

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SARAH PHILLIPS,

Claimant,

vs.

REM IOWA,

Employer,

and

NEW HAMPSHIRE INS. CO.,

Insurance Carrier,
Defendants.

File No. 5804484.02

REVIEW-REOPENING

DECISION

Headnotes: 1803, 2403, 2501,
2502, 2905

Claimant Sarah Phillips ("Phillips") filed three petitions in arbitration on October 2, 2013, alleging she sustained injuries to her head and neck affecting her cognitive and mental function when she was assaulted by residents while working for Defendant REM Iowa ("REM"), on October 15, 2011, File Number 5044838, on January 21, 2012, File Number 5044839, and on October 17, 2012, File Number 5804484. REM and its insurer, Defendant New Hampshire Insurance Co. ("New Hampshire"), filed answers to the petitions on October 30, 2013, admitting Phillips had sustained work injuries.

Following an arbitration hearing and briefing of the parties, an arbitration decision was issued on July 21, 2016, finding Phillips did not meet her burden of proof she sustained permanent impairments caused by the October 15, 2011 and January 21, 2012 injuries, finding Phillips sustained a 40 percent industrial disability as a result of the October 17, 2012 injury, entitling her to 200 weeks of permanent partial disability benefits commencing on August 4, 2013, at the weekly rate of \$206.98, and awarding Phillips additional relief.

On April 23, 2020, Phillips filed a review-reopening petition, File Number 5804484.02, alleging she had sustained a change of condition entitling her to additional benefits. On June 2, 2020, REM and New Hampshire filed an answer.

A hearing on the review-reopening action was held *via* CourtCall on April 22, 2021. Attorney Emily Anderson represented Phillips. Phillips appeared and testified. Attorney Edward Rose represented REM and New Hampshire Insurance Co. Joint Exhibits ("JE") 1 through 3, and Exhibits 1 through 7 and A through D were admitted into the record. The record was held open through June 11, 2021, for the receipt of JE 4

through 10 and post-hearing briefs. JE 4 through 10 were received and admitted into the record, the briefs were also received, and the record was closed.

The parties submitted a Hearing Report, listing stipulations and issues to be decided. The Hearing Report was approved at the conclusion of the hearing. REM and New Hampshire waived all affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed between REM and Phillips at the time of the alleged injury.
2. Phillips sustained an injury on October 17, 2012, which arose out of and in the course of her employment with REM.
3. The alleged injury is a cause of temporary disability during a period of recovery.
4. Temporary benefits are no longer in dispute.
5. The alleged injury is a cause of permanent disability.
6. The disability is an industrial disability.
7. The commencement date for permanent partial disability benefits, if any are awarded is April 23, 2020.
8. At the time of the alleged injury, Phillips's gross earnings were \$303.49 per week, she was single and entitled to one exemption, and her weekly benefit rate is \$206.98.
9. Prior to the hearing Phillips was paid 200 weeks of compensation at the rate of \$206.98 per week.
10. Costs have been paid.

ISSUES

1. Has Phillips established she has sustained a change of condition?
2. If Phillips has established she has sustained a change of condition, what is the extent of disability?
3. Is Phillips entitled to recover the cost of medical expenses set forth in Exhibit 6?
4. Is Phillips entitled to alternate medical care?
5. Is Phillips entitled to recover the cost of the independent medical examination under Iowa Code section 85.39?
6. Should costs be assessed against either party?

FINDINGS OF FACT

Phillips graduated from high school in Michigan. (Arbitration Decision) In 2007, Phillips received a bachelor's degree in recreational leadership and management, and she is qualified to work as a camp director, park ranger, city parks worker, and community recreation worker. (Arbitration Decision) Phillips worked as a day care provider, server and hostess, and nanny, in camps for girls and adults and children with disabilities, in a bookstore, in direct sales, in a call center, and in a movie theater. (Arbitration Decision) At the time of the review-reopening action Phillips was working as a nurse.

In 2011, Phillips commenced full-time work with REM as a direct support professional. (Arbitration Decision) As a direct support professional, Phillips provided personal care and supervision to persons with intellectual and physical disabilities over the age of 18 living in a residential group home. (Arbitration Decision) Phillips was responsible for helping prepare food for the residents, assisting the residents with their behavioral and learning programs, transferring residents with mobility issues, and intervening when residents engaged in behavioral issues, including self-injury and aggressive behavior directed toward others. (Arbitration Decision) REM required Phillips to physically restrain aggressive residents, each weighing over 50 pounds. (Arbitration Decision)

Phillips enrolled in a nursing program while working for REM and eventually moved to a part-time position. (Arbitration Decision) When Phillips reduced her hours to part-time, she earned \$9.65 per hour. (Arbitration Decision)

Phillips sustained three separate head injuries while working with combative REM residents on October 15, 2011, January 21, 2012, and on October 17, 2012. (Arbitration Decision) Following an arbitration hearing I found Phillips did not sustain permanent impairments caused by the October 15, 2011 and January 21, 2012 injuries. (Arbitration Decision) I found she sustained a 40 percent industrial disability caused by her third head injury on October 17, 2012. (Arbitration Decision)

After the October 2012 injury, Phillips developed head and neck pain. (Arbitration Decision) Her roommate noted changes in her behavior, where Phillips talked to her like she was her sister, Phillips wore a resident's clothing, and Phillips was mean and was short with her. (Arbitration Decision) Phillips sought emergency medical treatment and she was diagnosed with a head injury. (Arbitration Decision)

Phillips received follow-up care with Ann McKinstry, M.D., with WorkWell. (Arbitration Decision) Phillips complained of pain down the right side of her neck down into her trapezius muscle, an intense, pounding headache, a feeling of falling when she closed her eyes, forgetfulness, and vertigo when her eyes were open. (Arbitration Decision) Dr. McKinstry restricted Phillips from working. (Arbitration Decision) The day after her appointment, Phillips returned to the emergency room because her behavioral issues persisted and she reported she was continuing to have headaches, she was disoriented, and she was vomiting. (Arbitration Decision) Phillips was assessed with postconcussive syndrome and blunt head trauma. (Arbitration Decision)

Phillips continued to treat with WorkWell complaining she was forgetful, noting her roommate had to point out she had forgotten to rinse the shampoo out of her hair, and she was having difficulty concentrating on her nursing classes because of her headaches. (Arbitration Decision) Dr. McKinstry assessed Phillips with a concussion, headaches, and vertigo, and restricted Phillips from driving and working, and prescribed Zofran. (Arbitration Decision)

Phillips's symptoms persisted and she continued to complain of severe headaches, nausea, vertigo, difficulty sleeping, concentration problems, reading problems, and difficulty completing her nursing coursework and rotations. (Arbitration Decision) Phillips complained of two types of headaches, a throbbing headache that was constant and more frontal and temporal, and an intermittent occipital headache with pain extending down the right side of her neck and into her right trapezius muscle. (Arbitration Decision) Dr. McKinstry diagnosed Phillips with post-concussion syndrome, headaches, and a cervical strain, noted she believed she "would benefit medically from a reduced course load," restricted her from working, and ordered physical therapy. (Arbitration Decision)

Phillips continued to complain of severe daily headaches and vomiting. (Arbitration Decision) Dr. McKinstry referred Phillips to Jill Miller, ARNP, who worked with Andrew Peterson, M.D., a neurologist, for a neurological evaluation. (Arbitration Decision) Dr. McKinstry restricted Phillips from working and Phillips commenced vestibular therapy in December 2012. (Arbitration Decision)

During her first appointment with Miller on January 14, 2013, Phillips reported she was experiencing migraines two days per week, and that she was struggling with concentration, attention, focus, depression, and anxiety. (Arbitration Decision) Miller adjusted Phillips's medication, restricted her from working, ordered neuropsychological testing, and wrote a note for testing accommodations for Phillips's nursing coursework. (Arbitration Decision) Phillips required reasonable accommodations and supervision during her clinical nursing rotations. (Arbitration Decision)

