

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SHARON VOGT,

Claimant,

vs.

XPO LOGISTICS FREIGHT,

Employer,

and

INDEMNITY INSURANCE COMPANY  
OF NORTH AMERICA,

Insurance Carrier,  
Defendants.

File No. 5064694.01

ARBITRATION

DECISION

Head Note No.: 1108; 1400;  
1402; 1402.40; 1800; 1801; 1803;  
4100; 2500; 2700

**STATEMENT OF THE CASE**

The claimant, Sharon Vogt, filed a petition for arbitration seeking workers' compensation benefits from XPO Logistics Freight, Inc. ("XPO"), and its insurer, Indemnity Insurance Company of North America. Darin Luneckas appeared on behalf of the claimant. Timothy Wegman appeared on behalf of the defendants.

The matter came on for hearing on September 24, 2020, before Deputy Workers' Compensation Commissioner Andrew M. Phillips. An order issued on March 13, 2020, and updated June 1, 2020, and August 14, 2020, by the Iowa Workers' Compensation Commissioner, In the Matter of Coronavirus/COVID-19 Impact on Hearings (Available online at: <https://www.iowaworkcomp.gov/order-coronavirus-covid-19> (last viewed August 14, 2020)) amended the hearing assignment order in each case before the Commissioner scheduled for an in-person regular proceeding hearing between March 18, 2020, and November 20, 2020. The amendment makes it so that such hearings will be held by Internet-based video, using CourtCall. The parties appeared electronically, and the hearing proceeded without significant difficulties. The matter was fully submitted on November 24, 2020, after briefing by the parties.

The record in this case consists of Joint Exhibits 1-10, Claimant's Exhibits 1-9, and Defendants' Exhibits A-F. Testimony under oath was also taken from the claimant, Sharon Vogt. Amanda Groaning was appointed the official reporter and custodian of the notes of the proceeding.

**STIPULATIONS**

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

1. There was an employer-employee relationship at the time of the alleged injury.
2. The claimant sustained an injury arising out of, and in the course of, employment, on August 8, 2017.
3. The claimant's gross earnings were \$1,074.00 per week, she was married and entitled to one exemption.
4. The parties believe that the appropriate weekly compensation rate is \$663.95.
5. The prices or fees charged by providers are fair and reasonable.
6. The defendants are entitled to a credit pursuant to Iowa Code section 85.38(2) for payment of sick pay or disability income of \$12,761.81.

The defendants waived their affirmative defenses.

The parties are now bound by their stipulations.

### **ISSUES**

The parties submitted the following issues for determination:

1. Whether the alleged injury is a cause of temporary disability during a period of recovery.
2. Whether the alleged injury is a cause of permanent disability.
3. Whether the claimant is entitled to either temporary total disability, temporary partial disability, or healing period benefits from June 7, 2019 through October 29, 2019.
4. Whether the claimant was off work from June 7, 2019 through October 29, 2019.
5. The extent of permanent disability, if any is awarded.
6. Whether the disability is an industrial disability.
7. Whether Iowa Code section 85.34(2)(u) applies.
8. The proper commencement date for permanent partial disability benefits, if any are awarded.
9. Whether the claimant is permanently and totally disabled or odd-lot permanently and totally disabled.

10. Whether the claimant is entitled to payment of medical expenses as listed in Claimant's Exhibit 7.

With regard to the disputed medical expenses:

- Whether the treatment was reasonable and necessary.
- Whether the medical providers would testify as to the reasonableness of their fees and/or treatment set forth in the listed expenses.
- Whether the listed expenses are causally related to the work injury.
- Whether the listed expenses are causally connected to the medical conditions upon which the claim of injury is based.
- Whether the requested expenses were authorized by the defendants.

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

12. Whether the claimant was paid four weeks of compensation at \$663.95 per week prior to the hearing.

13. Whether the claimant is entitled to an assessment of costs.

### **FINDINGS OF FACT**

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

Sharon Vogt, the claimant, was 67 years old at the time of hearing. (Testimony). She was widowed in 2019. (Testimony). She graduated from Kennedy High School in Cedar Rapids, Iowa. (Testimony). In 1972, Ms. Vogt received a degree from Kirkwood Community College as a dental assistant. (Testimony). In 1994, Ms. Vogt received a degree from Hamilton Business College in general business. (Testimony). She was an above average student at Kirkwood, and a very good student at Hamilton Business College. (Testimony).

After graduation from Kirkwood, Ms. Vogt worked in dentistry as a dental assistant for 23 years. (Testimony). She left dentistry because she was divorced and needed financial security for her children. (Testimony). She subsequently worked for Heartland Express, West Side Transport, UPS Supply Chain, and Con-Way. (Testimony). Con-Way was later purchased by XPO. (Testimony). Ms. Vogt began working for XPO in August of 2010. (Testimony).

At XPO, Ms. Vogt worked as a freight classification specialist. (Testimony). Ms. Vogt appears to be an exceptional employee for XPO as she recently received a crystal vase and complimentary e-mail from her supervisor. (Testimony). As a freight classification specialist, Ms. Vogt works from 6:00 a.m. to 11:30 a.m. (Testimony). These are her accommodated hours. (Testimony). At the time of her injury, she earned

\$25.76 per hour. (Testimony). When working an eight-hour shift, Ms. Vogt was in the office for two hours per day, and then inspected freight for six hours per day. (Testimony). While she is inspecting freight, she measures freight and compares it to the classification code in order to correctly classify the freight. (Testimony). This allows XPO to charge the proper rate for items shipped through its system. (Testimony). Ms. Vogt also takes photos of the freight to document her decisions. (Testimony). Ms. Vogt has never been disciplined, nor has she ever been given a performance review that was anything less than "exceptional." (Testimony). In 2017, she alleges that her supervisor told her that she saved XPO over 3 million dollars. (Testimony). Ms. Vogt's appeal rate of her decisions is less than one-half of one percent. (Testimony).

On August 8, 2017, Ms. Vogt was walking across the freight dock. (Testimony). She walked between tall bales of fiberboard boxes on either side of her. (Testimony). The stacked boxes were held together by plastic banding straps. (Testimony). One of the bands broke and became stretched flat against the floor. (Testimony). As she walked, the toe of her foot caught the strap on the floor, and she fell forward. (Testimony). When she inspected freight, she carried an iPad. (Testimony). She held the iPad in her right hand, and when she fell, she struck her face on the iPad. (Testimony). After hitting the floor, her head bounced back and struck the floor a second time. (Testimony). She did not lose consciousness when she struck the ground. (Testimony). She immediately noticed her nose bleeding profusely. (Testimony). Two drivers helped her up, and gave her ice for her face. (Testimony).

On August 8, 2017, Ms. Vogt reported to Mercy Medical Center in Cedar Rapids, Iowa. (Joint Exhibit 1:1-4). Ms. Vogt noted that she caught her foot and fell onto her face causing bleeding and a deformity to her nose. (JE 1:1). She denied loss of consciousness and neck pain. (JE 1:1). The provider diagnosed Ms. Vogt with a facial laceration, and a closed fracture of the nasal bone. (JE 1:4). If there was a persistent deformity, additional care may be required. (JE 1:4).

Kevin Carpenter, M.D., examined Ms. Vogt as a new patient on August 14, 2017, for complaints stemming from her August 8, 2017, nasal fracture. (JE 2:9-12). Ms. Vogt related that she was walking along the dock at her place of employment when she fell face first. (JE 2:9). She initially had difficulty breathing through her nose, but since the initial emergency room visit, her breathing improved. (JE 2:9). She rated her facial pain a two out of ten. (JE 2:10). There is also a note of neck pain. (JE 2:10). Dr. Carpenter reviewed a CT scan of Ms. Vogt's face taken during her initial visit on August 8, 2017. (JE 2:11). Dr. Carpenter noted degenerative changes in Ms. Vogt's cervical spine, comminuted nasal bone and nasal septum fractures. (JE 2:11). Dr. Carpenter assessed Ms. Vogt with a deviated nasal septum and closed fracture of the nasal bones. (JE 2:11). He recommended that she undergo a procedure to reset her nasal fracture. (JE 2:11).

On August 18, 2017, Ms. Vogt reported to Virginia Gay Hospital for a preoperative visit with Stephanie Vogeler, PA-C. (JE 3:44-48). Ms. Vogeler noted that Ms. Vogt was scheduled for a closed reduction of a nasal fracture and possible septoplasty on August 22, 2017. (JE 3:44).

