BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TAMMY L. NEWCOMB, Claimant, vs. JOHN DEERE DAVENPORT WORKS, Employer, Self-Insured, Defendant.	FILED MAY 03 2019 WORKERS COMPENSATION	File No. 5048104 REVIEW-REOPENING DECISION Head Note No.: 2905
TAMMY L. NEWCOMB, Claimant, vs JOHN DEERE DAVENPORT WORKS, Employer, Self-Insured, Defendant.		File Nos. 5052805 5052806 5052807 ARBITRATION DECISION Head Note Nos.: 1802, 1803, 1804

STATEMENT OF THE CASE

Tammy Newcomb, claimant, filed a petition in arbitration seeking workers' compensation benefits from John Deere Davenport Works (John Deere), self-insured, as a result of injuries sustained on September 26, 2013, September 11, 2014, April 9, 2015 and May 6, 2015, that allegedly arose out of and in the course of her employment. File No. 5048104, date of injury September 26, 2013 is a claim for review-reopening.

This case was heard in Des Moines, Iowa, and fully submitted on October 30, 2018. The evidence in this case consists of the testimony of claimant, Zachary Waters, Robert Laverenz, Joint Exhibits 1 – 46, Defendant's Exhibits A - UU and Claimant's Exhibits 1 – 13[1]. The case was recessed until the submission of the depositions of Sanjay Sundar, M.D., marked Claimant's Exhibit 1 and Julia Marmion, Ph.D., marked as

[1] The parties were urged to limit the number of exhibits before hearing. The parties assured the undersigned they had done so. After review of all the exhibits it is clear that both parties submitted many documents that were not material to any fact in dispute. Included was an overly long two-day deposition of the claimant, a large exhibit in reverse chronological order and duplicate/triplicate exhibits. Well over 2,100 pages of documents were submitted. The party's attorneys were admonished in an order of August 6, 2018 that in the future, compliance with the hearing guidelines will be required.

Claimant's Exhibit 2. The depositions were received into the record. Claimant was allowed to supplement her statement of costs to reflect the deposition costs, which she did. (Transcript page 6) (Supplemental costs attached to Hearing Report). Both parties submitted briefs.

The claimant stated in her brief that she was dismissing File No. 5052806, an alleged right knee injury. (Claimant's brief p. 3) Claimant filed a dismissal on April 2, 2019. File No. 5052806 is dismissed.

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

For File No. 5048104 (Date of injury, September 26, 2013, Review–Reopening):

ISSUES

1. Whether claimant sustained a substantial change in condition that warrants an increase in her industrial disability award.

2. The extent of claimant's entitlement to any additional industrial disability benefits.

3. Whether claimant is entitled to permanent total benefits under the odd-lot doctrine.

4. Whether claimant is entitled to alternate medical care.

5. Whether costs of this contested case proceeding should be awarded against any party and, if so, the extent of reimbursement that should be ordered.

For File No. 5052805 (Date of injury, September 11, 2014, stipulated back injury):

ISSUES

1. Whether claimant sustained an injury to her neck, right knee, left arm and has a physical/mental injury.

2. The extent of claimant's entitlement to temporary benefits.

3. The extent of claimant's entitlement to permanent disability benefits.

4. Whether claimant is entitled to permanent total benefits under the odd-lot doctrine.

5. Whether claimant is entitled to alternate medical care.

6. Whether costs of this contested case proceeding should be awarded against any party and, if so, the extent of reimbursement that should be ordered.

7. Whether defendant is entitled to an offset of any award pursuant to Iowa Code section 85.34(7).

8. The claimant's gross weekly earnings and the resulting weekly workers' compensation rate.

For File No. 5052807 (Date of injury, May 6, 2015, stipulated left knee injury):

ISSUES

1. The extent of claimant's entitlement to temporary benefits.

2. The extent of claimant's entitlement to permanent disability benefits.

3. Commencement date of permanent disability benefits.

4. Whether claimant is entitled to alternate medical care.

5. Whether costs of this contested case proceeding should be awarded against any party and, if so, the extent of reimbursement that should be ordered.

6. The claimant's gross weekly earnings and the resulting weekly workers' compensation rate.

FINDINGS OF FACT

The deputy workers' compensation commissioner having heard the testimony and considered the evidence in the record finds that:

Tammy Newcomb, claimant, was 54 years old at the time of the hearing. Claimant went to high school but did not graduate. Claimant had a learning disability and took special classes in reading, science, and history. (Tr. p. 28) Claimant completed courses in blueprint reading in early 1990 and also took courses in Auto CAD 2000 for drafting. Claimant was a semester short of completing this program (Tr. pp. 102, 103; Ex. U, p. 201) Claimant's past relevant job history started when she worked as a break press operator at Case International Harvester from June 1996 through January 2000.

(Exhibit 11, p. 120) After claimant was laid off from Case International Harvester she attended Hamilton Tech and worked in a laundry.

Claimant had a non-work related injury to her back and was on Social Security Disability for four years. (Tr. p. 30; Exhibit B, page 30) Claimant went to work for the Gazette Newspaper Company in Colorado as a publication coordinator in 2004 and went off Social Security Disability. (Ex. 11, p. 121) Claimant did general office work in this job. (Tr. p. 102) Claimant's position was eliminated and claimant worked as a machinist at Woodland Mold & Tool from 2006 through 2009. (Ex. 11, p. 121) Claimant returned to Iowa in 2010 and worked as a machinist for Olsen Engineering until she began to work for John Deere in August 2011. (Ex. 11, pp. 121, 122) Claimant became a fork truck driver about a year after she started at John Deere. (Tr. p. 33)

A cogent summary of the injuries in dispute was authored by Rhea Allen, M. D., in her December 1, 2017 independent medical examination. Dr. Allen wrote,

> To summarize the history of injuries:
>
> On 9/26/13 Tammy was backing a fork truck out of semitrailer docked against an unloading/loading dock when the rear tire of her fork truck broke through the floor causing it to stop. A settlement regarding this injury was file [sic] with the Commissioner on 2/4/15. A petition was filed to reopen the claim last year.
>
> On 9/11/14, Tammy was walking to her fork truck when she tripped on rebar and fell forward onto the concrete floor. At the time of the Emergency department initial evaluation on 9/11/14 07:57 am, she was complaining of pain in the neck, back, left shoulder, and left hip. She had some abrasions on both elbows. She denied any numbness, tingling, or weakness in the arms or legs. On exam, her neck range of motion was noted to be normal. There was tenderness over the spinous processes and there was muscular tenderness. She had some tenderness in the left shoulder with ROM. She was noted to have some abrasions to the elbows. An xray of the left shoulder was negative. A CT of the cervical spine was negative for any acute traumatic injury. CT of the thoracic spine was negative. CT of the lumbar spine showed old postoperative changes, the metal hardware was in good position. The fusion mass was in good position, and there were no acute bone abnormalities or fractures.
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> On 4/9/15, Tammy reported that she hit her right knee on a guardrail while moving out of the way of another employee. When Tammy was seen in the Davenport Work's medical department by Mary Huesmann, ARNP on 5/7/16, Tammy reported pain left knee but denied any concerns with the right lower extremity.

> Tammy states that she injured her left knee on 5/6/17 after she missed a step in the swimming pool while at aqua therapy.

(Ex. DD, p. 356)

On May 6, 2013, David Segal, M.D., performed a micro discectomy at the L5 – S1 on the right. (JE. 8, p. 267) On October 22, 2013, Dr. Segal saw claimant due to a new injury of September 26, 2013 to her back that occurred at work. (JE. 8, p. 370) On January 14, 2014, Dr. Segal performed a posterior lumbar interbody fusion at L5-S1. (JE. 8, p. 374; Ex. G, p. 84) On May 29, 2014, claimant was returned to work with no restrictions. (JE. 8, p. 380)

On December 1, 2014, Richard Kreiter, M.D., provided a 10 – 13 percent rating for the claimant's back after her fusion surgery. (JE. 42, p. 902)

Dr. Segal saw claimant for neck and back pain on December 16, 2014 due to an injury of September 11, 2014. Dr. Segal wanted to view an MRI. (JE. 8, p. 383) Claimant saw Dr. Segal on July 30, 2015. Dr. Segal's assessment was,

> Assessments
>
> 1. Spondylosis with myelopathy, lumbar region
> 2. Cervical spondylosis with myelopathy
> 3. Degeneration of cervical intervertebral disc.
> 4. Intervertebral lumbar disc disorder with myelopathy, lumbar region.

