

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MIRIAN ESCOBAR DE CARBALLO,

Claimant,

vs.

AEROTEK, INC.,

Employer,

and

INDEMNITY INSURANCE COMPANY
OF N.A.,Insurance Carrier,
Defendants.

File No. 19003562.01

ARBITRATION DECISION

Head Note Nos.: 1108, 1402.30, 1402.40,
1403.10, 1802, 1803,
1803.1, 1804, 2206

Claimant Mirian Escobar de Carballo filed a petition in arbitration on December 1, 2020, alleging she sustained injuries to her right rotator cuff, neck, head, and body as a whole while working for Defendant Aerotek, Inc. ("Aerotek") on September 17, 2019. Aerotek and its insurer, Defendant Indemnity Insurance Company of North America ("Indemnity Insurance"), filed an answer on January 8, 2021.

An arbitration hearing was held *via* Zoom video conference on January 3, 2022. Attorney John Dougherty represented Escobar de Carballo. Escobar de Carballo appeared and testified. Kelly Henley provided Spanish interpretation services during the hearing. Jessica Sarabia, the daughter of Escobar de Carballo, testified on her mother's behalf. Attorney Peter Thill represented Aerotek and Indemnity Insurance. Joint Exhibits ("JE") 1 through 8, Exhibits 1 through 4, and Exhibits A through F were admitted into the record.

The record was held open through February 18, 2022, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

Prior to the hearing the parties submitted a Hearing Report listing stipulations and issues to be decided. The Hearing Report was approved at the time of the hearing. Aerotek and Indemnity Insurance waived all affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed between Escobar de Carballo and Aerotek at the time of the alleged injury.
2. Escobar de Carballo sustained an injury on September 17, 2019, which arose out of and in the course of her employment with Aerotek.
3. The alleged injury is a cause of temporary disability during a period of recovery.
4. Although entitlement to temporary benefits cannot be stipulated, Escobar de Carballo was off work from September 18, 2019 through January 13, 2021.
5. The alleged injury is a cause of permanent disability.
6. At the time of the alleged injury Escobar de Carballo's gross earnings were \$487.46 per week, she was married and entitled to two exemptions, and the parties believe the weekly rate is \$340.25.
7. Prior to the hearing Escobar de Carballo was paid the benefits set forth in Exhibit C.

ISSUES

1. What is the nature of the injury?
2. What is the extent of disability?
3. Has Escobar de Carballo established she is permanently and totally disabled under the common law odd-lot doctrine or statute?
4. What is the commencement date for permanent partial disability benefits?
5. Is Escobar de Carballo entitled to temporary total disability, temporary partial disability, or healing period benefits from September 18, 2019 through January 13, 2021?
6. Are Defendants responsible for the medical bills set forth in Exhibit 4?
7. Is Escobar de Carballo entitled to an award of penalty benefits?
8. Is Escobar de Carballo entitled to recover the cost of the independent medical examination under Iowa Code section 85.39?
9. Should costs be assessed against either party?

FINDINGS OF FACT

Escobar de Carballo grew up in Guatemala. (Transcript:9) She was an orphan and did not attend school. (Tr.:9, 43) Escobar de Carballo cannot write in English or Spanish. (Tr.:40) She can read some Spanish, but she cannot read in English. (Tr.:40) Escobar de Carballo has an Iowa driver's license. (Tr.:42)

Escobar de Carballo has experience in childcare, cleaning homes and businesses, working in a shirt factory, and in food service. (Tr.:9-14) Escobar de Carballo ran a day care certified by the Iowa Department of Human Services from 2014 to 2019. (Tr.:44) Escobar de Carballo closed her daycare when her husband had heart surgery because she needed to take care of him. (Tr.:44)

In August 2019, Aerotek hired Escobar de Carballo and placed her in the bakery at Hy-Vee. (Tr.:16) Escobar de Carballo has a history of thyroid cancer and diabetes, but reported having no problems with her neck, shoulder, or body before working for Aerotek. (Tr.:16-17, 19, 54-55) While working in the bakery, Escobar de Carballo was responsible for taking baked goods on a wheeled rack out of a commercial oven. (Tr.:19, 47-48)

On September 17, 2019, Escobar de Carballo went to the oven at work to remove a wheeled rack. (Tr.:20, 47-48) When she opened the oven the rack fell against her, she fell and hit her head on a table, and the rack fell on top of her. (Tr.:20, 48) Escobar de Carballo worked for a while after the incident, but she could not tolerate working and went home for the day. (Tr.:23, 48)

On September 18, 2019, Escobar de Carballo sought emergency medical treatment at MercyOne where she was examined by Karin Howe, D.O., an emergency medicine physician. (JE 1:1) Escobar de Carballo reported she was burned when a 15 shelf cart she pulled out of a walk in oven caught on the floor causing her to fall onto her right side. (JE 1:1) Escobar de Carballo also reported she hit her head on the table when she fell and the shelves hit her on the head. (JE 1:1) Escobar de Carballo reported she lost consciousness for a few seconds and she experienced multiple episodes of dizziness afterwards. (JE 1:1) Escobar de Carballo complained of having a headache, minor neck pain, right shoulder pain, left knee pain, and right tibia/fibula pain. (JE 1:1)

Dr. Howe ordered a cervical spine computerized tomography scan. (JE 1:3) The reviewing radiologist found Escobar de Carballo had no fracture of the cervical spine, but noted she had moderate degenerative disc disease at C5-C6. (JE 1:4, 6) Imaging of her right arm, left knee, pelvis, tibia and fibula did not reveal any fractures. (JE 1:4) Dr. Howe listed an impression of a superficial burn and concussion, ordered Escobar de Carballo to keep her burns clean and dry and to apply antibiotic ointment, and she discharged her with instructions to follow up with her primary care provider. (JE 1:4, 7-10) Dr. Howe released Escobar de Carballo to return to work on September 23, 2019 with no restrictions. (JE 1:5)

On September 26, 2019, Escobar de Carballo attended an appointment with Stephen Ash, M.D., an orthopedic surgeon, complaining of bilateral shoulder pain following a direct blow and fall at work. (JE 2:11) Dr. Ash assessed Escobar de Carballo with bilateral shoulder pain and a right long head biceps rupture, he recommended right shoulder magnetic resonance imaging, and he imposed restrictions of no use of the right arm and no lifting over 20 pounds with the left arm below shoulder level. (JE 2:12, 14)

Escobar de Carballo attended an appointment with Carlos Moe, D.O., a family medicine physician, on October 7, 2019. (JE 3) Dr. Moe assessed her with post-concussive syndrome, superficial burns of multiple upper extremity sites, a first-degree scalp burn, a right lower leg burn, a right shoulder and wrist contusion, and a right knee and lower leg contusion. (JE 3:80) Dr. Moe prescribed amitriptyline for post-concussive syndrome, headache, and sleep, and restricted Escobar de Carballo from working until she could be evaluated by a neurologist. (JE 3:81)

Escobar de Carballo underwent right shoulder magnetic resonance imaging on October 15, 2019. (JE 2:15) The reviewing radiologist listed an impression of "4 x 4 mm complete to near-complete full-thickness tear in the supraspinatus tendon" with no atrophy of the cuff musculature. (JE 2:15)

On October 25, 2019, Escobar de Carballo returned to Dr. Ash reporting her left shoulder had improved a great deal, but she was still having right shoulder pain. (JE 2:16) Dr. Ash assessed Escobar de Carballo with bilateral shoulder pain, unspecified chronicity and a right rotator cuff tear, discussed operative and nonoperative options with Escobar de Carballo, and she elected to proceed with surgery. (JE 2:17) Dr. Ash recommended a right shoulder arthroscopy arthroscopic subacromial decompression with rotator cuff repair and imposed a two-pound lifting restriction below shoulder level for the right arm. (JE 2:17-18)

On November 19, 2019, Escobar de Carballo commenced treatment with Michael Jacoby, M.D., a neurologist. (JE 4:82) Escobar de Carballo complained of constant left occipital pain without nausea, light and sound sensitivity, concentration and sleeping problems, and infrequent dizziness. (JE 4:82) Escobar de Carballo told Dr. Jacoby she had noticed she would forget why she was going to the store, she had trouble doing the wrong activities, she went to the wrong place once, and she threw trash into the refrigerator. (JE 4:82) Dr. Jacoby documented he observed Escobar de Carballo's language was fluent and logical, her speech was normal, her recent and remote memories were preserved, she had an appropriate fund of knowledge, and she had a good attention span and good concentration. (JE 4:84) Dr. Jacoby assessed Escobar de Carballo with post-traumatic headache, occipital neuralgia, concussion, and an altered mental status, and prescribed amitriptyline. (JE 4:84)

During an appointment on December 20, 2019, Dr. Jacoby administered a greater occipital nerve block on the left. (JE 4:88) Dr. Jacoby documented Escobar de Carballo was alert, appropriately oriented, her language was fluid and logical, her

speech was normal, and she had a good attention span and good concentration. (JE 4:88) Dr. Jacoby assessed Escobar de Carballo with occipital neuralgia, concussion, and post-traumatic headache. (JE 4:88)

