BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TAMMY STEIN, Claimant, vs. LUTHERAN HOME FOR THE AGED ASSOCIATION-EAST d/b/a VINTON LUTHERAN HOME, Employer, and ACCIDENT FUND INSURANCE CO. OF AMERICA, Insurance Carrier, Defendants.	File No. 1625461.01 ARBITRATION DECISION Head Note Nos.: 1803, 4100, 2502

STATEMENT OF THE CASE

Claimant, Tammy Stein, has filed a petition for arbitration seeking workers' compensation benefits against Lutheran Home for the Aged Association-East d/b/a Vinton Lutheran Home, employer, and Accident Fund Insurance Company of America, insurer, both as defendants.

In accordance with agency scheduling procedures and pursuant to the Order of the Commissioner in the matter of Coronavirus/COVID-19 Impact on Hearings, the hearing was held on February 2, 2021, via Court Call. The case was considered fully submitted on March 17, 2021, upon the simultaneous filing of briefs.

The record consists of Joint Exhibits 1-10, Claimant's Exhibits 1-11, Defendants' Exhibits A-H, and the testimony of claimant and James Carroll.

ISSUES

1. The extent of permanent disability, if any;

2. Whether claimant is an odd-lot employee;

3. Whether claimant is entitled to reimbursement of an IME;

4. Whether defendants are entitled to a credit of benefits previously paid;

5. Costs.

STIPULATIONS

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The parties stipulate claimant sustained a work-related injury on April 16, 2016. They further agree the injury was the cause of temporary and permanent disability. Entitlement to temporary benefits is no longer in dispute.

The parties agree the claimant sustained an industrial disability, but dispute the commencement date for permanent partial disability benefits.

At the time of the work-related injury, claimant's gross earnings were $611.19 per week. She was married and entitled to six exemptions. Therefore, the weekly benefit rate is $433.80.

Prior to the hearing, claimant was paid 43.57 weeks of indemnity benefits beginning November 14, 2016 at the rate of $433.80.

Defendants waive all affirmative defenses.

FINDINGS OF FACT

At the time of the hearing claimant was a 49-year-old person. Her highest educational level was the 10th grade. She testified that she struggled during school with reading and math and received assistance with classes. She does not believe she has improved in those skills since leaving school. She made an attempt to obtain her GED, but the process was frustrating and difficult.

Past employment history includes work at a casino as a change carrier where she would change out the tokens. She does not believe she could do this job because the coins are heavy to carry around. She was a cashier and stocker at Casey's. At times, she would have to lift over twenty pounds. She does not believe she could lift flats of pop or stock the upper shelves with soda cans and bottles.

The majority of claimant's work history has been as a CNA. Her duties included patient care such as feeding, helping them move, showering, and using the toilet. It is a job that has physical requirements and demands. She does not believe she could return to do CNA work.

She is not proficient with computer skills. She does not know how to attach documents or photographs to an email. Her resume was created by a friend of hers. She does not know how to create graphs or tables. She does have to use computers to enter patient care information for work. She testified that it was challenging at first but over time it became easier.

On or about April 16, 2016, claimant was grabbed by a resident causing injury to her fingers, wrist, and right arm. On the same date, claimant was initially seen at Virginia Gay Hospital Emergency Department by David Sheff, M.D. (JE 1:1-2) She was diagnosed with a right thumb sprain and provided a spica splint. (JE 1:2)

On April 20, 2016, claimant followed up with Margaret Mangold, M.D., who imposed work restrictions of no activities that rely on right hand motion and right-hand dominant work. (JE 1:5)

As claimant's pain persisted, she was referred to Dr. Pardubsky, a hand surgeon. (JE 1:7) Claimant was then seen by Meiying Kuo, M.D., a hand specialist, on May 11, 2016, with symptoms of constant moderate to severe pain from the IP joint down toward the thenar eminence along with pain in the right wrist. (JE 2:1) Dr. Kuo diagnosed claimant with deQuervain's tendonitis and administered a corticosteroid injection for treatment. (JE 2:3) Claimant returned for follow-up on June 22, 2016. (JE 2:6) At this visit, claimant complained of a new fullness along her volar wrist, and due to the ongoing pain, Dr. Kuo ordered an MRI. (JE 2:6-7) Dr. Kuo felt that the fullness was more suggestive of flexor tenosynovitis than a discrete mass and could have been exacerbated by the injury claimant sustained. Dr. Kuo administered another injection. (JE 2:9-10) Unfortunately, the injection provided no appreciable improvement. (JE 2:11) Dr. Kuo recommended surgical release of the right first extensor compartment, exploration of the right volar wrist, and possible debridement of the flexor tendon. (JE 2:13)

