

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ROBERTA MARRS,

Claimant,

vs.

REGIONAL CARE HOSPITAL
PARTNERS, INC.,

Employer,

and

AMERICAN ZURICH INSURANCE
COMPANY,Insurance Carrier,
Defendants.

File No. 5052161

REVIEW-REOPENING

DECISION

Head Note No.: 1402.40, 1803, 1804,
2501, 2602, 2907, 4100

STATEMENT OF THE CASE

Roberta Marrs, claimant, filed a petition seeking review-reopening of a prior decision of this agency. Specifically, claimant seeks to review and reopen a June 14, 2017 arbitration decision, which was affirmed in part and modified in part by the Iowa Workers' Compensation Commissioner on December 21, 2018 and ultimately affirmed by the Iowa Court of Appeals in a February 17, 2021, decision on judicial review.

In the underlying arbitration decision, the presiding deputy commissioner found that as the result of her July 28, 2014 work injury, claimant sustained injuries to her thoracic and cervical portions of her spine. The deputy commissioner also found she was entitled to a running award of healing period benefits commencing on October 22, 2014. At the time of the review-reopening hearing, the underlying case was on appeal to the Iowa Court of Appeals. On February 17, 2021, claimant's counsel filed a Notice of Court of Appeals Decision stating that on February 17, 2021, the Iowa Court of Appeals issued a decision affirming the underlying decision.

Claimant filed a review-reopening petition on October 22, 2018, seeking a determination of the proper commencement date for permanency benefits and a determination of the extent of permanent disability she sustained as the result of the work injury. This review-reopening proceeding came on for hearing before the undersigned on November 18, 2020. This case was scheduled to be an in-person hearing occurring in Des Moines. However, due to the outbreak of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via video means, using CourtCall. Accordingly, this case proceeded to a live video hearing via CourtCall with all parties and the court reporter appearing remotely.

Claimant was the only witness that testified live at the time of the review-reopening hearing. The evidentiary record also includes joint exhibits JE1-JE3, claimant's exhibits 1-7, and defendant's exhibits A-G. All exhibits were received without objection. The evidentiary record closed at the conclusion of the arbitration hearing.

The parties also submitted a hearing report, which contains stipulations. During the course of the hearing, claimant's counsel moved to amend the hearing report to include the odd-lot doctrine. Defense counsel stated that if the odd-lot doctrine was not raised on the petition for review-reopening, then defendants would object to the amendment. If odd-lot was included on the petition, then defendants did not have any objection to the amendment. A review of the petition filed on October 22, 2018 reveals that claimant did allege the odd-lot doctrine on her petition. Therefore, the hearing report was amended, without objection, to include an allegation of the odd-lot doctrine. The parties' stipulations were accepted by the presiding deputy commissioner and are now relied upon in entering this decision. No findings or conclusions will be entered with respect to the parties' stipulations and the parties are bound by those agreements.

ISSUES

The parties submitted the following disputed issues for resolution:

1. The extent of permanent disability benefits claimant is entitled to receive as the result of the July 28, 2014 work injury
2. The appropriate commencement date for permanency benefits.
3. Assessment of costs.

FINDINGS OF FACT

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

In a June 14, 2017, arbitration decision, another deputy workers' compensation commissioner concluded that claimant sustained injuries to her thoracic and cervical spine that were causally related to her work injury at Regional Care Hospital Partners, Inc., on July 28, 2014. Claimant was awarded running healing period benefits in the arbitration decision. The parties now agree that claimant has sustained a change of condition because she is no longer in a running healing period and benefits should be converted to permanency benefits. There is a dispute surrounding the proper commencement date. There is also a dispute between the parties regarding the extent of permanency claimant sustained as the result of the work injury.