In February 2013, Stephen Peters, Psy.D., performed a neuropsychological evaluation of Phillips. (Arbitration Decision) Dr. Peters found Phillips "demonstrated small measurable deficits including slowed cognitive processing speed, difficulty maintaining and shifting cognitive set, mild attentional difficulties, and mild deficits in working memory." (Arbitration Decision) Dr. Peters noted "cognitive difficulties are typical in the setting of mild head injury and are likely to resolve over time." (Arbitration Decision)

On February 20, 2013, Miller released Phillips to work four-hour shifts, on a part-time basis, for a maximum of 20 hours per week, and restricted Phillips from working with combative individuals. (Arbitration Decision)

During a follow-up appointment, Miller's office administered a Sumavel injection for Phillips's headaches, and referred her for chiropractic care because pharmaceutical treatment and physical therapy had not been effective in alleviating her migraines. (Arbitration Decision) Phillips received chiropractic treatment through Atlas Family

Chiropractic from April 2013 through June 2014 and reported chiropractic care helped her. (Arbitration Decision)

During an appointment with Dr. Peterson on March 25, 2013, Phillips reported she was not doing well at school, she could not concentrate, and noted she never had problems with her grades or test anxiety in the past. (Arbitration Decision) Dr. Peterson diagnosed Phillips with postconcussive syndrome, classic migraines with aura, and attention-deficit hyperactivity disorder, and released Phillips “to return to work with two 8 hours shifts and one four hour shift (max 20 hour [sic] per week). If she has a migraine HA then she needs to be permitted to skip her shift without penalty. NO EXPOSURE TO ANY COMBATIVE PATIENTS.” (Arbitration Decision)

Phillips finished the fall semester of nursing school in 2012, but she had to withdraw in the spring of 2013 because she was struggling with focus problems during her clinical program. (Arbitration Decision) Phillips’s work restrictions were modified to allow her to work an additional four-hour shift, up to 24 hours per week. (Arbitration Decision)

During an appointment with Miller on August 2, 2013, Phillips reported her headaches had improved, but were still “hit and miss,” and her chiropractic care had helped with her tension headaches and neck pain. (Arbitration Decision) Phillips requested Miller remove her work restrictions because she had to pay her bills. (Arbitration Decision) Phillips received an occipital block injection on August 6, 2013, and continued to take medication. (Arbitration Decision)

When Phillips returned to nursing school she received accommodations. (Arbitration Decision) Instead of shadowing a nurse on the floor, she shadowed the instructor, and she was not permitted to pass medication. (Arbitration Decision)

Phillips continued to receive treatment for her postconcussive syndrome and migraine headaches, including a greater and lesser occipital nerve block, a cervical occipital trigger point injection, and Botox. (Arbitration Decision) During a March 2014 visit with Dr. Peterson Phillips reported the Botox treatment had helped, but Dr. Peterson believed a cervical epidural might be more effective stating, “[t]he meds are certainly not helping hugely.” (Arbitration Decision)

Phillips received a cervical epidural steroid injection, but continued to complain about her migraine headaches. (Arbitration Decision) On April 24, 2014, Miller administered an intravenous Kaniecki cocktail. (Arbitration Decision)

In June 2014, Phillips underwent a second neuropsychological evaluation with Linda Collins, Ph.D. (Arbitration Decision) Dr. Collins concluded the testing results “did not indicate any deficits in cognitive processing speed, maintaining and shifting cognitive set, or working memory,” representing “significant cognitive gains in these areas,” but noted Phillips continued to have “[d]eficits in visual-motor speed and sustained attention,” mild depression, and mild to moderate anxiety. (Arbitration Decision) Dr. Collins also noted Phillips’s “attention efficiency scores were impaired due to a strong speed/accuracy trade-off. In other words, she sacrificed performance speed to achieve maximum accuracy (which would be the preferred compensation

strategy for her profession of nursing).” (Arbitration Decision) Dr. Collins found the results were “highly consistent with the diagnosis of post-concussion syndrome,” exacerbated by her neck pain, headaches, anxiety, depression, and sleep disruption, and that her neck pain, headaches, anxiety, depression and sleep disruption were contributing to her attention problems and difficulties with everyday functioning. (Arbitration Decision) Dr. Collins opined the results of the testing indicated Phillips should be able to be competitively employed in nursing, and “[i]t would be better for her to avoid jobs that involve frequently working with potentially combative patients” and to work in a job “where she can work at her own pace (rather than in a fast-paced setting such as the ER).” (Arbitration Decision)

During a follow-up appointment with Miller on June 9, 2014, Phillips reported the Botox treatment had helped with her tightness and neck pain, she had received injections through the pain clinic, and while her migraines had decreased, she was having daily tension headaches. (Arbitration Decision)

In June 2014, Phillips decided to move back near her family in Michigan. (Arbitration Decision) Phillips acknowledged she had always planned to move back to Michigan after she finished nursing school. (Arbitration Decision)

At the time of her last appointment with Dr. Peterson, Phillips’s symptoms had not resolved. (Arbitration Decision) Dr. Peterson agreed Phillips had not reached maximum medical improvement and opined in the foreseeable future she would need medication, possibly Botox, physical therapy, and massage therapy. (Arbitration Decision) Dr. Peterson concurred that Phillips’s depression, postconcussive syndrome, headaches, neck pain, and attention deficit hyperactivity disorder were more likely than not caused by the concussion injuries she sustained at work, including the most recent injury on October 17, 2012. (Arbitration Decision) Dr. Peterson opined Phillips needed permanent restrictions of not working in situations that would put her at risk for additional head injuries, including no work with combative patients or work in the emergency room or psychiatric ward. (Arbitration Decision)

After moving back to Michigan, Phillips took and passed her nursing boards. (Arbitration Decision) Phillips is licensed registered nurse in Michigan. (Arbitration Decision)

Phillips continued to receive chiropractic care in Michigan, but she did not find it as helpful as the treatment she received in Iowa. (Arbitration Decision)

Phillips commenced treatment with Mark Garwood, M.D., a neurologist with the University of Michigan in November 2014. (Arbitration Decision) Dr. Garwood assessed Phillips with chronic tension-type headaches, migraine headaches with aura, cervicgia, insomnia, and depression, ordered physical therapy and a sleep study to exclude obstructive sleep apnea as a cause of her headaches, and adjusted her medication. (Arbitration Decision)

During an appointment on January 29, 2015, Dr. Garwood noted while medical providers had previously stated Phillips should avoid working in the emergency room or psychiatry unit due to risk for further head injuries, he did not believe Phillips needed to

refrain from working in any specific area of nursing, noting she could be at risk working in any unit of a hospital and that her past injury should not prevent her from working in psychiatry. (Arbitration Decision) Dr. Garwood diagnosed Phillips with chronic tension-type headaches, migraine headaches with aura, cervicalgia, insomnia, and depression, attributed to post-concussion symptoms and post-concussive syndrome from a closed head injury, opined Phillips had reached maximum medical improvement, and found Phillips could return to full duty without restrictions on January 30, 2015. (Arbitration Decision)

Phillips participated in a sleep study, which revealed she had mild obstructive sleep apnea. (Arbitration Decision) Dr. Garwood recommended CPAP titration to see if it would improve Phillips's sleep related symptoms and headaches. (Arbitration Decision) Dr. Garwood noted it was difficult to determine whether Phillips's head injury caused the obstructive sleep apnea, but noted "there is an increased incidence of [obstructive sleep apnea] after a head injury." (Arbitration Decision)

In June 2015, Phillips secured employment at a daycare working with infants and preschool children, working three ten-hour shifts, and earning \$10.00 per hour. (Arbitration Decision)

In August 2015, Wade Cooper, D.O., with the University of Michigan, examined Phillips and administered bilateral occipital nerve block and trigger point injections for her headaches. (Arbitration Decision) When she returned in September 2015, Phillips reported a slight improvement in her symptoms following the injections, noting she continued to experience dizziness and vertigo with some of her headaches, and reporting during the last 30 days, she experienced six days of severe headaches, 24 days of low to moderate headaches, and zero days of no headaches. (Arbitration Decision)