Ms. Vogt reported to Mercy Medical Center again on August 22, 2017, for a closed reduction of a nasal fracture with internal and external stabilization. (JE 1:5).

Kevin Carpenter, M.D., diagnosed Ms. Vogt with a nasal fracture with nasal dorsal deviation to the right and septal deviation. (JE 1:5). She tolerated the procedure well and had a nice cosmetic result. (JE 1:5).

On August 29, 2017, Ms. Vogt visited Scott Huebsch, M.D., following a closed reduction of her nasal bone fracture. (JE 2:13-14). She reported doing very well. (JE 2:13). Dr. Huebsch removed her splint and tape and noted that her nose and septum were straight. (JE 2:13). He concluded by recommending that Ms. Vogt follow-up with Dr. Carpenter in “a couple of weeks.” (JE 2:13). Dr. Huebsch allowed Ms. Vogt to return to work on September 5, 2017, with no restrictions. (JE 2:15).

Ms. Vogt returned to Dr. Carpenter’s office on September 19, 2017, with complaints of “constant all over frontal headache” since her surgery. (JE 2:16-18). She reported her pain level as five out of ten. (JE 2:16). She noted experiencing facial pain and pressure on a regular basis even prior to the incident, as she worked in a dusty area. (JE 2:16). Dr. Carpenter found fullness in the left nasal dorsum and a mild saddle nose deformity. (JE 2:17). Dr. Carpenter also saw a 20 percent nasal septum abnormality on the left. (JE 2:17). Dr. Carpenter assessed Ms. Vogt with a deviated nasal septum, acute recurrent maxillary sinusitis, and a closed fracture of the nasal bones. (JE 2:18). Dr. Carpenter suspected sinusitis contributed to her headaches and prescribed an antibiotic and Flonase. (JE 2:18). He also ordered a CT scan and an allergy test. (JE 2:18).

During the weeks after the accident, Ms. Vogt testified that her cognitive skills declined. (Testimony). She would tell people the same thing on multiple occasions and would not remember telling them the information. (Testimony). She also alleged that her balance was poor, and caused her difficulty walking a straight line. (Testimony).

Ms. Vogt visited Calla Jayne H. Kleene, D.C., for treatment and care related to headaches and neck pain following her August 8, 2017, fall on October 2, 2017. (JE 4:64-68). Ms. Vogt reported some headaches along with pain in her neck and left shoulder. (JE 4:64). Dr. Kleene found that Ms. Vogt experienced pain with range of motion in her cervical spine. (JE 4:65). She also had issues with her shoulder range of motion. (JE 4:66). On further examination, Dr. Kleene found that Ms. Vogt had moderate to severe muscle spasms and nerve entrapments on the left side of the neck, posterior neck, and left trapezius. (JE 4:67). Dr. Kleene opined that the doctors overseeing Ms. Vogt’s care “appear to have not referred for proper diagnosis and treatment for what I feel is an undiagnosed concussion from fall on 8/8/17.” (JE 4:67). Dr. Kleene diagnosed Ms. Vogt with a dysfunction of the head region, concussion with loss of consciousness of 30 minutes or less, a dysfunction of the cervical region, and a sprain of cervical ligaments. (JE 4:67). Dr. Kleene also diagnosed Ms. Vogt with other soft tissue issues. (JE 4:67). Dr. Kleene referred Ms. Vogt to a Dr. Fitzgerald for evaluation and management of a suspected concussion. (JE 4:68).

Based upon Dr. Kleene’s referral, Ms. Vogt reported to DeAnn M. Fitzgerald, O.D. on October 12, 2017, for complaints of memory issues, cognitive issues, and headaches after a fall while at work. (JE 5:69-70). Dr. Fitzgerald assessed Ms. Vogt with a concussion with whiplash, cognitive issues and unresolved vision/vestibular. (JE 5:70). Dr. Fitzgerald noted, “needs therapy—CR vision in motion.” (JE 5:70). Ms. Vogt

contacted the workers' compensation insurer requesting payment for visits with Dr. Fitzgerald. (Testimony). They initially paid for visits with Dr. Fitzgerald. (Testimony).

On October 17, 2017, Ms. Vogt had a CT scan of her maxillofacial area based upon the order of Dr. Carpenter. (JE 2:19-20). The CT scan showed clear sinuses and healing fractures of the nasal bone. (JE 2:19).

Ms. Vogt returned to Dr. Carpenter's office on October 24, 2017, to discuss the findings from the CT scan. (JE 2:21-24). She continued to report constant frontal headache since her surgery. (JE 2:21). Dr. Carpenter recommended no additional procedures to Ms. Vogt's sinuses. (JE 2:23). Dr. Carpenter advised Ms. Vogt to follow-up with her primary care provider and see if they recommended she visit a neurologist for a consultation. (JE 2:23).

Ms. Vogt returned to work full duty after Dr. Carpenter released her from care. (Testimony). She worked eight-hour days. (Testimony). Working exacerbated her neck pain and migraines. (Testimony). The main cause of this was the need to look up and bend her head back when inspecting pallets. (Testimony).

On January 18, 2018, Dr. Fitzgerald wrote a letter indicating that she recommended additional treatment as reasonable and appropriate for Ms. Vogt. (JE 5:71). The additional treatment recommended included 12 additional therapy sessions at Vision in Motion for Ms. Vogt's alleged cognitive deficit. (JE 5:71). Ms. Vogt felt that she improved with treatment with Dr. Fitzgerald; however, the insurer refused to authorize additional treatments. (Testimony). Ms. Vogt felt around this time that the employer abandoned her medical care. (Testimony).

Dr. Fitzgerald wrote another letter on February 12, 2018, indicating Ms. Vogt presented to her on February 1, 2018, with concussion and whiplash-like symptoms. (JE 5:72). Ms. Vogt's symptoms included a lack of focus, attention and memory problems, fatigue, and headaches. (JE 5:72). Dr. Fitzgerald noted she treated Ms. Vogt for post-concussion syndrome and headaches. (JE 5:72).

On February 15, 2018, Michelle Terry, claims examiner with Sedgwick, wrote a responsive letter to Dr. Fitzgerald. (JE 5:73). Ms. Terry did not authorize Dr. Fitzgerald's proposed treatment plan, and indicated that XPO would seek an independent medical examination ("IME") to determine compensability and/or responsibility. (JE 5:73).

Ms. Vogt followed up with Ms. Vogeler again on April 27, 2018 for complaints of headache and neck pain. (JE 3:49-52). Ms. Vogt requested a referral to a neurologist for ongoing headaches and left-sided neck pain after a fall on concrete on August 8, 2017. (JE 3:49). A provider told Ms. Vogt that she had a herniated disk in her neck. (JE 3:49). Ms. Vogt reported constant pain radiating down her left arm. (JE 3:49). On examination, Ms. Vogeler found pain over the paraspinal muscles and cervical spine. (JE 3:51). Ms. Vogeler diagnosed Ms. Vogt with intractable chronic posttraumatic headache and left cervical radiculopathy. (JE 3:52). Ms. Vogeler referred her to a neurologist and ordered an MRI. (JE 3:52).

On April 30, 2018, Ms. Vogt reported to RCI for a CT scan of her head due to intractable chronic posttraumatic headache. (JE 6:74). Theodore Donta, M.D.

interpreted the results of the CT scan. (JE 6:74). Dr. Donta noted a few patchy hypodensities in the cerebral white matter bilaterally. (JE 6:74). Dr. Donta noted these are “most commonly associated with chronic small vessel ischemic disease.” (JE 6:74). Dr. Donta’s final impression was “[s]uspected chronic white matter change.” (JE 6:74).

Ms. Vogt presented to Cedar Rapids Neurologists, P.C., and Winthrop S. Risk, II, M.D., on June 13, 2018, for posttraumatic headaches and neck pain. (JE 7:76-78). She reported to Dr. Risk that she remembered her head bouncing back from the impact of the concrete. (JE 7:77). This is in contradiction to Ms. Vogt’s report to Dr. Fitzgerald that she had a period of unconsciousness. (JE 7:77). Her headache was in the back of her head and was associated with a pounding head pain, photophobia, phonophobia, and nausea. (JE 7:77). Therapy at Vision in Motion produced limited results. (JE 7:77). Ms. Vogt noted continuous neck pain for the last eight months that radiated into her left upper extremity. (JE 7:77). On physical examination, Dr. Risk found tenderness to palpation of Ms. Vogt’s cervical paraspinal musculature, as well as her upper thoracic paraspinal musculature. (JE 7:78). Dr. Risk concluded that Ms. Vogt suffered a concussion from a work incident on August 8, 2017. (JE 7:78). He concluded that she experienced chronic headaches attributable to her head injury. (JE 7:78). Dr. Risk recommended Botox injections and provided a prescription for sumatriptan. (JE 7:78). With regard to her neck, Dr. Risk diagnosed her with cervical radiculopathy affecting the left arm. (JE 7:78). Dr. Risk indicated that the diagnosis to her cervical spine is related to chronic degenerative changes in her neck exacerbated by her fall. (JE 7:78).