Ms. Marrs has received additional treatment since the April 4, 2017 arbitration hearing. She has continued to receive conservative treatment including medications, physical therapy, and injections. She has opted not to undergo surgery because the surgeons have told her that surgery will not alleviate the pain in her neck or her headaches. (Testimony)

In July of 2017, Ms. Marrs saw Todd Harbach, M.D., with bilateral lateral neck pain, bilateral posterior neck, and bilateral shoulder. She also had radiating pain to the bilateral upper arm, elbow, forearm interscapular, wrist, and hand pain. Dr. Harbach noted that he had seen her for an evaluation in February of 2017, and recommended surgery. At this July appointment, Dr. Harbach stated that the plan was to proceed with C6-C7 anterior cervical discectomy with fusion. He hoped this would treat her left upper extremity radicular pain and weakness and her interscapular pain/cervical pain. Dr. Harbach advised Ms. Marrs that she might not get complete relief of her cervical pain. She stated that she wanted to proceed with the surgery. (JE2, pp. 102–105)

In late August of 2017, Ms. Marrs saw John W. Rayburn, M.D., at Iowa Ortho. She reported neck pain. She was scheduled for C6-C7 fusion, but she was having other health issues so the surgery was on hold until approved for other health issues. Dr. Rayburn recommended C3-C6 medial branch blocks. If she received more than 80 percent relief then she would be a candidate for radiofrequency ablations (RFA). The first round of medial branch block injections was performed on September 8, 2017, the second round was performed on September 22, 2017, and the third was performed on October 24, 2017. (JE1, pp. 1-9)

By early December 2017, Ms. Marrs reported good relief from the RFA on the left side. She was still having pretty severe pain in the right neck musculature. She also reported more left arm and hand numbness. She had significant improvement with her headaches. Dr. Rayburn felt that a lot of her symptoms appeared to be soft tissue related trigger points. He recommended bilateral trigger point injection (TPI), physical therapy, and hydrocodone. Ms. Marrs received additional bilateral TPIs in early January 2018. (JE1, pp. 10-15)

Ms. Marrs returned to Dr. Rayburn on January 22, 2018. She reported 30 percent relief from TPIs. She noticed improvement with physical therapy and wanted to continue with conservative treatment and wait to undergo surgery for as long as possible. Dr. Rayburn recommended additional TPI and continuing physical therapy. (JE1, pp. 16-19)

By the end of February 2018, Dr. Rayburn felt Ms. Marrs was making significant progress. He believed one last TPI with some additional physical therapy would be beneficial. He also prescribed Lyrica and hydrocodone. Ms. Marrs was to follow-up as needed. Another TPI was performed on March 22, 2018. (JE1, pp. 19-26)

At the end of April 2018, Ms. Marrs returned to Dr. Rayburn. She reported that she did not receive much relief from the last injection. She does get some relief from physical therapy on the day of therapy, but the relief is not long lasting. (JE1, pp. 27-29)

Mr. Marrs returned to Dr. Rayburn on May 30, 2018. She reported that she has been doing better with physical therapy and her traction unit. She was very pleased with her progress. Dr. Rayburn recommended continued physical therapy and continued home traction. He refilled her Lyrica, Robaxin, and hydrocodone. (JE1, pp. 30-32)

Dr. Rayburn saw Ms. Marrs again on August 22, 2018. She reported that her pain had increased since stopping physical therapy. Ms. Marrs wanted to repeat the RFAs and restart physical therapy. She had been unable to sleep due to pain. Based on his examination, Dr. Rayburn felt that the RFA had worn off on the left side. He planned to repeat left C3-C4, C4-C5, RFA. He also recommended physical therapy and continuation of the home traction unit. The repeat RFA was performed on September 11, 2018. (JE1, pp. 33-40)

Ms. Marrs returned to Dr. Rayburn on October 10, 2018. She received good relief from the previous injection. Dr. Rayburn recommended continued physical therapy and moving into a maintenance phase. (JE1, pp. 37-39)

By mid-November 2018, Ms. Marrs reported that her right side pain continues to worsen and she would like repeat RFA on that side. Her current physical therapy is providing some benefit. On December 18, 2018, Dr. Rayburn performed the RFA on the right side. (JE1, pp. 40-45)

Ms. Marrs returned to see Dr. Rayburn on January 16, 2019. She reported relief from the RFA, but she still continues to have pain. Mr. Marrs reported that her medications are making her functional. He recommended refills of medications, right upper thoracic TPI, and continued physical therapy. Dr. Rayburn performed the right thoracic TPI on February 14, 2019. (JE1, pp. 46-50)