Phillips commenced treatment with Pamela Summers, M.D., an interventional pain management specialist in September 2015. (Arbitration Decision) Dr. Phillips assessed Phillips with cervicalgia, migraines, post-concussion syndrome, and depression. (Arbitration Decision) Phillips received additional injections in November 2015. (Arbitration)

James Milani, M.D., performed an independent medical examination of Phillips for REM and New Hampshire in December 2015. (Arbitration Decision) Dr. Milani opined Phillips had reached maximum medical improvement and using Chapters 15 and 18 of the Guides to the Evaluation of Permanent Impairment, (AMA Press, 5th Ed. 2001) ("AMA Guides"), found Phillips sustained an 11 percent whole person impairment relating to the October 17, 2012 injury. (Arbitration Decision) Using the range of motion method, for cervical flexion and extension Dr. Milani assigned a 1 percent impairment for 40 degrees of flexion and a 3 percent impairment for 30 degrees of extension under Table 15-12, for lateral bending he assigned a 1% impairment for 30 degrees left, and a 1% impairment for 30 degrees right under Table 15-13, and for rotation, he assigned a 1% impairment for 60 degrees left rotation and a 1% impairment for 60 degrees right rotation under Table 15-14, combining the impairments for an 8 percent whole person impairment for her cervical spine. (Arbitration Decision)

For her pain and headache symptoms Dr. Milani used Chapter 18 of the AMA Guides, finding under Table 18-3 she fit in the Class II for moderate, and “[w]hen going through the worksheet on table 18-6, she totals up to 34, that then on table 18-7 gives her a moderate impairment pertaining to her total pain. To get to the value of 34; she gets a 24 from the worksheet, a 0 from table 18-4, and a 10 on my clinical judgment of individual’s credibility.” (Arbitration Decision) Based on his findings and conclusions Dr. Milani assigned Phillips an 8 percent permanent impairment for her cervical spine and increased the impairment by 3 percent for her pain, for a total 11 percent whole person impairment caused by the October 17, 2012 work injury. (Arbitration Decision) Dr. Milani agreed with Dr. Garwood that Phillips could look for general employment in the nursing field. (Arbitration Decision)

Robin Sassman, M.D., performed an independent medical examination of Phillips on January 19, 2016. (Arbitration Decision) Using the AMA Guides, Dr. Sassman used the DRE method for assessing Phillips’s cervical spine, and placed her in DRE Cervical Category II, and assigned a seven percent permanent impairment due to her effects of the injury on her activities of daily living. (Arbitration Decision) For her head trauma, Dr. Sassman found Phillips had no impairment for aphasia or dysphasia under Table 13-7, and she placed Phillips in Class 1 with a seven percent impairment under Table 13-8 for mild limitations in activities of daily living and daily social and interpersonal functioning. (Arbitration Decision) Dr. Sassman assigned Phillips an additional three percent permanent impairment for her headaches, and combined the impairments for a total 10 percent impairment for her head trauma. (Arbitration Decision) Dr. Sassman then combined the cervical and head trauma impairments, for a combined 16 percent permanent impairment. (Arbitration Decision)

Dr. Sassman concluded Dr. Peterson’s restrictions were appropriate and found Phillips should not work in situations that would put her at risk for additional head injuries, including work where she would be exposed to combative patients, such as in an emergency room or a psychiatric ward. (Arbitration Decision) Dr. Sassman also recommended Phillips “limit lifting, pushing, pulling and carrying to 50 pounds occasionally from floor to waist and waist to shoulder height,” that “[s]he should limit lifting, pushing, pulling, and carrying above shoulder height to 20 pounds rarely,” and “[s]he should not use vibratory or power tools as these would likely exacerbate her symptoms.” (Arbitration Decision)

At the time of the arbitration hearing Phillips reported she continued to have issues with migraines, tension headaches, neck pain, and depression. (Arbitration Decision) Phillips testified her neck always hurt, and that she had been diagnosed with spasmodic torticollis, which she described as a head tilt to the right side. (Arbitration Decision) Phillips reported her tension headaches were worse on the right side and when she experienced a headache the whole base of her skull and her neck would become tight and painful. (Arbitration Decision) Phillips was taking muscle relaxers for the pain at night almost daily, and approximately three times per week during the day and that she did not feel comfortable driving or performing nursing duties while taking muscle relaxers. (Arbitration Decision) Phillips reported she often developed a tension headache and then a migraine, and relayed if she was able to take medication when

she first experienced symptoms, the migraine may last an hour or two, but if she did not take medication early on, the migraine may last the whole day, and at times, two or three days. (Arbitration Decision)

Phillips further reported the migraines affected her right side and caused pounding vertigo, sensitivity to light, and nausea, which caused her to vomit. (Arbitration Decision) Phillips relayed when she experienced a migraine at work she would go to her car and sleep for an hour or two before driving home. (Arbitration Decision) Phillips described the migraines as “unbearable” and reported that when she had a migraine she could not “even tell up from down.” (Arbitration Decision) Phillips testified she was only experiencing one or two migraines per month because she was consistently taking her medication. (Arbitration Decision) Before Phillips began consistently taking her medication she would have a migraine once or twice per week. (Arbitration Decision)

Phillips testified she had difficulty focusing, even though her ability to focus had improved. (Arbitration Decision) Before the October 2012 head injury Phillips could read two novels per week, and after her injury she could not sit and read a book, and instead listened to audiobooks. (Arbitration Decision) Before her October 2012 head injury Phillips was able to read textbooks and digest the information. (Arbitration Decision) At the time of the arbitration hearing she reported she had to take notes and use flash cards to digest new information. (Arbitration Decision) While in nursing school Phillips had to take tests at the test center and use tutors, which she did not need before her head injury. (Arbitration Decision)

At the time of the arbitration hearing Phillips was treating at the pain clinic at the University of Michigan, and taking Effexor for depression, Topamax for neuropathic pain and to prevent migraines, Zofran for nausea, Aleve for tension headaches, and Flexeril and Fioricet for tension headaches. (Arbitration Decision) Phillips was also using Biofreeze for her neck and shoulder a few times per day. (Arbitration Decision)

Phillips worked for three employers after she left REM. (Arbitration Decision) In 2014 Phillips worked seasonally, four of five weeks, for a Girl Scout camp, earning \$8.10 per hour. (Arbitration Decision) Phillips was able to perform the physical tasks of the position and worked on arts and crafts projects, science projects, a talent show, hiking, swimming, and field trips. (Arbitration Decision) Phillips also sold products through 31 Bags for a period of time in 2014 and 2015. (Arbitration Decision) Phillips reported the income she received was inconsistent, and she earned a total of approximately \$3,000.00. (Arbitration Decision)

Phillips commenced employment at a daycare center in June 2015 and continued to work at the daycare at the time of the arbitration hearing. (Arbitration Decision) Phillips worked 30 hours per week and earned \$10.00 per hour. (Arbitration Decision) Phillips testified she had to take some time off from work due to migraines and headaches, and her supervisor allowed her to have a flexible schedule. (Arbitration Decision) Phillips reported she experienced pain when she had to carry toddlers or larger children. (Arbitration Decision)

At the time of the arbitration hearing Phillips had applied for work as a nurse, but she had not been successful in securing employment as a nurse. (Arbitration Decision) Phillips testified many of the job postings stated new graduates need not apply and required a bachelor's degree in nursing, which she did not possess. (Arbitration Decision) Phillips volunteered at a free clinic administering shots and taking vital signs. (Arbitration Decision) During the summer of 2015, she worked twice a week at the clinic, and in the fall she worked once or twice per month at the clinic. (Arbitration Decision)

On April 23, 2020, Phillips filed a review-reopening petition. The matter proceeded to hearing on June 11, 2021. At the time of the review-reopening hearing, Phillips was 37. (Tr., p. 8) Phillips lives in Ann Arbor, Michigan. (Tr., p. 8)

