BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JODI OHLHAUSER, Claimant, vs. JE ADAMS INDUSTRIES, LTD., Employer, and INTEGRITY INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 22002942.02 ARBITRATION DECISION Head Notes: 1100, 1108, 1400, 1403.30, 1600, 1700, 1701, 1800, 1802, 1803, 2200, 2500, 2700, 2800

STATEMENT OF THE CASE

The claimant, Jodi Ohlhauser, filed a petition for arbitration seeking workers' compensation benefits from employer JE Adams Industries, Ltd. ("Adams"), and their insurer, Integrity Insurance Company. Anthony Olson appeared on behalf of the claimant. Stephanie Techau appeared on behalf of the defendants. Also present was Karen Pool, an Adams employee.

The matter came on for hearing on March 7, 2023, before Deputy Workers' Compensation Commissioner Andrew M. Phillips. Pursuant to an order of the Iowa Workers' Compensation Commissioner, the hearing occurred electronically via Zoom. The hearing proceeded without significant difficulty.

The record in this case consists of Joint Exhibits 1-7, Claimant's Exhibits 1-6, and Defendants' Exhibits A-P. All of the exhibits were received into evidence without objection.

The claimant testified on her own behalf. Matt Miersen testified on behalf of the defendants.

Amy Pedersen was appointed the official reporter and custodian of the notes of the proceeding. The evidentiary record closed at the end of the hearing, and the matter was fully submitted after the parties submitted post-hearing briefing on April 17, 2023.

STIPULATIONS

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

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

2. That, at the time of the alleged injury, the claimant was married and entitled to two exemptions.

3. That, with regard to the disputed medical expenses:

    a. The medical providers would testify as to the reasonableness of their fees and/or treatment set forth in the listed expenses, and the defendants are not offering contrary evidence.
    b. Although causal connection of the expenses to a work injury cannot be stipulated, the listed expenses are at least causally connected to the medical conditions upon which the claim of injury is based.

4. That, prior to the hearing, the claimant was not paid any compensation.

5. That the costs listed in Claimant's Exhibit 5 have been paid.

The defendants waived all of their affirmative defenses, except for one.

The parties are now bound by their stipulations.

ISSUES

The parties submitted the following issues for determination:

1. Whether the claimant sustained an injury which arose out of and in the course of employment on May 7, 2021.

2. Whether the alleged injury is a cause of temporary disability during a period of recovery.

3. Whether the alleged injury is a cause of permanent disability.

4. Whether the claimant is entitled to temporary total disability, temporary partial disability, or healing period benefits from May 7, 2021, to January 19, 2023.

5. Whether the claimant was off work from May 7, 2021, to January 19, 2023.

6. The extent of claimant's permanent disability, should any be awarded.

7. If the injury is found to be a cause of permanent disability, whether the disability should be evaluated as a scheduled member disability or an industrial disability.

8. Whether the commencement date for permanent disability benefits, should any be awarded, is November 1, 2022, or January 19, 2023.

9. The claimant's gross earnings and resulting weekly rate of compensation.

10. Whether the claimant is entitled to payment of certain medical expenses as itemized in Claimant's Exhibit 4.

11. With regard to the disputed medical expenses:

    a. Whether the fees or prices charged by the providers were fair and reasonable.
    b. Whether the treatment was reasonable and necessary.
    c. Whether the listed expenses were causally connected to the work injury.
    d. Whether the requested expenses were authorized by the defendants.

12. Whether the claimant is entitled to reimbursement for an independent medical examination ("IME") pursuant to Iowa Code section 85.39.

13. Whether the claimant is entitled to alternate care pursuant to Iowa Code section 85.27.

14. Whether the defendants are entitled to a credit pursuant to Iowa Code section 85.38(2) for payment of sick pay or disability income, and/or medical or hospitalization expenses.

15. Whether an imposition of a specific taxation of costs against the defendants is appropriate.

16. Whether the defendants proved the affirmative defense of lack of timely notice pursuant to Iowa Code section 85.23.

FINDINGS OF FACT

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

Jodi Ohlhauser, the claimant, lives in Cedar Rapids, Iowa, with her husband. (Testimony). At the time of the hearing, she was 58 years old. (Testimony). She is a smoker. (Defendants' Exhibit P). She smokes five cigarettes per day. (DE P).

Ms. Ohlhauser completed high school. (Testimony). She described herself as a "normal student," who received Bs and Cs. (Testimony). She has no formal education following her graduation from high school. (Testimony).

At the time of the hearing, Ms. Ohlhauser worked for Adams. (Testimony). She has been employed there for 35 years. (Testimony). She was described by her supervisor as a great, honest, dedicated employee. (Testimony). She began working in the small parts assembly area for eight years. (DE P). In May of 2021, the claimant worked in large assembly for Adams. (Testimony). She had been working in this area for 15 years at the time. (Testimony). She assembled car wash vacuums, which she described as "physical, repetitive assembly work," as the vacuums are five feet tall, and weigh between 50 and 125 pounds. (Testimony). Assembly involved putting raw product on an assembly line, assembling the vacuum, and then removing the completed vacuum off the assembly line. (Testimony). She built up to 10 vacuums per day during a 10-hour shift which ran from 5:00 a.m. to 3:30 p.m. (Testimony).

Job descriptions were provided for a "[f]an [a]ssembler" position and a "[l]arge [a]ssembly" position with Adams. (Claimant's Exhibit 2:18-19). The fan assembler position required the ability to lift up to 50 pounds, and push or pull a minimum of 75 pounds. (CE 2:18). It also required squatting, forward bending, and reaching. (CE 2:18). The large assembly position required installing various parts on vacuums. (CE 2:19). It required occasional pushing or pulling up to 150 pounds, and frequently pushing or pulling 101 to 150 pounds. (CE 2:19).

Ms. Ohlhauser had several prior incidents and injuries at work. (Testimony). Accordingly, some medical records dating to times prior to the incident at issue in this case were included in the record. The first of these was an x-ray taken on December 14, 2009, of the claimant's lower back. (Joint Exhibit 1:1). The x-rays showed mild marginal spondylosis throughout her lumbar spine, most notably at L2-3, along with mild disk space narrowing at L5-S1. (JE 1:1). The x-rays did not show a fracture. (JE 1:1).

Ms. Ohlhauser treated with MyChiro sporadically from 2012 through April of 2021. (JE 2:8-9). The records are handwritten, and largely illegible. (JE 2:8-9). There are mentions of "LBP" which generally is understood to mean "low back pain." (JE 2:8-9). She also reported some pain after working outside. (JE 2:9).

In May of 2021, Ms. Ohlhauser was working five days per week, which included overtime. (Testimony). She testified that the workload at the time of her alleged injury was quite busy. (Testimony). She earned twenty and 61/100 dollars ($20.61) per hour.

On May 7, 2021, the claimant was working with another employee to complete an order of 70 vacuum cleaners over two days. (Testimony). About five hours into her shift, as she was finishing up the large order, she began to feel soreness and stiffness

into her shoulder and neck areas. (Testimony). She described the pain as "achy" and "crampy." (DE P). She never had any traumatic incident or felt any pop; however, she described the pain as coming on "suddenly." (Testimony). After she began to feel pain she reported to her supervisor what she was experiencing, and that she felt that she needed a chiropractic adjustment. (Testimony). Her supervisor allowed her to leave for chiropractic care and return after her adjustment, which she did. (Testimony). At that time, Ms. Ohlhauser did not ask for, nor was she offered an injury report to fill out. (Testimony). Ms. Ohlhauser testified that, on May 7, 2021, she did not think her issues were work related and were potentially due to her sleeping wrong the night before. (Testimony). She contradicted this during cross-examination by stating that she had no doubt in her mind in May of 2021 that her work activities caused pain in her arm or shoulder. (Testimony).

Mr. Miersen testified that he recalled the claimant having some pain around May 7, 2021, with an unknown cause. (Testimony). After discussing her situation with him, Ms. Ohlhauser "kind of let it go…" (Testimony). He confirmed that she was allowed to leave to go to a chiropractic appointment. (Testimony). He did not remember her requesting an injury form, nor did he recall her indicating that her issues were work related around May of 2021. (Testimony).

After May 7, 2021, the claimant continued to work, missing no time. (Testimony). She was not working under any restrictions at that time. (Testimony).

The claimant returned to MyChiro on May 28, 2021. (JE 2:9). The records are illegible and unclear. (JE 2:9). She also saw Jeffrey Jones, M.D. at a UnityPoint Walk-in Clinic, on the same day. (JE 3:10-11). She complained of bilateral shoulder pain with pain into her neck and back. (JE 3:10). She had no radiculopathy. (JE 3:10). Her physical examination showed tenderness, and pain with movement, despite normal range of motion. (JE 3:10). Dr. Jones diagnosed Ms. Ohlhauser with a strain of the trapezius muscle, and prescribed acetaminophen and Nabumetone. (JE 3:10-11). He also recommended heat to the area and a follow-up if her symptoms did not resolve. (JE 3:11). Ms. Ohlhauser testified that the doctors told her that her "muscles were tight, and there could be a muscle strain…" which they felt could be resolved. (Testimony). The claimant did not follow-up with these doctors after this visit. (Testimony).

The claimant continued chiropractic care but noted that it did not resolve her pain issues. (Testimony). This included a chiropractic visit on June 26, 2021, where she reported pain in her shoulders and neck. (Testimony). The record from this visit includes what appears to be a mention of tightness in the shoulders. (JE 2:9). Her symptoms also included constant tingling in her shoulders. (Testimony). Through the summer of 2021, she continued working full-time and full duty. (Testimony; DE P). She also testified in her deposition that the nature and character of her pain did not change over the summer of 2021. (DE P).