(JE 8, p. 390) Dr. Segal referred claimant to Dr. Wagle for cervical facets injections and a repeat radiofrequency ablation. Based upon an MRI he did not think that a small bulge at C6-C7 was causing her symptoms and he did not recommend surgery. (JE. 8, p. 391) On September 24, 2015, Dr. Segal wrote that claimant may need a spinal cord stimulator (SCS) trial if the radiofrequency ablation does not help. (JE.8, p. 398) On September 28, 2015, Dr. Segal provided work restrictions of 4-hours per day not to exceed 20–hours per week. (JE. 8, p. 400) On October 27, 2015, Dr. Segal recommended a trial of an SCS. (JE. 8, p. 404) On February 19, 2016, Dr. Segal restricted claimant from all work until she was reevaluated. (JE. 8, p. 422) On February 23, 2016, D. Segal withdrew his restrictions and deferred to the restriction of Dr. Wagle. (JE. 8, p. 424) On May 5, 2016, Dr. Segal signed off on a letter prepared by defendant's attorney. Dr. Segal agreed that nothing in claimant's MRIs would explain claimant's radicular symptoms and he did not recommend any additional surgery. Dr. Segal agreed that any restrictions would be due to claimant's subjective symptoms rather than objective or anatomical perspective. Dr. Segal opined that claimant could perform some sedentary work and was not permanently disabled. (Ex. K, p. 133)

On September 26, 2013, claimant was operating a fork truck at John Deere when she had an accident and injured her back. (Tr. p. 34) Claimant testified that she had a back surgery fusion and returned to work. (Tr. p. 34) Claimant and John Deere reached an agreement for settlement on February 4, 2015 for this injury. The parties agreed that claimant had an 11.494 percent loss in earning capacity. (Ex. H, p. 94) Claimant returned to work with restrictions of no overtime on June 6, 2014, and returned to full duty June 13, 2014. (Tr. p. 35; JE 1, p. 142)

On September 11, 2014, claimant fell at work when her right foot got tangled with some rebar. (Tr. p. 37; Ex. AA, p. 281) Claimant said she fell forward on her elbows and knees and when she turned her left hip her right foot was still stuck. (Tr. p. 37) The incident report filed by John Deere describe claimant's symptoms as, "Elbows bilaterally superficially scrapped [sic], left hip soreness and lower back burning." (Ex. D, p. 44) Claimant went to the hospital via ambulance. (Tr. p. 38; Ex. AA, p. 287) Claimant said she injured both her elbows -- especially her left, right knee, right shoulder, neck. (Tr. pp. 38, 88) Claimant reported her fall to the Occupational Health Clinic (OH) at John Deere (OH).The nurse's note recorded,

> EE came in this am at 0630 and reported that she fell "outside" when she was going to her fork truck. EE states it was dark outside and that there was a rebar that "wasn't suppose [sic] to be there". EE stated that she doesn't know which foot she tripped on the rebar and that she does not know how she landed but that she feels like her L hip was hit so she "guess I landed on my hips and maybe my elbows because they are scrapped." [sic] Elbows are superficially scrapped [sic] bilaterally, no redness, bleeding, or discharge noted. The abrasions resembled a peeling on the elbows bilaterally. EE stated "I must have really fell because my coffee was spilled all over my leg" pointing to her L leg while stating this. EE also stated "I'm starting to feel the burn in my lower back a [sic] now my neck and shoulder hurt" pointing to the L shoulder et [sic] neck. Denies witnesses to the incident. EE stated "it was a really dark area and the rebar should not have been there." EE asked this writer "do you see a dark area on this hip?" pointing to the R hip. No bruising or redness noted et [sic] skin is intact without abrasions. L hip has no bruising or redness et [sic] skin is intact. EE asked this writer "is my lower back swollen now? It feels swollen? Lower back has no bruising or redness or swelling et [sic] skin is intact. L shoulder et [sic] neck is without redness, swelling or bruising et skin is intact. EE also stated that her mid back is hurting as well. Once ambulance was called EE stated to this writer that she is feeling pain running down R leg to the bottom of her R foot. Active ROM intact to all extremities without difficulty. Alert et [sic] oriented x 3.

(JE. 1, p. 143e, 143f) Claimant's radiological examinations did not show any fractures or dislocations in the shoulder or the lumbar spine. (JE. 2, pp. 147, 149) Claimant received a number of pain medications at that visit and was released. Claimant was

allowed to return to work after being evaluated by Concentra. (JE. 2, p. 144) Claimant testified in the following few weeks,

> A. Well, I had whiplash. My right knee began to hurt. I couldn't walk up and down stairs, so I knew there was something wrong with my knee, and I had a knot on my left elbow that I kept having Dr. Kelty look at.

(Tr. p. 39)

On October 15, 2015, Christine Deignan, M.D., of OH examined claimant. Dr. Deignan informed claimant that she did not see any signs that would require spinal surgery. (JE 1, p. 131) On December 15, 2015, Dr. Deignan responded to defendant's counsel concerning claimant's September 11, 2014 injury. Dr. Deignan wrote that back injuries stabilize after one year and claimant was at maximum medical improvement (MMI). Dr. Deignan wrote,

> The Tampa Scale for Kinesiophobia, completed by Ms. Newcomb, indicates that she has a significant level of kinesiophobia. Patient's with this condition are responding to their fear of movement rather than the pain. Patient's with kinesiophobia catastrophe events. An example of a catastrophic thinking would be "if I walk down the street, it will make me hurt, if I hurt I will not be able to get out of bed tomorrow." The vicious cycle of avoiding movement leads to more disability. A cognitive behavioral model is suggested for treatment.
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> Ms. Newcomb has been offered cognitive behavioral evaluation by the treating pain clinic and has refused. During my examination I again emphasized the advantages of psychological evaluation to help her with coping skills. She adamantly refused.

(Ex. F, p. 68) Dr. Deignan stated that claimant had no anatomic injury due to her September 11, 2014 fall; however, her functional level has deteriorated as a result of her kinesiophobia. Dr. Deignan stated claimant is not a good candidate for a SCS. (Ex. F, p. 69)

John Hoffman, M.D., examined claimant's right knee on November 25, 2014 as a result of her fall on September 11, 2014. (JE. 6, p. 264) Based upon an MRI, Dr. Hoffman assessed claimant with a, "Recurrent medial meniscus tear right knee." (JE 6, p. 265) Dr. Hoffman recommended arthroscopy. Claimant had a right knee arthroscopy with medial meniscectomy on March 9, 2015. (JE. 6, p. 268)

On January 13, 2015, claimant was on work restrictions of 4 hours of office work per day with claimant able to sit and stand as needed. (JE. 1, p 143d) After discussion with the claimant on January 20, 2015, OH and claimant agreed to start claimant at 2-hours per day for a few days then go to 4-hours per day. (JE. 1, pp. 143b, 143c) On

April 21, 2015, Dr. Wagle increased claimant's work time to 6-hours per day. (JE 1, p. 111)

Claimant said that she injured her left knee on May 6, 2015 when she was at physical therapy for her back. Claimant said she took a misstep when in a therapy pool. (Ex. AA, p. pp. 296, 297; JE 1, p. 109: JEx. 9, p. 443) In his deposition, Dr. Hoffman noted claimant reported pain right after this injury. (Ex. W, pp. 212, 213) On June 16, 2015, OH reported claimant was using a quad cane due to her left leg. (JE 1, p. 105)

Dr. Hoffman saw claimant concerning her left knee on July 14, 2015. Dr. Hoffman's assessment was, "Recurrent medial meniscus tear, left knee." And he recommended arthroscopy. (JE. 6, 276) Dr. Hoffman performed surgery on the left knee on August 19, 2015. His postoperative diagnosis was, "Medial meniscus tear, left knee." (JE. 6, p. 277) On September 17, 2015, claimant was using a cane for ambulation due to her back pain. (JE. 6, p. 285, 289) Claimant had three Euflexxa injections in her left knee. (JE. 6, p. 303) On January 19, 2016, Dr. Hoffman noted that claimant's knee pain was secondary to her back pain and placed her at MMI for her left knee. (JE. 6, p. 308) On May 28, 2016, Dr. Hoffman signed off on a letter prepared by defendant's counsel. Dr. Hoffman was unable to say that claimant injured her right knee after a fall on September 11, 2014. (Ex. M, p. 138) Dr. Hoffman agreed that if the fall on September 11, 2014 caused the right knee tear, claimant would have had pain in her knee within two to three days. (Ex. M, p. 139) Dr. Hoffman was not able to determine if claimant's left knee problems were caused by the fall of September 11, 2014 or incident in the pool on May 6, 2015. He stated that he would have expected claimant to have left knee pain within two to three days of the September 11, 2014 fall. (Ex. M, p. 139) Dr. Hoffman was not able to opine that claimant's permanent impairment to the left knee was or was not caused by the September 11, 2014 or pool misstep on May 6, 2015. (Ex. M, p. 140)

On February 4, 2016, claimant was seen by Tyson Cobb, M.D., for pain in the left elbow from a fall about a year ago. (JE. 7, p. 337) On March 2, 2016, surgery for claimant's left ulnar nerve was recommended. (JE. 7, p. 344) Claimant had a "left redo anterior transposition of the ulnar nerve with microscopic internal neurolysis and left forearm mass excision on 3/16/2016." (JE. 7, p. 348; JE. 44, p. 908) On May 23, 2016, Dr. Cobb signed off on a letter that was prepared by defendant's attorney. Dr. Cobb was not able to opine as to whether claimant's fall at work on September 11, 2014 caused her left elbow problems. (Ex. L, p. 135)

Dr. Hoffman performed surgery on claimant's left elbow approximately 18 years ago. (Ex. L, p. 135) On July 6, 2016, Dr. Hoffman wrote:

> We reviewed previous discussion that in some cases surgery does not fix the problem which could be related to scarring. She needs to continue actively using the hand. She was instructed in stretching home exercises to be performed frequently daily. We again discussed that I would recommend continued formal therapy. She should continue gabapentin 900 daily. She understands that her current problems are not related to

her work or activity level; though re-states that she did not have any symptoms prior to her fall at work. Have encouraged her to stay active and continue stretching program.