Phillips testified since the arbitration hearing she still has daily pain in her neck and the base of her skull, shoulder tension and headaches at the base of her head, and intermittent migraines. (Tr., p. 9) Phillips relayed she has increased anxiety about getting migraines because the migraines affect her activities, life, and ability to work and reported she gets depressed when she has long periods of increased pain because she does not feel like it is going to end. (Tr., p. 9) Phillips testified she has had these problems since the arbitration hearing, but her symptoms have increased or become worse. (Tr., pp. 9, 60-61)

In July 2016 Beaumont Troy hired Phillips as a full-time nurse in the Clinical Decisions Unit, working three 12-hour shifts per week, overnight. (Tr., pp. 17, 19) Phillips enjoys working as a nurse. (Tr., pp. 9-11)

At the time of the review-reopening hearing Phillips was working on a Bachelor of Science degree in nursing ("BSN"), which is a requirement for her to remain in her current position with Beaumont Health System. (Tr., pp. 11-12) Beaumont Health System had an original deadline of July 2021 for Phillips to obtain a BSN, but that was extended to July 2022 due to the Covid-19 Pandemic. (Tr., p. 12) Phillips is enrolled in an on-line program, and reported she has a difficult time completing her coursework because it is difficult for her to work on the computer, reading for long periods of time trigger her migraines, the pace of the program is challenging when working full-time, and she has missed time due to migraine headaches and pain. (Tr., pp. 12-13)

Phillips originally enrolled in a BSN program at Southern New Hampshire, taking one class at a time for six weeks. (Tr., p. 13) Phillips reported she had to take breaks and sometimes she had to withdraw because she could not meet the course demands due to her migraines and symptoms from her work injury. (Tr., pp. 13-14) Phillips withdrew in December 2017 and again in January 2020 due to her medical issues from her work injury because she could not complete the work due to her symptoms and the required deadlines and she would have failed her courses and been terminated from the nursing program. (Tr., p. 14)

Phillips transferred to an online BSN program with Western Governors University, which is a slower-paced and more flexible program. (Tr., pp. 14-15) Phillips planned to complete the program during the summer of 2021, but she is off pace because she had to work more due to the Covid-19 pandemic and because she has

had more symptoms. (Tr., pp. 15-16) After completing her BSN, Phillips will not receive additional pay and noted the program does not teach additional skills in terms of patient care, rather it focuses on resource management and administrative and budgeting tasks. (Tr., p. 16)

The Clinical Decisions Unit at Beaumont Troy is a progressive care unit in the emergency department. (Tr., p. 17) After a patient is admitted the patient comes to the Clinic Decisions Unit where the admitting tests and questioning are conducted before a room is available. (Tr., p. 17) The majority of the patients are elderly adults with cardiac and pulmonary problems. (Tr., pp. 17-18) Phillips had to turn some of the patients every two hours, perform personal care for the patients, assist the patients to the bathroom, and assist the patients with ambulating and getting up for meals. (Tr., p. 18) Phillips had to push and pull more than 50 pounds in the position, but she did not have to physically lift the patients. (Tr., pp. 18-19)

Phillips lived 58 miles from Beaumont Troy and she had difficulties with the commute because of her neck pain. (Tr., pp. 19-20) Phillips testified after working long shifts her neck and shoulder pain would be severe and if she developed a migraine with vertigo or vision changes it was not safe for her to drive and she would sleep in her car during the day. (Tr., pp. 20-21) After Phillips developed friendships with her coworkers, she stayed with her coworkers instead of sleeping in her car. (Tr., pp. 20-21)

Beaumont Troy accommodated Phillips's migraines and pain by allowing her to take intermittent FMLA. (Tr., p. 21) If she became incapacitated and could not work, she could call-off from work, which happened once or twice per month. (Tr., pp. 21-22) Phillips reported she had to take both paid time off and time off without pay. (Tr., p. 22) Phillips testified she did not believe she could consistently work five days in a row as a nurse because she would have to call-off and that would exhaust her paid time off and FMLA leave. (Tr., p. 23)

In the fall of 2019 Phillips started looking for a job that would be easier physically and closer to her home. (Tr., p. 23) Phillips testified she looked for an easier job because she was having more neck pain and more frequent migraines, which resulted in her having to call into work and she was concerned about being able to maintain her employment at Beaumont Troy. (Tr., p. 24) No one at Beaumont Troy told Phillips her job was in jeopardy. (Tr., p. 64) She did receive a verbal warning for attendance under the point system because she had clocked in late, and she was told she could not miss more days in the following six-month period. (Tr., pp. 65-66)

In December 2019, Phillips transferred to Beaumont Dearborn, which is 20 to 30 minutes from her home. (Tr., pp. 24, 26, 67) Beaumont Dearborn treats women and children. (Tr., p. 24) Phillips again worked three 12-hour shifts, but her patient load was lower. (Tr., pp. 28, 67) Most of the adult female patients are postsurgical patients who have undergone gynecological surgery and postpartum mothers who are not appropriate for the mother/baby unit, due to an infant death or planned adoption. (Tr., p. 26) Most of Phillips's patients can perform their activities of daily living independently and the work is lighter. (Tr., p. 27) Phillips assists some patients with walking after

surgery, but the patients can go to the bathroom independently and do not need to be turned in bed. (Tr., p. 26)

At Beaumont Dearborn Phillips can use FMLA when her migraines interfere with her work and her supervisor also will accommodate her schedule if she is having a migraine or increased pain. (Tr., p. 28) Phillips has consistently worked at least 36 hours per week for the past five years. (Tr., p. 65) Phillips trades shifts with coworkers when she is having a bad day, which has reduced the amount of FMLA she uses.

At the time of the review-reopening hearing Phillips was earning \$32.70 per hour, which is a great increase from the \$10.00 per hour she was earning working for the daycare at the time of the arbitration hearing. (Tr., pp. 29, 68-70) The nurses in the Beaumont Health System received a large increase in pay across the board between 2018 and 2019, due to a market adjustment. (Tr., pp. 29-30) Phillips has also received cost-of-living raises. (Tr., p. 30) In 2020 she received two Covid healthcare worker bonuses for having to work with Covid patients and she also had to work intermittent, mandatory overtime to care for Covid patients. (Tr., pp. 30, 67-68) Phillips worked an extra four to 12 hours in a workweek during the mandatory overtime. (Tr., p. 68)

At the time of the review-reopening hearing Phillips had accepted a transfer to the neonatal intensive care unit at Beaumont Dearborn. (Tr., p. 30) In this position Phillips will care for infants. (Tr., p. 30) Phillips's first day of training for the position is May 30, 2021. (Tr., pp. 30, 66) Phillips testified the work will be even lighter because all of the patients are infants and she cannot be pulled outside of the service line to care for women, just to care for infants, unlike her current assignment. (Tr., p. 31)

Phillips testified, on cross-examination, that from November 2020 through the time of the review-reopening hearing she had missed two shifts at work where she used FMLA leave. (Tr., p. 72) Phillips testified she also exchanged shifts with a coworker because of a migraine. (Tr., p. 72) Phillips admitted during her deposition in January 2021, she could recall five shifts she had missed since mid-December 2019 because of a migraine headache. (Tr., p. 73) Phillips also admitted missing work due to migraine headaches before she became a full-time nurse. (Tr., pp. 73-74)

Phillips testified after working in the nursing field she knows it would be difficult for her to work with dementia patients like she did in her first job because they are confused, and patients who are detoxing from alcohol. (Tr., p. 32) She believes the physical turning, pushing, and pulling of patients would be difficult for her to do and it also makes her life outside of work less enjoyable because of her increased pain. (Tr., p. 32) Phillips explained, "[i]f I can make it through three days of work, but I'm in bed for two days, because I need so many muscle relaxers or anything to be able to function, then I can't make plans with people to do things. I don't want to go places and – because I'm worried about being in pain or I am in pain. And so it's – it just makes it harder. It's just exhausting." (Tr., pp. 32-33)