Dr. Jones saw Ms. Ohlhauser again on October 1, 2021, for joint swelling in her left knee. (JE 3:12-14). She denied trauma to her knee, but noted that she fell one week prior. (JE 3:13). She also made no mention of tenderness or issues with her

shoulders or neck during this visit. (JE 3:13). Dr. Jones diagnosed the claimant with patellar bursitis to the left knee, and prescribed her with medication. (JE 3:13-14).

On October 2, 2021, MyChiro treated the claimant again. (JE 2:9). As before, these records are largely illegible and of little value to this decision due to their illegibility. (JE 2:9).

Tracy Niemeyer, M.D. examined Ms. Ohlhauser on October 11, 2021, for complaints of right fourth and fifth toe pain. (JE 3:15-18). The claimant told the doctor that she "was out yesterday morning playing with the dogs and she tripped and bent her toes back." (JE 3:17). Walking heightened her pain. (JE 3:17). X-rays were ordered, and Dr. Niemeyer prescribed medication for her pain. (JE 3:17).

On November 8, 2021, Jana Marlett, M.D. examined Ms. Ohlhauser for left shoulder pain. (JE 3:19-21). The claimant told Dr. Marlett that she had pain in her left shoulder since May. (JE 3:19). She attempted to manage the pain with medication, chiropractic treatment and massage, but received no relief for her symptoms. (JE 3:20). Dr. Marlett's record indicates that Ms. Ohlhauser had no numbness, tingling, or weakness into the left upper extremity, and that she had no history of injury. (JE 3:20). Upon examination, Dr. Marlett found the claimant to have full range of motion to the shoulder with no tenderness to the spine. (JE 3:20). Dr. Marlett observed tenderness in the trapezius and upper rhomboid area. (JE 3:20). Dr. Marlett noted that the claimant had a chronic issue, and diagnosed her with a left trapezius strain. (JE 3:20). She prescribed a muscle relaxer and Voltaren, and recommended that the claimant begin physical therapy. (JE 3:20). Ms. Ohlhauser was told that she had a strain; however, she testified that she had concerns that this was more than a strain at this time, as the pain worsened. (Testimony).

Ms. Ohlhauser had a physical therapy appointment on November 15, 2021. (JE 6:85-88). She complained of left sided upper back pain, along with tingling from the shoulder to the wrist. (JE 6:85). She rated her pain 8 out of 10 at the time of the appointment. (JE 6:86). She tried chiropractic care, anti-inflammatories, and ice/heat, with no relief. (JE 6:85). She told the therapist that her pain came and went at work, but that it was "hard to tell because she is focused on her work." (JE 6:85). Her goal for therapy was to "get rid of the pain." (JE 6:85). Upon examination, the therapist noted some tenderness around the scapular border, trapezius, and rhomboids. (JE 6:86). The therapist requested that she follow-up in one week; however, an addendum to the report indicates that Ms. Ohlhauser failed to return for further physical therapy sessions and was discharged. (JE 6:85, 87).

On November 30, 2021, Michelle Vetsch, N.P. examined the claimant for her left shoulder and back pain. (JE 3:22-26). Ms. Ohlhauser felt that her pain was worsening into "an intense pinching sensation…" along with tingling down her left arm into her left hand. (JE 3:22). If she sat for a long period of time, her pain would flare up. (JE 3:22). Ms. Ohlhauser had no recollection of an injury. (JE 3:22). She attempted chiropractic care, medication, ice and heat, with no improvement. (JE 3:22). She also attended one visit of physical therapy, "but did not find this helpful so she cancelled all follow up

visits." (JE 3:22). Upon physical examination, Ms. Vetsch observed that the claimant had pain in her upper back, and decreased range of motion in her left shoulder. (JE 3:23-24). Ms. Vetsch diagnosed the claimant with left shoulder and left upper back pain. (JE 3:25). She provided a prescription, encouraged the claimant to attempt physical therapy again, and ordered x-rays. (JE 3:25).

Subsequent to her appointment with Ms. Vetsch, the claimant had an x-ray of her thoracic spine at UnityPoint Health Cedar Rapids due to her six-month history of left upper back pain. (JE 1:2). The x-rays showed mild degenerative changes to the thoracic spine, a partially visualized scoliotic lumbar spine, and "[a]t least mild to moderate degenerative changes" of the cervical spine. (JE 1:2). Ms. Ohlhauser also had an x-ray of her left shoulder on November 30, 2021. (JE 1:3). The x-rays of the left shoulder showed evidence of underlying rotator cuff tendinopathy. (JE 1:3). It also showed mild changes to the glenohumeral joint and slight decreasing of the glenohumeral joint space. (JE 1:3). Finally, the x-ray showed mild degenerative changes to the AC joint. (JE 1:3).

However, she continued working full-time and with no restrictions at that time. (Testimony).

By late November, higher doses of Ibuprofen, muscle relaxers, physical therapy, and a steroid patch were ordered by Dr. Marlett. (Testimony). Ms. Ohlhauser testified that she had no conversations with anyone at Adams from May of 2021 to November of 2021 about her injury. (Testimony). It was not until November of 2021, or perhaps the beginning of December of 2021, that the claimant told Matt Miersen, at Adams, that she had an x-ray and was referred to an orthopedic surgeon. (Testimony).

On December 2, 2021, she was offered, and filled out a report of injury. (Testimony; CE 2:20). In said report, she indicated that the injury occurred on May 4, 2021, while building vacuums and doming units. (CE 2:20). Ms. Ohlhauser noted "[s]harp! pain tightness in area on the left side in shoulder area." (CE 2:20). On the back of the report, she included a handwritten narrative. (CE 2:21). She recounted going to a chiropractor, and being told that her muscles were "very tight and angry." (CE 2:21). Since the pain continued, she went to Unity Point and was given anti-inflammatories; however, this did not improve her pain, so she went back to Unity Point on several other occasions. (CE 2:21). She also went back to her chiropractor. (CE 2:21). She also recounted the results of some x-rays and a visit with her family doctor. (CE 2:21).

The claimant's supervisor, Matt Miersen, filled out an investigation report on December 2, 2021. (CE 2:22). The report indicates that both the supervisor and claimant were unsure of when or how the injury occurred. (CE 2:22). Mr. Miersen wrote, "she said back in May when she was building vacs [*sic*] it started to bother her. But I was under the impression that she had pulled muscles at home. She has said she does a lot of activities outside." (CE 2:22). Mr. Miersen also recalled the claimant telling him that she felt pain while she was kayaking. (CE 2:22). The claimant gave a statement to the insurer on December 7, 2021, which indicated that by October her pain

was "getting really red… like there [was] somebody just pinching and twisting in that area…the shoulder and down the neck." (DE K:57).

Ms. Vetsch saw the claimant again on December 14, 2021. (JE 3:27-30). Ms. Ohlhauser expressed a desire to quit smoking. (JE 3:27). She also mentioned her shoulder pain and requested a refill of her pain medication. (JE 3:27). Ms. Vetsch mentioned that the claimant was referred to an orthopedic doctor and "may need surgical intervention on her shoulder…" (JE 3:27). Ms. Vetsch refilled Ms. Ohlhauser's pain medication at the conclusion of the appointment. (JE 3:30).

Ms. Ohlhauser reported to Physicians' Clinic of Iowa, P.C. on February 3, 2022, where James Michael Pape, M.D., examined her for her left shoulder pain. (JE 4:32-33). Ms. Ohlhauser told Dr. Pape that she had left shoulder, neck and upper back pain for "at least the last 8 months." (JE 4:32). She did not recall a specific injury. (JE 4:32). Dr. Pape reviewed the imaging studies, and opined that Ms. Ohlhauser had a well-maintained glenohumeral joint with only minimal degenerative changes, along with a prominent greater tuberosity of the humerus. (JE 4:32). Dr. Pape observed "significant degenerative changes" in the lower cervical spine. (JE 4:32). Upon physical examination, Ms. Ohlhauser did not display significant tenderness. (JE 4:32). She displayed excellent range of motion and good strength in her left shoulder. (JE 4:32). She had some range of motion issues in her neck, along with tenderness to palpation around the cervical trapezius. (JE 4:32). Dr. Pape diagnosed Ms. Ohlhauser with left arm pain and neck pain, opined that her symptoms were cervical in nature, and recommended an MRI be performed. (JE 4:33).

On February 16, 2022, an MRI was performed on Ms. Ohlhauser's cervical spine due to neck and shoulder pain with numbness and tingling into her fingers. (JE 1:4-5). The MRI showed prominent degenerative marrow edema at C7 and T1. (JE 1:5). It also showed "[s]cattered cervical spondylosis" with severe foraminal stenosis at C5-6, moderate to severe foraminal stenosis on the left at C4-5, C6-7, and C7-T1. (JE 1:5).

Ms. Ohlhauser saw Christopher Donahue, PA-C on February 21, 2022 for her neck and left shoulder complaints. (JE 4:34-36). Ms. Ohlhauser noted that her symptoms began nine months prior "without any obvious causative event." (JE 4:34). Her pain was 90 percent in her neck and 10 percent in her left extremity. (JE 4:34). Her discomfort began in the cervicothoracic region and radiated down the posterior of her left arm terminating in her fingers. (JE 4:34). Mr. Donahue diagnosed the claimant with cervical spondylolisthesis, cervical spondylosis, cervical radiculopathy, and neck pain. (JE 4:35). Mr. Donahue reviewed the MRI results, and opined that based upon her examination results, she should consider a cervical epidural steroid injection. (JE 4:36).