Prior to surgery, claimant was seen by Amber Collum, PA-C, wherein claimant reported right shoulder pain which she attributed to the work injury. (JE 3:1) Claimant was prescribed Tramadol for pain management. (JE 3:2)

Dr. Kuo performed the surgery on November 14, 2016. (JE 2:15; JE 4:1-2) On November 29, 2016, claimant reported improvement in her pain. (JE 2:15) Dr. Kuo kept claimant off of right-hand work activities. (JE 2:16) On December 19, 2016, claimant reported ongoing pain in the radial wrist, although not as severe, but now radiating up the right arm. (JE 2:17) Claimant was referred to therapy and returned to work on December 27, 2016, with restrictions of no activities involving more than 10 pounds on the right. (JE 2:18)

Defendants put together a number of tasks that claimant could perform in order to fulfill an eight-hour work day. (DE D:24) Claimant was assigned to feed patients on the main floor from 0630 to 0930, 1100 to 1300 and from 1700 to 1830. Id. She was

also assigned to pass water and supplies on the floor and in the unit from 1530 to 1700. (DE D:24) This work schedule required claimant to either be at work 6:30 AM to 6:30 PM or to drive back and forth from her house. It was not a full continuous shift and it required her to be on the road several times a day as well as away from her children. Because of this, claimant handed in her resignation. She attempted to take it back, but her employer refused.

On the January 5, 2017 visit to Dr. Kuo, claimant reported that her right radial wrist pain was resolving, but the pain in her arm persisted. (JE 2:19) Dr. Kuo referred claimant to orthopaedics and encouraged claimant to continue physical therapy for myofascial massage. (JE 2:21)

On January 27, 2017, claimant was seen by Daniel Fabiano, M.D. (JE 2:22) He ordered an MRI of the right shoulder which revealed minor degenerative changes in the AC joint, mild edema at the myotendinous junction subjacent to the acromion at the junction of the supraspinatus and infraspinatus muscles. (JE 2:25-26; JE 2:29) Dr. Fabiano administered a steroid injection and advised claimant to continue with physical therapy. (JE 2:29)

Claimant returned to Dr. Kuo on February 16, 2017, with reports that Dr. Fabiano's injection provided no relief. (JE 2:30) Claimant continued to have pain in the arm but no complaints in the wrist or hand. She could not afford more time off of work and needed a work release, which Dr. Kuo provided. (JE 2:31) Claimant re-applied for a job with defendant employer and was hired again as a CNA. She was put into a unit for dementia and Alzheimer's residents. She had not worked with this group before and did not feel comfortable. She quit approximately ten days later.

She briefly worked for Winslow House as a CNA in the spring of 2017, but had a disagreement with management. She next worked at Northcrest Care Initiatives beginning on May 24, 2017. The job requirements including lifting up to 50 pounds up to two-thirds of the time and up to 100 pounds up to one-third of the time. (DE A:10) She underwent a pre-employment physical with Allen Occupational Health and was cleared for employment.

On June 23, 2017, claimant was evaluated by David Hart, M.D., at the referral of Dr. Kuo. (JE 2:35; JE 2:36) He recommended she undergo right shoulder arthroscopic surgery. (JE 2:38-39) On August 9, 2017, claimant was seen by David Tearse, M.D., for an IME to address the issue of causation as it related to claimant's shoulder. (JE 5:1) Dr. Tearse opined that claimant's symptoms were related to the wrist injury and thus casually connected to the work injury, but did not believe surgery would alleviate her symptoms. (JE 5:4-5)

Claimant returned to work, but the pain became unmanageable. She left her job at Care Initiatives on September 13, 2107. (DE A:2) On September 23, 2017, she visited Matt Betterton, D.C., and reported that she was moving beds when her lower

back gave out. (DE H) On November 10, 2017, claimant reported a left shoulder injury to Elizabeth J. Meyer, ARNP, when she was moving mattresses. (JE 3:5)