Phillips reported she has had to change her medical treatment routine to maintain her employment. (Tr., p. 33) Phillips testified she had to switch muscle relaxers to ones that are a little stronger and the dosages have increased. (Tr., p. 34) Phillips stated she takes Fioricet for tension-type headaches, which is not sedating, like

muscle relaxers, so she takes it frequently when she is working because it is one of the only drugs she can take and safely work. (Tr., p. 34) Phillips reported she has vertigo and dizziness that are more profound at times. (Tr., p. 34) Phillips takes Meclizine for dizziness and she takes nausea medication because she vomits with her migraines, she takes Tylenol or Aleve, as needed, and she uses ice, heat, and Biofreeze. (Tr., p. 34) Phillips testified she uses ice, heat, and Biofreeze more now that she is working. (Tr., p. 34)

Phillips testified at the time of the arbitration hearing she was taking different preventative medications that were not working well and that caused a lot of side effects, so her treating physician switched her medication and has adjusted the dose and she has been getting a once-a-month injectable to prevent migraines, Botox injections, and occipital and trigger point injections. (Tr., p. 35) Phillips reported she tried Aimovig and she was taking Emgality at the time of the review-reopening hearing. (Tr., p. 35)

Phillips relayed she has had difficulty obtaining authorization for her injections and medications and that the delays in treatment have impacted her symptoms. (Tr., pp. 35-36) Covid-19 also delayed her treatment, which made her symptoms worse. (Tr., p. 46) Phillips testified she need regular, routine medical treatment to maintain the level of her symptoms. (Tr., p. 36) She takes some of her medications daily and if she misses the medications her symptoms can become very severe and some medications are dangerous if they are not taken as scheduled. (Tr., p. 36) Phillips reported she takes Effexor and if she does not take it as scheduled, she experiences strong neurological effects and withdrawal symptoms and a different type of headache that feels like an “electrical-type pain,” in addition to severe mood swings, increased depression, and a general feeling of being unwell. (Tr., p. 37) Phillips reported she takes Zonegran to prevent migraines, and that Zonegran is used to treat seizures as well, and even if a patient taking Zonegran does not have a seizure history, if the patient stops taking Zonegran suddenly, the patient could have seizures. (Tr., p. 37) Phillips testified if she gets off schedule with her nerve blocks she can get into a cycle of continuing migraines that is difficult to break and she misses work. (Tr., p. 37) Phillips reported New Hampshire has not been paying for all of her medications and procedures Dr. Cooper’s team at the University of Michigan has ordered and she has a large outstanding medical bill balance. (Tr., pp. 36-37, 43-44)

Phillips testified the Botox injections she receives are different from the one Botox injection she had prior to the original arbitration hearing. (Tr., p. 38) The one Botox treatment she received before the arbitration hearing was for right-sided torticollis, to relieve the spasms from her head tilt. (Tr., p. 38) Phillips now receives 30 to 40 Botox injections every three months in her face, scalp, neck, and shoulders to treat her migraines. (Tr., p. 38) Phillips relayed the treatment is painful and causes bruising on her face and body, but she has noticed a decrease in the frequency of her migraines since she started the Botox treatment. (Tr., p. 39) Phillips reported she started the Botox because she could not tolerate higher levels of other medications and she had tried all of the other treatment options the University of Michigan offered. (Tr., p. 40)

At the time of the arbitration hearing Phillips was having one to two migraines per month she could not stop with fast-acting medication. (Tr., p. 39) Her migraines increased to four to six per month when she was working, and since she started the new medications with Botox and injections, she is back down to one or two migraines per month. (Tr., p. 39) Phillips testified she also believes the new medication, Emgality, has also helped with her migraines. (Tr., p. 39) Phillips reported the migraines she experiences may last a day or two, or as long as three days. (Tr., p. 45) If a migraine lasts three days she will go to the emergency room and she receives a migraine cocktail, which is a combination of medications to try to break the cycle. (Tr., pp. 45-46)

Phillips used to receive occipital nerve blocks and trigger point injections every one to three months, but she started getting more migraines, so her treating medical provider recommended she have the injections every four to six weeks and after switching to that schedule her migraines have been better under control. (Tr., p. 41) Phillips reported the injections address the pain she has in her neck, on the top of her shoulders, and at the base of her skull to reduce her migraines. (Tr., p. 41) Phillips testified she does not believe she could maintain a full-time job without her medication and injection regimen. (Tr., pp. 46-47)

Phillips has received extensive treatment as a result of her work injury. After the arbitration hearing, up until the time of the review-reopening hearing, Phillips continued to treat with Dr. Cooper at the University of Michigan. (JE 1, pp. 1-123) She has received regular occipital nerve blocks and trigger point injections for cervicalgia and myofascial pain, chemodenervation or Botox injections into her face for chronic migraines, pharmacological treatment for her symptoms and pain, and physical therapy. (JE 1, pp. 1-123) Phillips complained of continued pain, headaches, and fatigue with working. (JE 1, pp. 13, 17) Phillips relayed she had difficulty and increased symptoms with reading, looking down, looking up, reaching overhead, lifting, carrying, working on the computer, and falling asleep. (JE 1, pp. 18, 28, 42-43)

On May 8, 2017, Phillips sought emergency medical treatment at Troy Hospital after developing a migraine at work. (JE 3, p. 143) Phillips stated her migraines were typically on her right side and the migraine that night was on her left side with nausea, vomiting, photophobia, dizziness, and intermittent fuzzy vision, and reporting that she had never had a migraine that had been "so sudden or intense." (JE 3, pp. 143-45) Hospital staff examined Phillips and administered Toradol, Zofran, and Benadryl, which improved her headache, discharged her, and instructed her to follow up with neurology. (JE 3, p. 145)

Phillips received additional chiropractic manipulations for aching and tightness discomfort in the back of her neck and tightness and throbbing in the right side of her head from New Era Chiropractic on August 15, 2016, May 12, 2017, June 29, 2017, January 29, 2018, February 5, 2018, March 2, 2018, December 3, 2018, December 5, 2018, April 30, 2019, May 15, 2019, and August 13, 2019. (JE 2)

On February 19, 2019, Phillips was rear-ended in her vehicle by another vehicle when she was at a complete stop. (JE 3, p. 147; Tr., pp. 84-85) Phillips sought emergency medical treatment and reported she struck the left side of her head on the

window and she was complaining of a left-sided headache, bilateral neck pain, left shoulder pain, and tingling in her left arm. (JE 3, p. 147) Phillips relayed she had experienced chronic right-sided neck pain since a prior patient assault. (JE 3, p. 147) Hospital staff diagnosed Phillips with a cervical sprain, administered Toradol and Flexeril, and discharged her from care. (JE 3, p. 149) At hearing Phillips testified the accident caused an increase in her headaches for a day or two and that her head and neck were sore. (Tr., p. 85)

On July 6, 2019, Phillips returned to the emergency department at Troy Hospital, complaining of a migraine headache that had not improved with her home medications. (JE 3, p. 150) Phillips complained of associated vision changes and right-sided facial numbness that she had in the past and increased chronic neck pain she believed was secondary to the migraine. (JE 3, p. 150) Hospital staff examined Phillips, administered Benadryl, Toradol, Compazine, and IV fluids, noted her symptoms improved, but had not completely resolved with treatment, and discharged her from care. (JE 3, p. 154)

During a physical therapy session on January 6, 2020, Phillips reported her symptoms had become worse over the past three to four months. (JE 1, p. 49) Phillips relayed she had changed jobs from the emergency department at Troy to the pediatric department at Dearborn, and noted the week before she had tripped on a broken step and caught herself with her right upper extremity behind her, and reported she was experiencing constant pain at the base of her skull and right sided lower cervical pain. (JE 1, p. 49) A week later Phillips reported she was having real issues with her pain and migraine headaches because the workers' compensation carrier had not authorized additional injections and medication. (JE 1, pp. 52-53) During an appointment on January 24, 2020, Phillips reported her headache pain had been worse, she had constant pain at the base of her skull, right sided lower cervical pain, and right and left temporal pain. (JE 1, p. 57) Phillips relayed she had been miserable since workers' compensation had stopped paying for some of her medications and injections, noting she was four to six weeks overdue for her occipital nerve blocks and once a month injection she gives herself. (JE 1, p. 57)

During a physical therapy appointment on January 29, 2020, Phillips again relayed she was having significant difficulty with workers' compensation paying for her treatments that had helped her manage her pain and that she was "having to drop one of her 2 classes right now because she cannot tolerate the computer work required w/ increased head pain." (JE 1, p. 59) Phillips requested a withdrawal letter from school from Wade Cooper, D.O. (JE 1, p. 64) Dr. Cooper issued the letter on January 30, 2020, stating

Sarah Phillips is under our care for chronic migraine. She has had exacerbation of her head pain and is unable to get the necessary treatments that were prescribed for her due to unforeseen insurance issues. Prior to this, her pain was manageable with the regimen prescribed.

