BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FRANCES STALLMAN,

Claimant,

vs.

QUAKER OATS COMPANY,

Employer,

and

INDEMNITY INSURANCE COMPANY OF N. AMERICA,

Insurance Carrier,
Defendants.

File No. 5065202

ARBITRATION

DECISION

Head Note Nos.: 1701,1802, 1803
2401, 2402

STATEMENT OF THE CASE

Frances Stallman, claimant, filed a petition in arbitration seeking workers' compensation benefits from Quaker Oats Company (Quaker Oats) and its insurer, Indemnity Insurance Company of North America, as a result of an injury she allegedly sustained on December 5, 2016, that allegedly arose out of and in the course of her employment. This case was heard in Cedar Rapids, Iowa, and fully submitted on June 8, 2018. The evidence in this case consists of the testimony of claimant, Joint Exhibits 1 – 4, Claimant's Exhibits 1 – 8 and Defendants' Exhibits A – E. Both parties submitted briefs.

ISSUES

1. Whether claimant sustained an injury on December 5, 2016, which arose out of and in the course of employment;

2. Whether the alleged injury is a cause of temporary disability and, if so, the extent;

3. Whether the alleged injury is a cause of permanent disability and, if so;

4. The extent of claimant's disability.

5. Whether the claimant's alleged injuries were caused by a single accident and should be compensated under Iowa Code section 85.34(2)(s) (2016).

6. What the claimant's gross earnings were and the resulting weekly workers' compensation benefit rate.

7. Whether claimant provided defendants timely notice of her injuries.

8. Whether claimant timely filed a claim for benefits.

9. Whether claimant is entitled to payment of medical expenses.

10. Whether claimant is entitled to payment of an independent medical examination.

11. Whether defendants are entitled to a credit of $14,816.52 for disability benefits claimant was paid.

12. Whether claimant is entitled to penalty.

13. Assessment of costs.

STIPULATIONS

The parties filed a hearing report 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.

FINDINGS OF FACT

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

Frances Stallman, claimant, was 58 years old at the time of the hearing. Claimant graduated from high school. She took courses through Quaker Oats and a community college to be a First Responder and some other courses for fun. Claimant is not currently certified to be a First Responder and has no other post-high school degrees or certifications. (Transcript page 11)

Claimant's testimony was consistent as compared to the evidentiary record and her demeanor at the time of evidentiary hearing gave the undersigned no reason to doubt claimant's veracity. Claimant is found credible.

Claimant began working for Quaker Oats in September 1985. After working for a short time she was laid off and worked for Amana. Claimant returned to Quaker Oats in 1987. (Tr. p. 13) Throughout her tenure at Quaker Oats, claimant has worked for a number of departments. Claimant described many of the tasks that would require the use of her hands, such as using air hoses, shoveling, keyboarding and scraping.

Claimant testified that while working in the cleaning house at Quaker Oats she experienced pain in her right thumb and wrist. Claimant reported her symptoms to the Quaker Oats Health Center and was told to take a combination of various over-the-counter pain relievers. Claimant testified that this combination of drugs alleviated her pain. (Tr. p. 23) Claimant said that she was able to return to her work. She said that occasionally she would feel a twinge of pain, but it was not significant and she did not miss work. (Tr. p. 24) Claimant did not miss any work due to thumb pain. (Tr. p. 70)

Claimant said that her thumb pain started to increase in September 2016. (Tr. pp. 38, 39) Claimant was working the storeroom keeper job when her thumbs started to hurt enough for her to report it to her employer. This was in December 2016. (Tr. pp. 37, 38) Claimant testified that she decided to report her thumb symptoms to Quaker Oats Health Center due to the fact that Tylenol or other medicine would not take the pain away. (Tr. p. 38) This was on December 5, 2016. (Joint Exhibit 1, page 1) Claimant was assessed with bilateral 1st MCP joint inflammation. (JEx. 1, p. 1) I find that this is the date claimant reported her bilateral injuries to Quaker Oats.

Claimant saw Madelyn Pilcher, ARNP, on December 13, 2016. Claimant reported that she believed the work she performed caused her symptoms. Ms. Pilcher provided bilateral thumb splints, Aleve, and recommended ice and elevation. (JEx. 1, p. 2) Claimant said she was told that her complaints were related to arthritis and was advised to see her own physician about this problem. (Tr. p. 40)

On January 3, 2017,[1] claimant returned to the Health Center and expressed concern of the progression of symptoms over the past few years and had told the Health Center approximately 15 years ago she was experiencing thumb symptoms. (JEx. 1, p. 1) On January 10, 2017, Hailey Mercer from Quaker Oats Health Center met with claimant and viewed with claimant the loading and unloading portion of claimant's job, as well as composing a list of activities that claimant found painful. (JEx. 1, p. 1) Claimant testified that Ms. Mercer did not observe all of claimant's duties as the storeroom keeper. (Tr. p. 44)

As claimant reported the problem as a work related injury, Quaker Oats decided to investigate further and sent her for x-rays on January 11, 2017. (Tr. pp. 41, 42) The x-ray of the left thumb showed:

> Findings: Moderate to severe 1st CMC joint degenerative changes seen with associated joint space loss and hypertrophic bony spurring and subchondral sclerosis. No significant degenerative changes of the 1st MCP joint seen. Mild degenerative changes of the 1st IP joint noted. No acute fracture or dislocation.
>
> Impression: Degenerative changes of the left thumb as described above.

