BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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| LAUREN GOEDE,<br><br>Claimant,<br><br>vs.<br><br>US XPRESS, INC.,<br><br>Employer,<br><br>and<br><br>GREAT WEST CASUALTY CO.,<br><br>Insurance Carrier,<br>Defendants. | File No. 20006651.01<br><br>ARBITRATION DECISION<br><br>Headnotes: 1100, 1402.30, 1403.30, 1601, 1802, 1803, 2500 |

## STATEMENT OF THE CASE

Claimant Lauren M. Goede filed a petition in arbitration seeking workers' compensation benefits from defendants U.S. Xpress, Inc., employer, and Great West Casualty Co., insurer. The hearing occurred before the undersigned on June 3, 2021, via CourtCall video conference.

The parties filed a hearing report at the commencement of the arbitration hearing. In 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.

The evidentiary record consists of: Joint Exhibits 1 through 9; Claimant's Exhibits 1 through 5, 6 (except for pages 20 and 21), 7 through 15, and 17; and Defendants' Exhibits A through M.[1] Claimant testified on her own behalf and Gina Goede and Daniel Douglas also testified. The evidentiary record was closed upon receipt of Defendants' Exhibits L and M on June 21, 2021, and the case was considered fully submitted upon receipt of the parties' briefs on July 2, 2021.

[1] Exhibits L and M were accepted after the hearing.

## ISSUES[2]

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury that arose out of and in the course of her employment.

2. If claimant sustained an injury that arose out of and in the course of her employment, whether her claim is barred under Iowa Code section 85.16 due to intoxication.

3. If claimant's work-related injury is not barred by the intoxication defense, whether claimant is entitled to temporary or permanent disability benefits and the extent of any such benefits.

4. Whether claimant is entitled to reimbursement for medical expenses.

5. Whether claimant is entitled to attorney's fees.

6. Whether claimant is entitled to reimbursement for costs.

## FINDINGS OF FACT

Claimant was injured on April 10, 2020, around 4 a.m., when the semi-truck she was riding in as a passenger was involved in a motor vehicle accident.

Claimant testified she finished her driving shift shortly after midnight and then completed her brief post-trip duties. (Hearing Transcript, pp. 117-19) She was then required to take a 10-hour driving break, at which time she was expected to rest or sleep in the sleeper berth. (Tr., pp. 118-20) Claimant testified that when she went back to the sleeper berth she drank some peach vodka that she had received from her co-driver, Tyler Garrison, for her birthday. (Tr., pp. 121-22) She described the size of the bottle as an "airplane shot" or "the little bottles that come on the airplane." (Tr., pp. 121-23) She testified Mr. Garrison had given her two of these bottles, the first of which she consumed after her post-trip duties were complete, and the second of which she consumed sometime before the accident, though she was unsure what time. (Tr., pp. 121, 126) Claimant could also not recall whether she ate any food prior to the accident. (Tr., p. 126)

At some point after drinking the second bottle, claimant fell asleep in her bunk. (Tr., p. 125) She testified she was "absolutely not" intoxicated and that the alcohol only "helped her relax enough to fall asleep." (Tr., p. 127) It is undisputed, however, that claimant was not restrained in the available bunk restraint at the time of the accident.

[2] Rate was listed as a disputed issue on the hearing report, but in their post-hearing brief defendants waived this issue and stipulated to claimant's rate calculation of $817.72. As such, claimant's rate will not be addressed herein.

Claimant was asleep when the accident occurred, and she explained the next thing she remembered was "waking up broken . . . in front of the passenger chair." (Tr., p. 127) There is no evidence that claimant had an opportunity to react, whether by bracing herself or grabbing onto something, to mitigate her injuries.

She was unable to get out of the truck on her own; multiple emergency responders lifted her up onto a gurney. (Tr., p. 129) Claimant was taken to the hospital via ambulance and admitted to the ICU where she learned she had "broken nine ribs, shattered a few of them, [and] punctured a lung." (Tr., p. 129: Joint Exhibit 2, p. 8) She then underwent emergency surgery for her rib injuries. (Tr., p. 133; JE 3, p. 2)

The notes from the ambulance and intake notes from the emergency room indicate claimant was properly oriented and obeyed commands. (JE 2, pp. 2, 4) However, consistent with claimant's testimony that she drank two "airplane shots" of vodka, a blood specimen sample taken in the emergency room was positive for some level of alcohol in claimant's system. (JE 2, p. 6; Defendants' Ex. M, p. 7 (noting value for "alcohol, ethyl (B)" was "64" mg/dL))