On June 19, 2018, Ms. Vogt followed up with Mercy Medical Center for a cervical MRI. (JE 1:6). Dr. Donta interpreted the MRI. (JE 1:6). Dr. Donta found multilevel degenerative changes in the cervical spine with severe and moderate foraminal stenosis and moderate and mild spinal canal stenosis. (JE 1:6).

On August 21, 2018, Loren Mouw, M.D. examined Ms. Vogt for complaints of neck and left arm weakness and paresthesias. (JE 8:79-82). Her neck pain was five out of ten. (JE 8:79). Her left upper extremity weakness and pain had been present since August 8, 2017. (JE 8:79). Ms. Vogt noted tripping and falling at work when she caught her toe on a banding strap and fell on her face. (JE 8:79). Dr. Mouw reviewed radiographic reports including the MRI of Ms. Vogt’s cervical spine. (JE 8:79). Dr. Mouw found degenerative disc disease at C3-4, C4-5, C5-6, and C6-7. (JE 8:79). Dr. Mouw assessed Ms. Vogt with cervicgia, cervical spondylosis without myelopathy, and cervical radiculopathy. (JE 8:82). Dr. Mouw recommended a pain management consultation due to C6 or C7 radiculopathy on the left. (JE 8:82). Dr. Mouw noted that Ms. Vogt’s symptoms began when she fell at work. (JE 8:82).

Ms. Vogt visited with Ms. Vogeler at Virginia Gay Hospital again on October 29, 2018. (JE 3:53-56). Her left shoulder pain worsened along with her neck pain. (JE 3:53). She undertook physical therapy, which worsened her pain. (JE 3:53). She attempted one round of epidural injections as well with no relief. (JE 3:53). Ms. Vogeler diagnosed Ms. Vogt with chronic left shoulder pain and ordered an x-ray evaluation and an MRI if the x-rays are negative. (JE 3:55).

Ms. Vogt had an MRI of her left shoulder at RCI on November 6, 2018. (JE 6:75). Michael S. Hierl, M.D. interpreted the MRI. (JE 6:75). Dr. Hierl found low-grade bursal-sided tearing/fraying on the background of mild tendinopathy, moderate

osteoarthritis with prominent inferior osteophytes, and trace subacromial and subdeltoid bursa which may relate to mild bursitis. (JE 6:75).

On November 29, 2018, Ms. Vogt had her first visit with James Pape, M.D. for left shoulder complaints. (JE 2:25-27). She checked boxes indicating pain, numbness, and weakness to the left shoulder for the prior 15 months. (JE 2:25). The remainder of the handwritten notes were illegible. (JE 2:25). Ms. Vogt reported to Dr. Pape that she fell at work 15 months prior, landing hard on her face and shoulder. (JE 2:26). Ms. Vogt told Dr. Pape that she had no difficulties with her left shoulder prior to that injury. (JE 2:26). She also reported pain to her neck and cervical trapezius. (JE 2:26). Dr. Pape reviewed previous imaging studies and found a partial thickness bursal-sided tearing of the rotator cuff. (JE 2:26). Ms. Vogt told Dr. Pape that she did not have similar problems with her right shoulder. (JE 2:26). Upon physical examination, Dr. Pape found significant tenderness with impingement testing. (JE 2:26). Dr. Pape opined that the results of the examination were consistent with underlying rotator cuff tendinopathy with a partial thickness bursal-sided tear. (JE 2:27).

On March 21, 2019, Ms. Vogt returned to Virginia Gay Hospital where Ms. Vogeler examined her for continued complaints of neck pain, headaches, and occasional arm numbness. (JE 3:57-61). Ms. Vogt indicated that her headaches wrap around her head and are worse on the left than the right. (JE 3:57). Previous epidural injections provided no relief. (JE 3:57). Dr. Kline told her to return for a fusion, but Dr. Mouw indicated that he would not perform a fusion. (JE 3:57). Ms. Vogeler found tightness over the upper back and left trapezius, along with tenderness to palpation over the paracervical spinal muscles. (JE 3:60). Ms. Vogeler diagnosed Ms. Vogt with an intractable migraine without aura and muscle spasm of the left shoulder area. (JE 3:60). She referred Ms. Vogt to Marc Hines, M.D. in Waterloo for further treatment and ordered a head CT scan along with EMG if no improvement. (JE 3:60).

Ms. Vogt e-mailed her supervisor, Dawn Jesko, on March 26, 2019, indicating that she wished to reduce her work hours by one to one and a half hours per day for the month of April. (Claimant's Exhibit 4:20). Ms. Vogt indicated that she required more rest and relaxation in order to obtain better sleep. (CE 4:20).

On April 8, 2019, Ms. Vogt reported to David H. Segal, M.D., a board certified neurosurgeon for an IME. (CE 6:22-53). Dr. Segal's report dated April 17, 2019, contains a lengthy summary of Ms. Vogt's care from August 8, 2017 through early 2019. (CE 6:22-37). Upon examination, Ms. Vogt reported neck pain of 3 out of 10 and left shoulder pain of 3 out of 10. (CE 6:38). Her pain at the highest was 10-plus out of 10. (CE 6:38). Her pain severity depended on her activities. (CE 6:38). She described pain as radiating from her neck into her left shoulder. (CE 6:38). Various activities aggravated her pain to her neck and left shoulder. (CE 6:38). Rest, medication, lying supine, and cradling her left arm improved her pain. (CE 6:38). Ms. Vogt also reported decreased mobility, shoulder joint pain, loss of balance, numbness and tingling in her left arm to the index and middle finger, muscle spasms, tenderness, and weakness in the neck and left arm. (CE 6:38). Ms. Vogt indicated to Dr. Segal that chiropractic care helped slightly, but had no lasting effects. (CE 6:38). Additionally, physical therapy worsened her pain, while injections did not help. (CE 6:38). Her headaches were moderate to severe, and worsening. (CE 6:39). She reported that her headaches started in her neck, moved up the back of her head and enveloped her entire head. (CE

6:39). Her headache pain was worse on the left side in the face and jaw area. (CE 6:39). Her reported symptoms were positive for a number of post-concussive symptoms. (CE 6:39). Ms. Vogt told Dr. Segal that she had a severe headache at least three times per week. (CE 6:40). Her pain interfered with her sleep several nights per week. (CE 6:41).

Dr. Segal opined that Ms. Vogt suffered a “very severe injury” upon her fall at XPO on August 8, 2017. (CE 6:42). Dr. Segal noted that Ms. Vogt suffered a concussion with altered sensorium and post-concussive symptoms that continue, as well as a neck injury “manifesting as cervical radiculopathy, cervical facet arthropathy,” and a shoulder injury. (CE 6:42). Dr. Segal explained that the initial focus of medical providers appeared to be the broken nose, which did not indicate that the other symptoms were not present. (CE 6:43). Dr. Segal stated, “there is clear and sufficient documentation in the medical records that attribute all these symptoms to the work injury . . . .” (CE 6:43). Dr. Segal diagnosed Ms. Vogt with the following issues as directly and causally related to the August 8, 2017, work injury: displaced comminuted nasal fracture, concussion, post-concussive syndrome, post-concussive headaches and traumatic migraine, mild traumatic brain injury, cervical radiculopathy, cervical facet syndrome, left shoulder rotator cuff tear and injury, nasal fracture repair with residual symptomatology, and aggravation of pre-existing cervical and shoulder degenerative pathology. (CE 6:47). Dr. Segal recommended an MRI, as well, due to the results of the CT scan of the brain. (CE 6:47).

Based upon Dr. Segal’s examination and interpretation of the results, and utilizing the AMA Guides to the Evaluation of Impairment, Fifth Edition, Dr. Segal calculated Ms. Vogt’s impairment ratings as follows:

- Post-concussive headaches and migraines – 17 percent impairment of the whole person
- Cervical spine – 18 percent impairment of the whole person
- Left shoulder – 7 percent impairment of the whole person
- Nasal fracture – 3 percent impairment of the whole person

(CE 6:49-51). Based upon the combined values chart on pages 604-605 of the Guides, Dr. Segal calculated that Ms. Vogt sustained a 39 percent impairment of the whole person. (CE 6:49-51).