The claimant visited STL Interventional Pain Clinic on February 25, 2022. (JE 5:66-70). On a pain diagram, Ms. Ohlhauser indicated that her pain began in May of 2021, and shaded her left shoulder and upper back area. (JE 5:70). She rated her pain 8 out of 10. (JE 5:67). She described her pain as stabbing in nature. (JE 5:67). The doctor noted that the claimant failed conservative therapy and "due to chronicity a trial

cervical epidural steroid action was performed today." (JE 5:68). The doctor emphasized to Ms. Ohlhauser the importance of continuing her daily home-based physical therapy. (JE 5:68).

On March 23, 2022, Ms. Ohlhauser called the Physicians' Clinic of Iowa and noted that her first injection did not alleviate her pain. (JE 4:37). She noted that she was scheduled for another injection in April. (JE 4:37).

STL Interventional Pain Clinic treated Ms. Ohlhauser again on April 8, 2022. (JE 5:73-77). On her pain assessment diagram, Ms. Ohlhauser shaded areas of pain in proximity to her lower neck and upper shoulders. (JE 5:77). She indicated that her pain ranged between 7 out of 10 and 10 out of 10. (JE 5:77). The claimant told the doctor that the initial injection provided 10 percent to 50 percent pain relief for "a few weeks." (JE 5:73). Her pain remained the same across her neck and into her shoulder. (JE 5:77). The doctor noted that, if the medial branch block performed during this visit was successful, they would repeat the medial branch block before attempting something like radiofrequency ablation. (JE 5:75).

Ms. Ohlhauser called the Physicians' Clinic of Iowa again on May 16, 2022, noting that the injections did not help relieve her pain. (JE 4:38). She indicated that she was told the pain clinic could provide her with no further relief. (JE 4:38).

On May 26, 2022, the claimant returned to visit Mr. Donahue. (JE 4:39-41). She told Mr. Donahue that two cervical injections did not permanently relieve her pain. (JE 4:39). Ms. Ohlhauser felt that her symptoms were slowly worsening over time. (JE 4:39). Mr. Donahue reviewed the results of the claimant's MRI, her symptoms, and noted that "[g]iven her limited improvement despite injection modalities, surgical intervention was discussed." (JE 4:41). Mr. Donahue requested that the claimant keep a pain journal so that they could monitor the distribution of her pain. (JE 4:41). He also recommended an EMG. (JE 4:41). After moving forward with this plan, Ms. Ohlhauser was to return to the office to discuss a "more in-depth surgical plan." (JE 4:41).

Ms. Ohlhauser had an EMG at Physicians' Clinic of Iowa, P.C. with Laurence Krain, M.D., on June 13, 2022. (JE 4:42-44). Dr. Krain opined that the EMG was normal. (JE 4:42).

Mr. Donahue reviewed the findings of the EMG with Ms. Ohlhauser on June 14, 2022. (JE 4:45-47). Mr. Donahue offered the claimant a C6-7, C7-T1 anterior cervical discectomy and fusion, which she accepted. (JE 4:47).

Ms. Ohlhauser had a preoperative evaluation by Nasredin Dalil, M.D., on July 25, 2022, ahead of the scheduled neck surgery. (JE 5:79-84). Dr. Dalil determined that the claimant was very low risk for her elective surgery. (JE 5:84).

On August 5, 2022, Ms. Ohlhauser had a discectomy and cervical anterior fusion at C6-7 and C7-T1 performed by Kevin Eck, M.D. (JE 4:48-55). She tolerated the surgery well. (JE 4:48-50). The following day, she complained of moderate incisional

pain, and was to begin therapy. (JE 4:52). Dr. Eck recommended that the claimant remain off work until her two-week post-operative visit. (JE 4:54).

Ms. Ohlhauser continued working full-time with no restrictions until her surgery in August of 2022. (Testimony). Following her surgery, she was taken off work for thirteen weeks. (Testimony).

The claimant had her first post-surgical appointment with Dr. Eck on August 22, 2022. (JE 4:56-58). Ms. Ohlhauser did "very well" initially after her surgery with "near resolution of her upper extremity radicular complaints" along with manageable neck pain. (JE 4:56). She told Dr. Eck she was happy with the results of the surgery. (JE 4:56). Dr. Eck opined that Ms. Ohlhauser was doing well and that her radicular complaints had resolved. (JE 4:57). Dr. Eck kept the claimant off work for another four weeks until her next follow-up appointment. (JE 4:58).

On September 19, 2022, the claimant saw Dr. Eck again. (JE 4:59-61). She continued to be happy with the results of her surgery. (JE 4:59). Dr. Eck ordered x-rays, which showed the surgical results, including the anterior plate and screws. (JE 1:6). He allowed Ms. Ohlhauser to participate in low impact activities of daily living as tolerated. (JE 4:60). Dr. Eck also allowed the claimant to begin physical therapy. (JE 4:60). Finally, he issued a return-to-work note keeping Ms. Ohlhauser off work until her next appointment in six weeks. (JE 4:61).

On October 10, 2022, Ms. Ohlhauser reported to the offices of Joseph Chen, M.D., of Rehab Medicine & Pain Coaching, LLC, for an IME. (Defendants' Exhibit B:3-19). Dr. Chen produced a report outlining the findings of his IME on December 20, 2022. (DE B:3). Dr. Chen is board certified in physical medicine and rehabilitation, and spinal cord injury medicine. (DE C:22).

At the outset of the examination, Dr. Chen had Ms. Ohlhauser fill out a symptom diagram. (DE B:15). She indicated that she had aching, stabbing, and pins and needles pain from her left neck down her left arm. (DE B:15). She also noted burning pain in her left thigh. (DE B:15). She filled out some additional pain documents, indicating that her pain at its worst over the last week, and at the time of the appointment was 6 out of 10. (DE B:16). At its best, or least, her pain was 5 out of 10. (DE B:16). She indicated pain interfered with various aspects of her life at varying levels depending on the activity. (DE B:16). Ms. Ohlhauser also showed abnormal results for screening for anxiety and depression. (DE B:19).

Dr. Chen's report begins with a brief history of the claimant's injury and medical treatment. (DE B:3-8). Dr. Chen found the claimant to have "mainly neck pain with bending her neck forward." (DE B:8). She also described tightness in the back of her neck. (DE B:8). Upon physical examination, Dr. Chen found Ms. Ohlhauser to have diffuse tenderness to light palpation of "muscle attachment areas along the cervical paraspinal muscles, bilateral trapezius muscles, and medial scapular borders." (DE B:10). She also complained of pulling neck pain with extreme of neck flexion, rotation and bilateral side-bending. (DE B:10). Dr. Chen used a dual inclinometer to provide

range of motion measurements. (DE B:10). Ms. Ohlhauser showed 20 degrees of cervical flexion, 30 degrees of cervical extension, 30 degrees of left rotation, 30 degrees of right rotation, 30 degrees of left lateral tilt, and 30 degrees of right lateral tilt. (DE B:10). Dr. Chen also found the claimant to have normal muscle strength, and no consistent sensory loss or focal deficits. (DE B:10). Dr. Chen's examination of the claimant's shoulders was also normal. (DE B:10).

Dr. Chen noted that Ms. Ohlhauser had abnormal results for fear avoidance beliefs for physical activity, fear avoidance beliefs for work activities, anxiety, and depression. (DE B:10-11). Dr. Chen opined that these showed "high fear avoidance beliefs and concern for untreated anxiety and depression. All of these conditions are known personal risk factors for the development of a chronic pain syndrome even in the absence of musculoskeletal trauma or injury." (DE B:11).

The doctor then endeavored to answer several questions as provided by defendants' counsel. (DE B:11-13). Dr. Chen opined that Ms. Ohlhauser had a chronic history of neck, upper back, and shoulder pain, for which she sought treatment. (DE B:11). She was eventually diagnosed with cervical spondylosis "due to age-related disc degeneration likely due to her long history of tobacco use." (DE B:11). Dr. Chen opined further that the claimant had "no evidence of a cervical radiculopathy on her current physical examination based upon her ability to extend her neck without reporting any radiating left arm pain or tingling." (DE B:11). Dr. Chen states in his report, "[i]t is my medical opinion that Ms. Ohlhauser's work activities were not at all a contributing event to her symptoms that she reported to her medical providers and supervisor." (DE B:12). Dr. Chen continued, "[i]t is my medical opinion that Ms. Ohlhauser's symptoms that arose at the end of November 2021 occurred as a result of normal day to day personal activities as well as disc degeneration from decades of tobacco use." (DE B:12). Dr. Chen more unequivocally states that Ms. Ohlhauser's left shoulder and neck symptoms were "not caused or materially aggravated by any of her work activities at JE Adams." (DE B:12). He notes further that episodes of neck pain were common in the working population due to several factors, and that this pain "typically waxes and wanes over time with or without need for supervised medical treatment." (DE B:12). Dr. Chen also concluded that restrictions provided by Dr. Eck were not related to any work injury and were due to a personal health condition. (DE B:13).

The claimant began another course of physical therapy at Rock Valley Physical Therapy on October 11, 2022. (JE 7:89-94). She still had limited range of motion without pain complaints. (JE 7:89). Her goals through therapy were to address increased stiffness, decreased strength, decreased functional tolerance, and issues with lifting. (JE 7:90). She was instructed in a walking program and postural strengthening. (JE 7:92).

Ms. Ohlhauser returned to Dr. Eck's office for another post-surgical follow-up visit on October 31, 2022. (JE 4:62-65). She continued to slowly improve and remained happy with the results of the surgery, though she still experienced some neck discomfort with lifting more than 25 pounds. (JE 4:62). Ms. Ohlhauser requested restrictions, which Dr. Eck felt was "reasonable." (JE 4:64). These included no

repetitive lifting more than 25 pounds, and avoidance of activities that require repetitive flexion and extension of her cervical spine. (JE 4:64). Dr. Eck allowed her to return to work with said restrictions. (JE 4:65).