Defendants obtained an opinion regarding claimant's blood alcohol level (BAC) from Henry C. Nipper, Ph.D., who performs consultations in forensic and clinical toxicology. (Def. Ex. D) Applying studied metabolism rates to claimant's BAC at the hospital and working backwards to the time of the accident, Dr. Nipper estimated claimant's BAC was "0.076 g/dL to 0.089 g/dL with the central value of 0.082 g/dL." (Def. Ex. E, p. 2)

Dr. Nipper noted someone with a BAC of 0.082 g/dL is "markedly impaired by alcohol," with effects such as decreased inhibitions and diminution of judgment. (Def. Ex. E, p. 2) He opined "that to a reasonable degree of scientific certainty, [claimant] was impaired by alcohol at the time of the accident on April 10, 2020." (Def. Ex. E, p. 3) He also opined that claimant's impairment "was a substantial factor in and the proximate cause of the injury due to her failure to wear the safety harness provided to prevent such an injury." (Def. Ex. E, p. 3)

Claimant obtained a competing opinion from John Vasiliades, Ph.D., a toxicologist. (Cl. Ex. 4) In addition to being critical of Dr. Nipper's credentials, Dr. Vasiliades criticized Dr. Nipper's use of assumptions and speculations to arrive at an estimated BAC for claimant at the time of the accident. (Cl. Ex. 4, pp. 1-3) Dr. Vasiliades noted the uncertainty regarding when claimant consumed the vodka and whether she ate any food. (Cl. Ex. 4, p. 2) Dr. Vasiliades did not offer a different BAC calculation; instead, he opined "[t]here is no way from the current record to know [if claimant's] BAC was more or less than the estimated values at the time the co-worker lost control of the truck." (Cl. Ex. 4, p. 2) Based on the ambulance and emergency room notes that indicated claimant had a normal mood and affect, Dr. Vasiliades also stated, "There is also no evidence in the record that [claimant] was impaired by alcohol." (Cl. Ex. 4, p. 2)

In response to Dr. Vasiliades' opinion, Dr. Nipper noted that his BAC estimates were "based on science and referenced to the peer-reviewed literature" and that his

observations concerning "alcohol metabolism and elimination are backed by science." (Def. Ex. K, p. 2)

While I acknowledge Dr. Nipper had to rely on assumptions in arriving at his BAC estimates, these assumptions were scientific and peer-reviewed. Thus, I find Dr. Nipper's BAC estimate persuasive. Further, given the undisputed fact that claimant consumed at least two "airplane shots" of vodka between roughly midnight when she finished driving and 4 a.m. when the accident occurred, I am also persuaded by Dr. Nipper's opinion that claimant's inhibitions or judgment were affected by alcohol at the time of the accident.

That being said, I find claimant's consumption of alcohol had nothing to do with her decision to not use the bunk restraint. Both claimant and her former co-worker, Daniel Douglas, testified there was minimal, if any, training on how to properly use the bunk restraints, and neither claimant nor her co-driver used the restraints regularly. (Tr., pp. 104-06, 113-15, 216; Def. Ex. J, p. 11) Whether claimant violated defendant-employer's policies in not properly using the restraint will be addressed below, but I find her decision to sleep in the bunk without properly using the restraint was not a decision impacted by alcohol. Not wearing the bunk restraint was her usual practice, and as such, was a decision she would have made with or without alcohol.

After more than a week in the hospital after the accident, claimant was discharged and moved into her parents' house. (Tr., p. 133) Claimant initially had significant difficulty performing even basic self-care. (Tr., p. 143) Though by the time of the hearing claimant had re-trained herself to do some of her daily self-care tasks with her left hand, she continued to experience pain. (Tr., pp. 144-45) Claimant had several injections in her back and was taking several pain medications and participating in physical therapy at the time of the hearing. (Tr., pp. 151-52; JE 1, pp. 15-18; JE 6, pp. 3-4)

In addition to her alleged physical injuries, claimant was being treated for sleeplessness and anxiety prior to the accident in April of 2020, but she testified she became depressed after the accident. (Tr., p. 146-47) Shortly before the hearing in this case, claimant's treating physician, Greg Penilla, M.D., referred claimant to a psychiatrist for her depressive symptoms. (JE 1, p. 18) He also increased claimant's dosage of sertraline. (JE 1, p. 14)

Claimant was evaluated by psychiatrist Meredith Throop, M.D., on April 25, 2021. (JE 7, p 1) She diagnosed claimant with adjustment disorder with depression, prescribed Cymbalta, and recommended claimant see a therapist. (JE 7, pp. 2-3) At the time of the hearing, claimant was continuing to take Cymbalta and meet with her therapist. (Tr., p. 150, 154-55)