Dr. Segal recommended that Ms. Vogt undergo an additional MRI of the brain with diffusion tensor imaging, and a repeat cervical MRI. (CE 6:51). He also recommended additional pain medication, cognitive therapy, physical therapy, epidural steroid injections, facet injections, radiofrequency ablation, and potentially a cervical fusion. (CE 6:51). Finally, Dr. Segal recommended shoulder injections and a shoulder arthroscopy if her orthopedic doctor recommended it. (CE 6:52).

Dr. Segal provided a series of work restrictions, and noted that Ms. Vogt’s restrictions could change depending on additional treatment that Ms. Vogt may receive. (CE 6:52). Dr. Segal noted Ms. Vogt’s complaints that her work activities make her symptoms worse, or inhibit the prospect of any improvement she experiences otherwise. (CE 6:52). Dr. Segal limited Ms. Vogt’s work hours to five hours per day, not to exceed three hours per day on the loading dock. (CE 6:52). Dr. Segal also imposed

a requirement that Ms. Vogt rest at least every 30 minutes and/or take longer breaks. (CE 6:52). Dr. Segal also limited Ms. Vogt's lifting with her left arm to occasionally 1 to 5 pounds and rarely 6 to 10 pounds. (CE 6:52). Ms. Vogt could occasionally reach up. (CE 6:52). Ms. Vogt could perform activities involving movement of her neck and shoulder to her own tolerance. (CE 6:52). Dr. Segal placed no restrictions on walking, standing, sitting, or driving. (CE 6:52).

Ms. Vogt followed up with Dr. Pape on April 16, 2019, for ongoing left shoulder complaints. (JE 2:28-29). Dr. Pape opined that Ms. Vogt sustained a contusive injury to her left shoulder after falling at work. (JE 2:28). She also reported ongoing difficulties with her neck. (JE 2:28). Ms. Vogt reported 50 percent improvement due to a subacromial injection four to six weeks prior. (JE 2:28). Dr. Pape again observed significant left shoulder discomfort despite conservative treatment. (JE 2:28). Between previous imaging studies and Dr. Pape's examination, he opined that it was possible that Ms. Vogt could have a full thickness rotator cuff tear. (JE 2:29). Ms. Vogt indicated to Dr. Pape that she wanted to proceed with a left shoulder arthroscopy. (JE 2:29).

On May 13, 2019, Ms. Vogt had lab testing completed for her surgery. (JE 2:30).

On May 21, 2019, Dr. Hines examined Ms. Vogt. (JE 9:83-84). Dr. Hines noted a marked decrease in lateral flexion of Ms. Vogt's neck. (JE 9:83). Dr. Hines assessed Ms. Vogt with posttraumatic headaches with mainly cervicogenic and migrainous features, left rotator cuff and shoulder injury, a possible closed head injury, a history of insomnia worsened by her headache and neck pain, numbness of the left upper extremity, and probable occipital neuralgia. (JE 9:84). Dr. Hines recommended an EMG of the left upper extremity after recovery from her left shoulder surgery and follow up on trigger point injections. (JE 9:84).

Ms. Vogt followed up with Dr. Hines on June 5, 2019, for continued complaints of neck pain and migraines. (JE 9:85-88). She told Dr. Hines that her headaches never went away. (JE 9:85). Dr. Hines reviewed her MRI and found spinal stenosis at three levels in her cervical spine. (JE 9:86). She noted that her headache began posteriorly and traveled to become a throbbing headache with increased movement. (JE 9:86). Headache development was accompanied by a "swishing sound" depending on severity. (JE 9:86). Dr. Hines diagnosed Ms. Vogt with bilateral occipital neuralgia, cervicgia, a closed head injury, and intractable chronic posttraumatic migraine. (JE 9:88). He prescribed her Topamax, Zomig, and Imitrex. (JE 9:88).

Ms. Vogt returned to Mercy Medical Center on June 7, 2019. (JE 1:7-8). Dr. Pape performed a left shoulder arthroscopy with debridement of a superior labral tear as well as minimal chondral wear of the humeral head, a left arthroscopic acromioplasty and bursectomy, and a left shoulder mini open rotator cuff repair. (JE 1:7). Dr. Pape noted the preoperative diagnosis of a left rotator cuff tear. (JE 1:7). Postoperatively, Dr. Pape's diagnoses were a full-thickness tear of the left rotator cuff and a degenerative tear of the left shoulder superior labrum with minimal chondral fragmentation of the humeral head. (JE 1:7).

Ms. Vogt reported to the offices of Peter G. Matos, D.O., M.P.H., F.A.C.O.E.M., F.A.C.P.M., C.I.M.E., in Bettendorf, Iowa, for an IME on July 12, 2019. (Defendants' Exhibit A:1-18). Dr. Matos reviewed extensive medical records and examined the

claimant prior to drafting a report in response to a request from defendants' attorney. (DE A:1-18). Ms. Vogt reported tripping and falling face first on concrete. (DE A:3). Ms. Vogt told Dr. Matos that her headache pain ranged from three to four out of ten to ten out of ten. (DE A:4). Ms. Vogt also complained to Dr. Matos about neck pain radiating down her left side to three fingers and the side of her face. (DE A:4). She claimed occasional short-term memory loss from the August of 2017 injury. (DE A:4). Ms. Vogt's left arm remained in a sling due to her shoulder surgery. (DE A:4). Upon examination, Dr. Matos found tenderness to palpation at C2-4. (DE A:5).

Dr. Matos opined that Ms. Vogt sustained a deviated nasal septum, closed fracture of the nasal bone, and concussion without loss of consciousness as a result of her work injury. (DE A:6). Dr. Matos indicated concern that there was no description in any record of Ms. Vogt falling with her left arm or hand outstretched. (DE A:6). Further, he indicated that she did not complain of left shoulder problems until October of 2018. (DE A:6). Dr. Matos opined that the left shoulder issues, as seen on the November 6, 2018, MRI were due to her natural aging process and degeneration over time, and not any acute issues from the work injury. (DE A:6). Dr. Matos also opined that Ms. Vogt's neck issues were consistent with degenerative disc disease and natural aging, and thus not related to the work injury. (DE A:6). Dr. Matos assigned a 3 percent whole person impairment rating to the whole person for post-concussion syndrome. (DE A:6). He assigned a 3 percent whole person impairment rating for Ms. Vogt's ongoing headaches. (DE A:6). He assigned an additional 3 percent whole person impairment rating for Ms. Vogt's nasal fracture. (DE A:6). Dr. Matos recommended that Ms. Vogt continue seeking care with a neurologist for ongoing post-concussive syndrome. (DE A:6). Dr. Matos assigned no permanent restrictions related to the work injury. (DE A:6).

On July 23, 2019, Ms. Vogt had a six-week postoperative examination with Dr. Pape. (JE 2:31-32). Overall, Ms. Vogt felt that her shoulder improved. (JE 2:31). She reported some discomfort wearing her sling, but progressed with therapy for passive range of motion. (JE 2:31). Dr. Pape recommended that the claimant continue with therapy. (JE 2:31).

Ms. Vogt had a ten-week postoperative examination with Dr. Pape on August 27, 2019. (JE 2:33). Ms. Vogt noted stiffness at the end of her range of motion. (JE 2:33). Her shoulder improved overall, and she progressed with therapy. (JE 2:33). Dr. Pape felt that Ms. Vogt was doing well and requested that she continue her therapy program. (JE 2:33). Dr. Pape kept Ms. Vogt off work through her next appointment. (JE 2:34).

On October 9, 2019, Ms. Vogt visited James Huber, D.O. for chronic neck and shoulder pain. (JE 2:35-37). Ms. Vogt told Dr. Huber that she had ongoing left to right neck pain that progressed into severe headaches in a hood-like fashion. (JE 2:35). Ms. Vogt received two epidural steroid injections via interlaminar approach which were ineffective. (JE 2:35). Neck or head movement aggravated her pain and headaches. (JE 2:35). She reported intermittent numbness to the first three digits on her left hand two to three times per week. (JE 2:35). Dr. Huber reviewed an MRI which showed multilevel degeneration and mild to moderate foraminal stenosis at multiple levels along with moderate spinal canal stenosis. (JE 2:35). Dr. Huber diagnosed Ms. Vogt with bilateral occipital neuralgia, cervical spondylosis, and myalgia. (JE 2:36). Dr. Huber recommended a third occipital nerve block. (JE 2:36). If the nerve block was

unsuccessful, Dr. Huber recommended proceeding with medial branch blocks of the upper cervical spine. (JE 2:36).

