper maximum medical improvement date as well as the proper commencement date for permanent partial disability benefits. Claimant asserts he did not achieve maximum medical improvement until September 24, 2015, when the FCE was performed. Dr. Kuhnlein supports this date as the proper date for maximum medical improvement.

Defendants assert that claimant achieved maximum medical improvement by February 25, 2014. Defendants do not explain the precise basis for this date of maximum medical improvement. Another possible date for maximum medical improvement is the date selected by Dr. Bhangoo, which was April 21, 2014.

There is a significant gap in claimant's medical treatment from April 21, 2014 until February 25, 2015. Claimant testified that his employer would not authorize additional treatment after Dr. Bhangoo released claimant. Yet, claimant also returned to full-duty work during this period of time and worked until the November 6, 2014 incident in which claimant's employment was terminated.

I recognize that there was additional treatment administered to claimant in 2015, including the injections administered by Dr. Wells and the failed spinal cord stimulator trial. Yet, those treatment efforts appear to be attempts to manage or alleviate claimant's symptoms more than any curative treatment. Claimant's condition did not materially improve with the treatments offered by Dr. Wells. Therefore, I find that Dr. Wells' treatment in 2015 was essentially treatment for amelioration of symptoms and not treatment intended or likely to improve claimant's ultimate functional abilities. I find that claimant achieved maximum medical improvement as of April 21, 2014, when Dr. Bhangoo released claimant from his care.

Despite his testimony that he experienced ongoing and progressive difficulties, claimant worked at his pre-injury job from April 2014 through at least October 2014. I also find that claimant demonstrated during this six month period of time that he was capable of performing substantially similar employment activities upon his return to full-duty work for Iowa Select Farms after his surgery and eventual release from care by Dr. Bhangoo in April 2014.

Defendants disputed claimant's entitlement to benefits and; therefore, also disputed claimant entitlement to an award of costs. However, defendants stipulated at the commencement of hearing that claimants' costs could be awarded if I found against defendants on the substantive issues in this case. (Tr., p. 8) Claimant's asserted costs are contained in Exhibit 8 and total \$1,400.00.

## CONCLUSIONS OF LAW

The parties stipulated that claimant sustained a work related low back injury on May 14, 2013. (Hearing Report) Claimant seeks an award of healing period benefits from November 7, 2014 through September 24, 2015. This time period reflects the time claimant was off work after the misunderstanding with his supervisor at Iowa Select Farms through the date of the FCE and the date Dr. Kuhnlein declared maximum medical improvement.

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

In this instance, I found that claimant demonstrated his ability to perform substantially similar employment duties at Iowa Select during the six month period he returned to work between April 2014 and his termination in November 2014. Claimant ultimately was offered ongoing work at Iowa Select Farms at a different farm location. He declined that employment. However, having demonstrated his ability to perform substantially similar employment prior to November 2014, I conclude claimant is not entitled to healing period benefits from November 7, 2014 through September 24, 2015.

Alternatively, I conclude claimant is not entitled to healing period benefits during the claimed period because he achieved maximum medical improvement by April 21, 2014. Having found that claimant's treatment after November 2014 was directed at symptom management rather than functional improvement, I conclude that claimant's maximum medical improvement date pursuant to Dr. Bhangoo's opinion was April 21, 2014 and that claimant's entitlement to healing period benefits terminated on that date. Iowa Code section 85.34(1). Claimant has not proven entitlement to additional healing period benefits.

The parties stipulate that the claim should be compensated industrially as an unscheduled injury, pursuant to Iowa Code section 85.34(2)(u), if it is found that permanent disability has resulted from this injury. (Hearing Reports) This stipulation is legally accurate.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It 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 the 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).

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. Section 85.34.

After consideration of all of the relevant factors of industrial disability, I found that claimant proved he sustained a fifty-five percent (55%) loss of future earning capacity. Therefore, I conclude claimant has proven entitlement to 275 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u).

Claimant's entitlement to healing period benefits terminated on April 21, 2014 for the reasons outlined above. Therefore, I conclude that claimant's entitlement to permanent partial disability benefits commenced on April 22, 2014.

Claimant seeks reimbursement of his independent medical evaluation fee from Dr. Kuhnlein. Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Defendants' chosen physician, Dr. Bhangoo, issued a permanent impairment rating in April 2014. Dr. Kuhnlein evaluated claimant in October 2015 for purposes of rendering an impairment rating. Dr. Kuhnlein specifically opines that his evaluation fees are reasonable. (Ex. 2, p. 9) No contrary evidence is presented. I conclude claimant has proven entitlement

to reimbursement for Dr. Kuhnlein's \$2,637.40 fee pursuant to Iowa Code section 85.39. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 830 (Iowa 2015).

Claimant also requested reimbursement of mileage for attendance at his independent medical evaluation with Dr. Kuhnlein. Claimant may have been entitled to reimbursement for transportation expenses to and from this evaluation pursuant to Iowa Code section 85.39. However, the evidentiary record does not contain evidence of the total mileage traveled by claimant to attend this evaluation.

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. 6.14(6). Therefore, I conclude that claimant failed to carry his burden of proof to establish entitlement to mileage reimbursement for his travel to and from the evaluation with Dr. Kuhnlein.

Finally, claimant seeks assessment of his costs. Costs are assessed at the discretion of the agency. Iowa Code section 85.40. In this case, defendants disputed the award of costs, but stipulated that costs could be awarded if the undersigned found against defendants on the substantive disputes in this case. Therefore, exercising the agency's discretion and recognizing that claimant has prevailed on the substantive issues, I conclude that claimant's costs totaling \$1,400.00 should be assessed against defendants.

#### ORDER

#### THEREFORE, IT IS ORDERED:

Defendants shall pay claimant two hundred seventy-five (275) weeks of permanent partial disability benefits commencing on April 22, 2014 at the stipulated weekly rate of four hundred five and 13/100 dollars (\$405.13).

Defendants shall pay interest on all accrued weekly benefits pursuant to Iowa Code section 85.30.

Defendants are entitled to a credit for all benefits paid and stipulated to on the hearing report.

Defendants shall reimburse claimant's independent medical evaluation fee totaling two thousand six hundred thirty-seven and 40/100 dollars (\$2,637.40).

Defendants shall reimburse claimant's costs totaling one thousand four hundred and 00/100 dollars (\$1,400.00).

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

Signed and filed this \_\_\_\_\_ 27<sup>th</sup> \_\_\_\_\_ day of April, 2016.

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WILLIAM  
DEPUTY  
COMPENSATION COMMISSIONER

H.

GRELL  
WORKERS'

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