In a responsive letter to claimant's attorney, Dr. Penilla noted that claimant's sleeplessness and anxiety were "condition[s] that predated the 4/10/20 injury." (JE 8, p. 1) He agreed that the work injury "could be a factor aggravating" claimant's mental condition, but he did not go so far as to agree that the work injuries "materially

aggravated" claimant's mental condition. (JE 8, p. 1) Dr. Penilla also indicated claimant's work injury was "a contributing factor" to his psychiatrist referral, as was claimant's pre-existing condition. (JE 8, pp. 1-2 (emphasis added))

Then, in a check-the-box letter to claimant's attorney, Dr. Throop agreed claimant's adjustment disorder with depression was related to claimant's April 10, 2020 work injury. (JE 9, p. 1) She also agreed that her treatment of claimant, including her recommendation to go to therapy, was "reasonable and necessary as a result of [claimant's] April 10, 2020 work injury." (JE 9, p. 1) However, it is unclear which, if any, of claimant's medical records Dr. Throop reviewed prior to rendering these opinions, and it is not clear from the record whether Dr. Throop had any awareness of claimant's pre-existing anxiety.

Claimant was also evaluated for purposes of an independent medical examination (IME) with Jacqueline Stoken, D.O., on April 6, 2021. Dr. Stoken's impression of claimant included the following diagnoses: contusion of the thoracic and lumbar spine with nine rib fractures; chronic neuropathic pain of the right chest; decreased range of motion in the right shoulder secondary to her rib fractures and spine contusions; extreme depression secondary to her rib fractures and spine contusions; and chronic low back pain. (Cl. Ex. 1, p. 11)

Dr. Stoken opined that claimant reached maximum medical improvement (MMI) for her chest injuries, though she indicated claimant would continue to require treatment for "the sequelae of her injuries including but not limited to depression and neuropathic pain." (JE 1, p. 11) Dr. Stoken's opinion regarding whether claimant has reached MMI for her physical injuries is uncontroverted.

Dr. Stoken assigned a 9 percent whole person impairment for claimant's range of motion deficits in her right shoulder; 5 percent whole person impairment for claimant's chronic lumbar pain; and 69 percent whole person impairment for claimant's extreme depression. (JE 1, p. 12)

With respect to causation of claimant's physical injuries, Dr. Stoken opined that claimant's "injuries and resulting impairment are due to the mechanism of motor vehicle accident and not due to intoxication. She was asleep when the accident occurred and her intoxication did not have any role in the accident or injuries." (JE 1, p. 13) Regarding claimant's mental health condition, Dr. Stoken stated, "An increase of her sertraline based on my history and review of records is likely be [*sic*] a material aggravation of her mental health condition as a result of the work injury." (JE 1, p. 12)

I am not persuaded by the opinions of Dr. Stoken or Dr. Throop with respect to claimant's mental health condition. As mentioned, Dr. Throop's opinions were contained in a check-the-box style letter without any analysis or reasoning. It is not clear which, if any, of claimant's past medical records Dr. Throop reviewed, nor is it clear whether Dr. Throop had any understanding or awareness of claimant's pre-existing anxiety. I therefore assign little weight to her opinions regarding causation.

While Dr. Stoken reviewed Dr. Penilla's records pertaining to claimant's pre-existing anxiety, her causation opinion is based solely on the increase in the dosage in claimant's sertraline after the accident. Notably, as discussed above, Dr. Penilla, the doctor who prescribed the increase, was unwilling to agree that the accident materially aggravated claimant's condition leading to an increase in the sertraline dosage; he agreed only that the accident "could be a factor aggravating the condition." (JE 8, p. 1 (emphasis added))

Further, while not directly material to causation, Dr. Stoken assigned a 69 whole person impairment rating for "extreme depression," but neither Dr. Penilla nor Dr. Throop went so far as to label claimant's condition as extreme. For these reasons, I assign Dr. Stoken's opinions regarding claimant's mental health little weight.

I am most persuaded by the opinions of Dr. Penilla, who acknowledged the accident on April 10, 2020 may have been a contributing factor to the aggravation of claimant's mental health condition but did not go so far as to say the accident materially aggravated her condition. There is thus insufficient evidence to find that the April 10, 2020 accident materially aggravated claimant's mental health condition or was a substantial contributing factor to any such aggravation.

Claimant, however, sustained significant physical injuries as a result of the accident. I adopt Dr. Stoken's uncontroverted 9 percent whole person impairment rating for claimant's right shoulder range of motion deficits and 5 percent whole person impairment rating for claimant's chronic lumbar pain. (Cl. Ex. 1, p. 12) Combined, this amounts to a 14 percent whole person impairment. Though her impairment rating is relatively low, claimant's injuries have limited her ability to perform basic functions of daily living.