The right shoulder surgery was performed by Dr. Hart on November 29, 2017. (JE 4:3) He performed an arthroscopic rotator cuff repair, arthroscopic subacromial decompression, arthroscopic synovectomy, right shoulder manipulation, and an injection of the glenohumeral joint. (JE 4:3)

Claimant began occupational therapy on December 1, 2017, which continued until May 18, 2018 when she was discharged without goals met. (JE 1:10 et seq.) She has been seen for 48 visits following the shoulder surgery but continued to have pain 10/10 with activity, reduced range of motion, increased edema in the arm and neck due to restrictions in the shoulder impacting the lymphatic system. (JE 1:17)

On January 19, 2018, claimant returned to Dr. Hart for follow-up. (JE 2:47) Dr. Hart noted that the physical therapist was concerned claimant was suffering from nerve impingement of the radial nerve exacerbated with large trigger points present in the right upper trapezius and middle deltoid and that claimant might benefit from trigger point injections. (JE 2:47) Dr. Hart administered those injections.

On April 2, 2018, claimant reported improvement. (JE 2:53) Dr. Hart continued claimant on strict restrictions of no overhead use of the right arm and a 2-pound restriction on lifting, pulling, and pushing. (JE 2:55)

On April 26, 2018, claimant saw Tork Harman, M.D., for pain management. (JE 7:1) She reported her pain was improving. (JE 7:1) On examination, she had breakaway weakness of the biceps and deltoid secondary to pain in the biceps and deltoid regions. She had no swelling or color change and no dysesthesia to light touch. (JE 7:2) Dr. Harman believed claimant had a mechanical issue with her shoulder and that she should follow-up with Dr. Hart for manipulation under anesthesia. (JE 7:2)

In a follow-up visit on May 18, 2018, Dr. Hart noted continuing right shoulder pain, stiffness, and intermittent swelling. (JE 2:58) He diagnosed claimant with adhesive capsulitis and ordered a diagnostic MRI, which showed a partial-thickness bursal-sided tear and tendinopathy within the bursal surface of the anterior to mid-supraspinatus tendon. (JE 2:60; JE 8:2.) Because of the MRI study results, Dr. Hart recommended an additional right shoulder surgery in order to repair claimant's right rotator cuff. (JE 2:63, 65.) On June 19, 2018, Dr. Hart performed an arthroscopic extensive debridement and synovectomy, intra-articular and subacromial injection, and manipulation to the right shoulder. (JE 9:1)

Claimant was sent to physical therapy but did not participate fully, refusing to do certain activities as she was concerned it would be damaging and expressed to the therapists her lack of faith in the efficacy of therapy. (JE 6:4)

On July 2, 2018, claimant had a postoperative follow-up visit with Dr. Hart to assess her condition. (JE 2:66) Dr. Hart noted that claimant would reach maximum medical improvement at the conclusion of her physical therapy. (JE 2:67)

Claimant underwent an FCE at E3 Work Therapy Services on August 6, 2018. (JE 10) The results of the FCE were invalid due to claimant's inconsistent performance and lack of maximum effort. (JE 10:1) There was an absence of correlation between lifts of unmarked steel bars and the corresponding lifts on the XRTS Lever Arm. (JE 10:1) She had breakaway/cogwheeling during manual muscle testing, extreme overt pain behaviors, and "on three trials of—hand strength assessment no force production was recorded and the test was terminated. A force production of zero is most likely indicative of blatant non-compliance." (JE 10:1)

Dr. Hart placed claimant at maximum medical improvement on August 13, 2018, with permanent work restrictions of no lifting greater than 5 pounds at the right hand, no overhead lifting, and 20 pounds bilateral lifting from floor to waist. (JE 2:68.)

While claimant's FCE was deemed invalid, Dr. Hart testified that he used his best judgment to arrive at the restrictions based upon claimant's complaints and her physical presentation. (See Hart Depo. p. 7) He also testified that Dr. Bollier's statements regarding claimant's pain presentation being out of proportion with her physical limitations and the results of the FCE showing noncompliance were consistent with his own experience. (Hart Depo p. 11) Regardless, he felt that claimant had a significantly impaired right shoulder and that she could not do regular work above her shoulder. (Hart Depo. pp. 12, 31)