Ms. Vogt followed up with Dr. Pape on October 29, 2019, for a four-month follow-up to her left shoulder arthroscopy. (JE 2:38-39). Her therapy continued to progress. (JE 2:38). Her injections were also noted. (JE 2:38). Dr. Pape opined that Ms. Vogt's left shoulder continued to improve. (JE 2:38). Dr. Pape further opined that Ms. Vogt could return to work on a restricted duty basis on October 30, 2019. (JE 2:38-39). Ms. Vogt's restrictions included no working with her left arm. (JE 2:39).

On December 10, 2019, Dr. Pape examined Ms. Vogt. (JE 2:41-42). Ms. Vogt told Dr. Pape that she was doing well and was undergoing cervical and occipital injections. (JE 2:41). Dr. Pape opined that Ms. Vogt did well post-surgery and that it would be reasonable for her to return to regular duty work. (JE 2:41). Dr. Pape allowed Ms. Vogt to return to work with no restrictions effective December 10, 2019. (JE 2:43).

Ms. Vogeler issued work restrictions for Ms. Vogt on December 16, 2019. (JE 3:62). The restrictions allowed Ms. Vogt to work only six hours per day from December 16, 2019, to January 16, 2020. (JE 3:62). Ms. Vogeler renewed these restrictions on January 13, 2020, allowing Ms. Vogeler to only work five to six hours per day starting on January 16, 2020, through August 30, 2020. (JE 3:63). XPO accommodated these restrictions. (Testimony). She continued to work for the same wage but worked less hours. (Testimony). As acknowledgement of these restrictions and evidence of accommodation, Ms. Jesko e-mailed Ms. Vogt on December 18, 2019, indicating that Ms. Vogt should follow the direction of her doctors and work only six hours per day. (CE 5:21).

On June 1, 2020, Dr. Segal issued a letter including a records review of supplemental medical records, the diary of Ms. Vogt, and the IME of Dr. Matos. (CE 6:57-79). Ms. Vogt spoke to Dr. Segal on the phone, and indicated that all areas of her injury remained unchanged from her previous IME. (CE 6:66). Ms. Vogt reported constant daily headaches, and that she suffered a full-blown migraine seven to eight times per month. (CE 6:66). Since her previous exam, Ms. Vogt noted that a "snowy, swishing sound" became more prominent in the back of her neck when her headache pain increases. (CE 6:66). Her constant neck pain continued. (CE 6:66). Previous medial nerve blocks and nerve ablations were not helpful for her neck pain. (CE 6:66). Since her rotator cuff surgery, her left shoulder improved. (CE 6:66-67). Finally, Ms. Vogt reported that her memory and thought processes had not improved. (CE 6:67).

Ms. Vogt reported that she was working within the restrictions of five to six hours per day. (CE 6:67). Working remained very difficult for Ms. Vogt. (CE 6:67). Working on the dock triggers her migraines. (CE 6:67). She felt that she was in too much pain to work at all. (CE 6:67). Dr. Segal affirmed the opinions and conclusions in his letter, and opined, ". . . it is my medical opinion that she should not be working this job or potentially any job at this time due to the consistent severe, intractable pain levels that she experiences." (CE 6:67-68). If she continued to work, Dr. Segal recommended increased restrictions. (CE 6:68).

Dr. Segal then took the time to criticize or attempt to rebut Dr. Matos' IME opinions. (CE 6:69-73). Dr. Segal opined that in evaluating the medical records as a

whole, it is not reasonable to state that Ms. Vogt's shoulder injury is unrelated to the work incident because she did not seek specific medical care for the shoulder until sometime after the work incident. (CE 6:69). Dr. Segal noted that he did not believe that Dr. Matos accurately calculated the impairment rating because he omitted areas of injury and impairment. (CE 6:70). Dr. Segal reiterated his belief that Ms. Vogt should not be working at her job. (CE 6:74). Dr. Segal recommended work restrictions of three hours per day with only one hour at a time on the dock. (CE 6:74). Ms. Vogt should avoid any lifting or exertion with her left arm. (CE 6:74). Ms. Vogt should take a break every half hour. (CE 6:75). Ms. Vogt should also be given the ability to leave her work setting at any time when having a migraine. (CE 6:75). Dr. Segal's impairment rating remained unchanged. (CE 6:76-78).

On June 24, 2020, Ms. Vogt reported to Select Physical Therapy in Iowa City, Iowa, where Daniel Fog, DPT, completed a physical capacities evaluation. (JE 10:89-95). Mr. Fog concluded that Ms. Vogt demonstrated an ability to work within a medium category with a maximal occasional lift of 61 pounds. (JE 10:89). She had limitation in overhead lifting including no lifting over ten pounds on occasion with her left arm. (JE 10:89). Mr. Fog also opined that Ms. Vogt demonstrated limitations in balance. (JE 10:89). Mr. Fog concluded that Ms. Vogt's headaches caused her to fall into a category of severe impact based upon a Headache Impaction Tests survey. (JE 10:89). Interestingly, Mr. Fog noted, "[d]espite testing in the medium category, a follow up phone evaluation provides evidence that it is very unlikely that Mrs. Vogt would be able to work consistently at this level." (JE 10:89). Mr. Fog came to this conclusion because following the evaluation, Ms. Vogt had significant pain and issues. (JE 10:90). Mr. Fog noted that Ms. Vogt complained of significant pain after attempting to work four to five hours at her employer. (JE 10:90). Mr. Fog noted that this was consistent with Dr. Segal's findings. (JE 10:90).

Mr. Fog found issues with Ms. Vogt's lifting from the floor to her waist, overhead, and with both arms. (JE 10:92-93). Mr. Fog concluded a walking test after 12 minutes because Ms. Vogt demonstrated frequent self-corrected gait deviations which increased with frequency and magnitude. (JE 10:93). She was able to sit with no issues. (JE 10:93). Ms. Vogt could frequently climb stairs and kneel, occasionally balance, and never crouch. (JE 10:93-94). Ms. Vogt could frequently reach overhead and reach forward. (JE 10:94). She reported for work the day after the examination, but was unable to work at her normal speed. (JE 10:95). She indicated that she had difficulty at work using an iPad due to left shoulder pain. (JE 10:95).

On July 22, 2020, Dr. Segal issued yet another addendum to his IME report by way of a letter to claimant's counsel. (CE 6:80-83). Dr. Segal reviewed the report of Mr. Fog. (CE 6:80-81). Dr. Segal reaffirmed Ms. Vogt's work restrictions as listed in his June 1, 2020, report. (CE 6:80).

In a letter dated July 27, 2020, Barbara Laughlin, M.A., of Laughlin Management, issued a vocational assessment. (CE 7:91-104). Ms. Laughlin reviewed a number of medical records and employment records, including the IMEs of Dr. Segal. (CE 7:91-95). Interestingly, Ms. Laughlin failed to review or was not provided with the report of Dr. Matos. Ms. Laughlin also noted considering Ms. Vogt's age, education, past work experience, transferable skills, site of injury, work restrictions, and an ability to engage in employment for which she was fitted. (CE 7:91). Ms. Laughlin reviewed the positions

that Ms. Vogt worked at XPO, Old Dominion, and UPS. (CE 7:96-97). Except for one position, all of the positions were deemed semi-skilled or skilled and sedentary exertional level. (CE 7:96-97). Ms. Vogt reported sleep issues, balance impairment, difficulty with housework and laundry, increased irritability, concern regarding her memory, and socialization issues. (CE 7:97-98). Ms. Laughlin noted that Ms. Vogt is considered an “older worker.” (CE 7:98). Ms. Laughlin utilized the OASYS computer program in order to formulate a transferable skills analysis. (CE 7:98). Despite not mentioning reviewing Dr. Matos’ IME report, Ms. Laughlin now mentions that he offered no restrictions. (CE 7:100). Ms. Laughlin goes on to utilize one scenario with only the strictest restrictions of Dr. Segal. (CE 7:100). Based upon those restrictions, Ms. Laughlin determined that Ms. Vogt had a 99.2 percent occupational loss of all semi-skilled and skilled occupation in the closest match occupations, and a 99.3 percent loss of all semi-skilled and skilled occupations deemed “good match occupations.” (CE 7:100). Ms. Laughlin agrees that Dr. Segal’s restrictions are significant limitations on Ms. Vogt’s ability to work. (CE 7:100). Despite not performing any labor market research, Ms. Laughlin took it upon herself to opine that Ms. Vogt “is not employable outside of her employer of injury who has a vested financial interest.” (CE 7:100). Ms. Laughlin concludes, “[i]t is my opinion Ms. Vogt is not employable.” (CE 7:101). Ms. Laughlin further concluded that based upon the significant restrictions imposed by Dr. Segal, “I do not believe there is any other viable employment available to her.” (CE 7:101).