Claimant was ultimately terminated by defendant-employer due to their "zero tolerance" policy regarding alcohol. (Tr., p. 134-35) Claimant credibly testified she would be unable to return to her job as a driver due to her inability to lift, twist and climb. (Tr., p. 160-61)

Dr. Penilla agreed that claimant is unable to return to work as a truck driver and in the heavy to medium physical work conditions, but he also indicated he would defer to claimant's pain specialist and psychiatrist for her ability to return to work. (JE 8, p. 2) No other physician specifically indicated claimant is unable to return to work substantially similar to trucking, but several physicians and claimant's physical therapists echoed claimant's testimony that she continues to struggle with activities of daily living and that even basic acts aggravate her pain. (See e.g., JE 6, p. 3 (noting aggravating factors include walking, coughing, standing, sitting, etc.); Cl. Ex. 1, pp. 10-11; Cl. Ex. 17, p. 10 (noting claimant's difficulty with vacuuming, driving, bending, lifting)). Thus, I find claimant is unable to return to employment substantially similar to trucking.

Prior to working for defendant-employer, claimant worked in the restaurant business as a manager and bartender. She credibly testified she could not return to this

work due to the physical restrictions in her right arm and back. (Tr., p. 159) Given claimant's inability to return to trucking or her former work in the restaurant industry, her loss of earning capacity is substantial.

There is insufficient evidence, however, to find that claimant, who was 33 years old at the time of the hearing, is wholly incapable of returning to work or that she is not employable in the competitive labor market. Claimant provided no opinions from a vocational expert, for example, nor is there any statement from a physician indicating claimant is physically incapable of returning to work. Claimant likewise has not attempted to return to any job in a light or sedentary capacity. As a result, I find claimant has not sustained a total loss of earning capacity; instead, I find claimant sustained a 50 percent loss of earning capacity as a result of her work-related injuries.

A major dispute in this case is whether claimant violated defendant-employer's policies regarding the bunk restraint and alcohol consumption. The rules provide that "[n]o alcohol or other controlled substances are allowed on U.S. Xpress equipment or property at any time" and that drivers "may not use, be under the influence of, or have in [their] possession any alcoholic beverage, while [drivers] are operating or responsible for equipment, available for dispatch, or while on [defendant-employer's] property." (Def. Ex. G, p. 1; Def. Ex. H, p. 1) This prohibition specifically includes when drivers "are a passenger in a U.S. Xpress truck." (Def. Ex. H, p. 1) The rules also provide that drivers are "required to use the bunk restraint as designed when in the bunk of a moving vehicle." (Def. Ex. G, p. 2; see Def. Ex. H, p. 5)

Claimant asserted at hearing that she never received any written policies from defendant-employer. (Tr., pp. 102-03) She also testified she was not instructed on how to use the bunk restraint during the mandatory training she completed before becoming a driver for defendant-employer. (Tr., pp. 104-06) Claimant admitted knowing the bunk restraint existed, but she testified her trainer, Mark Kennedy, told her no one used them. (Tr., pp. 113-14) She also testified she never saw Mr. Garrison wearing the restraint and that Mr. Garrison actually told her his bunk restraint was cut out in the truck in which he trained. (Tr., p. 115) While Mr. Kennedy insisted he showed claimant how to use the restraint, he also testified the format of the training meant he had very few opportunities to enforce it and "there were some times she didn't use it." (Defendants' Ex. J, pp. 11-12)

Claimant's testimony is also consistent with the testimony of Mr. Douglas, a former truck driver for defendant-employer who attended trucking school with claimant. Like claimant, Mr. Douglas testified he received no training regarding the bunk restraint. (Tr., p. 216)

By not securing herself in the bunk restraint while in the bunk, claimant violated defendant-employer's rule. However, claimant credibly testified she had little, if any, training regarding the restraint, and even assuming she was aware of the existence of some regulations regarding the restraint, claimant also offered credible evidence that the bunk restraint rules were not strictly enforced.

With respect to defendant-employer's alcohol policies, claimant testified she knew alcohol "had to be out of the driver's reach and that you couldn't drink four hours prior to being on call." (Tr., p. 124) She also testified she was aware that a driver's blood alcohol level had to be down to ".02 by the time you're driving." (Tr., p. 124) She testified she learned these rules from Mr. Kennedy during her training.