Escobar de Carballo reported she did not receive any relief from the injection during her next appointment on January 8, 2020. (JE 4:89) Escobar de Carballo relayed she had throbbing pain all the time in the left occiput area that is worse at night, and which radiates from the occiput where the pain is hot and radiates over the top of her head and pulses. (JE 4:89) Dr. Jacoby documented her vision was fine, but she had tearing of her eye with severe pain. (JE 4:89) Dr. Jacoby noted Escobar de Carballo was alert, her language was fluent and logical, her speech was normal, and she had a good attention span and good concentration. (JE 4:91) Dr. Jacoby documented Escobar de Carballo never picked up the amitriptyline prescription he prescribed. (JE 4:89) Dr. Jacoby assessed Escobar de Carballo with headache and occipital neuralgia and prescribed gabapentin. (JE 4:91)

On February 24, 2020, Escobar de Carballo attended an appointment with Jose Angel, M.D., her primary care provider, for a preoperative exam. (JE 5:111) Dr. Angel noted Escobar de Carballo's right shoulder surgery had to be cancelled because her blood sugar was too high. (JE 5:111) Escobar de Carballo also has a history of thyroid cancer and Dr. Angel monitors her thyroid function. (JE 5:116)

During a follow-up appointment with Dr. Jacoby on March 18, 2020, Escobar de Carballo reported the gabapentin helped for one hour, it upset her stomach, and she believed it "makes her feel dumb." (JE 4:92) She also relayed she had been taking the amitriptyline he prescribed. (JE 4:92) Escobar de Carballo complained of pain in the back of her head and neck into the tops of her shoulder, and she complained of "tinnitus and 'radiation' from [a] phone also bothers her." (JE 4:92) Dr. Jacoby documented Escobar de Carballo was alert, her language was fluent and logical, her speech was normal, and she had a good attention span and good concentration. (JE 4:94) Dr. Jacoby assessed her with a headache, neck pain, and arm weakness and noted, "I doubt any ominous neuropathology. Due to continued, unremitting symptoms, and now the involvement of neck, MRI of C spine for anatomic clearance needed. One more neurologic attempt for treatment. Seems a bit histrionic." (JE 4:94)

On March 27, 2020, Escobar de Carballo underwent cervical magnetic resonance imaging. (JE 4:96) The reviewing radiologist listed an impression of diffuse cervical spondylosis. (JE 4:97)

Dr. Ash performed a right shoulder exam under anesthesia, right shoulder arthroscopy, arthroscopic subacromial decompression, and arthroscopic rotator cuff repair on Escobar de Carballo on April 6, 2020. (JE 2:19)

On April 9, 2020, Escobar de Carballo attended a follow-up appointment with Dr. Ash. (JE 2:22) Dr. Ash documented he spoke with Escobar de Carballo about the importance of getting her hand and elbow moving, he ordered physical therapy, and he

released her to return to work on April 13, 2020, with restrictions of no use of the right arm and a 10 pound lifting restriction with the left arm. (JE 2:23, 25-26)

On May 5, 2020, Escobar de Carballo returned to Dr. Jacoby, complaining of pain at the base of her head, neck pain, and a pulsing sensation. (JE 4:98) She also reported the naproxen he prescribed provided no benefit, and while amitriptyline did not help her pain, it helped her sleep. (JE 4:98) Dr. Jacoby assessed Escobar de Carballo with neck pain and noted she may have "[p]ossible cervical radiculopathy," discontinued her naproxen, and increased her amitriptyline at night. (JE 4:100-01)

Escobar de Carballo returned to Dr. Ash on May 7, 2020, complaining of continued pain in her right shoulder and some intermittent numbness and tingling in her hand that started eight days ago. (JE 2:27) Dr. Ash continued Escobar de Carballo's work restrictions, denied her request for pain medication, and continued her physical therapy. (JE 2:28-30)

On May 14, 2020, Escobar de Carballo attended an appointment with Dr. Angel reporting her diabetes was much improved and reporting problems with severe insomnia, anxiety, and depression due to the pandemic. (JE 5:122) Dr. Angel diagnosed Escobar de Carballo with uncontrolled type 2 diabetes, thyroid carcinoma, neck pain, occipital neuralgia, and depression and anxiety, and prescribed citalopram for her depression and anxiety. (JE5:125)

During her appointment with Dr. Ash on June 5, 2020, Escobar de Carballo reported her right shoulder was doing slightly better since her last visit. (JE 2:31) Dr. Ash continued her physical therapy and imposed a two-pound lifting restriction for the right arm below shoulder and next to her body. (JE 2:32-34)

On June 9, 2020, Escobar de Carballo attended an appointment with Einar Bogason, M.D., a neurosurgeon, complaining of significant pain over the base of her skull on the left side, pain in her neck going down the upper back on the left side, and intermittent pain and discomfort going down her left arm. (JE 4:102) Dr. Bogason documented he reviewed Escobar de Carballo's cervical magnetic resonance imaging with her, noting she had degenerative changes at C4-5, C5-6, and C6-7, with foraminal stenosis. (JE 4:105) Dr. Bogason found her imaging findings did not appear to be the cause of the majority of her pain and he recommended a pain management consultation for possible injections. (JE 4:105)

On June 24, 2020, Escobar de Carballo attended an appointment with John Rayburn, M.D., a physiatrist working in Dr. Ash's group, complaining of left lateral and posterior neck pain from the work injury she described as constant, stabbing, and worsening, and aggravated by head movements and relieved by rest and not moving. (JE 2:35) Dr. Rayburn noted cervical spine magnetic resonance imaging from March 27, 2020, showed multilevel diffuse spondylosis, no acute herniations, and several disc osteophyte complexes causing neural foraminal narrowing bilaterally at multiple levels. (JE 2:35) Dr. Rayburn assessed Escobar de Carballo with cervical spondylosis without

myelopathy, myalgia, other site, other chronic pain, and cervicalgia, noting “[s]he definitely has a soft tissue component in the LEFT upper neck which goes along with her mechanism of injury. Also likely that she flared up the arthritis that was already there when she fell, causing facet pain.” (JE 2:37) Dr. Rayburn recommended a left C3-C6 medial branch block, and if she obtained relief, radiofrequency ablation. (JE 2:37)

Escobar de Carballo returned to Dr. Ash on July 10, 2020, reporting her right shoulder pain was slightly better. (JE 2:39) Dr. Ash recommended additional physical therapy and continued her two-pound lifting restriction. (JE 2:40-42)

On July 10, 2020, Escobar de Carballo attended an appointment with Dr. Jacoby, reporting she received no benefit from amitriptyline and she had discontinued taking gabapentin because it upset her stomach. (JE 4:106) Escobar de Carballo reported having more pain in her left arm and knee. (JE 4:106) Dr. Jacoby documented Escobar de Carballo was alert, her language was fluent and logical, her speech was normal, and she had a good attention span and good concentration. (JE 4:109) Dr. Jacoby assessed her with neck pain, discontinued her gabapentin, instructed her to follow up with pain management and her primary care physician, and released her from care. (JE 4:109) Escobar de Carballo did not return to Dr. Jacoby for treatment.

On July 14, 2020 and July 21, 2020, Dr. Rayburn administered left C3-C5 diagnostic medial branch blocks to Escobar de Carballo. (JE 2:43, 45) Escobar de Carballo returned to Dr. Rayburn on July 29, 2020, reporting she received no relief from the blocks and that her neck pain had increased. (JE 2:47) Escobar de Carballo described her pain as aching and sharp, reported aggravating factors include turning her head, reaching her arm out, and movement, and using a heating pad relieves her pain. (JE 2:47) Dr. Rayburn opined her symptoms appeared to be coming from the muscles in her neck and upper back, noting her facets had improved on exam. (JE 2:48) Dr. Rayburn noted he believed the medial branch blocks had helped her facets and he recommended left upper back/cervical region trigger point injections. (JE 2:49)

Escobar de Carballo returned to Dr. Rayburn’s office on August 12, 2020 for the injections. (JE 2:51) Prior to the procedure Dr. Rayburn’s office tested Escobar de Carballo’s blood sugar because she has preexisting diabetes. (JE 2:51) The result was 315, which was too high to do the procedure and Dr. Rayburn rescheduled her appointment. (JE 2:51)

On August 20, 2020, Escobar de Carballo attended an appointment with Dr. Ash, reporting her right shoulder pain had improved slightly. (JE 2:54) Dr. Ash recommended right shoulder magnetic resonance imaging given her continued pain and weakness and continued her two-pound lifting restriction. (JE 2:55-56)

Escobar de Carballo returned to Dr. Rayburn’s office on August 27, 2020 for the injections. (JE 2:57) Prior to the procedure Dr. Rayburn’s office tested Escobar de Carballo’s blood sugar because she has preexisting diabetes. (JE 2:57) The result was

303, which was too high to do the procedure and Dr. Rayburn rescheduled her appointment. (JE 2:57)