By November 17, 2022, Ms. Ohlhauser attended her eleventh physical therapy session with Rock Valley Physical Therapy. (JE 7:95-97). Therapy exercises were performed, and she was continually educated in a walking program. (JE 7:95). The therapist observed that Ms. Ohlhauser had improved cervical motion, greater functional shoulder strengthening, and improved sleeping quality. (JE 7:95). Ms. Ohlhauser told the therapist that she was diligent with her home exercise plan. (JE 7:95). She met several of her goals, and continued progressing towards others. (JE 7:96). The therapist opined that the claimant's rehabilitation potential was "good." (JE 7:96).

Dr. Eck responded to a "check-box" letter from claimant's counsel on January 6, 2023. (CE 6:73-75). Dr. Eck checked "yes" indicating that he provided medical treatment to Ms. Ohlhauser. (CE 6:73). He checked "yes" to the statement "Jodi's work activities are not likely to be the sole cause of the neck conditions for which I performed surgery." (CE 6:74). He also checked "yes" to the statement "I cannot definitively state Jodi's need for surgery was brought on by her repetitive work activities assembling vacuum cleaners." (CE 6:74). Finally, he checked "yes" to the statement, "[h]owever, her work activities were, more likely than not, a significant contributing factor in aggravating or accelerating the preexisting conditions for which I performed surgery." (CE 6:74). It is interesting to note that Dr Eck provided no additional comment on any of these issues, and simply checked "yes" to each statement." (CE 6:74).

Farid Manshadi, M.D., F.A.A.P.M.&R., performed an IME on the claimant on January 19, 2023. (CE 1:1-6). He issued a report outlining the findings of his IME on January 30, 2023. (CE 1:1-6). Dr. Manshadi is a fellow of the American Academy of Physical Medicine & Rehabilitation. (CE 1:9). Dr. Manshadi reviewed a number of medical records, deposition transcripts, and a job description for the claimant in drafting his report. (CE 1:4). Ms. Ohlhauser recounted to Dr. Manshadi that on May 7, 2021, she was preparing a large order. (CE 1:4). In doing so, she had to "perform overhead activities with putting a large dome over the motors of the car-wash vacuum cleaners in a very repetitious manner…" (CE 1:4). On May 7, 2021, the claimant experienced "significant pain involving her neck and her left shoulder." (CE 1:4). Dr. Manshadi then proceeds to outline the claimant's medical treatment. (CE 1:4-5).

At the time of the IME, the claimant reported that the surgery provided her with some relief; however, she experienced some reduced range of motion in her neck. (CE 1:5). Ms. Ohlhauser noted that she returned to work with a 25-pound lifting restriction along with a restriction to avoid repetitive activity with her neck. (CE 1:5). At the time of the IME, she rated her neck pain 3 out of 10. (CE 1:5). Dr. Manshadi documented neck rotation, forward flexion and extension to be "about 3/4 of a range." (CE 1:5). Lateral bending was observed as "about 1/2 a range." (CE 1:5).

Dr. Manshadi opined, "…it is my professional medical opinion that Ms. Ohlhauser sustained a significant neck injury as a result of her work activities while working at JE

Adams Company." (CE 1:5). He continued by opining that the claimant's work activities at Adams "caused a significant aggravation of her pre-existing neck condition," and eventually necessitated her surgery. (CE 1:5). Dr. Manshadi placed the claimant at maximum medical improvement ("MMI") as of the date of the January 19, 2023, evaluation. (CE 1:5). Dr. Manshadi then cited to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, in arriving at a permanent impairment opinion. (CE 1:5-6). Specifically, Dr. Manshadi cited to Chapter 15, page 392, Table 15-5, in arriving at the opinion that Ms. Ohlhauser is a "DRE Cervical Category 4" impairment and had a 26 percent permanent impairment to the whole body. (CE 1:6). Dr. Manshadi concluded by agreeing with the restrictions of Dr. Eck and asserting that "…the treatment provided for Ms. Ohlhauser's neck injury has been reasonable and necessary." (CE 1:6).

Having worked at Adams for over 20 years, Ms. Ohlhauser experienced a number of prior work injuries. (Testimony). Mr. Miersen reinforced this through his testimony. (Testimony). The claimant knew the proper process for reporting a workers' compensation claim, as she reported several prior work injuries. (Testimony; DE H:48-51). She testified that there was a basket of injury reports sitting outside of her supervisor's office for employees to fill out as needed. (Testimony). She also testified to familiarity with filling out short term disability forms for a prior personally related medical leave. (Testimony). Ms. Ohlhauser indicated that through the summer of 2021, she felt she still had a strain that would resolve, and the pain would "go away." (Testimony).

Matt Miersen, the large assembly supervisor at Adams, and Ms. Ohlhauser's supervisor at the time of this alleged injury, testified to Adams' processes for reporting work related injuries. (Testimony). Specifically, Adams would use a "first responder" to clean up any injuries such as lacerations. (Testimony). The "first responder" would then contact Mr. Miersen to discuss the injury, Mr. Miersen would review the injury, and then make a decision as to whether the injured worker should be sent off-site for further treatment. (Testimony). At that time, an injured worker would fill out an injury report, which is located "right outside" of Mr. Miersen's office in a basket with 10 to 12 total copies. (Testimony).

Mr. Miersen testified that the claimant did not indicate that she injured herself at work until December 2, 2021, when she requested a work injury report. (Testimony). After filling out the form, Adams began their process of turning the report and claim into their insurer. (Testimony).

Ms. Ohlhauser opined that she had a 25-pound restriction "for the rest of [her] life," along with restrictions of no pulling and no repetitive work at shoulder height. (Testimony). These restrictions were provided by Dr. Eck. (Testimony).

At the time of the hearing, she was currently working for Adams in the small assembly area. (Testimony). She felt like she was performing well in the position, as small assembly did not require her to complete as much repetitive work as large assembly. (Testimony). She enjoys her job and plans on working at Adams for three to

five years before retiring. (Testimony). She assembled fittings for the car wash industry, such as hoses and other parts. (Testimony). She earned twenty-one and 90/100 dollars ($21.90) per hour. (Testimony). She continued to work 40 hours per week, but was not working as much overtime on an elective basis. (Testimony). Additionally, she testified that there was "no great call for overtime in small assembly." (Testimony).

Ms. Ohlhauser testified that she received a bonus once per year, in December, based upon the company's profits for the year. (Testimony). She received a bonus in 2020, 2021, and 2022. (Testimony). Each year, the bonus was six thousand and 00/100 dollars ($6,000.00). (Testimony). Mr. Miersen confirmed that bonuses were based upon profit sharing and were not guaranteed every year. (Testimony). He further testified that there were years when profit-sharing payments were not made. (Testimony).

CONCLUSIONS OF LAW

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

Arising Out Of and In the Course Of

While the defendants have asserted an affirmative defense, the first question to examine is whether the claimant's alleged injuries arose out of, and in the course of, her employment with Adams.

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, that 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). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place and circumstances of the injury. Id. An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. v. Willis, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held that 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. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979).

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

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

Iowa employers take an employee subject to any active or dormant health problems, and must exercise care to avoid injury to both the weak and infirm and the strong and healthy. Hanson v. Dickinson, 188 Iowa 728, 176 N.W. 823 (1920). While a claimant must show that the injury proximately caused the medical condition sought to be compensable, it is well established that a cause is "proximate" when it is a substantial factor, or even the primary or most substantial cause to be compensable under the Iowa workers' compensation system. Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980).

At the time of the hearing, the claimant was 58 years old, and a smoker. Ms. Ohlhauser worked for Adams for over 35 years at the time of the hearing. Ms. Ohlhauser initially worked in small assembly for about eight years. She then moved to a large assembly area where she assembled large vacuums for car washes. Generally, she built up to 10 vacuums per day during a 10-hour shift.

In May of 2021, Ms. Ohlhauser was working on a particularly large order of vacuums with one other employee. Rather than completing her normal 10 vacuums per day, she was expected to complete an order of 70 vacuum cleaners over two days with the co-employee. About five hours into her shift on May 7, 2021, Ms. Ohlhauser began to notice soreness and stiffness into her shoulder and neck areas. In her deposition, she described the pain as "achy" and "crampy;" however, she also indicated an uncertainty as to the cause of her pain. She noted that it could have been caused by sleeping on it wrong, and requested permission to leave for a chiropractic adjustment. Adams allowed her to leave for this adjustment.

Interestingly, there is no record of a chiropractic visit in the MyChiro records until May 28, 2021. Both Ms. Ohlhauser and her supervisor agree that she was released from work to attend a chiropractic visit, but the records from this visit are illegible and are of no help to this proceeding. On the same date, Ms. Ohlhauser presented to a walk-in clinic with complaints of bilateral shoulder pain with pain into her neck and back.

Ms. Ohlhauser also testified to being aware of the injury reporting procedures used at Adams. In fact, during her tenure with Adams prior to May of 2021, she had many occasions on which she took a form from a well-known location outside of her supervisor's office, and filled it out to indicate a potential work injury. Mr. Miersen also testified that Ms. Ohlhauser never indicated to him that her injuries were work related in May of 2021.