James Carroll, M.Ed., C.R.C., C.C.M., A.B.D.A., of Ohara, LLC, conducted a vocational assessment of Ms. Vogt on August 24, 2020, at the request of counsel for the defendants. (DE B:1-12). Mr. Carroll reviewed a plethora of medical records in preparing his report. (DE B:1-6). Mr. Carroll cited to Mr. Fog’s functional capacity evaluation, and his determination that Ms. Vogt was capable of working at the medium physical demand level based on the Dictionary of Occupational Titles. (DE B:8-9). In reviewing Ms. Vogt’s work history, Mr. Carroll opined that she worked in semi-skilled to skilled employment with physical demands that ranged from sedentary to medium. (DE B:10). Mr. Carroll completed a transferable skills analysis for Ms. Vogt based upon her work background and the Cedar Rapids, Iowa, area labor market. (DE B:10). Based upon that analysis, Mr. Carroll identified pre-injury access to employment of 268 occupations, which included 8,903 jobs. (DE B:10). Mr. Carroll considered the multiple medical opinions as to Ms. Vogt’s physical capabilities including those of Dr. Matos, the FCE, and Dr. Segal. (DE B:10). These ranged from no restrictions to medium duty to sedentary work, respectively. (DE B:10). Based upon Dr. Segal’s restrictions, which were the most restrictive, Mr. Carroll opined that Ms. Vogt experienced a three percent loss of access to employment and a 38 percent loss of earning capacity. (DE B:10). Based upon Dr. Matos’ opinion of no restrictions, Mr. Carroll found a zero percent loss of access to employment and a zero percent loss of earning capacity. (DE B:10). Mr. Carroll noted that Mr. Fog’s opinion changed based upon Ms. Vogt’s subjective complaints the day after a valid FCE. (DE B:11). Mr. Carroll noted, “I have been in the Vocational Rehabilitation field for more than 40 years. I have never seen where a supposedly valid and consistent FCE has been changed based on subjective complaints of the patient.” (DE B:11). Mr. Carroll opined, “[i]f Ms. Vogt wasn’t physically capable of doing medium level activity the next day, then the FCE couldn’t have been valid to begin with.” (DE B:11). Utilizing the valid results of the FCE, Ms. Vogt experienced a two percent loss of access to employment, and a zero percent loss

of earning capacity. (DE B:11). Finally, Mr. Carroll reviewed the vocational assessment prepared by Barbara Laughlin of Laughlin Management. Based upon Ms. Vogt's work history and physical limitations, even those as stringent as Dr. Segal's, Mr. Carroll could not replicate the numbers found by Ms. Laughlin utilizing the OASYS computer program. (DE B:11). Mr. Carroll noted further, "[w]hen completing a Transferable Skills Analysis using primarily Sedentary occupations to other Sedentary occupations, there is no way you can end up with a 99% Loss of Access to Employment. It cannot be done." (DE B:11).

Dr. Matos completed an addendum to his IME on August 30, 2020, after reviewing a functional capacity evaluation and Dr. Segal's addendum. (DE A:19-20). Dr. Matos noted that his opinion remained unchanged. (DE A:19). Dr. Matos recommended utilizing a standardized, evidence-based approach for evaluation of a traumatic brain injury. (DE A:19). Based upon that, Dr. Matos found Ms. Vogt's injury to initially be classified as a "mild traumatic brain injury." (DE A:19). Dr. Matos opined that Ms. Vogt's ongoing symptoms "could be affected by secondary gain issues" as most of her symptoms were self-reported and unverifiable. (DE A:20). Dr. Matos reiterated that the June 2018 cervical spine MRI showed results consistent with degenerative disc disease and natural aging, which were unrelated to the work injury. (DE A:20).

Again, Dr. Segal issued a letter attempting to dispute the opinions of Dr. Matos' August 30, 2020, IME addendum. (CE 6:84-85).

On September 15, 2020, Ms. Laughlin issued a report purporting to rebut Mr. Carroll's report. (CE 7:105-109). Ms. Laughlin was unable to replicate the results of Mr. Carroll's transferable skills analysis, and in attempting to do so, found a 15.4 percent occupational loss of all semi-skilled and skilled occupations in the "closest match" occupations, and a 21.1 percent occupational loss of all semi-skilled and skilled occupations in the "good match" occupations. (CE 7:106). Ms. Laughlin opined that Mr. Carroll did not account for all of Ms. Vogt's limitations, including her concussive symptoms. (CE 7:106). Ms. Laughlin alleged that she utilized those factors in her report. (CE 7:106). Overall, Ms. Laughlin felt that Mr. Carroll's report was deficient.

On September 18, 2020, the parties deposed Ms. Vogt's coworker at XPO, Alan Stolba. (CE 3:14-19). Mr. Stolba testified that he interacted with Ms. Vogt for about five hours per week. (CE 3:17). Since the accident, Mr. Stolba observed Ms. Vogt walking in an overly slow, deliberate, almost robotic fashion since her work injury. (CE 3:17). She would not mention her pain to anyone unless she was asked how she felt. (CE 3:18).

Ms. Vogt testified that she is never without a headache. (Testimony). She also experiences a "loud swishy sound" in her head. (Testimony). As she works, her pain level increases throughout the day. (Testimony). After concluding her shift at XPO, she returns home and cannot do anything further around her house. (Testimony). She continues to have problems sleeping and sleeps between two and six hours per night due to her ongoing pain complaints. (Testimony). She refuses to take headache medication for her ongoing headaches because the medications cause her to become dizzy. (Testimony). Since her injury, Ms. Vogt indicated that she is no longer able to perform as many inspections of freight as she did prior to the injury. (Testimony). Ms.

Vogt testified that she is planning on retiring due to the impact of cold weather on her nasal or facial pain. (Testimony). Also, wearing extra layers causes her neck pain and headaches to increase. (Testimony). She testified that she planned on retiring due to her pain. (Testimony). Ms. Vogt kept a diary or log of her daily struggles or pain that she alleges are the result of the work incident. (Testimony; CE 2:2-13). She notes a significant history of migraines and other pain. (Testimony; CE 2:2-13). There are very few “good days” noted in Ms. Vogt’s pain diary. (CE 2:2-13).

Ms. Vogt earned \$25.76 per hour at the time of her injury. (Testimony). She now makes \$28.15 per hour. (Testimony). She has received a raise on three occasions since the work incident. (Testimony).

### **CONCLUSIONS OF LAW**

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6)(e).

#### **Permanent and Total Disability / Odd-Lot**

Ms. Vogt alleges that she is permanently and totally disabled under the statute and common law odd-lot doctrine. The defendants reject this assertion.

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

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

In Guyton v. Irving Jensen, Co., the Iowa Supreme Court formally adopted the “odd-lot doctrine.” 373 N.W.2d 101 (Iowa 1985). 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 provide evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of fact finds the worker does fall in the odd-lot category, then 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.

Ms. Vogt is not permanently and totally disabled based upon a statutory theory. While Dr. Segal and Ms. Laughlin assess Ms. Vogt as unable to work, even in her current position, I do not find their opinions persuasive on this particular issue. Ms. Vogt sustained a permanent disability to several areas of her body, which will be discussed below in more detail. Ms. Vogt underwent a valid FCE with Mr. Fog, which placed her in the medium category of employment. While Mr. Fog later attempted to walk this back based upon subjective pain complaints, the objective results of the FCE speak for themselves. Additionally, Ms. Vogt continues to work for XPO. While the undersigned empathizes that she is in pain, and documents this subjective pain, she remains employed and working. She also continues to receive raises and exemplary performance reviews.