On March 11, 2019, claimant was seen by Amber Collum, PA-C, for the right shoulder and neck pain. (JE 3:15) Claimant was working on a computer for approximately 30-45 minutes and felt that overuse tightened everything up. (JE 3:15) Her neck was supple without lymphadenopathy, but she did have paravertebral tenderness on the right. (JE 3:16) Her range of motion in the right arm was limited due to pain, but her grips were equal and strong bilaterally. (JE 3:16)

On December 2, 2019, Dr. Hart saw claimant in follow-up for her now chronic right shoulder pain. (JE 2:70) He noted that claimant was having difficulty with the left shoulder but had no injury. (JE 2:70) He continued her shoulder diagnosis of adhesive capsulitis of the right shoulder. (JE 2:71) In his notes, he wrote "I feel bad for her and I reminded her that the last time we visited I said I really don't have anything more to offer her." (JE 2:71)

Dr. Hart saw claimant the last time on June 19, 2020, for complaints of left shoulder pain.

On November 2, 2018, Mrs. Stein underwent an IME with Dr. Matthew Bollier, an orthopedic surgeon, at the University of Iowa Hospital and Clinics. (DE E:1) Dr. Bollier

agreed with the permanent restrictions imposed by Dr. Hart from August 13, 2018, and recommended no additional treatment. (Id.) Using the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition, Dr. Bollier determined Mrs. Stein's right shoulder permanent impairment to be 6 percent of the whole person based on the loss of forward flexion, extension, loss of abduction and adduction, loss of external and internal rotation. (DE E:5) Dr. Bollier noted that claimant exhibited extreme guarding and thus based the impairment rating on the clinical notes, therapy notes and operative notes. (DE E:5)

On October 6, 2020, Mrs. Stein completed an FCE with Daryl Short, DPT. (Cl. Ex. 5.) This FCE was deemed valid. (CE 5:51-52) She was unable to lift objects above her head. (CE 5:51-52) Mr. Short placed claimant in the sedentary category of physical demand with limited activities at shoulder height and no activities above shoulder height. (CE 5:51-52) Mr. Short opined claimant could lift floor to waist up to 5 pounds, front carry 10 pounds for 50 feet, forward bend, crawl, kneel, and half-kneel. (CE 5:52)

Claimant underwent an IME on November 10, 2020 with Dr. Charles Wenzel of Medix Occupational Health Services. (CE 1) Dr. Wenzel agreed claimant was at MMI as of November 2, 2108, but assigned a 7 percent whole person impairment rating due to right wrist pain, right volar arm fullness, right thumb strain, and right shoulder pain. (CE 1:14) Dr. Wenzel adopted the work restrictions set forth in the October 6, 2020, FCE. (CE 1:14)

Mrs. Stein returned to Dr. Bollier for a second IME with him on December 21, 2020 at the request of the defendants. (DE E:7) Dr. Bollier affirmed his previous opinion that claimant's right shoulder impairment was 6 percent impairment of the whole person. (DE E:9) Dr. Bollier recommended different work restrictions in the light duty category of no lifting, pushing or pulling more than 20 pounds below shoulder height, may lift up to 5 pounds above shoulder height. (Id.)

Dr. Hart was sent both Dr. Bollier's and Dr. Wenzel's opinions along with the FCE of Mr. Short. Dr. Hart found that Dr. Bollier's restrictions were reasonable and appropriate. (DE G; CE 11) Dr. Hart also agreed that the restrictions set forth by Mr. Short were appropriate. (CE 11:93) In the deposition, Dr. Hart testified that he did not see much difference between the restrictions Dr. Bollier set forth and those of Dr. Wenzel or Mr. Short. He reaffirmed his own restrictions of no lifting greater than 5 pounds at the right hand, no overhead lifting, and 20 pounds bilateral lifting from floor to waist.

Currently she has work restrictions on the right arm with no lifting above her head, no lifting more than 5 pounds with the right and no lifting more than 25 pounds with both arms from the ground. She testified that she cannot lift anything heavier than a loaf of bread.

She is not currently working. Her last date of employment was in September 2017. She has attempted to look for work by applying through Indeed.com, but has had limited success. She has not gone in person to apply nor has she made it to the interview stage except for one with Amana. Amana asked if she had a GED or diploma to which she replied she did not. Claimant was asked if she would go back to school to obtain one and claimant replied that she had tried. She also mentioned she had a work restriction.