Based upon the information in the record, Ms. Ohlhauser sought no medical care for her alleged work injury between a June of 2021 visit with MyChiro and early November of 2021. She worked through the entire summer with no restrictions and no increase in her pain. She even followed-up with medical providers due to some falls, but made no mention of neck pain or shoulder pain during these visits. It was not until November 8, 2021, that Ms. Ohlhauser saw Dr. Marlett and complained of pain in her left shoulder since May of 2021. The claimant testified that she began to develop concerns that her issues were more than a strain as diagnosed by Dr. Marlett. It was at this time that Ms. Ohlhauser's medical care began in earnest, eventually progressing to the point where injections were attempted, and a cervical discectomy and fusion was completed in August of 2022. She was diagnosed with cervical spondylolisthesis, cervical spondylosis, cervical radiculopathy, and neck pain.

There are several opinions from medical providers as to whether or not the claimant's employment with Adams caused her shoulder and neck issues. The defendants retained Dr. Chen to conduct an IME. Dr. Chen opined that the claimant's cervical spondylosis was "due to age-related disc degeneration likely due to her long history of tobacco use." He further opined that Ms. Ohlhauser's work activities were "…not at all a contributing event to her symptoms…" as reported to various providers. Dr. Chen concluded that the claimant's symptoms were a result of normal day-to-day personal activities and disc degeneration from decades of tobacco use, and were neither caused nor materially aggravated by her work activities at Adams.

Dr. Eck, a treating physician, who was not selected by the employer, responded to a "check-box" letter from claimant's counsel in January of 2023. Dr. Eck checked "yes" indicating assent to the statement, "Jodi's work activities are not likely to be the sole cause of the neck conditions for which I performed surgery." He also checked "yes" to a statement that reads, "[h]owever, her work activities were, more likely than not, a significant contributing factor in aggravating or accelerating the preexisting conditions for which I performed surgery." Of note, Dr. Eck provided no additional commentary or opinions.

Finally, the claimant had an IME with Dr. Manshadi in January of 2023. Ms. Ohlhauser recounted to Dr. Manshadi that on May 7, 2021, she began to experience "significant pain involving her neck and her left shoulder," while assembling vacuum cleaners "…in a very repetitious manner…" Dr. Manshadi opined that the claimant sustained "a significant neck injury as a result of her work activities…" at Adams. He further opined that the claimant's work activities "caused a significant aggravation of her pre-existing neck condition…"

The claimant began experiencing pain on, or about May 7, 2021, while fulfilling a large order at Adams. The defendants argue that the claimant herself did not think that this was a work injury. The claimant's subjective belief is not relevant to this particular question. The question is whether the claimant's injuries arose out of, and in the course of her employment with Adams.

While Ms. Ohlhauser unquestionably had pre-existing issues with her neck, which were likely exacerbated by her tobacco use, she began experiencing new symptoms while working, on or around May 7, 2021. As noted above, the evidence shows that Ms. Ohlhauser was completing a much larger than normal order at the time of the increased pain to her left shoulder and neck. This process aggravated, or lit up, her pre-existing neck issues, as she began to experience pain at the time. Both Dr. Eck and Dr. Manshadi agree that Ms. Ohlhauser's work activities with Adams either caused, or materially aggravated her pre-existing issues in her neck. Therefore, I conclude that Ms. Ohlhauser's injuries arose out of her employment with Adams.

Furthermore, Ms. Ohlhauser testified that her pain began while she was working on the assembly line at Adams. The medical evidence is consistent with this testimony. As such, I conclude that the claimant's injuries occurred in the course of her employment with Adams.

Iowa Code section 85.23 Notice

The defendants assert an affirmative defense in this matter. Namely, they allege that the claimant did not provide notice of her injuries within ninety (90) days of their occurrence.

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

Iowa Code section 85.23 provides that an injury is not compensable unless, within ninety (90) days of the "date of the occurrence of the injury," either (1) the employer had actual knowledge of the occurrence of an injury, or (2) notice of the occurrence of an injury was provided to the employer. On July 1, 2017, "date of the occurrence of the injury" was defined to mean "the date that the employee knew or should have known that the injury was work related." Iowa Code section 85.23.

The purpose of this rule is to give the employer an opportunity to timely investigate the facts surrounding the injury. Defendants often read this to strictly require the defendants to have actual notice rather than constructive or imputed notice. However, the second part of Iowa Code section 85.23 allows for something less than actual notice. When an employer as a reasonably conscientious manager is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work related meets the actual notice alternative to notice. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Dept. of Transp., 296 N.W.2d 809 (Iowa 1980). Actual knowledge must include information that the injury might be work connected, but does not require claimants to include the specific body parts injured or the specific word "injury." Robinson, 296 N.W.2d at 811.

The first question is whether Adams had actual knowledge of the claimant's work injury on May 7, 2021, and whether the claimant knew, or should have known, that the injury was work related on this date.

The evidence shows that Ms. Ohlhauser began suddenly feeling pain on May 7, 2021. The pain occurred while Ms. Ohlhauser had been working for some time, and was working on filling a larger than normal order. The claimant told her supervisor that she experienced pain of an unknown cause. She indicated uncertainty as to whether she slept on her neck wrong the night before, or her work was causing her pain. Mr. Miersen recalled a discussion of pain around this time, but noted that Ms. Ohlhauser "kind of let it go…" after being allowed to leave to attend a chiropractic appointment. He also recalled that Ms. Ohlhauser never requested an injury form, nor did she indicate in May of 2021, that her issues were work related. It was established through testimony, and the evidence, that Ms. Ohlhauser was acutely aware of the injury reporting process at Adams. Despite this awareness, Ms. Ohlhauser did not report an injury at this time. Adams did not have actual knowledge on May 7, 2021, of the claimant's work injury.

"[T]he date that the employee knew or should have known that the injury was work related" is a more stringent standard. Iowa Code section 85.23. Courts have yet to interpret this new portion of the statute; however, previous arbitration decisions of this agency have addressed this change. In Stiles v. Annett Holdings, Inc., d/b/a TMC Transportation, File No. 5064673 (Arb. Nov. 15, 2019), the deputy commissioner indicated that "[t]he new statutory provisions for notice and statute of limitations are consistent with the discovery rule that has been followed in workers' compensation cases in Iowa for many years." Under the discovery rule, the period "does not begin to run until the claimant knows or in the exercise of reasonable diligence should know 'the nature seriousness and probably compensable character' of his or her injury." Baker v.

Bridgestone/Firestone, 872 N.W.2d 672, 685 (Iowa 2015). The claimant must have actual or imputed knowledge of all three elements before the time begins to run. Swartzendruber v. Schimmel, 613 N.W.2d 646, 650-651 (Iowa 2000).

The first component of the discovery rule is recognition of the nature of the injury. Id. at 680-81. Ms. Ohlhauser did not initially recognize that her injury was work related. She testified that she was unsure whether the pain that developed on May 7, 2021, was due to a work injury, or whether it was due to a personal issue, such as sleeping wrong. Mr. Miersen confirmed this via his testimony. He also confirmed that Ms. Ohlhauser "kind of let it go…" after she went to the chiropractor. Ms. Ohlhauser noted that she was diagnosed with a muscle strain during some of her initial follow-up appointments.

The second component of the discovery rule is recognition of the seriousness of the injury. Id. The court noted that ". . . . the limitations period does not commence 'until the employee . . . . knows that the physical condition is serious enough to have a permanent adverse impact on the claimant's employment or employability.'" Id. at 681 (citing Herrera v. IBP, Inc., 633 N.W.2d 284, 288 (Iowa 2001)). The court further noted, "…not every ache, pain, or symptom will be understood as possibly suggesting a permanent adverse impact on a claimant's health or physical capacity for employment." Id.

The claimant continued working full-time, full-duty, with no restrictions for quite some time after the injury. She sought some care during the summer, including a walk-in visit at UnityPoint where she complained of tenderness and pain with movement in her neck and shoulders. During this visit, doctors told Ms. Ohlhauser that her "muscles were tight, and there could be a muscle strain…" which they felt could resolve on its own. The doctor recommended that the claimant take certain medicines and apply heat to the area. The doctor also noted that the claimant should return to care if her symptoms did not resolve.

The claimant did not seek further follow-up care until late June of 2021. At that time, she had a chiropractic visit where she complained of pain in her shoulders and neck. A record from this visit contains scant evidence, but appears to indicate a complaint of tightness in the shoulders. Ms. Ohlhauser previously relied on chiropractic care for minimal aches and pains.

The claimant testified that the nature and character of her pain did not change during the summer of 2021. There is no indication during this time that the claimant had anything beyond the initially diagnosed muscle strain.

On November 8, 2021, the claimant saw Dr. Marlett with complaints of left shoulder pain since May of 2021. Ms. Ohlhauser indicated that she attempted to manage her pain, but received no relief from her symptoms. Dr. Marlett observed that Ms. Ohlhauser displayed tenderness in her trapezius and upper rhomboid area. Dr. Marlett opined that the claimant had a chronic issue and diagnosed her again with a muscle strain. She was prescribed a muscle relaxer and Voltaren, and recommended

physical therapy. Ms. Ohlhauser testified that it was around this time she had more than a strain, as her pain began to worsen.

During subsequent physical therapy visits, Ms. Ohlhauser told the therapist that her pain came and went at work, but that it was "hard to tell because she is focused on her work." She also complained of left sided upper back pain. She did not attend another therapy session at that time.

Then, on November 30, 2021, Ms. Vetsch first saw the claimant for left shoulder and neck pain. Ms. Ohlhauser indicated that the pain began in May of 2021, and was worsening into "an intense pinching sensation…" Ms. Ohlhauser could not recall a specific event causing her injury. At that time, imaging was ordered, which showed "[a]t least mild to moderate degenerative changes" of the cervical spine along with shoulder changes. Ms. Ohlhauser testified that she was referred to an orthopedic surgeon. Subsequent to this, on December 2, 2021, Ms. Ohlhauser filled out a report of injury, including a date of injury of May 4, 2021.