Claimant, however, also testified Mr. Kennedy "didn't say anything" regarding whether alcohol could be consumed while she was not driving and in her sleeper berth. (Tr., p. 124-25) This is contrary to Mr. Kennedy's consistent and adamant testimony in his deposition that there is no alcohol permitted on defendant-employer's trucks whatsoever and that he informed claimant of this rule. (Defendants' Ex. J, pp. 7-9)

Again, there is no doubt claimant violated defendant-employer's prohibition on alcohol while in the truck. Given claimant's admitted awareness of some rules regarding alcohol consumption and Mr. Kennedy's adamant testimony, I find claimant more likely than not was aware that her consumption of the vodka on April 10, 2020 was in violation of company policy.

Still, at the time of the accident, I find claimant was in a location in which she was not only allowed but also expected to be—her bunk—and she was doing what she was expected to do—rest during her mandatory 10-hour non-driving period. Though she violated defendant-employer's rules regarding the bunk restraint and alcohol consumption, these rules prescribed only the manner in which she was supposed to conduct herself during her mandatory rest period; nothing about either rule prohibited claimant's presence in her bunk at the time of the accident.

## CONCLUSIONS OF LAW

Defendants assert claimant's violation of defendant-employer's safety rules pertaining to alcohol and the sleeping berth restraint removed her from the course of her employment.

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 "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 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.

Though in rare instances the courts and this agency have held that a violation of a statute or rule removed a claimant from the course of her employment, not every violation amounts to such a departure. Pohler v. T.W. Snow Constr. Co., 33 N.W.2d 416, 422 (Iowa 1948). Instead, for a claimant to be deemed outside the course of her employment, "[t]he employee must be at a place where he would not reasonably

be expected to be in the course of his employment or must willfully do some act which creates a new and added peril to which his employment cannot reasonably be said to have exposed him. Mere negligence is not enough." Griffith v. Norwood White Coal Co., 229 Iowa 496, 294 N.W. 741, 743–44 (1940).

> Where an employee when injured is rendering a service he is employed to do or is doing something incidental thereto but does it in an unlawful or forbidden manner, he does not thereby depart from his employment even though the injury is a consequence of such violation. It is only when the service the employee is performing is itself prohibited, as distinguished from the manner in which the service is performed, that the violation of a statute or rule of the employer takes the employee out of the course of his employment and constitutes a defense. When, and only when, the statute or rule limits the scope of the employment and not merely the manner of rendering the service or doing the act which is not prohibited does the violation of the statute or rule constitute a departure from the course of employment. The test is whether the regulation was calculated to limit the scope of employment or only to govern the manner of performing a more comprehensive task.

Pohler, 33 N.W.2d at 422.

Only violations of rules that are unambiguous and rigidly enforced by the employer will remove a claimant from the course of her employment. See Enfield v. Certain-Teed Prod. Co., 233 N.W. 141, 145 (Iowa 1930); see also McKeag by McKeag v. Mahaska Bottling Co., 469 N.W.2d 674, 676 (Iowa 1991).

Turning first to the bunk restraint, I found claimant violated defendant-employer's rule requiring use of the bunk restraint as designed. However, I also found defendant-employer did not strictly enforce this rule. See id. Further, while claimant was negligent in her failure to use the bunk restraint, this failure did not expose claimant to a new and added peril that semi-truck driving did not; motor vehicle accidents are an unfortunate yet known risk of working as a semi driver. See Griffith, 294 N.W. at 743–44.

Perhaps most importantly, though, I found claimant's presence in the bunk was not prohibited; in fact, it was expected during her mandatory rest period. I found defendant-employer's rule regarding the bunk restraint limited only the manner of the way in which claimant slept in the bunk. Though sleeping without the restraint was prohibited, "[i]t is only when the service the employee is performing is itself prohibited, as distinguished from the manner in which the service is performed, that the violation of a statute or rule takes the employee out of the course of [her] employment." Pohler, 33 N.W.2d at 422. Thus, I conclude claimant's violation of defendant-employer's rule regarding the bunk restraint did not remove her from the course of her employment.

The same is true for defendant-employer's alcohol policy. Though I found claimant violated the alcohol policy, her consumption of alcohol did not expose her to a new and added peril; again, motor vehicle accidents are a known threat in the trucking

profession, and claimant's consumption of alcohol did not contribute to the accident in any way. See Griffith, 294 N.W. at 743–44.

Furthermore, though claimant's consumption of alcohol was prohibited, sleeping in the bunk was not. She not only had a right to do so, but an expectation. Id. at 744 (noting claimant had a right to be on the trip in which he was injured and his injury was due to the manner in which he traveled). In other words, the rule governed the manner in which claimant was to conduct herself while performing her duties for defendant-employer, including while she was in her rest period, but the rest period itself was not prohibited. Pohler, 33 N.W.2d at 422. I therefore conclude claimant's violation of the alcohol policy did not remove her from the course of her employment.