On February 25, 2019, Ms. Marrs returned to Dr. Rayburn. She reported 50-60 percent relief from the right thoracic TPIs. She noticed more pain in her left upper back. She believes she should have received bilateral TPIs. She received the bilateral injections on March 14, 2019. (JE1, pp. 51-56)

Dr. Rayburn saw Ms. Marrs again on March 27, 2019. Ms. Marrs received some relief from the injections, but she was still having some left-sided pain. She also reported frequent headaches. Ms. Marrs was scheduled for C6-C7 fusion, but she has been having other health issues so the surgery is on hold. Dr. Rayburn recommended left upper thoracic TPI; which was performed on April 10, 2019. (JE1, pp. 57-61)

On May 22, 2019, Ms. Marrs reported good relief from the previous procedure and is getting good relief from physical therapy. The severity of her pain comes and goes on her bad days. Dr. Rayburn recommended continuing physical therapy and advised her to follow-up in three months. She was instructed to call if she wanted repeat injections. (JE1, pp. 62-65)

Ms. Marrs received bilateral TPIs on August 19, 2019. By the end of August 2019, Ms. Marrs reported that she did receive some relief from these injections. Dr. Rayburn adjusted her medications, recommended continued physical therapy, and told her to follow-up in 3 to 4 months. (JE1, pp. 66-71)

On December 9, 2019, Ms. Marrs returned to Dr. Rayburn. She reported that she was starting to get more pain in the right side of her neck; the left side was still doing well. Ms. Marrs was wondering if she might need to repeat RFA. Dr. Rayburn

performed repeat RFA on the right. Ms. Marrs returned on February 10, 2020 and reported that she did not receive much relief from that repeat RFA. Dr. Rayburn recommended right upper thoracic TPI. (JE1, pp. 72-81)

On January 29, 2020, at the request of her attorney, Ms. Marrs saw Jacqueline M. Stoken, D.O., for an IME. Dr. Stoken's impression was: status post work injury on July 28, 2014, with herniated disk of the cervical spine and thoracic strain, chronic cervical and thoracic pain, and chronic muscle spasms. Dr. Stoken used the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, to place Ms. Marrs in the DRE cervical category II and assigned 8 percent impairment of the whole person for her cervical injury. Utilizing the Fifth Edition of The Guides, Dr. Stoken placed her in the DRE thoracic category II and assigned 5 percent impairment of the whole person for her thoracic injury. Using the combined values chart this amounts to 13 percent impairment of the whole person. Dr. Stoken opined that reasonable work restrictions would be per the January 29, 2020 FCE. (CI. Ex. 1, pp. 1-2)

Also on January 29, 2020, at the request of her attorney, Ms. Marrs underwent a functional capacity evaluation (FCE) at Advantage Physical Therapy and Rehab. The therapist noted that Ms. Marrs was willing to work to her safe maximal abilities throughout all the testing. Based on the results of the FCE, Ms. Marrs functional ability places her within the U.S. Department of Labor's light work category. Specifically, Ms. Marrs is to avoid waist-to-overhead lifting work activities on a frequent and constant basis and right upper extremity single carry work activities on a constant basis. She should consistently avoid performing elevated work activities or repetitive reaching of the right upper extremity at or above shoulder height, and limit repetitive work activities to 6-33 percent of the workday. No limit was placed on the number of hours that claimant could work each day, but specific recommendations were made for distribution of certain activities throughout the day, including limiting certain tasks to half hour at a time (rarely) or three hours (occasionally). Static work was recommended to be rare, 1 to 5 percent of an 8-hour workday, but claimant demonstrated the ability to perform forward bending/sitting frequently and forward bending/standing constantly. No restrictions were placed on ration sitting or rotation standing. She may only sit rarely, which is 1-5 percent of the day. She may stand only rarely. She may walk occasionally, which is 6-33 percent of the day. (CI. Ex. 2)

Dr. Rayburn performed a trigger point injection on February 17, 2020. By February 24, Ms. Marrs reported some relief, but still had continued pain. (JE1, pp. 82-85)

On February 20, 2020, Dr. Harbach authored a missive to defendants. Dr. Harbach noted that he had scheduled Ms. Marrs for surgery in the summer of 2017 due to her continuing neck and radicular arm pain. However, she had medical issues that prevented her from having the surgery. He stated he would place her at maximum medical improvement (MMI) on February 28, 2018 because that is the point where she had finished all the injections and reached a steady state. She had a maintenance trigger point and other injections after that point, but it was his opinion that they all just kept her at a steady state. Dr. Harbach utilized The Fifth Edition of the AMA Guides.