[1] The date on Joint Exhibit 1, page 1, lists 1/3/2016 and 1/10/2016 as the dates of the visits. This appears to be incorrect and the visits were in 2017.

(JEx. 2, p. 1) The x-ray of the right hand showed:

> Findings: Severe degenerative osteoarthritis is identified in the 1st carpometacarpal joint. Mild marginal osteophyte formation is noted at the 1st MTP joint without joint space narrowing. No acute fracture or dislocation is visualized.
>
> Impression: Advanced degenerative changes in the 1st CMC joint and mild degenerative changes in the 1st MCP joint.

(JEx. 2, p. 2) Claimant said that she made a number of attempts to find out the results of the investigation about her medical problem and was told in a phone call in February 2017, that Lawrence Goren, M.D., and Kevin Ingle of Sedgwick had determined that symptoms were not work related. (Tr. p. 43) Claimant testified that she had never seen, heard of, or met Dr. Goren at that time. (Tr. p. 43) Claimant testified that she was not sent a copy of Dr. Goren's causation letter of February 3, 2017. (Tr. p. 44; Joint Exhibit 1, pages 4, 5)

On February 3, 2017, Dr. Goren wrote the Health Center concerning the evaluation of claimant's conditions. He noted that x-rays found advanced degenerative changes in the first CMC joint of the left and right thumbs. (JEx. 1, p. 4) Dr. Goren wrote that there was an evaluation of claimant's worksite to see if there were activities that could accelerate of aggravate her underlying condition. Dr. Goren wrote that there was nothing in her job that would put significant forces acting on the CMC joint itself.

Dr. Goren wrote,

> At the end of the day, the evidence based medicine supports the fact that bilateral CMC joint arthritis is extremely common in females over the age of 50. The evaluation of the patient's job activities certainly give credence to the fact that the patient has symptoms arising from that existing condition. However, the ergonomic and risk analysis of the patient's job with regard to causing or accelerating her CMC joint arthritis reveals that there is nothing in her job that would do so. This does not appear to be a work related condition in any way.

(JEx. 1, pp. 4, 5)

Claimant was referred by her primary care physician to see Peter Pardubsky, M.D., to treat her thumbs. On March 30, 2017, Dr. Pardubsky examined claimant. His assessment was, "Localized primary osteoarthritis of the carpometacarpal joint- right greater than left." (JEx. 3, p. 3) Claimant and Dr. Pardubsky agreed to proceed with right thumb TMC arthroplasty. (JEx. 3, p. 4) On April 12, 2017, Dr. Pardubsky completed FMLA paperwork in anticipation of claimant's upcoming surgery. Dr. Pardubsky checked a form to state that claimant's condition was not the result of an

injury and was not a work related condition. (JEx. 3, p. 25:Ex. C, p. 2) Dr. Pardubsky performed surgery on her right thumb on May 2, 2017. Dr. Pardubsky performed:

> Procedures: Right thumb trapeziectomy with interposition arthroplasty, flexor carpi radialis transfer for ligament reconstruction, and abductor poilicis [sic] longus shortening.

(JEx.4, p. 1) His postoperative diagnosis was, "Right thumb trapeziometacarpal osteoarthritis." (JEx. 4, p. 1) Claimant testified the surgery was beneficial and relieved her constant pain. (Tr. p. 48) Claimant was off work from May 2, 2017 through July 31, 2017. (Ex. 5, p. 1) Claimant was allowed to return to work August 1, 2017 with no restrictions. (JEx. 3, p. 11) On July 31, 2017, Dr. Pardubsky recommended surgery on claimant's left thumb. (JEx. 3, p. 10) Claimant returned to work on August 1, 2017. (Tr. p. 48)

On August 4, 2017, claimant's attorney provided a detailed physical functional analysis of the storeroom keeper job that was compiled by Quaker Oats, as well as other documents to Dr. Pardubsky. (JEx. 3, pp. 28, 31-39; Ex. 1, pp. 1 – 10)

On August 30, 2017, Dr. Pardubsky agreed with a letter prepared by claimant's attorney concerning claimant's right thumb. Dr. Pardubsky agreed to the following four items,

1. Her diagnosis was right thumb trapeziometacarpal osteoarthritis (a/k/a CMC arthritis).

2. Her history included increasing bilateral thumb discomfort with increasing sharp pain in her radial right hand and wrist.