It is reasonable that Ms. Ohlhauser felt she had a muscle strain, which may resolve via chiropractic care, or even on its own. It was not until the pain persisted, and perhaps worsened, that she sought further care in November with Dr. Marlett, and Ms. Vetsch. Upon receiving the recommendation to seek care with an orthopedic doctor following x-rays showing degenerative neck issues, Ms. Ohlhauser filed a report of injury with Adams. Therefore, November 30, 2021, is when she became aware that her injury was serious enough to have a permanent adverse impact on her employability.

The final aspect of the discovery rule is whether or not the individual recognizes the probable compensable nature of their injury. Id. at 680-81. The Iowa Supreme Court has previously held, "[k]nowledge is imputed to a claimant when he gains information sufficient to alert a reasonable person of the need to investigate. As of that date he is on inquiry notice of all facts that would have been disclosed by a reasonably diligent investigation." Perkins v. HEA of Iowa, Inc., 651 N.W.2d 40, 44 (Iowa 2002)(citing Ranney v. Parawax Co., 582 N.W. 2d 152, 155 (Iowa 1998)).

While the claimant had pain initially on May 7, 2021, she credibly testified that she thought it could resolve as prior aches and pains resolved, through chiropractic care or on its own. The claimant sought some initial care, but was told that she had a muscle strain, and that she should follow-up with therapy and self-care. The pain went unchanged during the summer of 2021, and eventually began to worsen by the fall of 2021. The claimant then sought additional care since the pain did not resolve on its own. In late November of 2021, after seeing her primary care doctor and a nurse practitioner, as well as undergoing imaging, Ms. Ohlhauser sought additional care and filed a report of injury with Adams. When Ms. Ohlhauser's pain worsened in October or November, it was reasonable of her to investigate, which she did by seeking additional care with her primary care doctor and a nurse practitioner.

The burden of proving an affirmative defense is on the defendants. In this case, the claimant provided the defendants with notice of her injury within 90 days of

discovering it based upon the application of the discovery rule as discussed above. The defendants failed to prove by a preponderance of the evidence that the claimant failed to provide Adams with notice of her injury within the 90 days required by Iowa Code section 85.23. Therefore, the affirmative defense fails.

Causation

The claimant alleges that the May 7, 2021, work injury was a cause of temporary disability, and permanent disability.

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

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

Iowa employers take an employee subject to any active or dormant health problems, and must exercise care to avoid injury to both the weak and infirm and the strong and healthy. Hanson v. Dickinson, 188 Iowa 728, 176 N.W. 823 (1920). While a claimant must show that the injury proximately caused the medical condition sought to be compensable, it is well established that a cause is "proximate" when it is a substantial factor, or even the primary or most substantial cause to be compensable under the Iowa workers' compensation system. Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980).

Ms. Ohlhauser testified to pain beginning in May of 2021. This pain worsened in the fall of 2021, and eventually resulted in the claimant having surgery in August of 2022 after failing conservative treatment. Following her surgery, the claimant was off work for a time, and was also provided with restrictions, as further discussed below.

The defendants presented the opinions of Dr. Chen. Dr. Chen opined that Ms. Ohlhauser's work activities were "not at all a contributing event to her symptoms that she reported to her medical providers and supervisor." They also did not materially aggravate any pre-existing issues that the claimant had with her neck or shoulder. Dr. Chen continued by opining that the claimant's symptoms "…occurred as a result of normal day to day personal activities as well as disc degeneration from decades of tobacco use." He concluded that neck pain was common among people in the working population and that this pain "typically waxes and wanes over time with or without need for supervised medical treatment."

While Dr. Chen is clearly a qualified board-certified physician, his opinions in this matter do not comport with the evidence. While Dr. Chen attempts to connect the claimant's neck pain to her smoking or to common ailments of the working population which "wax and wane," the evidence is to the contrary. Dr. Chen seems to discount the claimant's complaints entirely simply because she is a smoker. While the undersigned is aware of medical studies indicating that tobacco use can lead to disc issues, Dr. Chen's report is not specific enough to indicate the same. Additionally, there is also no evidence in the record regarding tobacco use and cervical disc issues.

The claimant credibly testified that she began experiencing pain in May of 2021. The records back her assertion that her pain began to increase in the fall of 2021. She began attempting conservative care around that time, and then failed conservative care. Following this failure, the claimant had surgery performed by Dr. Eck.

The claimant presented opinions from treating physician Dr. Eck and IME physician Dr. Manshadi. Both doctors opined that the claimant's issues were caused by her work activities at Adams. Dr. Eck provided his opinions in the form of a check-box response. He opined that Ms. Ohlhauser's work activities were, "…more likely than not, a significant contributing factor in aggravating or accelerating the preexisitng conditions for which [he] performed surgery."

Dr. Manshadi is board certified in physical medicine and rehabilitation. After examining the claimant on January 19, 2023, Dr. Manshadi opined that the claimant "…sustained a significant neck injury as a result of her work activities…" at Adams. Further, he opined that Ms. Ohlhauser's work at Adams "caused a significant aggravation of her pre-existing neck condition," which eventually necessitated her surgery with Dr. Eck. Dr. Manshadi provided a detailed report and outlined his medical records review and interview with the claimant.

Based upon my review of the record, I find the opinions of Dr. Eck and Dr. Manshadi to be more credible than the opinions of Dr. Chen. Dr. Eck, as the treating physician, is best positioned to provide an opinion as to the cause of the claimant's issues. Dr. Manshadi also provided a well-reasoned opinion in great contrast to the opinions of Dr. Chen.

Therefore, I conclude that the claimant's injury on May 7, 2021, is a cause of both temporary disability during a period of recovery and permanent disability.

Temporary Disability

The claimant alleges that she was off work, and entitled to temporary total disability, temporary partial disability, and/or healing period benefits from May 7, 2021, to January 19, 2023. In their post-hearing brief, the claimant argues that she is entitled to healing period benefits from August 5, 2022, to November 7, 2022. The defendants argued in their brief that the claimant's work injury was not a cause of temporary disability during a period of recovery, and thus made no argument as to the time period for which the claimant is entitled to benefits.

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

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

Iowa Code 85.33(1) provides:

> ...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.

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

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

Having previously found that the claimant's May 7, 2021, injury was a cause of permanent disability, I find that the claimant is entitled to healing period benefits.

Ms. Ohlhauser worked full-time with no restrictions until her surgery on August 5, 2022. There is no evidence that the claimant was working light duty or part time during the time periods in question. Therefore, she would not be entitled to temporary partial disability benefits. The claimant testified that she was taken off work for 13 weeks following her surgery. The medical records show that, on August 5, 2022, Dr. Eck recommended that the claimant remain off work until her two-week follow-up visit. On August 22, 2022, Dr. Eck again recommended that the claimant remain off work for four weeks. On September 19, 2022, Dr. Eck took the claimant off work for six weeks. On October 31, 2022, Dr. Eck allowed the claimant to return to work on November 7, 2022, with restrictions that were requested by Ms. Ohlhauser. Based upon the opinions of Dr. Eck and the medical evidence, I find that the claimant is entitled to healing period benefits from August 5, 2022, to November 7, 2022. This amounts to 13.429 weeks of benefits.

Permanent Disability

Having previously determined that the claimant's work injury was a cause of permanent disability, I now turn to the extent of the claimant's permanent disability. The claimant argues that she is entitled to permanent disability benefits based upon an industrial disability analysis. The defendants argue that the claimant's permanent disability compensation should be limited to the extent of her permanent disability rating pursuant to Iowa Code section 85.34(2)(v).

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

An injury to a scheduled member may, because of aftereffects or compensatory change, result in permanent impairment of the body as a whole. Such impairment may in turn be the basis for a rating of industrial disability. It is the anatomical situs of the permanent injury or impairment which determines whether the schedules in Iowa Code 85.34(a) – (u) are applied. Lauhoff Grain v. MacIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943); Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

Generally, permanent partial disability falls into two categories. A scheduled member, as defined by Iowa Code section 85.34(a) – (u), or a loss of earning capacity, also known as industrial disability, as defined by Iowa Code section 85.34(2)(v). Lauhoff Grain v. MacIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943); Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

Iowa Code section 85.34(2)(v) provides an alternative to the scheduled member and/or industrial disability compensation methods. Iowa Code section 85.34(2)(v) states, in relevant part:

> If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity.

In determining whether the above provision of Iowa Code section 85.34(2)(v) applies, there is a comparison between the claimant's pre- and post-injury salary, wages, or earnings. McCoy v. Menard, Inc., File No. 1651840.01 (App. April 9, 2021). A claimant's hourly wage must be considered in tandem with the actual hours worked by that claimant or offered by the employer. Id. The Commissioner noted in McCoy that there remained unanswered questions about when and how to take the "snapshot of a claimant's post-injury earnings." Id. These questions were not answered by the legislature, the Commissioner in McCoy, and to date, have not been answered by an Iowa court. Id.

At the time of the injury, the parties agree that Ms. Ohlhauser earned twenty and 61/100 dollars ($20.61) per hour. She was working between 33.83 and 46 hours per week in the thirteen weeks prior to her injury. See CE 3:23. The average hours worked per week was 40.33 hours per week in the thirteen weeks prior to her May 7, 2021, date of injury. Id. She then continued to work much more than 40 hours during the rest of 2021, and around 40 hours during much of 2022. See DE D:33-35. Since there is no defined way to look at the snapshot of the claimant's wages or earnings and time worked prior to the incident, it is reasonable to look at the thirteen weeks immediately prior to the date of injury. This is reasonable because it is the same measure used to determine a claimant's average weekly wage and compensation rate. There is no indication in the statute that a bonus, whether regular or not, should be taken into consideration in arriving at a decision as to whether or not the claimant's earnings are the same as prior to the injury. This is a unique case because the claimant worked for almost one-and-a-half years prior to having surgery and being taken off work by Dr. Eck.