He placed her in the DRE cervical category II, found in Table 15-5 and assigned 8 percent permanent impairment of the whole person. He noted she had a clinically significant radiculopathy and an imaging study that demonstrated a herniated disk at the level and on the side that would be expected. Dr. Harbach reviewed the January 29, 2020 FCE. He recommended the FCE recommendations which placed her in the light duty category be followed. He also recommended that she perform her home exercise program daily. (JE2, pp. 106-107)

At the request of the defendants, Charles D. Mooney, M.D., conducted an independent medical evaluation (IME). He issued a report on February 25, 2020. Ms. Marrs reported daily headaches in the occipital frontal area. Her headaches are improved with traction, TPI, massage, and therapy. Ms. Marrs has constant pain in her neck, predominantly on the right side from the base of her skull. Her pain radiates into her right shoulder blade area and occasionally towards her right and left shoulder. She did not report any lumbar symptoms at the time of the exam. The EMG studies were not available for Dr. Mooney to review. Dr. Mooney diagnosed Ms. Marrs with chronic cervical pain consistent with aggravation of underlying cervical disc disease associated with radicular symptoms and chronic pain syndrome. She also demonstrates evidence of chronic cervical arthropathy and has responded minimally to rhizotomy and other international pain techniques. Dr. Mooney opined that these conditions are related to the July 28, 2014 work injury. He placed Ms. Marrs at MMI for the work injury as of February 13, 2017; at the time that she declined surgical intervention by Dr. Harbach. For her cervical spine, he placed Ms. Marrs in the DRE cervical category II and assigned 8 percent permanent impairment of the whole person related to the work injury. Dr. Mooney opined that Ms. Marrs should reconsider cervical fusion as discussed by multiple evaluators. He felt it would be reasonable to improve her condition and her ability to function and have her overall pain decrease. However, he stated that it is unlikely that a fusion would resolve all of her symptoms which appear to be multifactorial including chronic headaches and chronic pain syndrome. He felt she should be evaluated for potential Botox treatments which may be more effective in controlling her headaches which may allow for the weaning of opiate medications. Dr. Mooney confirmed that the FCE appeared to be valid and consistent with her medical condition. He believed that she could function at a higher level if she would undergo the recommended surgery. He stated that her permanent restrictions place her in the light-duty capacity. Specifically, maximum rare lift of 20 pounds, a maximum occasional lift of 10 pounds. He stated that Ms. Marrs would be unable to perform elevated work activities, requiring repeated reaching above her shoulder on the right. Dr. Mooney does believe that Ms. Marrs is employable. (Def. Ex. D)

At the request of the defendants, Lana Sellner issued an employability report on March 2, 2020. The defendants did not request that Ms. Sellner speak with or interview Ms. Marrs. Unfortunately, the vocational opinion is based primarily on records provided to Ms. Sellner. Ms. Sellner concluded that the FCE restrictions place Ms. Marrs in the light work category. Ms. Sellner set forth her understanding of Ms. Marrs' work history. She noted that Ms. Marrs had not explored or applied for any job opportunities since her injury. Ms. Sellner feels that Ms. Marrs has many transferable skills. She conducted labor market research to identify jobs within the Ottumwa, Iowa area for Ms. Marrs. Ms.