Because of this it is necessary for her to medically withdraw from school as her increased pain is limiting her ability to complete her school work. . . .

(JE 1, p. 65) Within two weeks, the workers' compensation carrier authorized all services for Phillips until the end of the year. (JE 1, p. 84)

In March 2020, the Covid-19 Pandemic hit, which interfered with Phillips's treatment and the University of Michigan cancelled her procedures and changed her medication. (JE 1, p. 89) Phillips resumed receiving bilateral occipital nerve blocks in May 2020. (JE 1, pp. 101, 110)

On August 1, 2020, Phillips contacted Dr. Cooper's office and reported her work was requiring the nurses to wear face shields or goggles with all patient contact. (JE 1, p. 120) Phillips reported the shields and goggles have straps that go around her head and hurt her scalp, increasing her pain. (JE 1, p. 120) Phillips reported she did not want to miss work and requested a note to wear an alternative eye covering. (JE 1, p. 121) Dr. Cooper issued a note stating Phillips "has a diagnosis of chronic migraine which has been refractory to multiple prevention and acute therapies. She has allodynia including sensitivity to pressure on her scalp from elastic bands or eyewear," and stated he strongly requested she be able to wear alternative eye protection that does not include pressure to her scalp when being used. (JE 1, p. 121)

On January 25, 2021, Michael Cullen, M.D., a neurologist conducted an independent medical examination of Phillips for REM and New Hampshire and issued his report on March 2, 2021. (Ex. A) Dr. Cullen examined Phillips and reviewed her medical records. (Ex. A) Dr. Cullen noted at the time of his exam Phillips remained symptomatic, complaining of fatigue, blurred vision with headaches, vertigo with headaches, nausea with vertigo, being moody/depressed, having difficulty concentrating, poor sleep, and facial numbness. (Ex. A, p. 6) Dr. Cullen documented as part of her headache treatment she was taking Venlafaxine 225 milligrams daily, four to six Fioricet per week, Naratriptan, Zonisamide, Tizanidine, Meclizine, and Naproxen, in combination with occipital nerve blocks, trigger point injections, and Botox therapy. (Ex. A, p. 6) On exam, Dr. Cullen noted Phillips had diffuse tenderness in the right splenius capitis muscle group and tenderness over the right greater occipital nerve following a Botox/trigger point injection one week before. (Ex. A, p. 7)

Dr. Cullen diagnosed Phillips with a closed head injury, cervicalgia, and mixed headache pattern and opined she had not sustained "any additional or greater permanent impairment" under the AMA Guides, noting "[a]ny worsening of Ms. Phillips symptomatology would be attributable to alternative contributors/explanations (i.e. emotional/psychological, degenerative conditions, etc.)." (Ex. A, p. 8) Dr. Cullen further opined Phillips did not need any permanent restrictions noting she had been working as a nurse for approximately five years "without apparent incident." (Ex. A, p. 8) As far as additional treatment is concerned, Dr. Cullen recommended Phillips avoid excessive Fioricet use, that Topamax in combination with "CGRP receptor therapies would seem appropriate," and that interventional treatments, including nerve blocks, trigger point injections, and Botox therapy had not resulted in significant reduction in medicinal

therapies and that he judged them as ineffective and not warranted, and recommended she follow up with a neurologist twice per year. (Ex. A, p. 8)

On January 26, 2021, Dr. Sassman conducted an independent medical examination for Phillips and issued her report on March 10, 2021. (Ex. 1) Dr. Sassman examined Phillips and reviewed her medical records. (Ex. 1)

Dr. Sassman diagnosed Phillips with repeated head trauma with persistent headaches, migraines, and cervicalgia. (Ex. 1, p. 29) With respect to a change of condition, Dr. Sassman opined:

[i]t is my opinion that there has been a change in Sarah's physical condition since the arbitration decision occurred on 7/21/16. This opinion is supported by the following facts: At the time of the arbitration decision, for her headaches Ms. Phillips was taking Topamax, Effexor, Flexeril, Amerge PM for migraines, Zofran, and Naproxen. Currently she is taking Zofran, Venlafaxine, Fioricet, Zanaflex, Amerge, Zonegran, Flexeril, and Meclizine. Additionally, Aimovig was tried for the headaches. She also was started on the loading dose of Emgality but could not get the future doses approved. These additional medications are specifically for her headache symptoms and the addition of these medications represents a worsening of her symptoms since the time of the arbitration decision in 7/21/16.

Along with the medication changes, she has continued occipital nerve blocks and trigger point injections, but the frequency that these are needed to provide a therapeutic effect has increased over the previous few years. Specifically, when she first began having these injections, she obtained relief for 1-3 months. Now, although she still obtains relief, the relief only lasts 4-6 weeks.

With the medication regimen and the injections, her current treatment regimen is more involved and more intense than the regimen she was on when I previously evaluated her in 2016, indicating a worsening of her symptoms.

Additionally, in looking at her visits with the Headache Clinic it is notable that when she first began her visits there, she had 1-2 headache-free days per month. Now she has no headache-free days. Her severe headache days in a month's time frame have also increased over the previous years to approximately 10 per month. All the above information represents a worsening of her symptoms since the arbitration decision of 7/21/16.

(Ex. 1, p. 30) Using the AMA Guides, Dr. Sassman assigned Phillips a 19 percent permanent impairment rating:

[f]or the cervical symptoms, using Section 15-2 on page 379, the DRE method is the appropriate method to use for assessment of the cervical

spine. Using Table 15-5 on page 392, she will be placed in a DRE Cervical Category II with 7% impairment of the whole person. The upper level of this category is chosen because of the impact on her activities of daily living.

For the head trauma, I followed the instructions in Section 13.2 on page 308 which delineates 5 steps to the process of evaluate cerebral impairment. Step 1 of the process is to assess if there is impairment for consciousness or awareness. Using Table 13-2 there is no impairment in the level of consciousness or awareness.

Step 2 is to evaluate mental status and highest integrative functioning based on Table 13-5 and 13-6 on page 320. There is no impairment for these issues.

Step 3 on page 308 is identifying any difficulty with understanding and use of language based on Table 13-7 on page 323. She is placed into a Class 1 with 0% impairment of the whole person due to no disturbance in comprehension and production of language symbols of daily living.

Step 4 is evaluation of any emotional or behavioral disturbances, such as depression, that can modify cerebral function based on Table 13-8 on page 325. She is placed in a Class 1 with 10% impairment of the whole person due to limitation of activities of daily living and daily social and interpersonal functioning since the head injury.

Step 5 of the process of rating a head injury states that I am to identify the most severe cerebral impairment of those listed above and combine the most severe impairment with any other impairment noted in Table 13-1 on page 308. Therefore, the criteria for rating impairment due to emotional and behavioral disturbances will be used, which is 10% whole person impairment. I am then to combine this with the value derived from Table 13-1. I will combine an additional 3% whole person impairment for the headaches. Turning to the Combined Values Chart on Page 604, this is combined for a total of 13% impairment of the whole person.

Overall, using the Combined Values Chart on page 604, 13% whole person impairment (for the head trauma) is combined with 7% whole person impairment (for the cervical spine) for a total of 19% impairment of the whole person. . . .