(JE. 7, p. 362)

On June 10, 2016, Luke Hansen, Psy. D., performed a psychological evaluation to determine if there were any psychological barriers to the SCS. The testing showed evidence of major depressive disorder symptoms, but claimant could proceed with the SCS. (JE. 14, p. 542) Dr. Hansen evaluated claimant again on April 19, 2017 and came to the same conclusion as his 2016 evaluation. (JE. 14. p. 546)

Claimant went to see Julia Marmion, Ph.D., on June 14, 2016 for counseling. Dr. Marmion diagnosis was "Adjustment Disorder with Mixed Anxiety and Depressed Mood." (JE. 15, p. 561) On May 15, 2017, Dr. Marmion wrote a "To Whom It May Concern" letter concerning claimant. Dr. Marmion opined that claimant's depressive, anxiety, memory, and concentration symptoms would make it difficult for claimant to remember rules and regulations at work and work at a fast and steady pace. Claimant's increase in irritability and fatigue could also impact her interactions with co-workers and supervisors. (JE. 15, p. 587) On May 31, 2017, Dr. Marmion wrote that claimant's current psychological symptoms would not prevent her from working. (JE. 15, p. 593) On April 3, 2018, Dr. Marmion noted that while claimant reports a number of depressive symptoms it was not clear claimant met the criteria for Major Depressive Disorder as some symptoms could be the result of her medication. Dr. Marmion continued the Adjustment Disorder diagnosis. (JE. 15, p. 614) On July 24, 2018, Dr. Marmion wrote to claimant's counsel. Dr. Marmion wrote, "However it is unclear whether these symptoms are mainly due to depression, chronic pain, or possible side effects from medication." (Ex. JJ, p.429; Ex. 6, p. 43) Dr. Marmion noted that claimant denied having significant anxiety or depressive symptoms before she started to see her for therapy. (Ex. JJ, p. 430)

Dr. Marmion was deposed on August 1, 2018. (Ex. 2) Dr. Marmion testified:

A. So for her the initial onset stressor appeared to be that she'd been dealing with chronic pain, and at that point physical demands at work were increasing, which caused additional stress in her life on top of the pain by itself, like the life changes, so that was her onsetting stressors, so to speak.

Q. Do you still hold that opinion today?

A. That she has adjustment disorder with mixed anxiety and depressed mood?

Q. Yes.

A. Yes, uh-huh.

Q. And do you still hold the opinions that the cause of it is the same as it was back in June of '16?

A. That the onset caused – So I think there have been stressors that are related. There are recurrent stressors over time that are related to her chronic pain and the change in life circumstances, so for her losing independence, those kind of stressors are maintaining the diagnosis.

Q. I think you said yes; is that fair?

A. So the onsetting stressor was the physical demands in addition to the chronic pain, and now she has had other stressors related to the chronic pain that kind of maintain the diagnosis, so she's not able to be as independent in her life. She's more dependent on other individuals. She's not been able to work. All of those are stressors maintaining it.

(Ex. 2, p. 3) Dr. Marmion stated that it was her understanding claimant did not have a past mental health treatment before she started seeing her. (Ex. 2, pp. 7, 8)

Claimant was referred for mental health counseling in 2001 due to chronic low back and upper extremity pain. (JE. 27, p. 767) James Nickel, Ph.D., provisional diagnosis was "1) Depression, Moderate to Severe 2) Psychological Factors Affecting Medical Condition." (JE. 27, p. 796) On October 5, 2001, Dr. Nickel wrote Iowa Disability Determination Services and stated claimant depression may present claimant with minor intermittent difficulties in some cognitive functions. (JE. 27, p. 788)

In January 2001, Dr. Hoffman performed a partial medial meniscectomy of the right knee. (JE. 23, p. 744) In May of 2001 he noted the knee pain was completely gone.

On June 16, 2016, claimant saw Dr. Hoffman due to sharp lateral pain in the right knee that occurs occasionally. (JEx. 6, p. 313) Dr. Hoffman provided a cortisone injection to the right knee. (JE. 6, p. 315) On October 11, 2016, Dr. Hoffman recommended a left knee unicomparmental (partial) knee replacement surgery. (JE. 6, p. 326

On October 25, 2016, Dr. Hoffman responded to a series of questions from claimant's counsel. Dr. Hoffman agreed that if claimant was not having right knee pain within two to three days before her September 11, 2014 injury then the September 11, 2014 injury was a substantial factor in causing the meniscus tear. (JE. 6, p. 329) Dr. Hoffman was unable to state within a reasonable degree of medical certainty that the injury of September 11, 2014 was a substantial factor for claimant's need for a partial right knee replacement. (JE. 6, p. 330) Dr. Hoffman did not state that claimant's left knee partial knee replacement was or was not related to the May 6, 2015 injury. He noted that claimant's progression from grade II to grade IV arthritis was atypical

progress. (JE. 6, p. 332) On November 22, 2016, Dr. Hoffman performed a left unicompartmental arthroplasty. (JE. 6, p. 333)

On October 12, 2017, Dr. Hoffman was deposed. In his testimony he stated that he cannot tell based upon an MRI as to whether claimant's right knee injury was caused by the fall of September 11, 2014. (Ex. W, p. 212) Dr. Hoffman said, "So I can't independently say that that particular episode caused it because I wasn't there. I didn't witness it." (Ex. W, p. 212) Dr. Hoffman said a meniscus will tear without trauma. (Ex. W, pp. 214, 221) Dr. Hoffman said he uses a patient history with the medical records to determine how an injury occurred. (Ex. W, pp. 212, 217, 221) Dr. Hoffman testified that the condition of claimant's left knee, that he performed the arthroscopy on, was consistent with a twisting episode and tear in the knee. (Ex. W, p. 213) Dr. Hoffman was asked as to whether the claimant's surgery of August 19, 2015 accelerated the progression of claimant's arthritis, which led to her partial knee replacement. Dr. Hoffman responded:

Q. If we say - - let me start over.
Can you say that the medial meniscus excision surgery done on August 19th, 2015, superimposed on what we did learn was a grade II arthritis – can we say that the excision of the medial meniscus is a material factor in increasing the likelihood of shortening the period of time before the partial knee replacement was necessary.

A. To some extent this question seems to be something we go over and over again. I'm not sure what the legal standard is. Certainly it's not helpful and it does, to some extent, shorten it. I'm not sure I know enough about the issues to be the person to make a decision which way we go here.

Q. Let me just ask you to read the causation standard that I put forth in my letter of October 25th, 2016. And after you look at that, then answer the question, if you can.

A. A substantial factor in bringing about disability or condition of ill-being and certainty need be only 51 percent to be causally related.

I guess my question is materially. So I see the issue – I see people at one stage in their life with a meniscus tear. We take it out. We see them go on, whether this is workman's comp, or not, to a new knee. And certainly that event is not helpful and, to some extent, accelerates the process.

And in terms of the legal standard is that then – I think one thing that makes it a little bit – let's see. Certainly she progressed fairly rapidly from the meniscectomy to the partial knee replacement.

Q. Exactly.

A. And that makes more of an argument that it's related than not as opposed to it being ten years.

But I see people with rather minor degrees of arthritis. A lot of it is age-related change. The tire tread that's sat out in the sun for ten years is not the tire tread that you have when you're 16, so it doesn't respond the same way.

So I think that's – I'm not sure I understand what it means. Certainly it has added to her issues with the knee.

(Ex. W, pp. 215, 216) Dr. Hoffman agreed that if claimant tripped over rebar on September 11, 2014 and twisted her right knee that he would deem the injury to be work related. (Ex. W, p. 217) Dr. Hoffman said that claimant's symptoms changed significantly based upon the September 11, 2014 incident. (Ex. W, p. 218) Dr. Hoffman stated that he would expect claimant to complain of pain in her right knee within a couple of days after her September 11, 2014 incident. He also acknowledged that some patients who have multiple injuries complain about the most severe first and as they start rehab notice other painful injuries. (Ex. W, p. 223)

Archana Wagle, M.D., evaluated claimant for pain in the back and legs on October 8, 2013. Dr. Wagle noted that claimant was doing well after the microdiscectomy in May 2013 until her injury of September 26, 2013. (JE. 37, p. 833) Dr. Wagle recommended caudal epidural injections and medications. (JE. 37, p. 834)

Dr. Wagle examined claimant for her back pain on September 24, 2014. Dr. Wagle noted that claimant's chronic pain had increased since her fall on September 11, 2014. (JE. 3, p. 150) Dr. Wagle ordered an MRI. There were no acute findings on the MRI. (JE. 3, p. 159) On October 8, 2014, Dr. Wagle's assessment was "Failed back syndrome with ongoing axial and neuropathic pain generators." (JE. 3, p. 164) On December 12, 2014, Dr. Wagle performed a caudal epidural steroid injection. (JE. 3, p. 169) On January 28, 2015, Dr. Wagle performed bilateral facet joint injections and trigger point injections. (JE. 3, p. 183) She noted that depression screening was positive. (JE. 3, pp 177, 178) On March 12, 2015, Dr. Wagle performed radiofrequency ablation in the lumbar spine. (JE. 3, p. 198) On June 5, 2015, Dr. Wagel noted that an MRI showed a bulging disk at C6-7 and an EMG study in December 2014 was normal. The MRI showed degenerative changes at L4-5, but nothing to explain claimant's radicular symptoms. (JE. 3, p. 208) Claimant had epidural injections on that date. (JEx. 3, p. 212) On July 23, 2015, Dr. Wagle performed radiofrequency ablation. (JE. 3, p. 220) On October 25, 2015, Dr. Wagle returned claimant to work. (JE. 37, p. 873)

On May 16, 2016, Dr. Wagle told claimant that she would no longer be her pain management physician for violation of the pain management contract. (JE. 3, p. 235.