On September 4, 2020, Escobar de Carballo underwent right shoulder magnetic resonance imaging. (JE 4:110) The reviewing radiologist listed an impression of a prior rotator cuff repair with no evidence of high-grade partial thickness or full-thickness rotator cuff re-tear, mild fatty infiltration of the supraspinatus and infraspinatus, and small to moderate amount of subacromial subdeltoid bursal fluid, query bursitis. (JE 4:110)

During a follow-up appointment on September 9, 2020, Dr. Ash noted he agreed with the radiologist that Escobar de Carballo's right rotator cuff repair appeared intact. (JE 2:59) Dr. Ash recommended additional physical therapy and imposed a four-pound lifting restriction with the right upper extremity below shoulder and next to the body. (JE 2:60-62)

On October 9, 2020, Escobar de Carballo returned to Dr. Ash complaining of right shoulder pain. (JE 2:63) Dr. Ash noted the physical therapist noted inconsistencies in Escobar de Carballo's performance during therapy activities. (JE 2:63) Dr. Ash found Escobar de Carballo had reached maximum medical improvement October 9, 2020, he released her with restrictions of a one-pound lifting limit up to shoulder level and five pounds up to waist level with the right arm, and stated he would see her back on an as-needed basis. (JE 2:64-65)

On November 2, 2020, using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Ash assigned Escobar de Carballo a two percent right upper extremity impairment, status post right rotator cuff repair. (JE 2:66)

Escobar de Carballo returned to Dr. Rayburn on November 11, 2020, complaining of left neck/upper back pain. (JE 2:67) Dr. Rayburn noted Escobar de Carballo had planned to undergo left upper cervical trigger point injections, but she had been unable to undergo the injections due to elevated glucose. (JE 2:67) Dr. Rayburn documented, "[a]t this point it looks like most of her symptoms are coming from the muscles in the neck. Her facets are improved on exam." (JE 2:69) Dr. Rayburn agreed to a one-time treatment of left upper cervical region trigger point injections, which he administered on December 3, 2020. (JE 2:69, 71)

On January 13, 2020, Escobar de Carballo attended an appointment with Dr. Rayburn complaining of left neck/upper back pain. (JE 2:74) Dr. Rayburn documented she reported the left upper cervical trigger point injection helped "a little bit at the time." (JE 2:74) Dr. Rayburn noted she appeared to have some enthesopathy at the attachment site in the occipital region, told her to do home exercises and work on stretching and strengthening her neck muscles, and found she had reached maximum medical improvement. (JE 2:75-76)

Escobar de Carballo testified that after Dr. Rayburn released her Aerotek did not call and offer her any work. (Tr.:30) Escobar de Carballo testified after she did not hear from Aerotek she called Aerotek, but she did not receive a return call until a couple of weeks later and a man told her Aerotek did not have any work for her because she could only lift one pound. (Tr.:31)

Escobar de Carballo underwent cervical spine magnetic resonance imaging ordered by Dr. Angel on June 28, 2021. (JE 5:156) The reviewing radiologist listed an impression of mild spinal canal stenosis at C4-5 and C5-6, “[s]evere left neural foramina narrowing at C6-C7, likely impinging the exiting C7 nerve root,” moderate right neural foramina narrowing at C6-7, moderate bilateral neural foramina narrowing at C5-6, and moderate to severe bilateral neural foramina narrowing at C4-5. (JE 5:156-57)

On August 25, 2021, Escobar de Carballo attended an appointment with Esmiralda Henderson, M.D., a neurosurgeon, complaining of left occipital neuralgic pain and swelling, trapezius muscle pain, pain shooting up her head, and left upper extremity pain. (JE 7, p. 180) Dr. Henderson noted Escobar de Carballo has multiple issues, it was unclear whether she truly has cervical radiculopathy, and surgery would be challenging due to her surgical history. (JE 7, p. 184) Dr. Henderson recommended lumbar spine magnetic resonance imaging for her left lower extremity and hip complaints. (JE 7, p. 184)

On August 31, 2021, Escobar de Carballo attended an appointment with Dr. Angel. (JE 5:158) Dr. Angel noted Escobar de Carballo had seen Dr. Henderson, she underwent cervical spine magnetic resonance imaging, and she was not offered surgery, which he agreed with. (JE 5:158) Escobar de Carballo complained of right shoulder abduction weakness, pain, and discomfort. (JE 5:158) Dr. Angel examined her and diagnosed her with “[d]iabetic frozen shoulder associated with type 2 diabetes mellitus” of the right shoulder. (JE 5:166)

During a follow-up appointment with Dr. Angel on September 20, 2021, Dr. Angel noted Escobar de Carballo’s depression and anxiety were worse with her shoulder pain and that she had a history of “right frozen shoulder” that appeared to be “trauma related with diabetes.” (JE 5:162)

On November 3, 2021, Jacqueline Stoken, D.O., a physiatrist, conducted an independent medical examination for Escobar de Carballo and issued her report on November 15, 2021. (Ex. 1) Dr. Stoken reviewed Escobar de Carballo’s medical records and examined her. (Ex. 1)

Dr. Stoken listed an impression of a traumatic brain injury, neck contusion, burns of the face, right arm and leg, and right shoulder rotator cuff tear, status post right shoulder exam under anesthesia, right shoulder arthroscopy, arthroscopic subacromial decompression, and arthroscopic rotator cuff repair, postconcussive syndrome with severe cognitive deficiencies and posttraumatic headaches, chronic neck and shoulder pain, complex regional pain syndrome of the right upper extremity, and impaired

mobility, gait, and ability to perform activities of daily living. (Ex. 1:12-13) Dr. Stoken opined the November 17, 2019 work injury caused the above diagnoses, noting before the work injury Escobar de Carballo was able to engage in life without oversight by her family and she did not have chronic neuropathic pain in her right upper extremity. (Ex. 1:13)

On exam, Dr. Stoken found Escobar de Carballo had cervical flexion to 30 degrees, extension to 20 degrees, side bending to the right 20 degrees and to the left 30 degrees, rotation to the right 30 degrees and to the left 40 degrees, noting she has trigger points and muscle tension in the cervical paraspinals. (Ex. 1:12)

Using the AMA Guides Dr. Stoken opined Escobar de Carballo fell within DRE Cervical Category II and assigned her an eight percent whole person impairment, noting her history and examination are compatible with the injury and she has asymmetric range of motion and muscle spasms. (Ex. 1: 13) For her right upper extremity, Dr. Stoken opined under Chapter 16, Figure 16-1b, page 437 of the AMA Guides Escobar de Carballo has a 49 percent impairment of the right upper extremity due to deficits in range of motion, which she converted to a 29 percent whole person impairment. (Ex. 1:13)

With respect to complex regional pain syndrome for the right upper extremity, Dr. Stoken opined:

Mrs. Carballo fits into the CRPS diagnostic guidelines as described in the *National Guide Clearinghouse* – Complex regional pain syndrome: treatment guidelines. I have enclosed the Guidelines for you.

1. She has continuing pain, which is disproportionate to any inciting event.
2. She must report at least one symptom in *three of the four* categories:

Sensory: She reports hyperesthesia or allodynia;

Vasomotor: She reports temperature asymmetry and/or skin color changes and/or skin color asymmetry;

Sudomotor/Edema: She reports edema and/or sweating changes and/or sweating asymmetry;

Motor/Trophic: She reported decreased range of motion and/or motor dysfunction (weakness, tremor, dystonia) and/or trophic changes (hair, nail, skin).

3. She must display at least one sign at time of evaluation in *two or more* of the following categories:

Sensory: She has evidence of hyperalgesia (to pinprick) and/or allodynia (to light touch and/or deep somatic pressure and/or joint movement);

Vasomotor: She has evidence to temperature asymmetry and/or skin color changes and/or asymmetry;

Sudomotor/Edema: She has evidence of edema and/or sweating changes and/or sweating asymmetry;

Motor/Trophic: She has evidence of decreased range of motion and/or motor dysfunction (weakness, tremor, dystonia).

(Ex. 1:13-14) Using the criteria for rating impairments related to chronic pain from Chapter 13, Table 13-22, of the AMA Guides, Dr. Stoken opined Escobar de Carballo fits into Class 4 Dominant Extremity and assigned her a 60 percent impairment of the whole person finding she is unable to use the involved extremity for self-care or daily activities. (Ex. 1:14)

For the alleged cognitive impairment, using Chapter 13, Table 13-5, page 320 of the AMA Guides, Dr. Stoken found Escobar de Carballo scored the following:

Memory: She scores 1.0 CDR for memory loss. She has moderate memory loss. More marked for recent events; defect interferes with everyday activities.

Orientation: She scores 1.0 CDR. She has moderate difficulty with time relationships; oriented for [lace [sic] at examination. She has geographic disorientation elsewhere.

Judgement and problem solving: She has a 1.0 CDR with moderate difficulty in handling problems, similarities, and differences; social judgment usually maintained.

Community affairs: She scores a 1.0 CDR. She is unable to function independently at activities although may still be engaged in some; appears normal to casual inspection.

Home and hobbies: She scores 1.0 CDR. Mild but definite impairment of function at home; more difficult chores abandoned; more complicated hobbies and interests abandoned.

Personal care: She scores 0.5 CDR. She is capable of self-care.