(Ex. 1, p. 31) Dr. Sassman recommended avoiding situations that will place Phillips at risk for additional head injuries, recommended restrictions of lifting, pushing, pulling, or carrying up to 50 pounds occasionally from floor to waist and from waist to shoulder height and 20 pounds rarely, with no use of vibratory or power tools. (Ex. 1, p. 32) In addition, Dr. Sassman assigned new restrictions of limiting pushing and pulling with her

arms extended away from her body to an occasional basis as this aggravates her cervical symptoms. (Ex. 1, p. 32)

Dr. Sassman recommended Phillips continue with the current treatment plan recommended by the experts at the Headache Clinic at the University of Michigan for a combination of Botox, Emgality, occipital nerve blocks, and trigger point injections, noting when she evaluated her on January 26, 2021, Phillips had just started Botox and noted her headaches had improved with Botox in terms of frequency. (Ex. 1, p. 32) Dr. Sassman disagreed with Dr. Cullen's opinion that additional interventional treatments were ineffective and not warranted, opining:

. . . Phillips does note improvement in her symptoms when she receives the injections at the recommended intervals as well as maintains her medications regimen. Unfortunately, she has had some issues with getting her medications and injections covered through the Workers' Compensation insurance and was not able to obtain the injections at the recommended intervals as well as remain on all the recommended medications. This led to an increase in her symptoms for a time. Recently, however, she began Botox injections which she stated has made her migraines less frequent. Therefore, she does see some benefit in the treatment regimen prescribed by the Headache Clinic at the University of Michigan, and I would recommend she continue her care there.

It should be noted that Ms. Phillips did have one Botox injection back in 2013, however, this was for treatment of the spasmodic torticollis symptoms she had at that time. This was not for the migraine treatment it is required for now.

(Ex. 1, p. 33) Dr. Sassman opined the occipital nerve blocks, trigger point injections, and Botox injections continue to be necessary as a result of the October 2012 work injury. (Ex. 1, p. 34)

Phillips testified pushing and pulling away from her body aggravate her neck symptoms more than lifting patients. (Tr., p. 52) Phillips reported she can lift 50 pounds sometimes, but has often had to ask her coworkers for help with lifting because she would end up with too much pain. (Tr., p. 53) Phillips testified she could not maintain a position where she would have to lift heavy patients on a full-time basis. (Tr., p. 55) None of Phillips's treating physicians have imposed any permanent work restrictions. (Tr., p. 59) Phillips has not provided her employer with Dr. Sassman's restrictions. (Tr., p. 59)

Phillips has an outstanding balance for medical treatment she has received at the University of Michigan. (Tr., p. 53) Phillips testified the care she received through New Era Chiropractic and the University of Michigan has been beneficial to her. (Tr., p. 53)

CONCLUSIONS OF LAW

I. Review-Reopening

Iowa Code section 86.14 governs review-reopening proceedings. When considering a review-reopening petition, the inquiry “shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded.” Iowa Code § 86.14(2). The deputy workers’ compensation commissioner does not re-determine the condition of the employee adjudicated by the former award. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 391 (Iowa 2009). The deputy workers’ compensation commissioner must determine “the condition of the employee, which is found to exist subsequent to the date of the award being reviewed.” Id. (Quoting Stice v. Consol. Ind. Coal Co., 228 Iowa 1031, 1038, 291 N.W. 452, 456 (1940)). In a review-reopening proceeding, the deputy workers’ compensation commissioner should not reevaluate the claimant’s level of physical impairment or earning capacity “if all of the facts and circumstances were known or knowable at the time of the original action.” Id. at 393.

The claimant bears the burden of proving, by a preponderance of the evidence that, “subsequent to the date of the award under review, he or she has suffered an *impairment or lessening of earning capacity proximately caused by the original injury.*” Simonson v. Snap-On Tools Corp., 588 N.W.2d 430, 434 (Iowa 1999) (emphasis in original)

Phillips alleges her symptoms have become worse since the arbitration hearing and she is not capable of performing all nursing jobs because of her work injury. REM and New Hampshire aver Phillips has not met her burden of proof that she has sustained a change of condition because her symptoms are the same since the time of the arbitration hearing, she has not received any new permanent work restrictions, and her financial condition has improved after securing full-time employment as a nurse.

In July 2016, Phillips obtained full-time employment as a nurse. At the time of the hearing Phillips’s hourly wage was more than three times her hourly wage at the time of the arbitration hearing.

Two expert witnesses have given opinions on whether Phillips has sustained a change of permanent impairment caused by the work injury, Dr. Sassman, and Dr. Cullen. Dr. Sassman assigned Phillips an additional three percent permanent impairment and additional work restrictions which she opined were caused by the October 2012 work injury, and further opined Phillips needs to continue to receive the treatment regimen developed by the University of Michigan. Dr. Cullen opined Phillips sustained no additional permanent impairment and he does not believe she needs additional injections recommended by Phillips’s authorized treating medical providers at the University of Michigan, noting, “any worsening of Ms. Phillips symptomatology would be attributable to alternative contributors/explanations (i.e. emotional/psychological, degenerative conditions, etc.” (Ex. A, p. 8). None of Phillips’s treating physicians have opined her current symptoms and need for treatment are “attributable to alternative

contributors/explanations (i.e. emotional/psychological, degenerative conditions, etc.” (Ex. A, p. 8). I do not find Dr. Cullen’s opinion reasonable or consistent with the other evidence I believe.

When considering expert testimony, the trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997). When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert’s education, experience, training, and practice, and “all other factors which bear upon the weight and value” of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

Phillips sustained three head injuries while working at REM, the last occurring in October 2012. In October 2012, a REM resident violently assaulted Phillips, causing her to sustain a head injury; her injuries resulted in a permanent impairment. Since that time Phillips has struggled with headaches and pain at the base of her head, memory issues, reading difficulties, and concentration problems. Despite these problems, Phillips has sought additional education to improve her situation. She is a remarkable person. Phillips’s work injury impaired her ability to obtain training as a registered nurse before the arbitration hearing and has impaired her ability to complete a BSN, which is required for her to maintain her current employment.

The record supports Phillips was doing well with her medical regimen in July 2016, when Beaumont Troy hired her as a full-time nurse in the Clinical Decisions Unit. Many of her patients were elderly and required frequent turning, assistance with personal cares, assistance with toileting, and assistance with getting up and ambulating, requiring Phillips to push and pull more than 50 pounds. (Tr., pp. 18-19) Phillips’s commute was 58 miles.

Phillips could no longer take muscle relaxers to combat her symptoms when working with patients. When she had a severe migraine, Phillips could not drive and slept in her car until her symptoms were better and she could drive and also stayed with coworkers. (Tr., pp. 19-21) Phillips also used intermittent FMLA leave once or twice per month when she had to call off from work. (Tr., pp. 21-22)

While Phillips received occipital nerve block and trigger point injections before the arbitration hearing, the frequency of her injections has increased over time to combat her work-related symptoms. As of December 14, 2017, the University of Michigan staff noted Phillips was experiencing on average 10 days of severe headaches, 18 days of moderate headaches, and one to two days of no headache within the last 30 days. (JE 1, p. 10) At the time of the arbitration hearing, Phillips was experiencing one to two migraines per month. (Arbitration Decision)

In December 2019, Phillips transferred to Beaumont Dearborn, which is 20 to 30 minutes from her home, which shortened her commute. (Tr., pp. 24, 26, 27) At Beaumont Dearborn Phillips works with adult women and children. The position is lighter in nature because the patients can ambulate on their own to the bathroom and

do not need to be turned in bed. (Tr., p. 26) Phillips has continued to complain of headaches and pain at the base of her skull.

In late 2019 and early 2020, New Hampshire stopped authorizing Phillips's care at the University of Michigan and her condition deteriorated, which is noted in her medical records. (JE 1) Phillips had to medically withdraw from her BSN program because she could not tolerate computer work with her increased pain. Dr. Cooper issued a letter on January 30, 2020, requesting she be given a medical withdrawal from school due to an exacerbation of her head pain and inability to obtain necessary treatment due to unforeseen insurance issues, noting "[p]rior to this, her pain was manageable with the regimen prescribed. (JE 1, p. 65)

Phillips filed an application for alternate care. At that time the University of Michigan was recommending ongoing occipital nerve block and trigger point injections, pharmacological treatment, chiropractic treatment, and Botox injections. REM and New Hampshire agreed to a consent order on February 3, 2020, agreeing to provide the requested treatment.