With regard to vocational assessments, I find Mr. Carroll’s more persuasive. Mr. Carroll reviewed all of the restrictions, including those of Dr. Segal, Dr. Matos, and Mr. Fog’s valid FCE. Based upon reviewing those documents, Mr. Carroll found that based upon Dr. Segal’s restrictions, Ms. Vogt experienced a three percent loss of access to employment, and a 38 percent loss of earning capacity. Mr. Carroll found that, based upon Dr. Matos’ IME results, Ms. Vogt experienced a zero percent loss of access to employment and a zero percent loss of earning capacity. Finally, Mr. Carroll found a two percent loss of access to employment and a zero percent loss of earning capacity based upon the valid FCE results. Ms. Laughlin lost credibility when she criticized Mr. Carroll for making the statement, based upon his 40 years of experience, that he never saw an FCE rescinded due to subjective complaints subsequent to the examination. Ms. Laughlin proceeded to opine that she had seen previously valid FCE’s rescinded due to subjective pain complaints. Additionally, Ms. Laughlin did not run an analysis utilizing Dr. Matos’ opinions, nor did she run an analysis utilizing the results of the FCE. Finally, Mr. Carroll noted that he utilized the OASYS program to run an analysis of the

information. This is the same program used by Ms. Laughlin. Mr. Carroll could not duplicate the results of Ms. Laughlin.

Based upon the results of the vocational assessments as discussed above, I also do not find Ms. Vogt to be permanently and totally disabled pursuant to the odd-lot doctrine. I find that Ms. Vogt failed to produce substantial evidence that she is not employable in the competitive labor market. Ms. Vogt is 67 years old and has a general business degree. She appears intelligent and is an exemplary worker. The claimant may argue that no longer being able to work comfortably at her current position with XPO and her inability to work in a physically demanding position is proof of her being unemployable in the competitive labor market. However, Ms. Vogt's employment history prior to XPO is largely in sedentary employment in the customer service field for various transportation employers. Ms. Vogt receives exemplary reviews from XPO and has experience that would avail her of positions in the competitive labor market based upon the valid FCE results of Mr. Fog and the report of Mr. Carroll.

### **Temporary and Permanent Disability**

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

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

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

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

Iowa Code 85.33(1) provides:

...the employer shall pay to an employee for injury producing temporary total disability weekly compensation benefits, as provided in section 85.32, until the employee has returned to work or is medically capable of returning to employment substantially similar to the first employment in which the employee was engaged at the time of injury, whichever occurs first.

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

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

An employee has a temporary partial disability when, because of the employee's medical condition, "it is medically indicated that the employee is not capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury but is able to perform other work consistent with the employee's disability." Iowa Code 85.33(2). Temporary partial disability benefits are payable in lieu of temporary total disability and healing period benefits, due to the reduction in earning ability as a result of the employee's temporary partial disability, and "shall not be considered benefits payable to an employee, upon termination of temporary partial or temporary total disability, the healing period, or permanent partial disability because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury." Id.

Additionally, Iowa Code 85.33(3) provides in pertinent part:

If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, and be compensated with temporary partial benefits. If the employee refuses to accept the suitable work with the same employer, the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal.

Iowa Code 85.33(3).

The Iowa Supreme Court held that there is a two-part test to determine eligibility under Iowa Code 85.33(3): “(1) whether the employee was offered suitable work, (2) which the employee refused. If so, benefits cannot be awarded, as provided in section 85.33(3).” Schutjer v. Algona Manor Care Center, 780 N.W.2d 549, 559 (Iowa 2010). “If the employer fails to offer suitable work, the employee will not be disqualified from receiving benefits regardless of the employee’s motive for refusing the unsuitable work.” Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 519 (Iowa 2012).

In this case, the claimant seeks temporary total disability or healing period benefits from June 7, 2019, to October 29, 2019, related to her shoulder surgery performed on June 7, 2019, by Dr. Pape. Whether or not these are awarded to the claimant turns on the question of whether the work incident caused Ms. Vogt’s shoulder injury. In this case, Ms. Vogt had a severely delayed report of left shoulder pain. During a recorded interview on August 14, 2017, an employee of Sedgwick asked Ms. Vogt if she had any other injuries. She made no mention of her left shoulder. Further, Ms. Vogt’s version of how she fell evolved over time. Initially she reported falling flat on her face and/or nose. She later added that her left arm was outstretched while she fell. I find that Ms. Vogt was an overall credible witness; however, the evolution of her story is concerning. Treating physician Dr. Pape indicated that the left shoulder injuries were degenerative in nature. The claimant argues semantics over Dr. Pape’s review of the MRI, but there is no indication that Dr. Pape connected Ms. Vogt’s left shoulder injury to her work incident. Additionally, Dr. Matos opined that the left shoulder issues as seen on the November 6, 2018, MRI were due to Ms. Vogt’s natural aging process and degeneration over time and not any acute issues from the work injury. Based upon the foregoing, I find that Ms. Vogt’s fall at XPO was not a cause of her left shoulder injury, and subsequent surgery based upon her description of the injury. I also find that any temporary total disability and/or healing period benefits related to the left shoulder are not causally connected to the work incident and decline to award temporary total disability and/or healing period benefits for the time in question.

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

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

In this case, the only scheduled member to which Ms. Vogt alleges injury is her left shoulder. I concluded above that Ms. Vogt failed to prove by a preponderance of the evidence that her shoulder injury was a cause of temporary disability. For the same

reasons, I conclude that the left shoulder injury is not a cause of permanent disability. Based upon the IME of Dr. Segal, the IME of Dr. Matos, the supporting medical documentation, and the evidence in the record, I find that Ms. Vogt carried her burden of proof to show permanent impairment due to her nasal fracture, her post-concussive symptoms, and her cervical injuries. In this case, both Drs. Segal and Matos agree that Ms. Vogt sustained permanent disability based upon her injuries to her nose and post-concussive symptoms. Dr. Segal also concludes that Ms. Vogt suffered a cervical injury causing permanent impairment, while Dr. Matos opines that Ms. Vogt's cervical injury was caused by age-related degeneration. Dr. Risk supports the opinions of Dr. Segal in that Ms. Vogt's neck pain was degenerative but exacerbated by her fall. The work incident itself also supports the neck injury occurring as Ms. Vogt struck her face and head directly on concrete pavement. Simple logic indicates that a neck injury is connected to said impact.

I conclude that the claimant established by the preponderance of the evidence that her injury extends into the body as a whole and should be compensated pursuant to Iowa Code 85.34(2)(v). Iowa Code 85.34(2)(v) provides:

In all cases of permanent partial disability other than those hereinabove described or referred to in paragraphs 'a' through 't' hereof, the compensation shall be paid during the number of weeks in relation to five hundred weeks as the reduction in the employee's earning capacity caused by the disability bears in relation to the earning capacity that the employee possessed when the injury occurred. A determination of the reduction in the employee's earning capacity caused by the disability shall take into account the permanent partial disability of the employee and the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury. If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity.

In this case, the claimant argues that the claimant sustained an industrial disability. The defendants argue that Iowa Code section 85.34(2)(v) applies and the claimant should only be compensated based upon her functional impairment ratings as she returned to work at the same or higher rate of earnings. The claimant did return to work at the same or higher wages than she earned at the time of the injury, however, the claimant reduced her hours due to the effects of her injury. She also reduced her hours due to the initial restrictions of Dr. Segal. The defendants claim that she made these reductions based upon her own volition, however, the reduced work hours are in line with the initial restrictions of Dr. Segal. Ms. Vogt returned to work at the same or greater hourly wage as the time of her injury, however, her earnings were reduced due to the restrictions imposed by her injury and Dr. Segal. The language of the statute conflicts with itself in that Ms. Vogt's wages increased or remained the same, but her earnings decreased. Workers' compensation statutes are liberally construed in favor of the worker. Ewing v. Allied Const. Services, 592 N.W.2d 689, 691 (Iowa 1999) (citing

Stumpff v. Second Injury Fund of Iowa, 543 N.W.2d 904, 905 (Iowa 1996)). Since the claimant had reduced earnings due to her reduced hours, I conclude that the claimant sustained an industrial disability.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Ry. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: “[i]t is therefore plain that the Legislature intended the term ‘disability’ to mean ‘industrial disability’ or loss of earning capacity and not a mere ‘functional disability’ to be computed in terms of percentages of the total physical and mental ability of a normal man.”

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee’s age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted, and the employer’s offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Iowa Code 85.34.

Ms. Vogt is 67 years old. She possesses a high school diploma, a certification as a dental hygienist, and a general business degree. For over 20 years, Ms. Vogt worked in the dental industry. She then transitioned to working various customer service jobs across the transportation industry. She started at XPO in 2010 as a freight classification specialist. She continues to work for XPO and is considered an exemplary employee. She is motivated to continue working, although she recently discussed retirement due to the pain issues she continues to experience.