Sellner identified 16 available positions for Ms. Marrs, including customer service or sales representative, monitor technician, registration clerk, client service representative, nurse case manager, scheduling coordinator, coordinator care plan nurse, weekend receptionist, care coach, telephonic specialty medication review nurse, cardiovascular data entry abstractor, clinical reviewer, and customer service care coordinator. Based upon her research, Ms. Sellner believes Ms. Marrs would be able to utilize her RN degree in a nondirect patient care manner. Ms. Sellner feels that Ms. Marrs has non office and computer skills that are assets in many different industries. The labor market survey identified part-time and full-time jobs for Ms. Marrs. She listed some job accommodations to assist with Ms. Marrs' physical limitations for her to be successful. She also identified jobs that could be performed from home. Ms. Sellner felt Ms. Marrs would be considered a valuable candidate in the snapshots of jobs she listed. Ms. Sellner stated that the jobs she listed are available within the recommended FCE guidelines, with or without accommodations. (Def. Ex. E, pp. 11-17)

On May 11, 2020, Dr. Rayburn performed thoracic TPIs. He also recommended continued physical therapy and medications. (JE1, pp. 86-92)

Ms. Marrs returned to Dr. Rayburn on August 10, 2020. She reported that her pain had gotten significantly worse over the past few weeks. She was there for right upper thoracic/cervical TPI. He advised her to return in three months. (JE1, pp. 94-101)

Ms. Marrs testified that she has not undergone the fusion surgery because every surgeon has told her that the surgery would not alleviate the pain in her neck, nor would it terminate her headaches. The surgeons have advised her that the operation could help with her arm pain, but not her neck, shoulder, and head pain. Because the crux of her pain is in her neck and head, Ms. Marrs feels that the risks of the surgery do not outweigh the potential benefits. (Testimony)

At the time of hearing, Ms. Marrs continued what was described as maintenance treatment with Dr. Rayburn. This includes ablation and trigger injections. She also used medications such as Lyrica, methocarbamol, hydrocodone, ibuprofen, and Lidocaine patches. Ms. Marrs testified that she has bad days and really bad days, she does not have great days. When she increases her dosage of methocarbamol she is very slow, very sleepy, lethargic, and has difficulty communicating; it can also basically knock her out. Activities that trigger really bad days include sitting, or standing for long periods of time, doing any type of manipulation with her hands or having to hold things. She also utilizes a traction machine two to three times per day for 20 to 30 minutes at a time. On bad pain days she could be in traction six times per day. She also gets some relief using heating pads. She keeps a heating pad in her car, in her bedroom, and at her desk chair. Ms. Marrs was concerned that sitting for such a long period of time during the hearing would flare her symptoms, so she scheduled a physical therapy appointment for later in the day to try to work through her increased symptoms.

Ms. Marrs last saw Dr. Rayburn approximately one week prior to the hearing. She received multiple TPIs in her neck and upper thoracic area. They helped her quite a bit with her pain and relief in her movement. She has been receiving these injections approximately every three months and will continue to receive injections and ablations into the future as needed. She will also continue her medications and physical therapy. (Testimony)

Ms. Marrs participated in the hearing from her home. At the start of the hearing, Ms. Marrs was sitting in a reclined desk chair. Midway through the hearing, she experienced technical difficulties and had to move to a different location in her home. At that point, she was able to sit in her recliner, lying back. Although Ms. Marrs does have a computer at her house, she rarely uses it. She is only able to use it for a very short time and then has to take a break. Simply using the keyboard, causes her arms to give out and she develops tightness in her neck. Her mobility decreases after just a few minutes of use. Ms. Marrs is only able to sit in a desk chair that is not reclined for approximately ten to fifteen minutes due to the pressure that it puts on her neck. When talking on the phone Ms. Marrs uses a headset because her hands go numb and her hands feel weak which increases the pain in her neck and head. Ms. Marrs is not able to clean her own home. Her aunt comes over once a week and cleans her home for her. Her three teenage boys help with daily and weekly chores. Her husband takes care of the laundry and any other household duties. Ms. Marrs does not do any out of town driving, her husband takes her to out-of-town doctors' appointments. (Testimony)