The claimant testified that, at the time of the hearing, she earned twenty-one and 90/100 dollars ($21.90) per hour. This is an increase from her hourly wage at the time of the work injury. Following her return to work in November of 2022, Ms. Ohlhauser worked varying hours. See DE D:34. The defendants included personal time and holiday time with the claimant's time sheet following her return to work. Id. At the time of the hearing, the claimant worked in small assembly. She testified that she was working 40 hours. She testified that more overtime was available to her in 2021; however, she further indicated that overtime was elective and not mandatory. She also testified that she did not work as much overtime because where was "no great call for overtime in small assembly." (Testimony). Mr. Miersen collaborated Ms. Ohlhauser's

testimony that business was slow across the company, and that even large assembly was not working overtime at the time of the hearing. (Testimony). Finally, the claimant was asked:

> Q: Are you earning more money now than you earned back in May of '21, less money, or about the same?
>
> A: The same.

(Transcript). The evidence shows that Ms. Ohlhauser was working 40 hours (including personal time and holidays) per week following her return from surgery in November of 2022.

Based upon the evidence in the record, I conclude that the claimant is earning the same, or more than she earned at the time of the work incident. Any reduction in earnings is due to a voluntary decision to not work elective overtime, or a general slowdown in the business. An employer cannot control economic conditions which may result in the slowdown of business. Additionally, calculation of an average weekly wage does not consider overtime. Since I used the thirteen weeks prior to the date of injury as a basis for the claimant's pre-injury earnings, it is logical and reasonable to conclude that overtime should not be included in the post-injury examination of earnings.

While a reduction in overtime availability may lower her overall earnings, the claimant continues to work 40 hours per week, which is essentially the average hours per week that she worked prior to the injury. She also earns more per hour than she did at the time of the injury. The claimant should be compensated based upon her functional disability based upon the language of Iowa Code section 85.34(2)(v).

There is only one impairment rating in the record. This is from the IME of Dr. Manshadi. Dr. Manshadi used the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, to arrive at an impairment rating. Dr. Manshadi opined that the claimant had a 26 percent impairment to her whole body due to her neck injury. An impairment to the body as a whole is compensated based upon 500 weeks. See Iowa Code section 85.34(2)(v). Therefore, the claimant is entitled to 130 weeks of compensation. (500 weeks x 26 percent = 130 weeks).

As noted above, compensation for permanent partial disability commences at the termination of the healing period. I previously determined that the healing period ended on November 7, 2022, when the claimant returned to work. Therefore, permanent disability benefits would commence on November 7, 2022.

Rate of Compensation

The parties dispute the proper average weekly wage for the claimant, and therefore the proper rate of compensation. The claimant argues that she was paid a yearly bonus, and that this should be prorated and included in her weekly earnings. The defendants contend that the bonus is profit-sharing and should not be included in any average weekly wage calculation.

The parties agree that the claimant was married and entitled to two exemptions at the time of the work injury. The claimant argues a proper average weekly wage of one thousand seven and 96/100 dollars ($1,007.96). The result would be a weekly compensation rate of six hundred fifty-eight and 54/100 dollars ($658.54) per week. The defendants argue that the proper average weekly wage for the claimant is eight hundred ninety-three and 00/100 dollars per week. The resulting weekly compensation rate would be five hundred eighty-nine and 69/100 dollars ($589.69) per week.

Iowa Code 85.36 states "[t]he basis of compensation shall be the weekly earnings of the injured employee at the time of the injury." Weekly earnings are defined as the gross salary, wages, or earnings of an employee had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for work of employment. Id. The subsections of Iowa Code 85.36 set forth methods for computing weekly earnings depending upon the type of earnings and employment.

If an employee is paid on a daily, or hourly basis, or based upon output, weekly earnings are computed by dividing by thirteen (13) the earnings over the thirteen (13) week period immediately preceding the injury. However, any week that does not fairly reflect the employee's customary earnings shall be replaced by the closest previous week that is a fair representation of the employee's customary earnings. See Iowa Code section 85.36(6). The calculation shall include shift differential pay, but not overtime or premium pay in the calendar weeks immediately preceding the injury. Id. If the employee was absent during the time period subject to calculation for personal reasons, the weekly earnings are the amount the employee would have earned had the employee worked when work was available to other employees in a similar occupation for the employer. Id.

As discussed above, the dispute amongst the parties appears to stem from the inclusion, or exclusion of a profit-sharing bonus from the calculation of gross earnings and thus compensation rate. Iowa Code section 85.61(3) defines gross earnings as: "recurring payments by the employer to the employee for employment, before any authorized or lawfully required deduction or withholding of funds by the employer, excluding irregular bonuses, retroactive pay, overtime, penalty pay, reimbursement of expenses, expense allowances, and the employer's contribution for welfare benefits." The defendants contend that the profit-sharing bonus was irregular and thus should not be considered in the calculation of the claimant's gross earnings.

The Court of Appeals considered whether a bonus was regular or irregular in Noel v. Rolscreen Co., 475 N.W.2d 666 (Iowa App. 1991). In Noel, the claimant argued that a Christmas bonus should have been considered in computing the weekly compensation benefit. Id. at 667. The amount of the bonus received by the claimant in Noel varied from year to year. Id. The employer also required that employees meet a condition precedent in order to receive the bonus. Id. The employee handbook in Noel defined the bonus in question as an "anticipated bonus." Id. The employer could discount the program for any reason. Id. The program could be changed in any manner or replaced at the employer's discretion. Id. The Court determined that bonus

was not regular, as it was of a varying amount, subject to a condition precedent, and not fixed in terms of entitlement or amount until late in the fiscal year. Id. at 668.

The Iowa Supreme Court examined the Noel decision in a subsequent case. The Court indicated that the Court of Appeals in Noel did not indicate that these factors are exclusive or exhaustive. Burton v. Hilltop Care Center, 813 N.W.2d 250, 266 (Iowa 2012). Accordingly, the Court indicated in Burton that: ". . . we do not feel a strict reading of Noel is appropriate." Id. The Court further stated, "[s]ince no two cases present the same set of facts, we will not handcuff the agency by limiting its inquiry." Id.

On July 12, 2017, the Commissioner issued a Declaratory Order Regarding Profit Sharing Bonus and Continuous Improvement Pay Plan ("the Order") regarding several John Deere locations. The Order indicates that John Deere's fiscal year runs from November 1 to October 31. Declaratory Order Regarding Profit Sharing Bonus and Continuous Improvement Pay Plan, Iowa Industrial Commissioner (July 12, 2017). Whether John Deere paid a profit sharing bonus, and the amount thereof, is determined in November of each year. Id. The profit sharing bonus is calculated based upon a number of factors including the employee's average earnings and the overall profitability of John Deere. Id. In two of the 18 years predating the decision, bonuses were not paid. Id. Another incentive pay program also provided a bonus upon employees exceeding production goals. Id. This bonus is paid out quarterly based upon certain factors. Id. The Commissioner adopted the "common and ordinary meaning" of the words "recurring," "irregular bonuses," and "retroactive." Id. Based upon the evidence provided to the Commissioner, the Commissioner determined that the profit sharing bonus paid by John Deere was not a recurring payment, but was "an irregular bonus dependent upon the overall profitability of Deere North America and Deere Worldwide for the prior fiscal year." Id. Therefore, the Commissioner opined that the profit sharing bonus should be excluded from gross earnings when determining an employee's weekly compensation rate. Id. The Commissioner concluded that the quarterly bonus was to be included in gross earnings because John Deere did not establish that the quarterly bonuses were retroactive. Id.

Ms. Ohlhauser testified that she received a profit-sharing bonus on a yearly basis in December. She confirmed that the bonus is based upon "profits for the year." She testified further that she received a bonus in 2020, 2021, and 2022. According to her testimony, the bonus amounted to six-thousand and 00/100 dollars in each of those years.

Mr. Miersen testified on behalf of the employer that the bonus was a profit sharing bonus. He further testified that the bonus was not guaranteed, and that there were years in which the bonus was not paid. The bonus for the year 2021, was paid out in December of 2021, which is several months after the claimant's injury.

The defendants did not provide any evidence as to their company's bonus programs, such as portions of an employee handbook. Therefore, the only evidence is the testimony of the claimant and Mr. Miersen.

The profit sharing bonus in this case is akin to the profit sharing bonus in the 2017 order. Additionally, the bonus is retroactive insofar as it is based upon the company's profitability during the previous year, but it is not retroactive pay. The statute differentiates between retroactive pay and an irregular bonus. The profit sharing bonus is an extra payment over and above the claimant's hourly pay as an incentive or award. It is dependent on the company's profitability. (Testimony). Because the bonus payments are dependent on the company's financial results, they are inherently variable and erratic. Despite the claimant being paid the same bonus in 2020, 2021, and 2022, Mr. Miersen testified that there were prior years where a profit sharing bonus was not paid. Further, it appears from the testimony, that the bonus is not fixed until December of the calendar year. Based upon the foregoing, I conclude that the profit sharing bonus should not be included in the calculation of the claimant's average weekly wage, as it is an irregular bonus.