Claimant sought out another pain management physician and Dr. Wagle deemed that a violation of the agreement.

On July 21, 2016, Dr. Wagle signed off on a letter prepared by defendant's counsel. Dr. Wagle agreed to the statement,

> Tammy Newcomb had been a patient of mine since October 2013. I stopped seeing Ms. Newcomb as of May 16, 2016 as a result of her seeing another pain specialist without my knowledge or approval which violated our Patient Treatment Contract. Neither my office nor I have any appointment scheduled with Ms. Newcomb. While my office and I are no longer prescribing medication for Ms. Newcomb, had I continued to see Ms. Newcomb, I would have at some point began to taper Ms. Newcomb off her pain medication.
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> As of my withdrawing from Ms. Newcomb's care, there was no diagnostic or objective explanation for the complaints and symptoms that Ms. Newcomb was presenting. This is noted in the lumbar and cervical spine CTs of January 6, 2015 which show no evidence of an acute injury. The lumbar spine MRI record of May 29, 2015 states "[n]othing is seen to explain the radicular symptoms". I similarly note in my record of June 5, 2015 that "[n]othing seen to explain radicular symptoms". The MRI of the cervical spine on December 2, 2015 showed "[n]o acute abnormalities". Finally, my record of January 11, 2016 again states "[n]othing seen to explain radicular symptoms".
>
> There is no reason from an objective standpoint to restrict Ms. Newcomb's physical activity going forward. Any restrictions on Ms. Newcomb's physical activity going forward would be as a result of her subjective complaints. Neither I nor my office prescribed or recommended that Ms. Newcomb use a cane or any other assistive device.

(Ex. P. pp. 165, 166)

Lester Kelty, M.D., noted of July 8, 2015 stated that an MRI of claimant's left knee showed a complex medial meniscus tear. (JE. 1, p. 100; JE 5, p. 251)

Claimant had left knee surgery on August 19, 2015. (JE. 1, p. 97) OH staff on September 1, 2015 informed claimant that she could return to work 4 hours a day and a wheelchair could be provided. Claimant did not want to return to work under those conditions. (JEx. 1, p. 95) On February 23, 2016, Dr. Segal recommended claimant work 6 hours in an office setting. (JE. 1, p. 86) On April 15, 2016, claimant was restricted to no typing. (JE. 7, pp. 353, 355) At that time there was no accommodated work that John Deere had for claimant. (JE. 1, p. 82) Claimant's typing restriction was removed on May 11, 2016 and claimant was allowed to return to work with her prior restrictions. (JE. 1, p.81: JE. 7, p. 359)

Claimant said that a trial SCS was recommended by David Segal, M.D., in October 2015. (Tr. p. 43) Claimant had the SCS on November 13, 2017. (Tr. p. 44; Ex. AA, p. 280)

Claimant was informed on May 17, 2016 that claimant's pain physician, Dr. Wagel would no longer treat her as she had gone to another pain physician. (Tr. pp. 49, 69; JE 3, p. 325) Claimant went to her primary care provider, Benjamin Kolner, PA-C, on May 18, 2016 due to pain and wanting referral to a psychiatrist. (Tr. p. 50; JE. 10, p. 459) PA- Kolner excused claimant from work due to back pain and anxiety on May 9, 2017. (JE. 10, p. 505; Ex. GG, p. 278) On May 30, 2017, PA Kolner noted claimant's anxiety and depression had improved and could return to work from a mental health perspective; however, she did need to have physical restrictions established by her workers compensation physician. (JE. 10, p. 509) Claimant was off work from May 18, 2017 through June 4, 2017. (Hearing Reports) Claimant returned to work on June 7, 2017 and was assigned to cleaning helmets in the tool crib. (Tr. p. 54)

Claimant was referred by John Deere to a pain specialist, Kerry Panozzo, M.D. Dr. Panozzo wanted to provide injections, but claimant would not allow him to perform the injections. (Tr. p. 71; Ex. AA, p. 258) On May 27, 2016, Dr. Panozzo recommended claimant be weaned off the Nucynta and compound cream and undergo a series of injections cervical, thoracic, lumbar and bilateral sacroiliac joint areas. Dr. Panozzo did not believe the SCS would work due to the diffuse back pain. (JE. 13, pp. 537, 539) Claimant refused care from Dr. Panozzo. (JE. 1, pp. 77, 143a)

Two union representatives informed OH on July 7, 2017 that claimant had a medical emergency. OH went to claimant's location and spoke to claimant. Claimant informed them she wants to insure that her pain prescription would not run out. (Ex. AA. p. 363; JE. 1, pp. 51 - 53) Claimant agreed that there was not a medical emergency at that time, but would be if she did not have her prescription filled. (JE. 1, p. 53)

John Deere sent claimant to pain specialist, Frederick Dery, M.D., in Iowa City, Iowa on February 7, 2017. Dr. Dery was asked to provide an opinion as to whether claimant was a candidate for a SCS. (JE. 17, p. 688) Dr. Dery's impression was claimant had "Postlaminectomy syndrome, Lumbar [sic] seemingly related to her fall at work on or about 9/11/2014." (JE. 17, p. 690) Dr. Dery wrote,

> From the information provided to me by Mr. Howell and by the patient I do believe it's reasonable to assume that she had a pre-existing surgical condition (2 prior back surgeries) that made her susceptible to her current symptoms that she is having which seemed to have started when she fell at work on or around 9/11/2014. I can only attribute her current symptoms to the fall on 9/11/2014 since there does not seem to be any other related trauma that has been documented nor can the patient describe any other potential entity which may have caused these current symptoms. It is likely to assume that had she not had the 2 prior back surgeries and still

> suffered the subsequent fall in question then she would not be dealing with these current symptoms.

(JE. 17, p. 690) Dr. Dery wrote the SCS was an option for claimant, pending a psychological examination. (JE. 17, p. 691) On February 26, 2017, Dr. Dery reviewed the June 10, 2016 psychological evaluation of Dr. Hansen and stated that claimant should have a more current psychological evaluation and should be actively treating for her depression before she receives the SCS. (JE. 17, p. 692) On June 16, 2017, Dr. Dery performed the procedure for a trial SCS. (JE. 17, p. 703) On June 23, 2017, claimant reported that she had at least 60 percent improvement in her pain due to the SCS. (JE. 17, p. 708) Claimant was returned to work 5 hours per day, desk work only. (JE. 17, p. 709) Dr. Dery noted on July 19, 2017 that if claimant has not adapted to the gabapentin then she should not drive. (JE. 17, p. 710; JEx. 1, p. 49)

On August 14, 2017, claimant fell at work. Claimant was in stable condition and sent to the emergency department. She was released from the emergency department with no restrictions from that fall. Dr. Dery informed the OH that claimant had requested to be off work due that fall. Dr. Dery informed OH that he would discharge claimant as a patient if she made additional unreasonable requests. (JE. 1, p. 45) On August 21, 2017, Dery wrote, "I am no longer taking care of this patient. She has repeatedly requested excessive work restrictions, time off work, etc. without what I feel is reasonable cause. She can follow with another pain physician, either Dr. Kari or Dr. Sundar, if she wishes to pursue further treatment." (JE 17, p. 712)

Claimant was evaluated by Sanjay Sundar on July 18, 2016 for back pain. His assessment was lumbar stenosis and lumbar HNP with myelopathy. (JE. 16, p. 631) In September 2017, Dr. Sundar included postlaminectomy syndrome as well. (JE. 16, p. 640) On September 26, 2017, Dr. Sundar prescribed a wheeled walker with seat for claimant. (JE. 16, p. 642)

Pain management and the placement of the SCS were taken over by Dr. Sundar on October 18, 2017. (JE. 1, p. 16) On November 13, 2017, Dr. Sundar placed a permanent SCS in the claimant. His postoperative diagnosis was "Lumbar post laminectomy syndrome." (JE. 16, p. 645) On November 21, 2018, Dr. Sundar performed a S1 joint injection. (JE. 16, p. 670) On March 6, 2018, Dr. Sundar noted the SCS provided greater than 60 percent relief. (JE. 16, p. 671)

On October 27, 2017, Sunil Bansal, M.D., performed an IME. (Ex. 8) Dr. Bansal diagnosed injuries to the claimant's neck, left elbow, back, right hip, and right knee due to the September 11, 2014 fall. (Ex. 8, p. 100) Dr. Bansal assigned ratings of 5 percent whole body to the neck, 5 percent upper extremity for the left elbow, 11 percent to the whole body for the back, 3 percent to the whole body for the right hip and 2 percent to the lower extremity for the right knee. (Ex. 8, pp.104 – 106)