(Ex. 1:14-15) Using Chapter 13, Tables 13-5 and 13-6, Dr. Stoken opined Escobar de Carballo fits into Class II and assigned her a 29 percent whole person impairment

noting her CDR is 1.0 and her impairment requires direction of some activities of daily living. (Ex. 1:15)

For postconcussive headaches, using Chapter 18, Table 18-1, page 571 of the AMA Guides, Dr. Stoken assigned Escobar de Carballo a three percent impairment for postconcussive headache pain syndrome without significant, identifiable organ dysfunction to explain the pain. (Ex. 1:15) Using the combined values chart at page 604, Dr. Stoken assigned Escobar de Carballo a combined 82 percent whole person impairment. (Ex. 1:15)

Dr. Stoken noted Escobar de Carballo underwent a valid functional capacity evaluation on October 27, 2021, which found she functions in the sedentary physical demand level. (Exs. 1:15; 2) Using the evaluation, Dr. Stoken assigned the following restrictions:

Floor to waist lift 0 lbs. never.

Waist to overhead lift of 0 lbs. never.

Horizontal lift [sic] of 0 lbs. never.

Static push of never.

Static pull of rarely.

Right single upper extremity carry never.

Left single upper extremity carry of 10 lbs. occasionally and 15 lbs. rarely.

Front carry never.

Elevated work with prolonged use and repetitive reaching with the right upper extremity never.

Elevated work with prolonged use and repetitive reaching with the left upper extremity 5 lbs. occasionally and 10 lbs. rarely.

Elevated work, crawling, deep static crouch, never.

Forward bending/sitting, rotation sitting, rarely.

Forward bending/standing, rotation standing, kneeling, repetitive squat, standing tolerance, walking, stair climbing, occasionally.

Sitting tolerance – frequently.

Step ladder climbing never.

Dynamic balance rarely.

(Ex. 1:15-16) Dr. Stoken found Escobar de Carballo has significant cognitive deficits and pain which preclude her from working. (Ex. 1:16)

Dr. Stoken recommended future medical care, including an evaluation and treatment by an occupational therapist to maximize Escobar de Carballo's ability to perform activities of daily living independently, an evaluation and treatment by a physical therapist for complex regional pain syndrome of the right upper extremity, evaluation and treatment from a speech therapist to work on improving and strategizing how to improve function with memory loss, and reasonable future medical care, including physician visits, medication, injections, and/or physical therapy for complex regional pain syndrome. (Ex. 1:16)

Joseph Chen, M.D., a physiatrist, conducted an independent medical examination for Aerotek and Indemnity on December 3, 2021, and issued his report on December 4, 2021. (Ex. E) Dr. Chen reviewed Escobar de Carballo's medical records and examined her. (Ex. E)

On exam Dr. Chen noted on exam Escobar de Carballo:

had significant displays of pain behavior with common maneuvers unrelated to her right shoulder including tremoring of her right hand while closing a fist and extending her neck and elbow. These behaviors improved towards the end of the appointment. She had a normal neurological examination without focal peripheral nerve deficits. Skin was warm and dry with normal and symmetric capillary refill despite her complaints that her fingers turn purple and she gets swelling. She was cooperative, good eye contact, sat in chair. She grimaced early in the appointment as we were discussing her history. At the end of her appointment, I assisted in helping her put her coat on and she moved her right shoulder with improved range of motion than when directly examining her shoulder planes.

(Ex. E:24) Dr. Chen noted no areas of edema, swelling, or erythema of skin in the neck and bilateral upper extremities. (Ex. E:25)

Dr. Chen documented Escobar de Carballo had diffuse tenderness to light tactile stimulation of the cervical spine and tenderness over the left trapezius and scapular borders and she was able to perform active flexion to full chin tuck, full neck extension, rotation, and side bend with complaints of pulling neck pain with extremes of neck flexion, rotation, and side-bending bilaterally. (Ex. E:25) Dr. Chen found for her neck she had 30 degrees of extension, 30 degrees of flexion, 30 degrees of left and right lateral tilt, noting "[n]one of these maneuvers led to complaints of radiating arm pain with neck extension. (Ex. E:25) Dr. Chen reported "no findings of swelling, scars,

discoloration, deformity, atrophy, hair loss, nail changes in the hands or forearms.” (Ex. E:25)

For her right shoulder Dr. Chen noted Escobar de Carballo:

had limited right shoulder range of motion in all directions with direct examination. She was noted to have only 20 degrees of shoulder flexion, no shoulder abduction, kept her elbow by her side with full internal rotation with inability to get her right arm even to neutral for external rotation. She had no extension on direct examination. She had no atrophy of the right rotator cuff or scapular stabilizer muscles. She had no atrophy of the biceps or forearm muscle from side to side comparison.

(Ex. E:25) For her left shoulder, Dr. Chen found she had flexion to 150 degrees, abduction to 90 degrees and internal and external rotation to 80 degrees. (Ex. E:25)

Dr. Chen diagnosed Escobar de Carballo with chronic right shoulder myofascial pain “due to multiple substantial personal factors and only minimally related to her [September 2019] work injury.” (Ex. E: 27) He also found she sustained an acute, nearly full-thickness tear to her right supraspinatus muscle. (Ex. E:27)

Dr. Chen opined Escobar de Carballo does not meet the criteria for complex regional pain syndrome of the right upper extremity. (Ex. E:28) While Escobar de Carballo reported her right hand turns purple and swells at times when she does not move it, Dr. Chen found no objective evidence of any trophic or temperature changes in her skin, nails, or hair growth consistent with complex regional pain syndrome. (Ex. E:28)

Dr. Chen further opined she does not have a diagnosis of post-concussive headaches or post-concussion syndrome, noting during the appointment with him “[s]he reported no concerns of pain in her head based upon the symptom drawing that she and her interpreter completed today.” (Ex. E:28) Dr. Chen noted he asked her to complete a checklist of common post-concussive symptoms that have bothered her over the past two days and she scored high with pain, balance problems, headache, but also high on cognitive symptoms, sleep symptoms, and emotional symptoms, noting her “pattern of escalating symptoms over the past two years is inconsistent with that expected of a headache/concussion syndrome and more consistent with the evolution and development of a chronic pain condition.” (Ex. E:29)

Dr. Chen opined Escobar de Carballo’s right shoulder rotator cuff tear is causally related to the work injury, she was diagnosed with a concussion and she received appropriate neurological evaluation and treatment. (Ex. E:29) Dr. Chen found she does not meet a diagnosis of complex regional pain syndrome of the right upper extremity stating he did not believe Dr. Stoken considered alternative etiologies for her ongoing pain. (Ex. E:29)

Dr. Chen found Escobar de Carballo reached maximum medical improvement on October 9, 2020. (Ex. E:29) Dr. Chen disagreed with Dr. Stoken's 82 percent whole person impairment, noting as the medical director of an inpatient rehabilitation hospital he had not seen any individuals who have had such a marked impairment following even catastrophic injuries, including amputation, stroke, or spinal cord injuries. (Ex. E:30) He disagreed with Dr. Stoken's 60 percent whole person impairment due to a diagnosis of complex regional pain syndrome noting Escobar de Carballo did not have any objective findings of muscle atrophy or trophic changes of the skin, hair, or nails. (Ex. E:30)

Dr. Chen agreed with Dr. Ash's impairment rating and noted when he helped Escobar de Carballo put her coat on he found she had more movement in her right shoulder than on exam. (Ex. E:30)

Dr. Chen disagreed with the 29 percent impairment Dr. Stoken assigned due to traumatic brain injury. (Ex. E:30) Dr. Chen noted Escobar de Carballo provided him with a detailed and accurate history recalling her past and current events which is inconsistent with impairment from clinical dementia, and noted while she has limited formal education, she is able to function at an average level in society with the ability to provide caregiving for her husband who recently underwent open heart surgery. (Ex. E:30) Dr. Chen's findings are consistent with those of Dr. Jacoby.