Claimant was evaluated by two vocational experts—one retained by defendants and one retained by claimant. Vocational expert Kara Merkwan, retained by the defendants, was unable to testify at hearing, but an associate in the same office, James Carroll, testified at hearing. Mr. Carroll explained that claimant had a 19 percent loss of access to employment based on Dr. Bollier's restrictions and 87 percent loss of access of employment based on Dr. Wenzel's restrictions. (DE F:9) Ms. Merkwan also opined that regardless of which doctor's set of restrictions were used, claimant's job opportunities paid a higher wage than she had earned with the defendants' employer, and thus claimant had no loss of earning capacity. (DE F:9) Mr. Carroll testified that the 19 percent loss of access to employment was based on the consultant's position that claimant could lift up to 20 pounds and that there were entry level jobs, such as a cashier position or order taker at a fast-food restaurant, which would be within Dr. Bollier's restrictions.

Neither Ms. Merkwan nor Mr. Carroll provided direct job assistance.

Kent Jayne, a vocational expert retained by the claimant, opined that claimant's restrictions eliminated most jobs on the market. The limitation in reaching imposed by Dr. Wenzel removed approximately 90 percent of the labor market access for claimant. (CE 3:27) He concluded that claimant was "so limited in quality, dependability or quantity of work that a reasonable stable labor market for her residual abilities does not exist." (CE 3:31)

CONCLUSIONS OF LAW

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

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" refer to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. 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 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

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 Ry. Co. of Iowa, 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 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.

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City Ry. Co. of Iowa, 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

There are three sets of restrictions set forth by the experts in this case. Dr. Hart placed Mrs. Stein at maximum medical improvement on August 13, 2018, with permanent work restrictions of no lifting greater than 5 pounds at the right hand, no overhead lifting, and 20 pounds bilateral lifting from floor to waist.

Dr. Bollier initially adopted these work restrictions, but later changed them to move claimant into the light duty category of no lifting, pushing or pulling more than 20 pounds below shoulder height, may lift up to 5 pounds above shoulder height.

Dr. Wenzel adopted the work restrictions that placed claimant in the sedentary category of physical demand with limited activities at shoulder height and no activities above shoulder height, and lifting restrictions of no more than 5 pounds floor to waist and front carry of 10 pounds.

Dr. Hart was deposed, and while he had signed several letters from the parties, in the end he confirmed his original opinions, which were that claimant had a significant dysfunction in her right shoulder. He did not find a great difference between his opinions and that of Dr. Bollier. Dr. Hart based his assessment on claimant’s subjective complaints, acknowledging claimant had outsized pain complaints that did not match her physical presentation, as well as his own examination. He performed three surgeries and characterized claimant as having significant dysfunction in her right shoulder.

Claimant was initially motivated to return to work. She asked for a work release, obtained two jobs following her resignation, but as the pain in her shoulder persisted, she felt she could no longer do her CNA duties. She does not have a high school diploma and claimant testified at hearing that there were many jobs that required a diploma or diploma equivalent. Her job searches since her last employment in 2018 have not been very dedicated. Outside of applying online, claimant has done little in

relation to job retraining or education. It is unknown whether she could physically perform some of the jobs identified such as an entry level clerk position.

"An odd-lot employee is one who is incapable of finding work in any established branch of the labor market." Second Injury Fund v. Nelson, 544 N.W.2d 258, 267 (Iowa 1995) The burden is on the employee to produce "substantial evidence that the worker is not employable in the competitive labor market." Id. (emphasis omitted) (quoting Guyton v. Irving Jensen Co., 373 N.W.2d 101, 106). "[I]t is 'normally' incumbent on the claimant 'to demonstrate a reasonable effort to secure employment' in the worker's area of residence before the burden of producing evidence shifts to the employer." Id. To make a prima facie case of odd-lot disability, claimant must prove that she is not employable in any capacity in her labor market, not just that she could not perform her former job.

Based on Dr. Hart's restrictions, defendants' retained vocational expert estimates a loss of 87 percent access to the labor market. Mr. Jayne, retained by the claimant, finds her fully and totally disabled. However, Dr. Hart's restrictions are the most reliable in this case. He performed the three surgeries on claimant and saw her over the course of nearly three years. He acknowledged her pain complaints are in excess of her physical limitations, but also recognizes she does have significant dysfunction. Dr. Wenzel's restrictions are too narrow, and Dr. Bollier's second set are too broad.