Dr. Bansal found that claimant had an injury to her left knee on May 6, 2015 when claimant was in a therapy pool. (Ex. 8, p. 107) Dr. Bansal noted that the medial meniscal tear contributed to the acceleration of her degenerative joint disease as shown by comparing x-rays two years apart. (Ex. 8, p. 109) Dr. Bansal provided a 37 percent impairment rating to the lower extremity for this injury. (Ex. 8, p. 109) Dr. Bansal recommended restrictions of avoiding activities that require repetitive neck motion, avoid activities that involve repetitive or sustained left elbow flexion, limit lifting to 2-pounds frequently and 5-pounds occasionally, no frequent bending or twisting, no frequent kneeling, squatting, climbing, avoid multiple steps, uneven ground and ladders. (Ex. 8, pp. 109, 110)

On December 1, 2017, Dr. Allen performed an IME. Dr. Allen wrote that claimant did not complain of right knee pain until six weeks after her fall and claimant had no injury to the right knee due to the September 11, 2014 fall. (Ex. DD, pp. 359, 360) Dr. Allen noted that at most claimant had a neck strain due to the September 11, 2014 fall. She said claimant's strain would have resolved within a few weeks and claimant had no permanent impairment of her neck due to that fall. (Ex. DD, p. 360) Dr. Allen said that the only injuries to the left and right elbows were abrasion and that the ulnar symptoms were longstanding before her fall. (Ex. DD, pp. 360, 361)

Dr. Allen noted claimant reported her right knee pain during pool therapy on May 6, 2015. Dr. Allen wrote, "To a reasonable degree of medical certainty Tammy incurred a strain to the left knee resulting in a partial meniscectomy about 3 weeks later." (Ex. DD, p. 362. Dr. Allen provided a 2 percent rating to the left lower extremity for this injury. Dr. Allen said the need for the partial knee replacement was not caused by the May 6, 2015 pool injury. While Dr. Allen wrote that the left knee replacement was a 37 percent lower extremity impairment, claimant's impairment due to the pool injury was 2 percent. (Ex. DD, p. 362)

Dr. Allen wrote that claimant had anxiety and depression long before her work at John Deere and opined those conditions did not arise out of her employment at John Deere. (Ex. DD, p. 363)

On March 19, 2018, Dr. Sundar completed a residual functional capacity (RFC) questionnaire. Dr. Sundar wrote claimant could sit for 10 minutes, before needing to get up, could stand for 15 minutes, stand and walk 2 hours in an 8-hour work day and sit a total of 4 hours. (JE. 16, p. 681) He stated claimant would sometimes need to take unscheduled breaks. He said claimant could frequently lift 5 pounds, occasionally lift 10 pounds, rarely lift 20 pounds and never lift 50 pounds. Claimant should never climb ladders or crouch/squat. (JE. 16, p. 682) Dr. Sundar estimated that claimant would be absent about 4-days a month due to the impairments. (JE. 16, p. 682)

On April 10, 2018, OH received notice from Dr. Sundar that claimant was at maximum medical improvement (MMI). (JE. 1, p. 10) Dr. Sundar wrote,

> This patient is well-known to me; she has a functioning spinal cord stimulator for lumbar radiculitis. Additionally, she has other orthopedic issues in her knees that we have not dealt with. At this point I do find the patient at MMI with regards to her lumbar spinal issues. I do not foresee any significant change in her status or any further procedural management outside of emergency in the next 12 months. With regards to work restrictions, I would recommend the following: Patient is not to lift greater than 30lbs rarely, 20 lbs occasionally and may lift 10lbs frequently. She should be allowed to change positions frequently and may not tolerate long periods of standing or sitting greater than 2 hours. Her walking tolerance is somewhat limited. She has no restrictions on her fine motor movements of the hands. She is not to climb, crawl, kneel, or bend extend to the extremes from her waist. She may operate heavy machinery as long as the spinal cord stimulator is turned off and has no restrictions in normal driving.

(JE. 16, p. 684) On April 12, 2018, Dr. Sundar informed claimant that there was no additional care he could provide her. He told her again that he did not believe that long-term narcotic therapy was a wise choice. (JE. 16, p. 687; JE. 45, p. 910)

On May 2, 2018, Dr. Sundar signed off on a letter prepared by defendant's counsel. Dr. Sundar agreed that he was no longer recommending any medications or prescriptions for the claimant. Dr. Sundar said that the restrictions he recommended were primarily to protect the SCS. (Ex, FF, pp. 373, 374) Dr. Sundar stated, "There is nothing from my review of the recent lumbar/spinal MRI to explain Ms. Newcomb's current alleged symptoms." (Ex. FF. p. 375)

On June 21, 2018, a Functional Capacity Examination (FCE) was performed by WorkWell. The FCE showed valid effort by claimant. The report recommended claimant work at the sedentary level and that claimant be able to change positions between sitting, standing and walking as needed. (Ex. 4, p. 40)

Dr. Sundar was deposed on August 2, 2018. (Ex. 1) Dr. Sundar was asked questions about the RFC he completed on claimant. (JE. 16, pp. 679 – 682; Ex. 1 depo Ex 1) Dr. Sundar's RFC noted that claimant was not a malingerer and that the symptoms he noted of the claimant were pain, insomnia and decreased function. (Ex. 1, p. 2) Dr. Sundar did not believe that the claimant's anxiety and depression was exacerbating her pain symptoms. (Ex. 1, p. 3) Dr. Sundar stated that he anticipated claimant's pain symptoms to be a lifelong challenge. (Ex. 1, p. 5) Dr. Sundar agreed with the functional capacity examination (FCE) WorkWell report that claimant walked with an altered gait and that he had no problem with claimant using a quad-cane or walker. (Ex. 1, p. 6) Dr. Sundar did not believe that claimant could return to work. And that she could only work up to 6 hours a day and that she would miss time of 4 days a week. He opined that claimant could perform some part-time sedentary work. (Ex. 1, p. 6) Dr. Sundar acknowledged there were some conflict between the restrictions in his May 2, 2018 letter and the RFC form. Dr. Sundar testified that he felt more comfortable

sticking with the restrictions in the RFC. (Ex. 1, p. 7) Dr. Sundar testified that claimant could not drive or operate heavy machinery while the SCS is turned on. (Ex. 1, p. 8)

I find that the restrictions in the March 2018 RFC completed by Dr. Sundar are claimant's restrictions due to her lumbar spine and fusion.

On May 14, 2018, Dr. Allen examined the claimant's lumbar spine after claimant was found to be at MMI by Dr. Sundar. Dr. Allen provided a 22 percent impairment to the whole person for the lumbar spine. (Ex. DD, p. 366)

Claimant's last day of work at John Deere was August 23, 2017. (Tr. p. 59) Claimant was told to report to work in May or June 2018 as a fork truck driver. Claimant was on narcotic pain medication at that time and informed John Deere she could not drive a fork truck. (Tr. p. 61)

On February 20, 2018, PA Kolner's assessment was:

Failed back surgical syndrome,

Essential hypertension,

Anxiety and depression,

Mixed hyperlipidemia.

(JE. 10, p. 518) On May 24, 2018, claimant saw PA Kolner for her failed surgical back syndrome. Claimant was having mobility problems even with her 4-wheeled walker. (JE. 10, p. 524) PA Kolner wrote a prescription for a wheelchair. (JE. 10, p. 525) PA. Kolner filled out Weekly Indemnity (WI) forms on that date. PA Kolner wrote that he did not believe that claimant could ever return to work. (Ex. GG, pp. 380, 403) PA Kolner did not believe claimant could return to work in any capacity. (Ex. GG, p. 392)

On May 26, 2018, claimant was seen by G. Narayana, M.D., at Quad City Mental health. Dr. Narayana's assessment was, "Major depressive disorder, single episode, severe without psychotic features." (JE. 21, p. 731)

Claimant testified that she was working with vocational rehabilitation to learn medical billing and coding, although the training was being put on hold for a time period due to claimant's need for home health care. (Tr. pp. 63, 64) Claimant has a guardianship of two grandchildren who live her. (Tr. p. 98)

At the time of the hearing, claimant was taking Percocet, Xanax and gabapentin. (Tr. p. 64) Claimant has her spinal cord stimulator on all the time. Claimant did not think the permanent implant worked as well as the trial implant of the spinal cord stimulator. (Tr. p. 64) Claimant had been using a 4-prong cane since 2015. In October 2017, Dr. Sundar prescribed a walker for her to use. (Ex. AA, p. 253) Claimant testified in her deposition that she and her fiancé go to casinos about twice a week. (Ex. AA. p. 310)

Claimant filed a police report against Dr. Deignan, of OH alleging inappropriate medical examination. (Ex. AA pp. 262 – 278) This exam was on October 15, 2014. Dr. Deignan performed a thorough exam and claimant mentioned urinary symptom's that raised the issue of cauda equina syndrome. Dr. Deignan performed a vaginal and rectal examination with a nurse present. The Davenport Police department has closed the investigation and no charges will be filed. (Tr. p. 78) Claimant also threatened on September 13, 2017 to include Dr. Allen of OH, in a civil rights complaint for not authorizing narcotic pain medication; claimant believed the failure to prescribe the pain medication was inhumane. (JE 1, pp. 29, 30; Tr. p. 86)

Claimant had a meniscus repair on her left knee in the late 1990s. (Tr. p. 89) Claimant had surgery on her right knee ACL in 1977. (Tr. p. 90) Claimant had surgery for her ulnar nerve in her left elbow on March 10, 1999 (JE. 23, p. 736)

Claimant was seen for depression several times by James Nickel, Ph.D., in 2001. (Tr. p. 92: JE. 27, pp. 767 – 788) Claimant reported to Dr. Allen on December 1, 2017 that she had been on the same medication for depression since 2006 and other depression medications prior to that time. (Ex. DD, p. 356) Claimant testified she did not remember talking to Dr. Allen about past medication for depression. (Tr. p. 94)

Claimant applied for Social Security Disability. Her initial application was denied on July 12, 2017. The denial noted that claimant had significant benefit from the temporary spinal cord stimulator. The decision noted that claimant was able to handle her affairs even with her depression and anxiety. (EX. S, p. 181) Claimant requested a reconsideration and received a denial from the Social Security Administration on October 6, 2017. (Ex. V, p. 205)

Claimant applied for vocational services and was accepted by Iowa Vocational Services on February 6, 2018. (Ex. 7, p. 45) Claimant expressed interest in learning medical coding and billing programs. (Ex. 7, p. 49) At the time of the hearing claimant had not enrolled in any training.