This outcome is similar to the outcome reached by the Iowa Court of Appeals in Dorman v. Carroll County, 316 N.W.2d 423 (Iowa Ct. App. 1981). In Dorman, two deputy sheriffs were killed in a car accident while working on "auxiliary duty." Id. at 424. The deputy driving the vehicle was speeding and had a blood alcohol level of .0815 percent, and the other deputy had a blood alcohol level of .104 percent. Id. Defendants argued "the fact that the deputies were speeding and had been driving removed them from coverage." Id. at 425. Citing Pohler, the Court of Appeals held that the deputies were in the course of their employment at the time of the accident. Id.

Claimant, though she violated both rules, was in a place she was expected to be performing the service (sleeping) she was expected to perform. Though the manner in which she performed that service was not in total compliance with defendant-employer's policies and rules, these rules were designed to govern the manner in which claimant performed her duties—not to limit the scope of her employment. I therefore conclude claimant satisfied her burden to prove she sustained an injury that arose out of and in the course of her employment.

Defendants also assert the affirmative intoxication defense as set forth in Iowa Code section 85.16. The legislature amended Iowa Code section 85.16 in 2017 to create a presumption of intoxication upon a positive test result reflecting "the presence of alcohol." More specifically, the section provides as follows:

> (1) If the employer shows that, at the time of the injury or immediately following the injury, the employee had positive test results reflecting the presence of alcohol . . . it shall be presumed that the employee was intoxicated at the time of the injury and that intoxication was a substantial factor in causing the injury.
>
> (2) Once the employer has made a showing as provided in subparagraph (1), the burden of proof shall be on the employee to overcome the presumption by establishing that the employee was not intoxicated at the time of the injury, or that intoxication was not a substantial factor in causing the injury.
>
> Iowa Code § 85.16(2)(b).

In this case, I found claimant had a positive test result reflecting the presence of alcohol. Thus, claimant must show she was not intoxicated or that her intoxication was not a substantial factor in causing her injury.

"Intoxication" is not defined in chapter 85; however, the Iowa Supreme Court adopted the following definition:

> A person is "under the influence of alcohol" and therefore intoxicated when one or more of the following are true:
>
> > (1) the person's reason or mental ability has been affected; (2) the person's judgment is impaired; (3) the person's emotions are visibly excited; and (4) the person has, to any extent, lost control of bodily actions or motions.

Garcia v. Naylor Concrete Co., 650 N.W.2d 87, 90 (Iowa 2002) (citing Benavides v. J.C. Penney Life Insurance Co., 539 N.W.2d 352, 355 (Iowa 1995). The Court also noted "blood-alcohol level revealed by chemical testing is important evidence on the question of intoxication." Id.

In this case, I found Dr. Nipper's estimate of claimant's BAC to be persuasive; he estimated claimant's BAC was between 0.076 and 0.089 gm/dL at the time of the accident. Given these estimates and claimant's admitted consumption of alcohol in the hours leading up to the accident, I likewise found persuasive Dr. Nipper's opinion that claimant's judgment and inhibitions would have been affected by alcohol at the time of the accident.

Notably, claimant's expert, Dr. Vasiliades, opined there was "no way . . . to know" claimant's BAC at the time of the accident. Again, however, based on the legislature's 2017 amendments, it is claimant's burden to overcome the presumption of intoxication. Even without knowing claimant's BAC at the time of the accident, claimant admitted drinking two "shooters" in the preceding hours, with the effect of making her feel "relax[ed] enough to fall asleep." (Tr., p. 127) Thus, while there is little evidence that claimant was belligerent or disruptive in any way, claimant provided insufficient evidence to overcome the presumption that her reason, judgment, and inhibitions were not affected by her admitted alcohol consumption.

Based on this evidence, I conclude claimant failed to carry her burden to overcome the presumption that she was intoxicated at the time of the accident.

With respect to whether claimant's intoxication was a substantial factor in causing her injuries, defendants argue claimant failed to show that the failure to wear her bunk restraint "was a reasonable decision not impacted by intoxication." See Toler v. Midwest Cornerstone Property Management, File No. 5066128 (Appeal Dec., June 15, 2020). Claimant, however, credibly testified that she regularly did not use the bunk restraint. I found her decision to not use the bunk restraint was not a decision impacted by her intoxication.

Furthermore, claimant was not driving the semi, and her intoxication had no causal impact whatsoever on the accident itself; there is no claim, for example, that she was distracting or disrupting her team driver. To the contrary, there was a motor vehicle accident and claimant, as a sleeping passenger, happened to have consumed alcohol.