Dr. Chen disagreed with Dr. Stoken's assignment of five percent impairment for neck pain and three percent impairment for headache, finding the conditions are unrelated to any sequelae of the work injury. (Ex. E:30) He also disagreed with Dr. Rayburn's opinion that the work injury led to an aggravation of her preexisting cervical spondylosis and facet joint pain, noting she reported the injections she received were extremely painful and lead to increased hearing or anxiety/distress following the injections. (Ex. E:30) Dr. Chen opined her neck pain has been myofascial all along. (Ex. E:30)

Dr. Chen opined Escobar de Carballo should observe a work restriction of no overhead work for her right arm as a result of her current level of limited physical fitness unrelated to the September 2019 work injury. (Ex. E:31)

Lana Sellner, MA, CRC, conducted a vocational analysis regarding Escobar de Carballo's employability for Aerotek and Indemnity Insurance. (Ex. D) Sellner reviewed Escobar de Carballo's medical records and work history. (Ex. D)

Sellner noted Escobar de Carballo has a history of working in unskilled and semi-skilled light to heavy work as an oven tender, baker helper, cook helper, kitchen helper, housekeeping cleaner, housekeeper, child care assistant, and child monitor. (Ex. D:10) Sellner opined she believed Escobar de Carballo remains employable within a sedentary work position. (Ex. D:12) Sellner completed labor market research of the Des Moines area, and found positions, including light assembly starting at \$12.00 per hour, cell phone tester, starting at \$13.00 per hour, after-school childcare or monitor

with an entry wage of \$8.61 per hour, and ticket taker/usher, with an entry wage of \$8.42 per hour, consistent with her functional limitations and residual capacities. (Ex. D:11) Sellner also believed Escobar de Carballo would be a candidate for Mexican/Hispanic grocery stores and restaurants typically found by storefront or word of mouth as a hostess, light kitchen help/prep, cashier, order taker, light housekeeping, and/or silverware helping with an entry level wage range of \$8.56 to \$10.21 per hour. (Ex. D:11)

On December 9, 2021, Dr. Ash issued an opinion letter after reviewing Dr. Stoken's independent medical examination as follows:

Dr. Stoken assigned a 49% right upper extremity impairment due to her deficits in range of motion, which converted to a 29% whole person impairment for the right upper extremity. I reviewed Dr. Joseph Chen's evaluation of the patient that he performed on December 3, 2021. I have reviewed it in detail. It should be noted that in my operative report from April 6, 2020, there is a typographical error. On the first page, under the paragraph Details of Operation, the second and third sentences should read, she had 170 degrees of elevation. In 90 degrees of abduction, she externally rotated 90 degrees and internally rotated 85 degrees. The originally produced operative report has this typographical error and I have a very routine way of describing my shoulder range of motion exam under anesthesia. In summary, at the operation, she did not have significant stiffness in the shoulder when she was anesthetized. Similarly, on my last exam of the patient on October 9, 2020, she had no significant limitation of motion in the right shoulder passively. I could elevate her 175 degrees. In 90 degrees of abduction, I could externally rotate her 90 degrees and internally rotate her 90 degrees. She externally rotated 40 degrees in adduction and could extend 50 degrees. I think it is possible that Dr. Chen would modify some of the statements in the IME if he were aware of this typographical error.

(JE 2:78) Dr. Ash stated he stood by his two percent upper extremity rating. (JE 2, p. 78)

Escobar de Carballo testified she could not return to work as a food service worker because she would not be able to lift the big pans, trays, or clean a microwave. (Tr.:37) Escobar de Carballo reported she could not return to a cleaning or janitorial position because she would not be able to clean blinds because she cannot lift her arm and she would not be able to run the vacuum because a vacuum is heavy. (Tr.:38)

Escobar de Carballo testified she has difficulty eating, styling her hair, and washing her back because she cannot lift her arm. (Tr.:38) Escobar de Carballo reported before the work injury she was right-hand dominant and now she has difficulty tying her shoes and she has to use her other hand to lift a cup of coffee. (Tr.:38)

Escobar de Carballo reported she has not cooked a meal since September 2019 because the pans are heavy. (Tr.:46)

Escobar de Carballo testified she started having problems with her memory after the September 17, 2019 work injury, but reported that when she contracted Covid-19 her memory started bothering her “a little bit more.” (Tr.:56) Escobar de Carballo relayed she believes she has decreased short-term memory as a result of the accident. (Tr.:65)

On cross-examination, Escobar de Carballo admitted she told Dr. Stoken she has headaches two-thirds of the days in a month that last 12 hours per day. (Tr.:61) She also reported she told Dr. Stoken she has sensitivity to sound and light and that her sensitivity to sound is the same, but her sensitivity to light has improved. (Tr.:62-63) Escobar de Carballo responded, “[y]es, I get a lot of – It’s not exactly a headache. It’s the part in the back that received the impact. It bothers me a lot.” (Tr.:61) When asked whether she told Dr. Stoken she experiences migraine symptoms 5 to 9 days per month, as follows,” [y]es; yes, but I don’t think it’s a migraine. I think it’s when I hit my head, that pain has stayed there, but – I don’t think it’s a migraine, but I did tell her I do have strong pain.” (Tr.:63) Escobar de Carballo relayed the pain has remained the same. (Tr.:63) At the time she saw Dr. Stoken, Escobar de Carballo was taking naproxen for headache pain. (Tr.:64) At the time of the hearing she was not taking naproxen because it was not helping with her headache pain. (Tr.:64)

Escobar de Carballo reported she has difficulty getting up and down from a chair or a bed, “whenever I sort of strain a little bit to lie down or sit that I get pain the back of the neck where I was hit.” (Tr.:65)

Sarabia stated it is difficult for her mother to drive because it hurts too much for her to rotate her arm, so she drives her unless it is a short drive. (Tr.:73) Sarabia reported her mother can no longer sweep and mop due to the function of moving her shoulder and arm. (Tr.:74) Sarabia helps her mother scrub her back, set the table and move things because of her arms. (Tr.:74) Sarabia stated her mother cannot stir or move pots with food in them because the pots are too heavy. (Tr.:74)

Sarabia reported sometimes when she speaks to her mother she looks at her like she does not understand what she was saying, whether it was a statement or a question. (Tr.:74) Sarabia stated she has to track her mother on her phone because she will forget where to turn at her house and will call stating she is lost. (Tr., p. 75)

CONCLUSIONS OF LAW

I. Applicable Law

This case involves the issues of nature and extent of disability, temporary benefits, recovery of medical bills, penalty benefits, and recovery of an independent medical examination and costs under Iowa Code sections 85.27, 85.34, 85.39, 86.13,

and 86.40. In 2017, the Iowa Legislature enacted changes to Iowa Code chapters 85, 86, and 535 effecting workers' compensation cases. 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 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.71, 86.26, 86.39, and 86.42 apply to injuries occurring on or after the effective date of the Act. The occurred after the changes to the statute, therefore, the new provision of the statute apply to these cases.

II. Nature of the Injury

Escobar de Carballo alleges she sustained injuries to her right shoulder and cervical spine caused by the September 2019 work injury and that the work injury caused her to develop dementia and a cognitive impairment, post-concussive headaches, and complex regional pain syndrome. Aerotek and Indemnity Insurance agree Escobar de Carballo sustained an injury to her right shoulder caused by the work injury, but deny she sustained an injury to her cervical spine or that the work injury caused her to develop dementia, a cognitive impairment, post-concussive headaches, or complex regional pain syndrome.

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 Co. 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).

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 v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997). 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).

A. Complex Regional Pain Syndrome

Two physicians have given opinions on whether the work injury caused Escobar de Carballo to develop complex regional pain syndrome, Dr. Stoken, a physiatrist who conducted an independent medical examination for Escobar de Carballo, and Dr. Chen, a physiatrist who conducted an independent medical examination for Aerotek and Indemnity Insurance. Dr. Stoken opined Escobar de Carballo developed complex regional pain syndrome caused by the work injury and Dr. Chen opined Escobar de Carballo does not meet the criteria for a diagnosis of complex regional pain syndrome. No physician, other than Dr. Stoken, has diagnosed Escobar de Carballo with complex regional pain syndrome.

In reaching her conclusion, Dr. Stoken used reported she used “the CRPS diagnostic guidelines as described in the *National Guide Clearinghouse – Complex regional pain syndrome: treatment guidelines*.” (Ex. 1:13) The Division of Workers’ Compensation has adopted the Fifth Edition of the AMA Guides for evaluating impairment. 876 IAC 2.4. Dr. Stoken did not use the AMA Guides in determining

whether Escobar de Carballo meets the criteria for complex regional pain syndrome. I do not find her opinion persuasive.

Table 16-16 at page 496 of the AMA Guides provides objective criteria for determining whether an individual meets a diagnosis of complex regional pain syndrome, as follows:

Local clinical signs

Vasomotor changes:

- Skin color: mottled or cyanotic
- Skin temperature: cool
- Edema

Sudomotor changes:

- Skin dry or overly moist

Trophic changes:

- Skin texture: smooth, nonelastic
- Soft tissue atrophy: especially in fingertips
- Joint stiffness and decreased passive motion
- Nail changes: blemished, curved, talonlike
- Hair growth changes: fall out, longer, finer

Radiographic signs

- Radiographs: trophic bone changes, osteoporosis
- Bone scan: findings consistent with CRPS

Interpretation

- ≥ 8 Probable CRPS
- ≤ 8 No CRPS

The AMA Guides provide “[a]t least eight of these findings must be present concurrently for a diagnosis of CRPS. Signs are objective evidence of disease perceptible to the examiner, as opposed to symptoms, which are subjective sensations of the individual.” AMA Guides p. 496.

Under the “Current Status” section of her report, Dr. Stoken discussed Escobar de Carballo’s complaints of pain involving her head and neck, right shoulder and her alleged cognitive problems. (Ex. 1:10-11) The “Physical Examination” section of her report includes findings from a mini mental status exam, reflexes, cervical range of motion, and right wrist and elbow range of motion. (Ex. 1:12) On exam, Dr. Stoken noted “[t]he right hand is mottled purplish in color and very cold compared to the left hand. She exhibits allodynia and hyperalgesia in the right upper extremity. The right hand is cooler than the left hand.” (Ex. 1:12) Dr. Stoken did not note any radiographic

signs supporting her diagnosis, sudomotor changes, or trophic changes on exam. Dr. Stoken did not find and list eight or more of the objective criteria contained in the AMA Guides in reaching her conclusion.