Ms. Vogt continues to experience significant pain due to ongoing migraines and neck issues. Working aggravates these issues. Ms. Vogt provided a diary of her ongoing significant pain issues; however, Ms. Vogt continues to work at XPO. While Ms. Vogt continues to work, she is working severely reduced hours causing a loss of earnings as she is an hourly employee.

Based upon her testimony, Ms. Vogt works from 6:00 a.m. to 11:30 a.m. This appears to be in line with the restrictions provided by Dr. Segal in his initial IME report.

In this case, as in so many, there are conflicting impairment ratings. Dr. Matos opined that Ms. Vogt suffered a 3 percent whole person impairment due to her post-concussion issues, a 3 percent whole person impairment due to her headaches, and a 3 percent whole person impairment due to her nasal fracture. Based upon the combined values chart on pages 604-605 of the Guides, this would result in a 9 percent whole person impairment rating. Dr. Matos found no causation for the neck injury. Dr. Segal assessed Ms. Vogt with impairment ratings as follows: 17 percent to the whole person for post-concussive headaches and migraines, 18 percent to the whole person for the cervical spine, 3 percent to the whole person for her nasal fracture, and 17 percent to the whole person for the left shoulder. Dr. Segal opined that this resulted in a 39

percent whole person impairment based upon the combined values chart on pages 604-605 of the Guides. Excluding the shoulder impairment rating due to my finding of lack of causation to the shoulder, Dr. Segal's impairment ratings combine to a whole person impairment rating of 34 percent to the whole person. I find Dr. Segal's whole person impairment ratings to be more persuasive. Dr. Segal is a board-certified neurosurgeon. While he has given up his surgical privileges, he remains well qualified to opine on these issues.

Based upon the foregoing factors, considered under an industrial disability analysis, I find that Ms. Vogt sustained a 65 percent industrial disability. This represents 325 weeks (65 percent x 500 weeks = 325 weeks). I find that the commencement date for benefits is October 24, 2017, the date on which Dr. Carpenter released Ms. Vogt to return to work. It is unclear from the evidence provided what the nature of the benefits paid by the defendants to the claimant were. Therefore, I cannot award four weeks of credit at \$663.95 per week.

### **Reimbursement of Medical Expenses**

The defendants dispute whether medical care in Exhibit 8 was reasonable and necessary. They further dispute whether the fees and/or treatment set forth are reasonable. They also dispute whether the expenses in Exhibit 8 are causally connected to the work injury and whether the treatment was at least causally connected to medical conditions upon which the claim of injury is based. Finally, the defendants dispute authorization of the expenses.

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

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

In cases where the employer's medical plan covers the medical expenses, claimant is entitled to an order of reimbursement only if she has paid treatment costs; otherwise, the defendants are ordered to make payments directly to the provider. See Krohn, 420 N.W.2d at 463. Where medical payments are made from a plan to which the employer did not contribute, the claimant is entitled to a direct payment. Midwest Ambulance Service v. Ruud, 754 N.W.2d 860, 867-68 (Iowa 2008) ("We therefore hold that the commissioner did not err in ordering direct payment to the claimant for past medical expenses paid through insurance coverage obtained by the claimant independent of any employer contribution."). See also Carl A. Nelson & Co. v. Sloan, 873 N.W.2d 552 (Iowa App. 2015) (Table) 2015 WL 7574232 15-0323.

The employee has the burden of proof to show medical charges are reasonable and necessary and must produce evidence to that effect. Poindexter v. Grant's Carpet Service, Iowa Industrial Commissioner Decisions, No. 1, at 195 (1984); McClellon v. Iowa Southern. Utilities.

The employee has the burden of proof in showing that treatment is related to the injury. Auxier v. Woodard State Hospital-School, 266 N.W.2d 139 (Iowa 1978), Watson v. Hanes Border Company, No. 1 Industrial Comm'r Report 356, 358 (1980) (claimant failed to prove medical charges were related to the injury where medical records contained nothing related to that injury). See also Bass v. Vieth Construction Corp., File No 5044438 (App. May 27, 2016) (Claimant failed to prove causal connection between injury and claimed medical expenses); Becirevic v. Trinity Health, File No. 5063498 (Arb. December 28, 2018) (Claimant failed to recover on unsupported medical bills).

In this case, the claimant seeks reimbursement for medical expenses as listed in Claimant's Exhibit 8. Ms. Vogt's employer provided health insurance paid for her unauthorized medical care. In this case, I found causation for complaints related to Ms. Vogt's neck, headaches, and post-concussion treatment. I did not find causation regarding the left shoulder injury. In reviewing Exhibit 8, there are several charges for posterior tibial tendonitis to the right leg. These charges are clearly not related to the work incident. There are also charges for osteoarthritis of the right hip. These are not related to the work incident. There are numerous charges related to the left shoulder. Overall, it appears Ms. Vogt's employer-provided health insurance paid \$53,846.86. When treatment for unrelated expenses is removed, the total paid is \$32,162.57. It is unclear as to how much remains to be paid to providers. Should any amount remain owing to providers regarding treatment for Ms. Vogt's neck, headaches, or nasal issues, the defendants are ordered to reimburse the providers. The defendants are also ordered to reimburse the health insurer should anything be owed to the health insurer for work related medical expenses. The defendants are free to negotiate these amounts.

### **Alternate Care Pursuant to Iowa Code section 85.27**

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

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

Iowa Code 85.27(4).

The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Iowa Code 85.27. Holbert v. Townsend

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

By challenging the employer's choice of treatment - and seeking alternate care - claimant assumes the burden of proving the authorized care is unreasonable. See e.g. Iowa R. App. P. 14(f)(5); Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 209 (Iowa 2010); Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what care is reasonable under the statute is a question of fact. Long, 528 N.W.2d 122 (Iowa 1995).

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

There is little by way of evidence indicating that the defendants abandoned care as Ms. Vogt argues. Ms. Vogt visited a chiropractor, who referred her to an optometrist for treatment of her concussion symptoms. Dr. Carpenter recommended that Ms. Vogt visit a neurologist in notes dated October 24, 2017. Ms. Vogt did not seek care from a neurologist until April 27, 2018. Additionally, there is no evidence presented that Ms. Vogt complained of displeasure with the care provided by the defendants. However, the undersigned determined that causation has been proven for injuries related to Ms. Vogt's neck, head, and concussion symptoms. Based upon that determination, it is unreasonable for the defendants to continue to withhold care. The defendants shall authorize care, with providers of their choosing, related to Ms. Vogt's ongoing neck, head, and concussion issues.

## **Costs**

Claimant seeks the award of costs as outlined in Claimant's Exhibit 9. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. See 876 Iowa Administrative Code 4.33; Iowa Code 86.40. 876 Iowa Administrative Code 4.33(6) provides:

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

The administrative rule expressly allows for the taxation of costs for no more than two doctors' or practitioners' reports.

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

In this matter, the claimant seeks taxation of \$750.00 for an FCE report of Mr. Fog, \$750.00 for the June 1, 2020, report of Dr. Segal, \$250.00 for the July 22, 2020, report of Dr. Segal, and \$1,240.00 for Ms. Laughlin's report. In reviewing the invoices provided in Exhibit 9, Ms. Laughlin's invoice included time for client visits, file reviews, and research. I decline to award costs for Ms. Laughlin's report. I award the claimant costs of one thousand and xx/100 dollars (\$1,000.00) for the reports of Dr. Segal.

## ORDER

THEREFORE, IT IS ORDERED:

The claimant shall take nothing further for temporary total disability or healing period benefits.

The defendants are to pay unto claimant three hundred twenty-five (325) weeks of permanent partial disability benefits at the rate of six hundred sixty-three and 95/100 dollars (\$663.95) per week from the commencement date of October 24, 2017.

The defendants shall reimburse the providers or health insurer thirty-two thousand one hundred sixty-two and 57/100 dollars (\$32,162.57).

The defendants shall reimburse claimant for costs of one thousand and no/100 (\$1,000.00).

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. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

That defendants shall be given credit for benefits previously paid of twelve thousand seven hundred sixty-one and 81/100 dollars (\$12,761.81), as stipulated.

The claimant is entitled to alternate medical care pursuant to Iowa Code section 85.27.

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

Signed and filed this 17th day of February, 2021.



ANDREW M. PHILLIPS  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Darin Luneckas (via WCES)

Timothy Wegman (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.