This is a departure from the usual scenario in which the intoxication defense is claimed, such as when defendants assert a claimant's intoxication caused a fall that resulted in injuries. See, e.g., Garcia, 650 N.W.2d 87. Here, defendants assert that claimant's intoxication prevented her from properly reacting to an accident caused by another individual; in other words, claimant's intoxication is a step removed from her injuries. Defendants assert that claimant "may have been able to brace herself, grab onto something, or otherwise react in a way that would have prevented her from being flung forward into the front of the vehicle" had she not been intoxicated. (Def. Brief, p. 12)

Claimant, however, was sleeping at the time of the accident. She testified the next thing she remembered was waking up in the cab. There is no evidence indicating claimant would have had an opportunity to react, even if she had not been intoxicated. Defendants' assertion that claimant may have been able to react had she not been drinking is mere speculation.

Ultimately, it was not claimant's intoxication that caused her injuries; it was the impact from an accident. Whether the bunk restraint would have minimized those injuries will never be known, but her intoxication did not impact her decision to not use the restraint. Furthermore, though claimant was intoxicated, she was sleeping when the collision occurred and had no opportunity to brace herself, grab something or react in a mitigating fashion. Thus, I conclude claimant carried her burden to overcome the presumption that her intoxication was a substantial factor in causing her injuries. Defendants' affirmative intoxication defense under Iowa Code section 85.16 therefore fails, and claimant's claim is not barred.

Having determined the April 10, 2020 accident arose out of and in the course of claimant's employment and that claimant's claim is not barred by the intoxication defense under Iowa Code section 85.16, I must now consider whether claimant is entitled to any temporary or permanent disability benefits.

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).

As discussed, I was not persuaded by Dr. Stoken or Dr. Throop's causation opinions regarding claimant's mental health condition. As a result, I conclude claimant failed to carry her burden to prove that her mental health condition or any aggravation thereof is causally related to the April 10, 2020 accident. I conclude claimant's compensable injuries are limited to her physical injuries.

Turning first to claimant's entitlement to temporary benefits, Iowa Code section 85.34(1) provides that healing period benefits are payable from the first day of disability after the injury until (1) she "has returned to work; (2) "it is medically indicated that significant improvement from the injury is not anticipated"; or (3) she is "medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury." Iowa Code § 85.34(1).

With respect to the second factor, the Iowa Supreme Court has described MMI as "stabilization of the condition or at least a finding that the condition is 'not likely to remit in the future despite medical treatment.'" Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 200 (Iowa 2010) (citing Guides, Sixth Edition, p. 27). "[T]he persistence of pain may not itself prevent a finding that the healing period is over, provided the underlying condition is stable." Myers v. F.C.A. Servs., Inc., 592 N.W.2d 354, 359 (Iowa 1999) (citations omitted). When it is not likely that further treatment will decrease the extent of permanent industrial disability, then continued treatment does not prolong the healing period. See id. In other words, neither maintenance medical care nor a claimant's persistent symptoms will necessarily prolong the healing period when claimant's condition is stable.

In this case, I conclude claimant reaching MMI is the first of these three factors in Iowa Code section 85.34 to occur. Claimant did not return to work after the accident and had not returned to work at the time of the hearing. Additionally, given her severe limitations due to pain, I found claimant is not capable of returning to employment substantially similar to trucking. However, Dr. Stoken opined claimant was at MMI, and there is no contrary opinion in the record. Though claimant continues to undergo physical therapy and pain management, it appears this treatment is primarily for maintenance and palliative purposes. Thus, I conclude claimant reached MMI as of April 6, 2021—the date on which claimant was evaluated by Dr. Stoken. Claimant is therefore entitled to healing period benefits from August 11, 2020 through April 6, 2021. See Iowa Code § 85.34(1).

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

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.

In this case, claimant provided no opinions from a vocational expert regarding her employability, she had not attempted any light or sedentary work, and no physician opined she was physically incapable of returning to the workforce. As a result, I found insufficient evidence that claimant is wholly disabled from performing the work that she would otherwise be capable of performing. I also found insufficient evidence that she is not employable in the competitive labor market. Thus, I conclude claimant failed to carry her burden to prove that she is permanently and totally disabled either under the traditional analysis or the odd-lot doctrine.

That said, claimant's work-related injuries have significantly limited her physical and functional capabilities, and her loss of earning capacity is substantial.

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). A determination of the reduction in an employee's earning capacity must additionally consider the employee's permanent partial disability and the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury. Iowa Code § 85.34(2)(v) (post-July 2, 2017).