Dr. Chen used the AMA Guides in preparing his report. He noted on exam Escobar de Carballo's "[s]kin was warm and dry with normal and symmetric capillary refill." (Ex. E:24) Dr. Chen opined Escobar de Carballo does not meet the criteria for complex regional pain syndrome of the right upper extremity, noting while Escobar de Carballo reported her right hand turns purple and swells at times when she does not move it, he found no objective evidence of any trophic or temperature changes in her skin, nails, or hair growth consistent with complex regional pain syndrome. (Ex. E:28)

No physician, other than Dr. Stoken, has diagnosed Escobar de Carballo with complex regional pain syndrome. Based on the lack of objective findings made by Dr. Chen using the AMA Guides and the evidence presented at hearing, I find Escobar de Carballo has failed to establish she developed complex regional pain syndrome as a result of the work injury.

B. Cognitive Deficits and Post-Concussive Headaches

Escobar de Carballo avers she sustained permanent cognitive deficits and post-concussive headaches caused by the work injury. Aerotek and Indemnity reject her assertion.

Dr. Stoken assessed Escobar de Carballo with a traumatic brain injury and post-concussive syndrome with "severe cognitive deficiencies and posttraumatic headaches." (Ex. 1:13) Based on a conversation Dr. Stoken had with Escobar de Carballo and her daughter, Dr. Stoken assigned Escobar de Carballo a 29 percent whole person impairment for cognitive deficits related to a traumatic brain injury using Chapter 13, Table 13-5 for Clinical Dementia Rating and Table 13-6, Criteria for Rating Impairment Related to Mental Status of the AMA Guides. (Ex. 1:15) Using Chapter 18, Table 18-1, page 571 of the AMA Guides, she assigned Escobar de Carballo a three percent impairment for post-concussive headache pain syndrome without significant identifiable organ dysfunction to explain the pain. (Ex. 1:15)

Dr. Chen opined Escobar de Carballo does not have a diagnosis of clinical dementia, post-concussive headaches, or post-concussive syndrome. (Ex. E:28-30) A professional interpreter provided Spanish interpretation services during his independent medical examination. (Ex. E:15) During Dr. Stoken's independent medical examination Escobar de Carballo's daughter provided interpretation services for her mother and filled out the forms for her mother.

Dr. Chen noted Escobar de Carballo provided a detailed and accurate history recalling past and current events that is inconsistent with an impairment from clinical dementia. (Ex. E:30) Dr. Chen further noted, "[s]he reported no concerns of pain in her head based upon the symptom drawing that she and her interpreter completed today."

(Ex. E:28) Dr. Chen documented he asked her to complete a checklist of common post-concussive symptoms that have bothered her over the past two days and she scored high with pain, balance problems, headache, but also high on cognitive symptoms, sleep symptoms, and emotional symptoms, noting her “pattern of escalating symptoms over the past two years is inconsistent with that expected of a headache/concussion syndrome and more consistent with the evolution and development of a chronic pain condition.” (Ex. E:29)

I find Dr. Chen’s opinion, as supported by the record to be the most persuasive. When the oven rack fell on Escobar de Carballo she hit her head on a table. The day after the work injury she sought emergency medical treatment and she was diagnosed with a concussion. (JE 1) A few weeks later Dr. Moe, a family medicine physician assessed her with post-concussive syndrome and restricted her from working until she had been evaluated by a neurologist. (JE 3:81)

On November 19, 2019, Escobar de Carballo commenced treatment with Dr. Jacoby, a neurologist. (JE 4:82) Dr. Jacoby assessed Escobar de Carballo with post-traumatic headache, occipital neuralgia, concussion, and an altered mental status, and prescribed amitriptyline. (JE 4:88) When she returned on December 20, 2019, Dr. Jacoby administered a greater occipital nerve block on the left. (JE 4:88) During her follow-up appointment on January 8, 2020, Escobar de Carballo reported she received no relief from the injection and Dr. Jacoby noted she had not filled her amitriptyline prescription. (JE 4:89) Dr. Jacoby documented Escobar de Carballo complained her “[p]ain is present all the time in the left occiput that throbs and [is] worse at night. [Her] pain radiated from the occiput where the pain is hot and it radiates over the top of the head and pulses.” (JE 4:89) Dr. Jacoby assessed her with a headache and occipital neuralgia and prescribed gabapentin. (JE 4:91)

When she returned to Dr. Jacoby on March 18, 2020, Escobar de Carballo relayed the gabapentin helped for one hour, the medication upset her stomach and she believed it “makes her feel dumb.” (JE 4:92) During the appointment she complained of pain back in the back of her head and neck into the tops of her shoulder and of “tinnitus and ‘radiation’ from [a] phone also bothers her.” (JE 4:92) Dr. Jacoby assessed her with a headache, neck pain, and arm weakness and noted “I doubt any ominous neuropathology. Due to continued, unremitting symptoms, and now the involvement of neck, MRI of C spine for anatomic clearance needed. One more neurologic attempt for treatment. Seems a bit histrionic.” (JE 4:94)

On May 5, 2020, Escobar de Carballo returned to Dr. Jacoby, complaining of pain at the base of her head, neck pain, and a pulsing sensation. (JE 4:98) She also reported naproxen provided no benefit, and while amitriptyline did not help her pain, it helped her sleep. (JE 4:98) Dr. Jacoby assessed Escobar de Carballo with neck pain and noted she may have “[p]ossible cervical radiculopathy,” discontinued her naproxen, and increased her amitriptyline at night. (JE 4:100-01)

During a follow-up appointment two months later on July 10, 2020, Escobar de Carballo reported she received no benefit from the amitriptyline and she had discontinued taking gabapentin because it upset her stomach. (JE 4:106) Dr. Jacoby assessed her with neck pain and discontinued her gabapentin, instructed her to follow up with pain management and her primary care physician and to return as needed. (JE 4:109) Escobar de Carballo has not returned to Dr. Jacoby or seen another neurologist or neuropsychologist since Dr. Jacoby released her from care.

After treating her for four months, Dr. Jacoby documented he doubted she had “any ominous neuropathology,” due to her “continued, unremitting symptoms, and now the involvement of neck,” he ordered cervical spine magnetic resonance imaging, and documented he would make “[o]ne more neurologic attempt for treatment,” and documented Escobar de Carballo seemed “a bit histrionic.” (JE 4:94) During her final appointment Dr. Jacoby did not assess Escobar de Carballo with any neurological condition. At the time of the hearing Escobar de Carballo was not receiving any treatment for a post-concussive disorder or headaches. No neuropsychological testing has been done regarding her alleged dementia/cognitive impairment. Based on all the record evidence, including claimant’s testimony and that of her daughter, I do not find Escobar de Carballo has met her burden of proof she sustained a cognitive disorder or dementia, permanent post-concussive disorder, or permanent headaches caused by the work injury.

C. Cervical Spine

Escobar de Carballo avers the work injury caused an aggravation of her preexisting degenerative cervical spine condition. Aerotek and Indemnity Insurance reject her assertion.

Three physiatrists have provided causation opinions on whether Escobar de Carballo sustained a work injury to her cervical spine in this case, Dr. Rayburn, a treating physiatrist, Dr. Stoken, and Dr. Chen. Dr. Rayburn assessed Escobar de Carballo with cervical spondylosis without myelopathy, myalgia, other site, other chronic pain, and cervicgia and opined she “likely flared up” the preexisting arthritis in her cervical spine when she fell, causing facet pain. (JE 2:37) Dr. Stoken opined Escobar de Carballo sustained a neck contusion and she has chronic neck pain caused by the work injury. (Ex. 1:12-13) Using the AMA Guides, Dr. Stoken opined Escobar de Carballo fell within DRE Cervical Category II and assigned her an eight percent whole person impairment, noting her history and examination are compatible with the injury and she has asymmetric range of motion and muscle spasms. (Ex. 1: 13) Dr. Chen has opined Escobar de Carballo’s neck condition was not caused or aggravated by the work injury, opining her pain was myofascial. (Ex. E:30) I find Dr. Stoken’s opinion, as supported by Dr. Rayburn’s opinion to be the most persuasive.