Ms. Marrs discussed the FCE that she underwent. Her husband drove her to and from the appointment. The FCE took approximately two hours. She felt completely wiped out after the testing and her pain was increased for several days following the testing. The FCE indicates that she may only sit rarely, which is 1 to 5 percent of the day. The FCE indicates that she may only stand rarely. Standing causes her problems due to the compression of her spine which creates numbness in her right arm, right shoulder as well as increased pain which leads to increased headaches. This happens after only standing for approximately five minutes. The FCE estimated that Ms. Marrs could walk occasionally, which is 6 to 33 percent of the day. Ms. Marrs testified that she is able to walk no more than ten to fifteen minutes at a time. If she walks longer than that, then her pain and weakness increase and she will need to lie down in her traction. If she is in her chair or in a standing position for five minutes, then she needs to take a break for an hour or two, she usually goes right into traction. She spends most of her day lying down in her recliner or in her bed. The FCE also indicates that Ms. Marrs cannot use her right arm for reaching or for elevated work. Ms. Marrs feels that this is accurate. For example, she cannot even hold her right arm over her head to do her hair. The FCE also indicated that she may use her left arm only on an occasional basis. When Ms. Marrs uses her left arm, then her neck muscle tense up, the tightness and pain increases and there is weakness in her left arm. (Testimony)

There is a dispute regarding the appropriate commencement date in this case. Dr. Harbach placed Ms. Marrs at MMI on February 28, 2018. This is the date claimant's treatment plateaued; I find the treatment after this date was maintenance. I find the proper commencement date in this case is February 28, 2018.

I find the impairment ratings set forth by Dr. Harbach and Dr. Mooney carry greater weight than the rating from Dr. Stoken.

I find the restrictions set forth by the FCE and adopted by Dr. Kanis, Dr. Harbach, Dr. Stoken, and Dr. Mooney are persuasive. Therefore, I find that as a result of the July 28, 2014 work injury Ms. Marrs now has permanent restrictions as set forth in the FCE.

Ms. Marrs was unable to return to her job at Regional Care Hospital Partners, Inc. She believes she is not able to work at any of her previous work. She applied for and was approved for Social Security Disability (SSD). The list of impairments in the SSD decision include: obesity, degenerative disc disease of the cervical and lumbar spine, carpal tunnel syndrome, osteoarthritis, anxiety disorder NOS, panic disorder without agoraphobia, and chronic PTSD. Her primary impairments are her neck, headaches, arm weakness and thoracic. Ms. Marrs testified that at the SSD, they focused on her neck condition. (Testimony; Cl. Ex. 6, p. 107)

Ms. Marrs was never asked to speak with the vocational counselor in this case. Ms. Marrs did look at the jobs Ms. Sellner listed. Some of the jobs listed are jobs that Ms. Marrs previously performed; Ms. Marrs knows that she is no longer physically capable of performing those jobs. Ms. Marrs does not believe she is capable of performing any of the jobs identified by the counselor. However, since her work injury, Ms. Marrs has not made any attempts to secure employment because she does not feel that there are any jobs that she is capable of performing. She believes that there are not any jobs that she is physically able to perform with any level of accuracy. She is not aware of any jobs that would allow her to lie down for 90 percent of her day. Ms. Marrs feels she is not capable of performing work-from-home jobs either. For example, she needs to be in her traction machine three to four times a day for thirty minutes each. She is not capable of sitting or standing for any long periods of time. (Testimony)

At the time of the review-reopening hearing Ms. Marrs was 48 years old. She graduated from high school in 1990. She attended classes at the University of Nebraska in Lincoln and the University of Phoenix for business management, but she did not obtain a degree. In 2013, Ms. Marrs obtained her R.N. with an associate's degree in nursing. (Testimony) Ms. Marrs' testimony demonstrates that she is an intelligent, pleasant, forthright, and well-spoken woman. During the hearing she appeared to be physically uncomfortable.