Of great significant is the fact that claimant is unable to return to work as a trucker, nor would she be capable of returning to work as a bartender. Thus, considering these and all of the relevant factors to industrial disability, I conclude claimant sustained a 50 percent industrial disability, entitling her to 250 weeks of permanent partial disability (PPD) benefits.

Iowa Code section 85.34(2), as amended by the legislature in 2017, provides that PPD benefits are to commence when a claimant reaches MMI. See Iowa Code § 85.34(2). As discussed, I found claimant reached MMI as of April 6, 2021. Thus, claimant's PPD benefits should commence on April 7, 2021.

In addition to temporary and permanent disability benefits, claimant is seeking reimbursement for and payment of medical expenses. Iowa Code § 85.27. I concluded claimant failed to prove her mental health condition is causally related to the April 10, 2020 accident. As a result, I conclude claimant is not entitled to payment or reimbursement for any medical treatment for her mental health condition, including her treatment with Dr. Throop and the Center for Mindfulness.

However, I also concluded claimant carried her burden to prove she sustained compensable, work-related physical injuries. Thus, claimant is entitled to payment or reimbursement for any medical expenses related to her physical injuries, including her hospital stay, surgery, pain management, physical therapy and any medications prescribed for her physical injuries or pain resulting therefrom.

Unfortunately, though claimant's attorney provided a summary of claimant's claimed medical expenses, defendants refused to stipulate to these amounts, in part because the evidence for claimant's prescription expenses is limited to photographs of Walgreens' bags with no identifying information, Walgreens' prescriptions with no identifying information, and claimant's handwritten notes. (See Cl. Ex. 8) Claimant's counsel's summary likewise fails to reference the exhibit pages on which the expenses for each provider are found. The exhibit is messy and confusing.

Still, defendants denied liability for claimant's claim and provided no care, leaving claimant to seek care for her work-related condition. Because claimant proved she suffered compensable injuries that required significant medical care, the responsibility for such care should be borne by defendants. As such, within 7 days of this decision,

claimant shall serve upon defendants an itemized list of all medical expenses incurred in the treatment of claimant's compensable physical injuries. Expenses incurred in connection with claimant's mental health condition shall be excluded. Within 7 days thereafter, defendants shall notify claimant of any objections to the claimed expenses. If the parties are unable to agree as to the responsibility of the claimed expenses, the dispute may become the subject of a request for rehearing before the undersigned.

Finally, claimant seeks reimbursement for costs and attorney fees. Assessment of costs is a discretionary function of this agency. Iowa Code § 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. I decline to award any attorney fees in this case, but I find a taxation of some costs is appropriate in this case.

Claimant first seeks reimbursement for her IME with Dr. Stoken. Defendants denied liability for claimant's claims prior to receiving an evaluation of permanent disability by an employer-retained physician. Defendants' denial does not equate to an opinion of zero impairment and does not trigger claimant's right to a reimbursable IME under Iowa Code section 85.39. Accordingly, claimant is not entitled to reimbursement for the entirety of Dr. Stoken's invoice.

However, consistent with the Iowa Supreme Court's holding in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015) (hereinafter "DART"), the cost of Dr. Stoken's report may be taxed as a cost. Dr. Stoken's invoice indicates the charge for her report was $1,600.00. (Cl. Ex. 7, p. 2) Because I relied on Dr. Stoken's report in my findings, I assess defendants with this cost.

Claimant also seeks reimbursement for the letter drafted by David Cornell, M.D., but I decline to tax defendants with this cost because Dr. Cornell failed to break down his bill between the cost for his report and the cost for preparation of his report, as required by DART. See Reh v. Tyson Foods, Inc., File No. 5053428 (App. Mar. 26, 2018); (Cl. Ex. 7, p. 3).

Claimant lastly seeks reimbursement for her filing fee and deposition transcripts. I tax defendants the costs of claimant's filing fee ($100.00) and transcripts for the depositions of Tim McCorkle ($331.50), Mark Kennedy ($564.00), and claimant ($192.50). 876 IAC 4.33(2), (3).

## ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant healing period benefits from April 10, 2020 through April 6, 2021, at the stipulated rate of eight hundred fifteen dollars and 72/100 ($815.72) per week.

Defendants shall pay claimant 250 weeks of permanent partial disability benefits commencing on April 7, 2021, at the stipulated rate of eight hundred fifteen dollars and 72/100 ($815.72) per week

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

Defendants are responsible for medical expenses as set forth in the decision.

Pursuant to rule 876 IAC 4.33, defendants shall reimburse claimant's costs as set forth in the decision.

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

Signed and filed this ___15th_____ day of September, 2021.

STEPHANIE J. COPLEY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Barbara Diment (via WCES)

Patrick Mack (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.