When she sought emergency medical treatment the day after the injury, Escobar de Carballo complained of having a headache, minor neck pain, right shoulder pain, left knee pain, and right tibia/fibula pain. (JE 1:1) Based on her cervical spine pain

complaint, Dr. Howe ordered a cervical spine computerized tomography scan. (JE 1:3) The reviewing radiologist found Escobar de Carballo had no fracture of the cervical spine, but noted she had moderate degenerative disc disease at C5-C6. (JE 1:4, 6)

In March 2020, while she was treating with Dr. Jacoby she again complained of neck pain. (JE 4:92-94) Dr. Jacoby assessed her with a headache, neck pain, and arm weakness, and he ordered cervical spine magnetic resonance imaging. (JE 4:94) Dr. Bogason, a treating neurosurgeon, examined Escobar de Carballo and reviewed her cervical spine magnetic resonance imaging, which he found showed degenerative changes at C4-5, C5-6, and C6-7 with foraminal stenosis. (JE 4:105) Dr. Bogason found her imaging findings did not appear to be the cause of the majority of her pain and he recommended a pain management consultation for possible injections. (JE 4:105) Following his recommendation, Escobar de Carballo commenced treatment with Dr. Rayburn. (JE 2) Dr. Rayburn opined Escobar de Carballo likely flared up the preexisting arthritis in her neck when she fell, causing facet pain and he commenced treating her. (JE 2:37)

There was no evidence presented at hearing Escobar de Carballo complained of or sought treatment for cervical spine pain before the work injury. Following the work injury she reported having ongoing pain in her cervical spine, requiring treatment, including injections. At the time of both independent medical examinations Escobar de Carballo complained of tenderness with tactile stimulation to her cervical spine. (Ex. E:25; 1:12) I find Escobar de Carballo has met her burden of proof the work injury aggravated her preexisting cervical spine condition. A permanent impairment to the cervical spine is compensated as an unscheduled injury, therefore, extent of disability for this work injury is determined using industrial analysis.

D. Right Shoulder

The parties agree Escobar de Carballo sustained a permanent injury to her right shoulder caused by the work injury. The parties disagree on the nature of the injury and extent of disability. Three physicians have given opinions on the nature and extent of Escobar de Carballo's permanent impairment to her right shoulder, Dr. Ash, a treating orthopedic surgeon, and Drs. Stoken and Chen.

Dr. Ash performed a right shoulder exam under anesthesia, right shoulder arthroscopy, arthroscopic subacromial decompression, and arthroscopic rotator cuff repair on Escobar de Carballo on April 6, 2020. (JE 2:19) Following surgery Escobar de Carballo continued to complain of right shoulder pain. Repeat magnetic resonance imaging showed her right rotator cuff repair appeared intact. (JE 2:59; JE 4:110)

During an appointment on October 9, 2020, Dr. Ash documented the physical therapist noted inconsistencies in Escobar de Carballo's performance during therapy activities. (JE 2:63) He found she had reached maximum medical improvement and released her with restrictions of a one-pound lifting restriction up to shoulder level and five pounds up to waist level with the right arm. (JE 2:64-65) On November 2, 2020,

using the AMA Guides, Dr. Ash assigned Escobar de Carballo a two percent right upper extremity impairment, status post right rotator cuff repair. (JE 2:66) Dr. Chen also agreed with his rating.

For her right upper extremity, Dr. Stoken opined under Chapter 16, Figure 16-1b, page 437 of the AMA Guides Escobar de Carballo has a 49 percent impairment of the right upper extremity due to deficits in range of motion, which she converted to a 29 percent whole person impairment. (Ex. 1:13) Dr. Stoken found she had zero degrees flexion, extension, adduction, and abduction. (Ex. 1:18) She did not make any comparison findings for the left shoulder.

For her right shoulder Dr. Chen noted Escobar de Carballo

had limited range of motion in all directions with direct examination. She was noted to have only 20 degrees of shoulder flexion, no shoulder abduction, kept her elbow by her side with full internal rotation with inability to get her right arm even to neutral for external rotation. She had no extension on direct examination. She had no atrophy of the right rotator cuff or scapular stabilizer muscles. She had no atrophy of the biceps or forearm muscle from side to side comparison.

(Ex. E:25) For her left shoulder, Dr. Chen found she had flexion to 150 degrees, abduction to 90 degrees and internal and external rotation to 80 degrees. (Ex. E:25)

Dr. Chen diagnosed Escobar de Carballo with chronic right shoulder myofascial pain “due to multiple substantial personal factors and only minimally related to her [September 2019] work injury.” (Ex. E: 27) He also found she sustained an acute, nearly full-thickness tear to her right supraspinatus muscle. (Ex. E:27) Dr. Chen documented, “[a]t the end of her appointment, I assisted in helping her put her coat on and she moved her right shoulder with improved range of motion than when directly examining her shoulder planes.” (Ex. E:24) Dr. Chen did not describe the improved range of motion with any specificity.

Escobar de Carballo takes issue with how Dr. Chen performed his examination. As discussed in greater detail below, I have serious concerns regarding her credibility, as noted by multiple treating physicians. Dr. Stoken found Escobar de Carballo had no range of motion for her right shoulder. Dr. Chen found she only had 20 degrees of flexion. These findings differ significantly from those of Dr. Ash. (JE 2) However, when Dr. Ash released Escobar de Carballo from care, he released her with permanent restrictions of lifting one pound up to shoulder level and five pounds up to waist level with the right arm. (JE 2:64-65) Dr. Stoken documented her findings and rating for the right shoulder in her report, consistent with Chapter 16 of the AMA Guides. (Ex. 1:18) Escobar de Carballo has very limited ability to use her right upper extremity. Having diabetes impacted Escobar de Carballo’s recovery. There was no

credible evidence presented at hearing that her diabetes is the sole cause of her shoulder range of motion problems. But for the work injury she would not have needed surgery and permanent work restrictions. For these reasons, I find Dr. Stoken's opinion to be the most persuasive.

IV. Healing Period Benefits

Iowa Code section 85.33 (2019) 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). Escobar de Carballo seeks healing period benefits from September 18, 2019 through January 13, 2021, when she was released by Dr. Rayburn.

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 benefit depends on whether or not the employee has a permanent disability. Dunlap, 824 N.W.2d at 556.

“[A] claim for permanent disability benefits is not ripe until maximum medical improvement has been achieved.” Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 201 (Iowa 2010). “Stabilization of the employee’s condition ‘is the event that allows a physician to make the determination that a particular medical condition is permanent.’” Dunlap, 824 N.W.2d at 556 (quoting Bell Bros. Heating & Air Conditioning, 779 N.W.2d at 200). If the employee has a permanent disability, then payments made prior to permanency are healing period benefits. Id. If the injury has not resulted in a permanent disability, then the employee may be awarded temporary total benefits. Id. at 556-557.

Iowa Code section 85.33(1) governs temporary total disability benefits as follows:

[e]xcept as provided in subsection 2 of this section, the 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 employment in which the employee was engaged at the time of injury, whichever occurs first.

Under Iowa Code section 85.33(6), “‘employment substantially similar to the employment in which the employee was engaged at the time of the injury’ includes, for purposes of an individual who was injured in the course of performing as a professional athlete, any employment the individual has previously performed.”

The evidence supports Escobar de Carballo was off work from September 18, 2019 through January 13, 2021, when she was released without any restrictions by Dr. Rayburn. Aerotek and Indemnity Insurance did not present any evidence of offers of work made to Escobar de Carballo. I find she is entitled to healing period benefits from September 18, 2019, through January 13, 2021, at the stipulated weekly rate of \$340.25.

V. Extent of Disability

Compensation for an unscheduled injury through the industrial method is determined by evaluating the employee's earning capacity. Westling v. Hormel Foods, 810 N.W.2d 247, 251 (Iowa 2012); Pease, 807 N.W.2d at 852. 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). When considering the extent of disability, the deputy commissioner considers all evidence, both medical and nonmedical. Evenson v. Winnebago Indus., Inc., 881 N.W.2d 360, 370 (Iowa 2016).

The Iowa Supreme Court has held, "it is a fundamental requirement that the commissioner consider all evidence, both medical and nonmedical. Lay witness testimony is both relevant and material upon the cause and extent of injury." Evenson, 881 N.W.2d 360, 369 (Iowa 2016) (quoting Gits Mfg. Co. v. Frank, 855 N.W.2d 195, 199 (Iowa 2014)). Escobar de Carballo avers she is permanently and totally disabled under the statute and under the odd-lot doctrine. Aerotek and Indemnity Insurance aver she is not.

In Iowa, a claimant may establish permanent total disability under the statute, or through the common law odd-lot doctrine. Michael Eberhart Constr. v. Curtin, 674 N.W.2d 123, 126 (Iowa 2004) (discussing both theories of permanent total disability under Idaho law and concluding the deputy's ruling was not based on both theories, rather, it was only based on the odd-lot doctrine). Under the statute, the claimant may establish the claimant is totally and permanently disabled if the claimant's medical impairment together with nonmedical factors totals 100 percent. Id. The odd-lot doctrine applies when the claimant has established the claimant has sustained something less than 100 percent disability, but is so injured that the claimant is "unable to perform services other than 'those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.'" Id. (quoting Boley v. Indus. Special Indem. Fund, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997)).

“Total disability does not mean a state of absolute helplessness.” Wal-Mart Stores, Inc. v. Caselman, 657 N.W.2d 493, 501 (Iowa 2003) (quoting IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 633 (Iowa 2000)). Total disability “occurs when the injury wholly disables the employee from performing work that the employee’s experience, training, intelligence, and physical capacities would otherwise permit the employee to perform.” IBP, Inc., 604 N.W.2d at 633.