Ms. Marrs has worked in a variety of jobs. While Ms. Marrs attended college she worked as a waitress. Her first full-time job was for Newell Rubbermaid where she worked as a 401(k) administrator. She traveled across the country providing 401(k) information to employees, converting them to 401(k) plans and performed data entry. She performed this work for around three years. For the next five years she worked for Edward Jones as a branch office administrator, where she performed data entry and dealt with customers and clients via telephone. (Testimony)

For approximately four years Ms. Marrs was the co-owner of a landscaping business. She owned this business for approximately four years with her then husband until the time they separated. Her duties included installations, ordering inventory, managing locations, and a small retail operation. Her time was predominately spent doing installations and landscape purchasing for wholesalers and picking up product. This work ended when she separated from her husband. (Testimony)

Ms. Marrs worked as a pharmacy technician for approximately five years. In this position she stood all day long. Her work included distributing medications, putting away inventory that came in several times per week. She was also responsible for getting the nursing home medication travel boxes ready and distributing medication that would go to the nursing home. She would also get any grocery items ready for delivery. She left this job to attend nursing school. (Testimony)

After graduating from nursing school, Ms. Marrs' first job was at Mahaska Health Partnership in Oskaloosa, Iowa. She also worked as an ICU telemetry nurse at Regional Care. She was responsible for patient care which ranged from bathing, ambulating to the restroom, changing, wound care, medication administration, NG tubes, telemetry monitoring, post-op cardiac catheterization care, charting and reading telemetry strips. Her duties included a lot of heavy lifting and a lot of standing. (Testimony)

Ms. Marrs does not believe she is physically capable of performing the 401(k) job that she previously held. She believes she cannot perform data entry because she is not able to sit at her computer and type for more than five minutes without taking an hour or two break. She also testified that she is not able to sit in a traditional desk chair. At the review-reopening hearing, Ms. Marrs sat in a reclined-back desk chair with a heating pad and her legs elevated. Additionally, she is not able to travel like she was previously required to do for her 401(k) job. (Testimony)

Ms. Marrs feels she is not able to perform an administrative assistant job at Edward Jones. She is not able to sit at a computer for any length of time. She spends 90 percent of her day lying down. She also testified that because of the work injury she is not physically capable of performing the work of a pharmacy technician. Likewise, she is not physically capable of performing her landscaping job. (Testimony)

Ms. Marrs reviewed Ms. Sellner's report. Ms. Marrs does not believe that she is capable of performing any of those jobs. Additionally, she does not believe that she is capable of returning to an in-person or online classroom to complete her degrees from University of Nebraska or University of Phoenix. (Testimony).

Unfortunately, the years of treatment, including RFAs and TPIs have not resolved Ms. Marrs' symptoms. Prior to the July 28, 2014, injury Ms. Marrs did not have any permanent restrictions placed on her activities. As the result of the work injury, Ms. Marrs has substantial permanent restrictions placed on her activities. The evidence clearly demonstrates that Ms. Marrs is no longer physically capable of performing work

at the levels necessary to perform her prior work at Regional Care Hospital or many of her prior jobs.

This is a difficult case because I find Mr. Marrs' testimony regarding her ongoing symptoms and physical capabilities to be credible. She has difficulty with standing, sitting, and walking. She spends 90 percent of her time lying down and anywhere from one and a half to three hours per day in traction. However, the defendants have offered a vocational report which lists a snapshot of jobs that are in Ms. Marrs' geographical area and fit within the FCE's light work category. This vocational report is un rebutted. It is not known for certain whether Ms. Marrs is capable of performing the jobs provided by Ms. Sellner because Ms. Marrs has not made any attempts to reenter the workforce.

Considering Ms. Marrs' age, educational background, employment history, ability to retrain, length of healing period, permanent impairment, and permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that she has sustained 80 percent loss of future earning capacity as a result of her work injury with the defendant employer. This entitles claimant to a finding that she is entitled to 400 weeks of permanent partial disability benefits.

I find that claimant failed to establish a prima facie case that there are not any jobs or well-known branches of the labor market for which claimant would be capable of obtaining and retaining employment. Even if claimant had established a prima facie case, I find that with the un rebutted report of the vocational counsel, defendant produced sufficient and convincing evidence to rebut the claimant's evidence. Therefore, I find that claimant ultimately failed to prove by a preponderance of the evident that she is not currently capable of performing any substantially gainful employment within a well-known branch of the labor market.