Zachery Waters, Safety and Health Manager, at the Davenport John Deere plant testified. Mr. Waters contacted the claimant on June 8, 2017 to request that she return to driving a fork truck. Mr. Waters believed claimant could perform fork truck driving with some accommodations. (Tr. p. 136) Claimant told Mr. Waters she was still taking Percocet. Mr. Waters said that employees may not drive fork trucks while on narcotics. (Tr. p. 139) The next day, June 9, 2017 claimant was placed on sick leave. (Tr. p. 139) Sick leave is referred to as WI (Weekly Indemnity) at John Deere.

Mr. Waters was informed that claimant had reached maximum medical improvement in April 2018. (Tr. p. 145) Mr. Waters, the medical department and labor relations began to discuss what positions claimant may be eligible to perform. Mr. Waters was aware that claimant's physician, Dr. Sundar, had recommended no additional narcotic therapy and to discontinue the gabapentin. (Tr. p, 147; JE 16, p. 687) Dr. Sundar said that claimant could operate heavy machinery as long as the spinal cord

stimulator is turned off. (JE. 16, p. 684) Mr. Waters called and spoke to claimant about returning to work as a fork truck driver after some training and evaluation. Claimant informed Mr. Waters that she was taking narcotic medication, which was prescribed by PA Kolner. (Tr. p 150) Claimant could not return to fork truck driving. (Tr. p. 158) Mr. Waters, in consultation with a physician, felt that claimant could safely clean/refurbish welder's helmets. (Tr. p. 151) Claimant performed that job for a week and a half and was then transferred to the office to scan files. (Tr. p. 162) Claimant worked this position until August 2017. Claimant had restrictions of working 5 hours per day and was taking 2 hours a day as personal time so she was working about three hours per day. (Tr. p. 168) John Deere made the decision to have claimant stop coming to the plant and then claimant received temporary total disability. (Tr. p. 167)

Robert Laverenz, claimant's fiancé testified. Mr. Laverenz said that claimant does not do much housework and does not drive anymore due to her medication. (Tr. pp. 182, 183)

On June 9, 2016, Lana Sellner, M.S, CRC, issued a vocational assessment. Ms. Sellnar opined that as Dr. Segal, Dr. Hoffman and Dr. Cobb have not imposed restrictions and claimant could perform any number of jobs. (Ex. O, pp. 152, 153) Ms. Sellner stated claimant was employable. (Ex. O, p. 155) On July 11, 2018, Ms. Sellner issued another vocational report based upon additional information. Based upon no restrictions by doctors, Segal, Cobb, Hoffman, Dery, Marmion and PA Kolner claimant would be able to work. (Ex. O, p. 159) When considering the restrictions of Dr. Sundar and Dr. Allen claimant could perform work in a light duty capacity. (Ex. O, p. 159) Ms. Sellner identified a number of positions could be performed with the light work restriction. (Ex. O, pp. 160,162) Ms. Sellner reviewed a vocational report written by Barbara Laughlin, M.A. Ms. Sellner questions Ms. Laughlin's selections of restrictions and evaluation of claimant's reading, computer skills, and her age as barriers to employment. (Ex. O, p. 163)

Ms. Laughlin completed a vocation assessment on June 27, 2018. (Ex. 3) Using the restriction for the WorkWell FCE Ms. Laughlin wrote:

	Occupations-Pre-Injury Access	Occupations-Post-Injury Access	Occupations-Occupational Loss%
Closest match occupations:	218	2	99.1%
Good match occupations:	797	6	99.2%
Unskilled occupations	3102	4	99.9%

(Ex. 3, p. 13)

Using the restriction form Dr. Sundar Ms. Laughlin wrote:

	Occupations-Pre-Injury Access	Occupations-Post-Injury Access	Occupations-Occupational Loss%
Closest match occupations:	218	43	80.3%
Good match occupations:	797	97	87.8%
Unskilled occupations	3102	135	95.6%

(Ex. 3, p. 15)

Using the May 30, 2018 restrictions from Dr. Allen she wrote:

	Occupations-Pre-Injury Access	Occupations-Post-Injury Access	Occupations-Occupational Loss%
Closest match occupations:	218	106	51.4%
Good match occupations:	797	322	59.6%
Unskilled occupations	3102	1592	48.7%

(Ex. 3, p. 16)

Using the restrictions from Dr. Bansal she wrote:

	Occupations-Pre-Injury Access	Occupations-Post-Injury Access	Occupations-Occupational Loss%
Closest match occupations:	218	2	99.1%
Good match occupations:	797	6	99.2%
Unskilled occupations	3102	4	99.9%

(Ex. 3, p. 16)

Ms. Laughlin concluded:

In my opinion Ms. Newcomb is unable to obtain any work in any quantity, quality or dependability and a reasonably stable labor market does not exist for her. Ms. Newcomb's past relevant work history is

mostly medium exertional level from which she is precluded from performing because she is now classified at the sedentary work level by all medical doctors, including Dr. Sundar, Dr. Allen, and Dr. Bansal.

(Ex. 3, p. 21)

Ms. Laughlin reviewed Ms. Sellner's vocational assessment and disagreed with many portions of Ms. Sellner's report. (Ex. 3, pp. 30 – 34)

Defendant calculated claimant's weekly rate as:

Worker's Compensation Calculation
13 Week Average
Date of Injury: 11-Sep-14

Week	Hours	Earnings	W/E date
1	41.50	$778.20	8/17/2014
2	51.50	$963.89	7/13/2014
3	44.00	$916.36	6/29/2014
4	52.00	$973.32	6/22/2014
5	50.00	$945.77	9/29/2013
6	46.50	$1,057.47	9/22/2013
7	49.50	$949.52	9/15/2013
8	40.00	$761.79	8/18/2013
9	42.50	$810.75	7/21/2013
10	43.00	$782.28	3/17/2013
11	42.00	$764.11	3/10/2013
12	46.00	$842.16	3/3/2013
13	51.50	$942.99	2/24/2013
Most recent CIPP payment		$287.82	3/2/2014
		$11,776.43	13 weeks of earnings
		$905.88	gross average earnings (Total gross earnings divided by 13)
		$542.79	Work comp rate (spendable earnings per pamphlet) "Workmen's Comp Benefit Schedule" provided by Iowa Workmen's Comp Advisory Committee

Worker's Compensation Calculation
13 Week Average
Date of Injury: 6-May-15

Week	Hours	Earnings	W/E date
1	42.50	$809.48	9/14/2014
2	41.50	$778.20	8/17/2014

Week	Hours	Earnings	W/E date
3	51.50	$963.89	7/13/2014
4	44.00	$916.36	6/29/2014
5	52.00	$973.32	6/22/2014
6	50.00	$945.77	9/29/2013
7	46.50	$1,057.47	9/22/2013
8	49.50	$949.52	9/15/2013
9	40.00	$761.79	8/18/2013
10	42.50	$810.75	7/21/2013
11	43.00	$782.28	3/17/2013
12	42.00	$764.11	3/10/2013
13	46.00	$842.16	3/3/2013
Most recent CIPP payment		$287.82	3/2/2014
		$11,642.92	13 weeks of earnings
		$895.61	gross average earnings (Total gross earnings divided by 13)
		$537.89	Work comp rate (spendable earnings per pamphlet) "Workmen's Comp Benefit Schedule" provided by Iowa Workmen's Comp Advisory Committee

(Ex. MM, pp. 459, 461)

Claimant provided the following wage calculations:

Worker's Compensation Calculation
13 Week Average
Date of Injury: 11-Sep-14

Week	Hours	Earnings	W/E date
1	41.50	$778.20	8/17/2014
2	51.50	$936.89	7/13/2014
3	44.00	$916.36	6/29/2014
4	52.00	$973.32	6/22/2014
5	50.00	$945.77	9/29/2013
6	40.50	$1,057.47	9/22/2013
7	49.50	$949.52	9/15/2013
8	40.00	$761.79	8/18/2013
9	42.50	$810.75	7/21/2013
10	43.00	$782.28	3/17/2013
11	42.00	$764.11	3/10/2013
12	46.00	$942.16	3/3/2013
13	51.50	$942.99	2/24/2013

	600.00	$11,561.61
	[sic]	
	[594.00	Actual total hours]
Most recent CIPP payment	$651.82	semi-annual payment of $1,303.62 paid 09/01/13 divided by 2 to make it quarterly equals $651.82.
	$12,213.43	13 weeks of earnings
	$939.49	gross average earnings (Total gross earnings divided by 13)
	$559.01	Work comp rate (spendable earnings per pamphlet) "Workmen's Comp Benefit Schedule" provided by Iowa Workmen's Comp Advisory Committee