Therefore, the appropriate gross earnings are eight hundred ninety-three and 00/100 dollars ($893.00) per week. The claimant is married, and entitled to two exemptions. This translates to a weekly compensation rate of five hundred eighty-nine and 69/100 dollars ($589.69) per week.

Payment of Medical Expenses and Credit

The claimant requests payment for certain medical expenses incurred in Claimant's Exhibit 4. This includes a lien from The Rawlings Company on behalf of Wellmark in the amount of forty thousand five hundred sixty-nine and 21/100 dollars ($40,569.21). The defendants argue that, if they are ordered to pay for outstanding medical expenses, they should be ordered to reimburse The Rawlings Company for their lien, and "be entitled to a credit for any amounts paid to Wellmark against the total amount awarded for medical benefits." See Defendants' Post-hearing Brief, pg. 12.

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

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

In cases where the employer's medical plan covers the medical expenses, claimant is entitled to an order of reimbursement only if he has paid treatment costs; otherwise, the defendants are ordered to make payments directly to the provider. See

Krohn, 420 N.W.2d at 463. Where medical payments are made from a plan to which the employer did not contribute, the claimant is entitled to a direct payment. Midwest Ambulance Service v. Ruud, 754 N.W.2d 860, 867-68 (Iowa 2008) ("We therefore hold that the commissioner did not err in ordering direct payment to the claimant for past medical expenses paid through insurance coverage obtained by the claimant independent of any employer contribution."). See also Carl A. Nelson & Co. v. Sloan, 873 N.W.2d 552 (Iowa App. 2015)(Table) 2015 WL 7574232 15-0323.

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

The employee has the burden of proof in showing that treatment is related to the injury. Auxier v. Woodard State Hospital School, 266 N.W.2d 139 (Iowa 1978), Watson v. Hanes Border Company , No. 1 Industrial Comm'r report 356, 358 (1980) (claimant failed to prove medical charges were related to the injury where medical records contained nothing related to that injury) See also Bass v Vieth Construction Corp., File No 5044430 (App. May 27, 2016)(Claimant failed to prove causal connection between injury and claimed medical expenses); Becirevic v Trinity Health, File No. 5063498 (Arb. December 28, 2018) (Claimant failed to recover on unsupported medical bills).

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

The claimant elected to participate in a traditional medical plan provided by the defendant-employer, and made contributions towards the same. See DE F:37-38. Therefore, the defendants would be ordered to pay any of the reasonable medical bills. This includes reimbursement of payments made through Wellmark.

Having previously found that the claimant's injuries arose out of, and in the course of, her employment with the defendant-employer. I find that the medical care sought by the claimant was reasonable and provided a more favorable outcome than would likely have been achieved by the lack of care authorized by the defendants. I therefore find that the defendants are liable for reimbursement of medical care sought by the claimant.

The defendants shall reimburse either the health insurance provider, the provider, or the claimant for the payments made in Claimant's Exhibits 4, pages 37-53. There appear to be some duplicate entries between the bills from Physicians Clinic of

Iowa and those paid by Wellmark on the lien from The Rawlings Company. Where these payments overlap, the reimbursement should be made to the lienholder.

In reviewing the lien, I found treatments and lien claims made for items that do not appear to be related to the claimant's medical care stemming from the work incident. Specifically, I found charges for immunizations totaling one hundred eighty-eight and 92/100 dollars ($188.92) and a note from July 22, 2022, related to hypertension treatment, to be unrelated. Therefore, The Rawlings Company should be reduced by those amounts. The defendants shall reimburse The Rawlings Company directly.

Alternate Medical Care

The claimant indicated that they are seeking an order for alternate medical care pursuant to Iowa Code section 85.27.

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

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care…. The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

Iowa Code 85.27(4).

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

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

1995). Determining what care is reasonable under the statute is a question of fact. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

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

The claimant made no indication or argument in the hearing, or their post-hearing briefing as to what alternate medical care she seeks. I do not find continued recommendations for care from any medical providers. Therefore, I cannot find what alternate care the claimant seeks. As such, I decline to order alternate medical care.

Credits Pursuant to Iowa Code section 85.38

The defendants seek a credit for short-term disability benefits paid to the claimant while she was off work from August 5, 2022, through November 7, 2022.

Iowa Code section 85.38(2) provides that an employer is entitled to credit for compensation payments made pursuant to Iowa Code chapter 85 for any benefits under any group plan covering nonoccupational disabilities contributed in whole or partially by the employer. Iowa Code section 85.38(2). The amounts to be credited shall be deducted from payments made under Iowa Code chapter 85. Id.

The claimant was enrolled in a short-term disability plan through the defendant-employer. See DE F:37-38. She was paid short term disability totaling six thousand two hundred eighty-seven and 38/100 dollars ($6,287.38). See DE L:60. The extent of the defendant-employer's contributions to said plan are unclear. The evidence in the record indicates that the coverage was voluntary. However, the payroll records in the claimant's exhibits do not indicate any employer contributions. It is reasonable from the records that the employer made some contribution for this short-term disability plan, either in whole or in part as the claimant elected it on her annual benefits election form. See DE F:37-38. Therefore, the defendant-employer is entitled to a credit for six thousand two hundred eighty-seven and 38/100 dollars ($6,287.38) for short-term disability payments made to the claimant.

Reimbursement for IME pursuant to Iowa Code section 85.39

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.
>
> . . .
>
> 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.

Iowa Code section 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). An opinion finding a lack of causation is tantamount to a zero percent impairment rating. Kern v. Fenchel, Doster & Buck, P.L.C., 2021 WL 3890603 (Iowa App. 2021).

In this case, Dr. Chen completed an IME of the claimant on October 10, 2022, on behalf of the defendants. Subsequently, Dr. Chen issued a report outlining his findings from the IME on December 20, 2022. In his report, Dr. Chen opined that the claimant's work activities were not a cause of a work-related injury. He further opined that Ms. Ohlhauser's symptoms were the result of normal day-to-day personal activities combined with disc degeneration from decades of tobacco use.

Claimant's counsel then arranged an IME for the claimant with Dr. Manshadi, which occurred on January 19, 2023. Dr. Manshadi issued an IME report on January 30, 2023. Dr. Manshadi's IME and report was billed at two thousand five hundred and 00/100 dollars ($2,500.00). Considering I found the claimant's work activities to be a cause of her injury and a cause of disability, it is appropriate for the defendants to reimburse the claimant for the reasonable costs of Dr. Manshadi's IME and report. I find the costs provided in Claimant's Exhibit 5:68 to be reasonable.

Costs

Claimant seeks the award of costs as outlined in Claimant's Exhibit 5. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. See 876 Iowa Administrative Code 4.33; Iowa Code section 86.40. 876 Iowa Administrative Code 4.33(6) provides:

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

Pursuant to the holding in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015), only the report of an IME physician, and not the examination itself, can be taxed as a cost according to 876 IAC 4.33(6). The Iowa Supreme Court reasoned, "a physician's report becomes a cost incurred in a hearing because it is used as evidence in lieu of the doctor's testimony," while "[t]he underlying medical expenses associated with the examination do not become costs of a report needed for a hearing, just as they do not become costs of the testimony or deposition." Id. (noting additionally that "[i]n the context of the assessment of costs, the expenses of the underlying medical treatment and examination are not part of the costs of the report or deposition"). The commissioner has found this rationale applicable to expenses incurred by vocational experts. See Kirkendall v. Cargill Meat Solutions Corp., File No. 5055494 (App. Dec., December 17, 2018); Voshell v. Compass Group, USA, Inc., File No. 5056857 (App. Dec., September 27, 2019).

I previously assessed the costs of Dr. Manshadi's IME pursuant to Iowa Code section 85.39. Therefore, I will not include Claimant's Exhibit 5:68 with the costs discussed herein.

Based upon my discretion, I award the claimant one hundred and 30/100 dollars ($100.30) for the filing fee. I decline to award the claimant Dr. Eck's consultation fee, as there is no indication that this relates to the drafting of a report. I also decline to award the claimant fees for obtaining certain medical records in Claimant's Exhibits 5:70-72.

ORDER

THEREFORE, IT IS ORDERED:

That the claimant's average weekly wage was eight hundred ninety-three and 00/100 dollars ($893.00) per week, with a resulting compensation rate of five hundred eighty-nine and 69/100 dollars ($589.69) per week.

That the claimant was off work and is entitled to healing period benefits from August 5, 2022, to November 7, 2022, which equates to 13.429 weeks of healing period benefits at rate of five hundred eighty-nine and 69/100 dollars ($589.69) per week.

That the defendants shall pay the claimant one hundred thirty weeks of permanent partial disability benefits at the rate of five hundred eighty-nine and 69/100 dollars ($589.69) per week commencing on November 7, 2022.

That the defendants shall reimburse medical expenses as noted.

That the claimant is denied alternate care.

That the defendants shall reimburse the claimant two thousand five hundred and 00/100 dollars ($2,500.00) for Dr. Manshadi's IME and report.

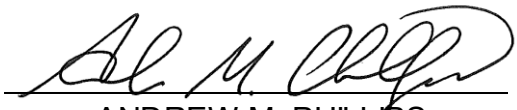
That the defendants shall reimburse the claimant one hundred and 30/100 dollars ($100.30) for costs.

That the defendants are entitled to credit of six thousand two hundred eighty-seven and 38/100 dollars ($6,287.38) for short-term disability benefits pursuant to Iowa Code section 85.38(2).

That the defendants shall pay accrued weekly benefits in a lump sum together with interest. All interest on past due weekly compensation benefits shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

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

Signed and filed this ___12TH___ day of July, 2023.



ANDREW M. PHILLIPS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Anthony Olson (via WCES)

Stephanie Techau (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.