There appear to be jobs available to her in the entry level positions that would not require heavy lifting or over-the-shoulder work. While claimant has only had one interview, her job searches in the past couple of years have not appeared to be rigorous. She has not recently attempted to sit for the GED. These factors weigh against finding that claimant is completely and totally disabled or that she is an odd-lot employee.

Based on the foregoing, it is found claimant has sustained an 87 percent industrial loss.

The next issue is the commencement of PPD benefits. For pre-July 2017 injuries, section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Iowa Code section 85.34(1) (2017) The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, Iowa App 312 N.W.2d 60 (1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

Claimant was released to return to work without restrictions on February 17, 2017, by Dr. Kuo. Defendants argue that even if claimant was entitled to temporary benefits up to February 17, 2017, claimant's refusal of light duty work resulted in the suspension of her benefits. Iowa Code 85.33(3). According to the Supreme Court in

Schutjer v. Algona Manor Care Center, 780 N.W.2d 549 (Iowa 2010) the correct test is "(1) whether the employee was offered suitable work, (2) which the employee refused. If so, benefits cannot be awarded, as provided in section 85.33(3)."

There is no dispute that the claimant voluntarily quit. However, claimant argues that the split shift offered was not suitable light duty work. Claimant had not worked a split shift in the past and it required her to be absent from her home. She initially tendered her resignation, but tried to take it back. Defendants characterize this resignation as a refusal to perform light duty work on the date of the resignation and any time forward.

In Schutjer, the claimant asserted she was being asked to perform work outside of her restrictions. The employer denied this. The commissioner found that the employer had been offering accommodated work within claimant's restrictions and it was on that basis that the Supreme Court of Iowa affirmed the commissioner's decision.

In the present case, claimant was asked to work a split shift which required her to either be on the job for nearly twelve hours or to drive back and forth from her home at least twice a day. Her home was five minutes away, but she had minor children she cared for at the time. I find that the split shift was not suitable work and therefore the refusal to perform does not result in suspension of benefits. The commencement date of PPD is February 17, 2017.

Defendants are entitled to a credit of temporary total benefits up to February 17, 2017, and a credit of permanent benefits for any benefits paid after February 17, 2017.

Claimant seeks reimbursement of the IME of Dr. Wenzel.

Iowa Code 85.39(2) states:

> 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.

Iowa Code 85.39(2).

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 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).

Dr. Bollier issued an impairment rating of 6 percent on November 2, 2018. Claimant obtained opinions from Dr. Wenzel on November 10, 2020. Thus, claimant is entitled to reimbursement of the IME. According to DART v. Young, the examination portion of the IME is reimbursable under 85.24 and the report is reimbursable as a cost under 4.33. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839 (Iowa 2015).

Claimant also seeks reimbursement of costs including a $900.00 fee from Short Physical Therapy which presumably is the FC examination and report, and $3,503.25 from Kent Jayne for the vocational opinions, and medical records of $795.78. Defendants argue claimant's costs should not be reimbursed as the fees of Short Physical Therapy and Kent Jayne are not itemized and vocational rehabilitation consultants are not experts under 4.33.

Rule 876 IAC 4.33 indicates, in relevant part:

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

The preparation of a vocational expert report is a cost that can be taxable. Rodriguez-Contreras v. JBS Swift & Company, File No. 5029197 (App. May 8, 2012) However, it is not possible to discern from Exhibit 9 what portion of the fees are related to the report and what is related to the examination; thus the fees of Short Physical Therapy and Kent Jayne are not taxed as costs against defendants. Dr. Hart's fee for consultation is preparation of an expert witness testimony. The medical records do not appear to fall under a category itemized in 876 IAC 4.33 and are not assessed.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant four hundred thirty-five (435) weeks of permanent partial disability benefits at the rate of four hundred thirty-three and 80/100 dollars ($433.80) per week from February 17, 2017.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants are to be given credit for temporary benefits previously paid up to February 17, 2017. Benefits paid after February 17, 2017, shall be credited against the award of permanent benefits.

That defendants shall pay the entirety of the IME pursuant to Iowa Code section 85.39 and Rule 876 IAC 4.33.

That defendants shall pay the costs of this matter pursuant to rule 876 IAC 4.33 including the filing fee and the fee of Dr. Hart.

Signed and filed this 27th day of July, 2021.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Emily Anderson (via WCES)

Dillon Besser (via WCES)

Lee Hook (via WCES)

Christopher Spencer (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.