As analyzed above, I rejected many of Dr. Stoken’s opinions. I do not find Escobar de Carballo has established the work injury caused her to develop complex regional pain syndrome, a cognitive disorder or dementia, or that she sustained a permanent post-concussive disorder and headaches caused by the work injury. I do find the work injury caused her right rotator cuff tear and aggravated her preexisting cervical condition. Given my disagreement with much of Dr. Stoken’s opinion, I also reject the permanent restrictions she imposed.

Multiple medical providers questioned Escobar de Carballo’s commitment to treatment, including Dr. Jacoby, Dr. Ash, her treating physical therapist, and Dr. Chen. This leads me to believe she is not a credible witness. Claimants who lack credibility sustain work injuries just as claimants do who are credible. On October 9, 2020, Dr. Ash found Escobar de Carballo had reached maximum medical improvement and he released her with restrictions of lifting up to one pound to shoulder level and five pounds up to waist level with the right arm. (JE 2:64-65) Escobar de Carballo has very limited use of her right arm as found by Dr. Ash, based on the restrictions he imposed.

At the time of Sellner’s December 5, 2021 report Escobar de Carballo was 54. (Ex. D:9) Escobar de Carballo attended no formal schooling. She is illiterate in English and Spanish. I believe retraining would be difficult for her. At the time of the hearing Escobar de Carballo had not applied for any jobs. I do not find she is motivated to return to work.

Sellner correctly noted Escobar de Carballo has a history of working in unskilled and semi-skilled light to heavy work as an oven tender, baker helper, cook helper, kitchen helper, housekeeping cleaner, housekeeper, child care assistant, and child monitor. (Ex. D:10) Sellner opined she believed Escobar de Carballo remains employable within a sedentary work position. (Ex. D:12) Escobar de Carballo lives in the urban Des Moines area where there are a number of sedentary jobs. I find she has not established she is permanently and totally disabled under the odd-lot doctrine.

Sellner’s report does not provide the lifting requirements of the light assembly work, cell phone tester position, after-school childcare or monitor, or ticket taker positions, or whether these purported positions are full-time or part-time. (Ex. D:11) I do not believe she could work as a dishwasher, hotel housekeeper, general production worker in a meat packing plant or as a linen/towel folder with the restrictions imposed by Dr. Ash. No information was provided concerning the food service position at Grand View. (Ex. D:11) Based on all the factors of industrial disability, I find Escobar de Carballo has sustained a 40 percent industrial disability.

Escobar de Carballo avers the commencement date for permanent partial disability benefits is January 14, 2021. Aerotek and Indemnity Insurance aver the commencement date for permanent partial disability benefits is October 9, 2020. Under the statute, “[c]ompensation for permanent partial disability shall begin when it is medically indicated that maximum medical improvement from the injury has been reached and that the extent of loss or percentage of permanent impairment can be determined” using the AMA Guides. Iowa Code § 85.34(2). As discussed above, Dr. Rayburn found Escobar de Carballo reached maximum medical improvement on January 13, 2021, and he released her from care. At that time permanency benefits could have been determined as claimed by Escobar de Carballo. Escobar is awarded 200 weeks of permanent partial disability benefits, at the stipulated weekly rate of \$340.25, commencing on January 14, 2021.

VI. Medical Bills

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

Escobar de Carballo avers Aerotek and Indemnity Insurance should be responsible for the medical bills set forth in Exhibit 4 after they discontinued her care. Escobar de Carballo did not provide a summary itemizing what the bills were for. As discussed above, I found Escobar de Carballo sustained permanent impairments to her right shoulder and cervical spine. I did not find she sustained dementia, a permanent cognitive impairment, permanent post-concussion headaches or post-concussive disorder, or complex regional pain syndrome caused by the work injury. I find the treatment she received set forth in Exhibit 4 that was not authorized, reasonable or beneficial. Bell Bros. Heating & Air Conditioning, 779 N.W.2d at 206; Brewer-Strong v. HNI Corp. 913 N.W.2d 235 (Iowa 2018). Aerotek and Indemnity Insurance are not responsible for the medical bills set forth in Exhibit 4, but remain responsible for all causally connected medical bills necessitated by the work injury.

VII. Penalty Benefits

Escobar de Carballo seeks an award of penalty benefits alleging Aerotek and Indemnity Insurance ignored her cervical spine injury and only paid the 2 percent shoulder rating. Aerotek and Indemnity Insurance aver no penalty benefits should be awarded.

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

The statute requires the employer or insurance company to conduct a "reasonable investigation and evaluation" into whether benefits are owed to the employee, the results of the investigation and evaluation must be the "actual basis" relied on by the employer or insurance company to deny, delay, or terminate benefits, and the employer or insurance company must contemporaneously convey the basis for the denial, delay, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits. Iowa Code § 86.13(4). An employer may establish a "reasonable cause or excuse" if "the delay was necessary for the insurer to investigate the claim," or if "the employer had a reasonable basis to contest the employee's entitlement to benefits." Christensen, 554 N.W.2d at 260. "A 'reasonable basis' for denial of the claim exists if the claim is 'fairly debatable.'" Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 267 (Iowa 2012). "Whether a claim is 'fairly debatable' can generally be determined by the court as a matter of law." Id. The issue is whether the employer had a reasonable basis to believe no benefits were owed to the claimant. Id. "If there was no reasonable basis for the employer to have denied the employee's benefits, then the court must 'determine if the defendant knew, or should have known, that the basis for denying the employee's claim was unreasonable.'" Id.

Benefits must be paid beginning on the eleventh day after the injury, and "each week thereafter during the period for which compensation is payable, and if not paid when due," interest will be imposed. Iowa Code § 85.30. In Robbennolt, the Iowa Supreme Court noted, "[i]f the required weekly compensation is timely paid at the end of the compensation week, no interest will be imposed As an example, if Monday is the first day of the compensation week, full payment of the weekly compensation is due the following Monday." Robbennolt, 555 N.W.2d at 235. A payment is "made" when the check addressed to the claimant is mailed, or personally delivered to the claimant. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996) (abrogated by Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299 (Iowa 2005) (concluding the

employer's failure to explain to the claimant why it would not pay permanent benefits upon the termination of healing period benefits did not support the commissioner's award of penalty benefits)).

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

Dr. Stoken conducted an independent medical examination in November 2021, finding Escobar de Carballo sustained a permanent impairment to her cervical spine caused by the work injury. Dr. Rayburn had previously opined her cervical spine condition was causally connected to the work injury in June 2020, over a year before. Aerotek and Indemnity Insurance did not contemporaneously send a letter to Escobar de Carballo providing the reason for their refusal to pay permanent partial disability benefits for the cervical spine condition after receiving Dr. Stoken's report, or even after receiving Dr. Chen's report. I find Escobar de Carballo should be awarded \$2,000.00 in penalty benefits based on the failure.

VIII. Independent Medical Examination

Escobar de Carballo seeks to recover the \$4,200.00 cost of Dr. Stoken's independent medical examination. (Ex. 1) Aerotek and Indemnity Insurance aver Escobar de Carballo is not entitled to recover the cost of the examination because the examination was not reasonable and expanded well beyond her right shoulder injury.

Iowa Code section 85.39(2) provides:

2. If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination. . . . An employer is only liable to reimburse an employee for the cost of an examination conducted pursuant to this subsection if the injury for which the employee is being examined is determined to be compensable under this chapter or chapter 85A or 85B. An employer is not liable for the cost of such an examination if the injury for which the employee is being examined is determined not to be a compensable injury. A determination of the reasonableness of a fee for an examination made pursuant to this subsection, shall be based on the typical fee

charged by a medical provider to perform an impairment rating in the local area where the examination is conducted.

Dr. Stoken provided an impairment rating after Dr. Ash provided an impairment rating in this case. Escobar de Carballo disagreed with the rating and sought an independent medical examination. As discussed above, I found Escobar de Carballo sustained permanent impairments to her right shoulder and cervical spine caused by the work injury. Aerotek and Indemnity Insurance did not present any evidence showing the cost of Dr. Stoken's report exceeds the cost of reports prepared by other expert witnesses for similar cases. I find Escobar de Carballo is entitled to recover the cost of Dr. Stoken's independent medical examination.

ORDER

IT IS THEREFORE ORDERED, THAT:

Defendants shall pay Claimant two hundred (200) weeks of permanent partial disability benefits at the stipulated rate of three hundred forty and 25/100 dollars (\$340.25) per week, commencing on January 14, 2021.

Defendants shall pay Claimant healing period benefits from September 18, 2019, through January 13, 2021, at the stipulated rate of three hundred forty and 25/100 dollars (\$340.25) per week.

Defendants are entitled to a credit for all benefits paid to date.

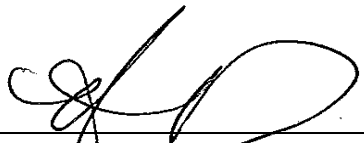
Defendants shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

Defendants shall pay Claimant two thousand and 00/100 dollars (\$2,000.00) in penalty benefits.

Defendants shall reimburse Claimant four thousand two hundred and 00/100 dollars (\$4,200.00) for the cost of the independent medical examination.

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 1st day of April, 2022.



HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

John Dougherty (via WCES)

Peter Thill (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.