Worker's Compensation Calculation
13 Week Average
Date of Injury: 6-May-15

Week	Hours	Earnings	W/E date
1	42.50	$809.48	9/14/2014
2	41.50	$778.20	8/17/2014
3	51.50	$963.89	7/13/2014
4	44.00	$916.36	6/29/2014
5	52.00	$973.32	6/22/2014
6	50.00	$945.77	9/29/2013
7	46.50	$1,057.47	9/22/2013
8	49.50	$949.52	9/15/2013
9	40.00	$761.79	8/18/2013
10	42.50	$810.75	7/21/2013
11	43.00	$782.28	3/17/2013
12	42.00	$764.11	3/10/2013
13	46.00	$842.16	3/3/2013
	591.00	$11,355.10	

Most recent CIPP Payment corresponding to chosen weeks as representative	$651.82	semi-annual payment of $1,303.62 paid 09/01/13 divided by 2 make it quarterly equals $651.82.
	$12,006.92	13 weeks of earnings
	$923.61	gross average earnings (Total gross earnings divided by 13)
	$551.64	Work comp rate (spendable earnings per pamphlet) "Workmen's Comp Benefit Schedule" provided by Iowa Workmen's Comp Advisory Committee

(Ex. 13, pp. 137, 139)

Claimant was not working at the time of the hearing. While claimant was accepted by Iowa Vocational Rehabilitation for services, she was not receiving training at the time of the hearing. Claimant was unable to drive due to the SCS. Clamant was receiving homemaker services. (Ex. 7, p. 47) Claimant was using a quad-cane and a walker. Given the restrictions of Dr. Sundar's RFC claimant has a complete loss of earning capacity.

Claimant originally submitted request for costs of $15,557.38 and then supplement the request and asked for an additional $1,539.60 after the depositions of Dr. Sundar and Dr. Marmion were submitted. (Attachment to hearing report) The claimant's total request is $17,096.98.

RATIONAL AND CONCLUSIONS OF LAW

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The

expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

Defendant has asserted claimant is not credible for a number of reasons. Defendant points to the report claimant made accusing Dr. Deignan of inappropriate contact of a sexual nature. The incident was investigated by the police and no charges were issued by the police nor was there any evidence from any licensing board that found improper conduct by Dr. Deignan. There was no evidence to show that Dr. Deignan did anything that was inappropriate or unprofessional in her exam. Claimant threatened to include Dr. Allen in a civil rights complaint if she did not receive pain medication. Claimant was in pain and did not receive medication/treatment she thought was appropriate. Claimant lashed out at her physician. Claimant's reaction of threatening to sue a physician if she did not receive pain medications was inappropriate and overreaching.

In evaluating claimant's testimony I do consider her inappropriate reactions to physicians Deignan and Allen and that there are some inconsistencies in the record and claimant's testimony.

I did not find the mix up on the medical emergency at the plant or claimant not filing taxes to diminish her credibility. Likewise, claimant reporting injury to multiple body parts due to a fall does not diminish her credibility.

In most cases, it is the medical evidence as to causation and limitations that is the most compelling. It is true in this case as well. It is what I have primarily relied upon in making this decision as to causation, limitations and extent of impairment.

File No. 5048104 (Date of injury, September 26, 2013, Review-Reopening):

Upon review-reopening, claimant has the burden to show a change in condition related to the original injury since the original award or settlement was made. The change may be either economic or physical. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959). A mere difference of opinion of experts as to the percentage of disability arising from an

original injury is not sufficient to justify a different determination on a petition for review-reopening A failure of a condition to improve to the extent anticipated originally may also constitute a change of condition. Meyers v. Holiday Inn of Cedar Falls, Iowa, 272 N.W.2d 24 (Iowa App. 1978).

Claimant has presented no convincing evidence to show that the claimant's lower back condition changed after September 26, 2013 injury and the agreement for settlement of February 4, 2015. Claimant has not provided convincing evidence that claimant's economic condition change due to her September 26, 2013 injury. Claimant returned to work and was able to continue to perform her work until she had a different injury in September 2014. There does not appear to be any significant treatment of claimant for the September 26, 2013 injury after the agreement for settlement. Claimant had some medication and an injection after the agreement for settlement and before the September 11, 2014 injury, but it does not appear to be more than palliative.

Claimant has failed to prove by a preponderance of the evidence that she has a significant change in condition that would allow for review-reopening.

For File No. 5048104 claimant will take nothing further.

File No. 5052805 (Date of injury, September 11, 2014, stipulated back injury):

Defendant has stipulated claimant had an injury to her back that arose out of and in the course of her employment at John Deere. Defendant paid 60 weeks of permanent partial disability for this injury. Defendant denies claimant had any is due any more temporary or healing period benefits for this injury. The extent of this disability will be discussed infra in another section of this decision.

Defendant denies that claimant suffered any compensable injury to her neck, right knee, left arm and a physical/mental injury due to the fall on September 11. 2014.

I find claimant has failed to prove by a preponderance of the evidence that she has either temporary or permanent disability to her neck, left arm, and right knee due to the September 11, 2014 incident.

I find the opinion of Dr. Cobb the most convincing on claimant's left elbow injury. He performed surgery on claimant's left elbow many years ago and the most recent surgery in March 2016. He was not able to opine that the surgery on her left elbow was related to her fall of September 11, 2014. I do not find Dr. Bansal's opinion convincing on this issue. The fact that a fall can cause nerve damage to the arm does not prove causation in this case.

Claimant has also failed to prove that her right knee injury was causally related to the September 11, 2014 fall. The claimant did not report right knee pain for weeks after the fall. While claimant had other medical issues that she was being treated for at that time, the extent of these injuries do not appear so overwhelming as to preclude her from

bringing the right knee pain to the attention of a medical provider at the time or closed to the time of the injury. I find Dr. Hoffman's opinion the most convincing. Claimant has failed to prove her right knee was injured in her fall on September 11, 2014. Claimant has also failed to prove that her right knee partial replacement was related to a work injury as well. The record shows claimant had an injury to her right knee, but there is not a preponderance of the evidence to show that the right knee injury was work related.

Claimant has failed to prove that the September 11, 2014 fall caused a compensable injury to her neck. I found Dr. Allen's opinion the most convincing and in line with all the medical reports, except Dr. Bansal. Dr. Segal also said that the claimant's neck symptoms were not related to her fall. I do not find Dr. Bansal's opinion convincing on this issue. The fact that a fall can cause a herniation of a disk in the neck does not prove causation in this case.

I find claimant has failed to prove she has a mental/physical injury due to her September 11, 2014 fall or her May 6, 2015 injury to her left knee. Dr. Marmion did not have a complete history of claimant's mental health treatment. While Dr. Marmion indicated that claimant's pain and inability to work have caused anxiety and depression, I cannot rely upon her opinion as there was material treatments that she was unaware of and therefore her opinion on causation cannot be relied upon. There is convincing evidence that claimant has anxiety and depression, but not that it was work related.

For File No. 5052807 (Date of injury, May 6, 2015, stipulated left knee injury):

Defendant has stipulated claimant injured her left knee when she was in a pool doing physical therapy. Dr. Allen found that claimant did have a knee injury on that date. She found the left knee surgery on August 19, 2015 was related to that injury. This injury arose out of and in the course of her employment with John Deere.

Dr. Allen provided a two percent impairment rating for this portion of claimant's left knee injury Dr. Allen did not believe the claimant November 22, 2016 partial left knee replacement surgery was caused by claimants May 6, 2015 injury.

Both Dr. Allen and Dr. Bansal have rated the disability to claimant's left knee with the partial knee replacement at 37 percent.

I find that claimant has proven by a preponderance of the evidence that the need for the partial left knee replacement was due to her May 6, 2015 injury and subsequent surgery. Claimant had preexisting degenerative disease in her left knee before the May 6, 2015 injury. The convincing evidence is that the May 6, 2015 injury and surgery accelerated the need for a partial replacement.

Dr. Hoffman noted that the rapid progression of claimant's knee condition was atypical. Dr. Bansal reviewed the x-rays of that showed a rapid deterioration after her May 6, 2015 injury. Dr. Hoffman said in his deposition the August 19, 2015 surgery

shortened the time before the claimant's need for the partial knee replacement. Dr. Allen opined the May 6, 2015 injury did not cause the partial left knee replacement. Dr. Allen did not address as to whether the May 6, 2015 injury and surgery accelerated the need for this surgery. The claimant has proven by a preponderance of the evidence her May 6, 2015 injury and partial knee replacement arose out of and in the course of her employment.

I find claimant has a 37 percent loss to the left leg. This entitled claimant to 81.4 weeks of benefits.

I do not award claimant alternate medical care for this injury. Claimant is entitled to medical care but has not shown the defendant is denying reasonable care to her left knee.

Extent of Disability - lower back:

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: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

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

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

In assessing an unscheduled, whole-body injury case, the claimant's loss of earning capacity is determined as of the time of the hearing based upon industrial disability factors then existing. The commissioner does not determine permanent disability, or industrial disability, based upon anticipated future developments. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009).

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co.,

288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City Ry. Co., 219 Iowa 587, 258 N.W. 899 (1935).