Phillips began receiving Botox injections in February 2020 for her migraines. (JE 1, p. 2) While Phillips received one Botox injection prior to the arbitration hearing, the one injection she received was not for chronic migraines; rather it was for her right-sided torticollis, to relieve the spasms from her head tilt. (Tr., p. 38) Since February 2020, Phillips has received 30 to 40 Botox injections every three months in her face, scalp, neck, and shoulders to treat her migraines. (Tr., p. 38; JE 1, pp. 1-2) Phillips relayed the treatment is painful and causes bruising on her face and body, but she has noticed a decrease in the frequency of her migraines since she started the Botox treatment. (Tr., p. 39) Phillips reported she started the Botox because she could not tolerate higher levels of other medications and she had tried all of the other treatment options the University of Michigan offered. (Tr., p. 40)

At the time of the review-reopening hearing, Phillips's headaches and pain were again under control with additional Botox treatment and a regular treatment regimen through the University of Michigan. I find Phillips has established she has sustained a change of physical condition, which has resulted in the need for additional treatment, the Botox injections, more frequent occipital and trigger point injections, and other medications, caused by the work injury. I also find Phillips needs to continue with ongoing treatment recommended by the University of Michigan for her headaches and chronic pain. Without the treatment, I do not believe she would be able to continue to perform her duties as a nurse.

I did not find Dr. Sassman's lifting restrictions at the time of the arbitration hearing to be Phillips's permanent restrictions. Phillips's treating physicians have not imposed any permanent restrictions on Phillips. Phillips has not requested any accommodations from her employer based on Dr. Sassman's recent recommended restrictions. I do not adopt Dr. Sassman's restrictions as Phillips's permanent restrictions.

Given Phillips has established a change of physical condition, it is necessary to determine whether the change in condition warrants an award of additional

compensation benefits. “Industrial disability is determined by an evaluation of the employee’s earning capacity.” Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 852 (Iowa 2011). In considering the employee’s earning capacity, the deputy commissioner evaluates several factors, including “consideration of not only the claimant’s functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment.” Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (Iowa 2010). The inquiry focuses on the injured employee’s “ability to be gainfully employed.” Id. at 138.

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u).

At the time of the review-reopening hearing Phillips was 37. (Tr., p. 8) Since the arbitration hearing Phillips has secured full-time employment as a nurse with the Beaumont Health System, based, in part, on her determination and grit, despite a significant impairment. Phillips has successfully worked for two hospitals in the Beaumont Health System for the past five years. Phillips’s hourly wage is more than three times higher than her hourly wage at the time of the arbitration hearing. While she has struggled with the coursework for her BSN degree, I do not find Phillips’s struggles with learning and reading have changed since the arbitration hearing. Based on the record evidence at hearing, I do not find Phillips has established she has sustained any additional industrial disability caused by the work injury.

II. Medical Bills and Medical Care

Phillips seeks to recover the medical bills set forth in Exhibit 6 and she requests Defendants be required to authorize ongoing treatment recommended by her treating medical providers at the University of Michigan, including injections and pharmacological treatment.

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

has denied liability for the injury, or has abandoned care. Iowa Code § 85.27(4); Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010).

While the employer retains the right to choose the employee's medical care under the statute, the employee is not prohibited from seeking her own care when the employer denies compensability for the injury or the employee "abandons the protections of section 85.27 or otherwise obtains his or her own medical care independent of the statutory scheme." Brewer Strong v. HNI Corp., 913 N.W.2d 235, 248 (Iowa 2018) (quoting Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010)). In Brewer-Strong and Gwinn, the court held the employer's duty to furnish reasonable medical care includes unauthorized care if the employee is able to prove "by a preponderance of the evidence that such care was reasonable and beneficial" under the totality of the circumstances. Id. (quoting Gwinn, 779 N.W.2d at 206). The court further held "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.

I find the medical care Phillips received that resulted in the medical bills set forth in Exhibit 6 reasonable and beneficial to Phillips. REM and New Hampshire are responsible for the medical bills set forth in Exhibit 6 and for all causally related medical care, including, but not limited to the ongoing care ordered by Phillips's treating medical practitioners at the University of Michigan.

III. Cost of the Independent Medical Examination

Phillips seeks to recover the \$5,280.00 cost of Dr. Sassman's independent medical examination. Dr. Cullen provided an opinion in this case that Phillips had sustained no additional permanent impairment. Phillips disagreed and obtained an independent medical examination from Dr. Sassman.

Iowa Code section 85.39 (2012), provides, in part:

[a]fter an injury, the employee, if requested by the employer, shall submit for examination at some reasonable time and place and as often as reasonably requested, to a physician or physicians authorized to practice under the laws of this state or another state, without cost to the employee; but if the employee requests, the employee, at the employee's own cost, is entitled to have a physician or physicians of the employee's own selection present to participate in the examination. If an employee is required to leave work for which the employee is being paid wages to attend the requested examination, the employee shall be compensated at the employee's regular rate for the time the employee is required to leave work, and the employee shall be furnished transportation to and from the place of examination, or the employer may elect to pay the employee the reasonable cost of the transportation. . . . 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. . . .

The Iowa Court of Appeals recently addressed this issue in Kern v. Fenchel, Doster & Buck, P.L.C., No. 20-1206, 2021 WL 3890603 (Iowa Ct. App. Sept. 1, 2021). In Kern, the defendants' expert found there was no causation. Kern disagreed with the opinion and sought an independent medical examination at the defendants' expense. The Commissioner found Kern was not entitled to recover the cost of an independent medical examination. The Court of Appeals reversed, finding the "opinion on lack of causation was tantamount to a zero percent impairment rating," which is reimbursable under Iowa Code section 85.39. Dr. Cullen opined Phillips sustained no additional impairment. Phillips disagreed and sought an independent medical examination with Dr. Sassman. Under Kern, Phillips is entitled to recover the \$5,280.00 cost of Dr. Sassman's independent medical examination.

IV. Costs

Phillips seeks to recover \$62.40 or \$50.00 for photocopies, \$75.65 for medical records, \$288.45 for postage and service of process fees, the \$103.00 filing fee, and the \$122.85 cost of Phillips's deposition.

Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Rule 876 Iowa Administrative Code 4.33, provides costs may be taxed by the deputy workers' compensation commissioner for: (1) the attendance of a certificated shorthand reporter for hearings and depositions; (2) transcription costs; (3) the cost of service of the original notice and subpoenas; (4) witness fees and expenses; (5) the cost of doctors' and practitioner's deposition testimony; (6) the reasonable cost of obtaining no more than two doctors' or practitioners' reports; (7) filing fees; and (8) the cost of persons reviewing health service disputes.

The administrative rule expressly allows for the recovery of the cost of the filing fee and the cost of the deposition. Phillips did not itemize the service of process fees from the postage or explain what the postage was for. The costs of postage, medical records, and photocopies are not recoverable under the rules. Because Phillips did not itemize the service of process fees, I do not find she is entitled to the service of process fees.

ORDER

IT IS THEREFORE ORDERED, THAT:

Claimant shall take nothing further.

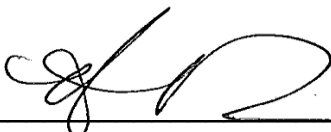
Defendants shall reimburse Claimant five thousand two hundred eighty and 00/100 dollars (\$5,280.00) for the cost of Dr. Sassman's independent medical examination.

Defendants are responsible for the medical bills set forth in Exhibit 6 and for all causally related medical care, including ongoing care for Claimant's work-related injury, at the University of Michigan.

Defendants shall reimburse Claimant one hundred three and 00/100 dollars (\$103.00) for the filing fee, and one hundred twenty-two and 85/100 dollars (\$122.85) for Claimant's deposition.

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

Signed and filed this 9th day of November, 2021.



HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Emily Anderson (via WCES)

Dillon Besser (via WCES)

Edward Rose (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.