We now turn to the issue of costs. Costs are to be assessed at the discretion of the deputy hearing the case. I find that claimant was generally successful in her claim and therefore an assessment of costs is appropriate. Claimant is seeking costs in the amount of \$100.00 for the filing fee in this case. I find that this is an appropriate cost and assess defendants' costs in the amount of one hundred and no/100 dollars (\$100.00).

CONCLUSIONS OF LAW AND REASONING

Claimant brings this review-reopening proceeding. A review-reopening proceeding is appropriate whenever there has been a substantial change in condition since a prior arbitration award or settlement. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387 (Iowa 2009). Under Iowa Code section 86.14(2), this agency is authorized to reopen a prior award or settlement to inquire about whether the condition of the employee warrants an end to, diminishment of, or increase of compensation. Id.

Upon review-reopening, claimant has the burden to show a change in condition related to the original injury since the original award or settlement was made. The change may be either economic or physical. Blacksmith v. All-American, Inc., 290

N.W.2d 348 (Iowa 1980); Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959). A mere difference of opinion of experts as to the percentage of disability arising from an original injury is not sufficient to justify a different determination on a petition for review-reopening. Rather, claimant's condition must have worsened or deteriorated since the time of the initial award or settlement. Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957). A failure of a condition to improve to the extent anticipated originally may also constitute a change of condition. Meyers v. Holiday Inn of Cedar Falls, Iowa, 272 N.W.2d 24 (Iowa App. 1978). In the present case, the parties stipulated that agree that the issue of permanency is now ripe for determination. Thus, I conclude there has been a change of condition since the original award.

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

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

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

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

Based on the above findings of fact, I conclude Ms. Marrs has not demonstrated by a preponderance of the evidence that she is permanently and totally disabled. Unfortunately, Ms. Sellner has not applied for any jobs since the work injury. Although Ms. Sellner has substantial restrictions placed on her activities, no medical provider has opined that she is completely precluded from returning to work. Rather, all the doctors have stated that she may work with the restrictions set forth in the FCE. I conclude that claimant has failed to demonstrate that she is wholly disabled from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. I find she has sustained 80 percent loss of future earning capacity as a result of her work injury with the defendant employer. This entitles claimant to a finding that she is entitled to 400 weeks of permanent partial disability benefits.

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34. Based on the above findings of fact, I conclude these benefits shall commence on February 28, 2018.

We now turn to the odd-lot doctrine. In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the "odd-lot doctrine." Under that doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id., at 105.

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106. Factors to be considered in determining whether a worker is an odd-lot employee include the worker's reasonable but unsuccessful effort to find steady employment, vocational or other expert evidence demonstrating suitable work is not available for the worker, the extent of the worker's physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried, and only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

Based on the above findings of fact, I find that claimant failed to establish a prima facie case that there are not any jobs or well-known branches of the labor market for which claimant would be capable of obtaining and retaining employment. Even if

claimant had established a prima facie case, I find that with the un rebutted report of the vocational counsel, defendant produced sufficient and convincing evidence to rebut the claimant's evidence. Therefore, I find that claimant ultimately failed to prove by a preponderance of the evidence that she is not currently capable of performing any substantially gainful employment within a well-known branch of the labor market.

Finally, each party submits a statement of costs and seeks reimbursement of those costs. Assessment of costs is a discretionary function of the agency. Iowa Code section 86.40. We now turn to the issue of costs. Costs are to be assessed at the discretion of the deputy hearing the case. I find that claimant was generally successful in her claim and therefore an assessment of costs is appropriate. Claimant is seeking costs in the amount of \$100.00 for the filing fee in this case. I find that this is an appropriate cost under 876 IAC 4.33(7). Thus, defendants are assessed costs in the amount of one hundred and no/100 dollars (\$100.00).

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the stipulated rate of five hundred fifty-nine and 49/100 dollars (\$559.49).

Defendant shall pay 400 weeks of permanent partial disability benefits commencing on the stipulated commencement date of February 28, 2018.


Defendant shall be entitled to credit for all weekly benefits paid to date.

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

Defendants are assessed costs in the amount of one hundred and no/100 dollars (\$100.00).

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

Signed and filed this 11th day of June, 2021.


ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

John Dougherty (via WCES)

Charles Blades (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.