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

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

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

The evidence shows that after claimant's September 26, 2013 injury and fusion surgery claimant was able to return to her work as a fork truck driver. After her fall, claimant has received treatment from a number of pain specialists, occupational physicians, and primary care providers for her low back pain.

Dr. Sundar was the last pain specialist to treat claimant. Dr. Sundar performed the spinal cord implant surgery and was the pain specialist that last extensively treated claimant. Dr. Sundar was a physician authorized by defendant. I previously found the restrictions of Dr. Sundar's RFC are claimant's restrictions. These restrictions limit claimant's lifting to sedentary lifting restrictions. Claimant cannot crouch/squat or climb and rarely stoop. Claimant is limited in sitting, standing, and walking. Claimant would need unscheduled breaks and would likely need to take up to four days off per month

due to her back condition. Ms. Laughlin used Dr. Sundar's restrictions in her vocational assessment; Ms. Sellnar did not use these restrictions.

Claimant's age is not positive in making a transition to different occupations. Her need to take unscheduled breaks, miss work and physical limitations are significant barriers for even sedentary work. Claimant cannot drive when she is using her SCS and claimant uses the SCS 24-hours a day. Considering all of the factors for industrial disability I find claimant is permanently and totally disabled. The parties stipulated that the commencement date for permanent benefits for this injury is April 11, 2018.

As I have found claimant is permanently and totally disable there is no need to analyze the case under the odd-lot doctrine.

I do not award claimant alternate medical care for this injury. Claimant is entitled to medical care but has not shown the defendant is denying reasonable care to her lower back. At the time of the hearing, Dr. Sundar said that claimant did not need prescription or other treatments for her back. While that could change in the future, defendant was providing reasonable care at the time of the hearing.

Healing period

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. 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)

Clamant has requested healing period benefits from May 18, 2016 through June 4, 2017. PA Kolner took claimant off work due to her mental condition. As I found that claimant has not proven causation of her mental condition as work related, claimant is not entitled to healing period benefits for this time.

Rate

The parties have agreed as to what weeks to be used in calculating claimant's gross earnings for both the September 11, 2014 and May 6, 2015 injuries.

The parties dispute as to whether to include John Deere's' profit sharing plan and the Continuous Improvement Pay Plan Payments (CIPP).

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee

was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Section 85.36(6).

> In pertinent part, section 85.36 states:
>
> The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury. Weekly earnings means *gross* salary, wages, or *earnings* of an employee *to which such employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured,* as regularly required by the employee's employer for the work or employment for which the employee was employed, computed or determined as follows and then rounded to the nearest dollar:
>
> . . . .
>
> 3. In the case of an employee who is paid on a semimonthly pay period basis, the semimonthly gross earnings multiplied by twenty-four and subsequently divided by fifty-two.
>
> (Emphasis added.) "Gross earnings" is defined as;
>
> recurring payments by employer to the employee *for employment,* before any authorized or lawfully required deduction or withholding of funds by the employer, *excluding irregular bonuses,* retroactive pay, overtime, penalty pay, reimbursement of expenses, expense allowances, and the employer's contribution for welfare benefits.
>
> Iowa Code § 85.61(3) (emphasis added).
>
> . . . .
>
> When interpreting this statute in prior cases, we have required the commissioner to look beyond the numbers appearing on an employee's paycheck when determining the employee's weekly gross earnings under sections 85.36 and 85.61(3).

Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 262 (Iowa 2012).

The Iowa Workers' Compensation Commissioner recently considered the issue of John Deere's profit sharing bonuses in a declaratory order. In that declaratory order, the commissioner concluded that the profit sharing bonus was an irregular bonus because it was dependent upon the overall profitability of the employer. He also concluded that the bonus was irregular because it was variable and erratic. The commissioner concluded that the profit sharing bonus should be excluded as an irregular bonus under Iowa Code section 85.61(3). In re Declaratory Order Regarding Profit Sharing Bonus and Continuous Improvement Pay Plan, (July 12, 2017). (Hereinafter Profit Sharing Order).

The claimant offered no evidence that would alter the factual and legal conclusion of the commissioner that held the bonus payment as irregular payment. The commissioner's declaratory order is binding precedent upon the undersigned.

The Profit Sharing Order described CIPP payments as,

> The CBA covering wage employees also provides an incentive pay program known as the CIPP, which provides an incentive payment to wage employees based on a CIPP team exceeding production goals. (Zimmerman Affidavit, ¶ 16) Wage employees are members of CIPP teams. Under the CIPP, each week in which a CIPP team exceeds its production goals, John Deere makes a positive adjustment or addition into the CIPP reserve fund for the CIPP team, and each week in which a CIPP team underperforms its production goals, John Deere makes a negative adjustment or subtraction from the CIPP reserve fund. (Zimmerman Affidavit, ¶¶ 17-18) Each week John Deere records the positive and negative adjustments to the CIPP reserve fund on each CIPP team member's weekly payroll record. (Zimmerman Affidavit, ¶ 21) At the end of the quarter, John Deere tallies the positive and negative weeks for each CIPP team member, and it makes a quarterly CIPP payment from the reserve funds to each CIPP team member. (Zimmerman Affidavit, ¶ 19)
>
> Given the design of the CIPP, the actual CIPP payment is not made until after the week in which the CIPP benefit is earned. (Zimmerman Affidavit, ¶ 20) The CIPP payment made to each wage employee is based on the number of hours the wage employee contributes to the CIPP. (Zimmerman Affidavit, ¶ 22)

Profit Sharing Order, p. 2

The Profit Sharing Order held.

> The weekly CIPP earnings should not be included in gross earnings and the quarterly CIPP payment should be included in gross earnings when determining an employee's weekly rate for workers' compensation benefits.

Profit Sharing Order, p. 8

Claimant acknowledges in her brief that pursuant to the Profit Sharing Order the defendant correctly divided the semi-annual CIPP payment by two to arrive at the correct amount for CIPP payments. (Claimant's brief p, 27)

I find that defendant's calculation of rate for both injuries is correct. The claimant's weekly rate for the September 11, 2014 injury is $542.79. I find the claimant's weekly rate for the May 6, 2015 injury is $537.89.

COSTS

Iowa Code section 86.40 states:

> **Costs.** All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states in part:

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

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010). The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

Claimant has requested costs in the amount of $17,096.98.

Claimant has requested reimbursement fees that exceed limitations under 876 IAC 4.33 due to a number of depositions of physicians in this case. My award below awards only the amount allowed by Iowa Code section 622.72 for expert witness fees. Under the applicable rules only two reports may be reimburse. While there were two

files that I have awarded benefits using my discretion considering the excessive documentation in this case I am awarding only two reports. There is no provision for reimbursement of copy fees for records under the applicable rules so none are awarded.

Claimant has requested the IME expense of Dr. Bansal. Dr. Bansal performed his IME after defendant authorized physician provided impairment ratings. As claimant has not prevailed in all files I reduce the award by one third. [4,986 x 33% = 1,645.38. 4,986 – 1,645.38 = 3,340.62]. I award claimant $3,340.62 for Dr. Bansal's IME.

I award the claimant the claimant the following fees and costs:

DATE	ITEM	AWARDED
7/20/2015	Filing fee	$100.00
7/21/2016	Filing fee (2nd)	$100.00
9/18/2017	Orthopaedic Specialists - Dr. Hoffman deposition fee	$150.00
11/6/2017	KRC Reporting - deposition of John Hoffman, M.D.	$252.90
11/17/2017	Sunil Bansal, M.D. - IME	$3,340.62
12/19/2017	Weston Reporting - deposition of Claimant	$661.15
7/2/2018	ORA - Dr. Sanjay Sundar deposition fee	$150.00
7/6/2018	Unity Point Clinic - Benjamin Kolner, PA-C deposition fee	$150.00
7/6/2018	Laughlin Management - Employability Assessment report	$2,341.60
8/3/2018	Julie Marmion, PhD deposition fee	$150.00
9/10/2018	Weston Reporting deposition of Julie Marion, PhD	$302.60
9/10/2018	Weston Reporting deposition of Sanjay Sundar, MD	$302.60
9/12/2018	Weston Reporting deposition of Ben Kolner, PA-C	$434.40
		$8,435.87

ORDER

THEREFORE, IT IS ORDERED:

For File No. 5048104 (Date of injury, September 26, 2013, Review–Reopening): Claimant will take nothing further.

For File No. 5052805 (Date of injury, September 11, 2014, stipulated back injury):

Defendant shall pay claimant permanent total disability benefits so long as she is totally disable at the weekly rate of five hundred forty two and 79/100 dollars ($542.79) commencing April 11, 2018.

For File No. 5052806 (Date of injury, April 9, 2015 right knee) the claimant shall take nothing further. Claimant filed a dismissal on April 2, 2019.

For File No. 5052807 (Date of injury, May 6, 2015, stipulated left knee injury):

Defendant shall pay claimant eighty-one point four (81.4) weeks of permanent partial benefits commencing on January 20, 2016 at the rate of five hundred thirty seven and 89/100 dollars ($537.89).

For File No 5052807 and File No. 5052805:

Defendant shall have a credit for benefits already paid.

Defendant shall pay claimant costs in the amount of eight thousand four hundred thirty-five and 87/100 dollars ($8,435.87).

Defendant shall provide medical care as set forth in this decision.

Defendant shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

Defendant shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Signed and filed this 3rd day of May, 2019.

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JFE/kjw

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 in writing and received by the commissioner's office 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 a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.