3. The cause of her CMC arthritis is multifactorial.

4. Fran's repetitive use of her hands with gripping and fingering frequently throughout her workday for many years is a material aggravating factor of her condition and the need for surgery on 5/2/17.

(JEx. 3, pp. 40, 41)

On September 7, 2017, Dr. Pardubsky completed FMLA paperwork in anticipation of claimant's upcoming left thumb surgery. Dr. Pardubsky checked the form to state that claimant's condition was not the result of an injury and was not a work related condition. (Ex. C, p. 8)

Dr. Pardubsky performed surgery on her left thumb on September 19, 2017. (Tr. p. 49) Dr. Pardubsky performed the following:

> PROCEDURE:

1. Left thumb CMC interposition arthroplasty with FCR transfer for ligament reconstruction and tendon interposition.

2. Left APL shortening from improved thumb abduction.

(JEx. 4, p. 3)

His postoperative diagnosis was, "Left thumb CMC osteoarthritis." (JEx 4, p. 3) Claimant said that the surgery on her left thumb helped as well. (Tr. p. 49) Claimant was released to return to work on December 14, 2017. (Tr. p. 49; Ex. 5, p.1) Claimant returned to work on December 18, 2017, and after a short plant shut down decided to retire January 2, 2018. (Tr. p. 65)

On February 28, 2018, Dr. Pardubsky agreed with a letter prepared by claimant's attorney concerning claimant's left thumb. Dr. Pardubsky agreed to the following four items;

1. Her diagnosis was left thumb trapeziometacarpal osteoarthritis (a/k/a CMC arthritis).

2. Her history includes bilateral thumb pain increasing with use of her hands at work.

3. The cause of her CMC arthritis is multifactorial.

4. Fran's repetitive use of her hands with gripping and fingering frequently throughout her workday for many years is a material aggravating factor of her condition and the need for surgery on 9/19/17.

(JEx. 3, pp. 42, 43)

On January 17, 2018, Theron Jameson, D.O., performed an independent medical examination (IME) of the claimant. (Ex. A, pp. 1 – 4) Dr. Jameson noted the claimant had good results from the right thumb surgery when she requested surgery on her left thumb. (Ex. A, p. 2) Dr. Jameson stated that the claimant's bilateral thumb/hand condition was not related to her work at Quaker Oats. Dr. Jameson noted it is common for women over 50 to have CMC arthritic conditions. Dr. Jameson stated that claimant would more likely have metacarpophalangeal joint instability from her work, but claimant did not have that condition. (Ex. A, p. 4) Dr. Jameson did not believe claimant had any ratable impairment under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, and did not need any permanent restrictions. (Ex. A, p. 4) I find that this is a zero impairment rating by Dr. Jameson.

On March 23, 2018, claimant reported some recent increase in pain; however, Dr. Pardubsky did not think there were any surgical complications. He stated that he would provide an impairment rating if asked. (JEx. 3, p. 23)

On April 13, 2018, Dr. Pardubsky provided impairment ratings for claimant's left and right thumbs. His rating for the left thumb was 12 percent to the left upper extremity and his rating for the right thumb was 11 percent to the right upper extremity. Dr. Pardubsky said claimant did not need restrictions for her right or left hands and thumbs. (JEx. 3, pp. 44, 45) I find that this rating by Dr. Pardubsky was obtained after defendants obtain a rating from a physician defendants retained.

I find that claimant has proven a cumulative injury to both her right and left thumbs/hands. The injuries are a single accident. Her bilateral injury arose out of the same cumulative trauma. Claimant had pain in her thumbs that she reported to Quaker Oats in 2012. After receiving advice to take a combination of over-the-counter medication, claimant's symptoms substantially subsided. In the summer of 2016, claimant started to have more pain in the thumbs and claimant recognized on December 5, 2016 her symptoms might impact her work. Claimant commenced a contested case against the defendants on March 16, 2017.

At the time of the hearing, claimant was retired from Quaker Oats. Claimant wanted to be able to help her mother and spend more time with her sister. (Tr. p. 50) Claimant said that she was able to use her hand, but needed to have her right hand help her left when she was lifting a gallon of milk. Claimant also stated that her hands get tired now. (Tr. p. 51, 52) Claimant has not suffered a total loss of function to either hand.

Claimant did not recall that when she reported her thumbs hurting to the Health Center in December 2016 that she told them that she had pain in the left thumb for the past 10-15 years. (Tr. p. 55) Claimant agreed that she has not had any traumatic injury to her thumbs and that the surgery on her right thumb was a success. (Tr. p. 64) Claimant has not suffered a total loss of function to either hand.

Claimant applied for and received short-term disability during the times Dr. Pardubsky took claimant off work due to her thumb surgeries. Quaker Oats group health plan paid her medical bills, other than co-pays and deductibles. (Tr. p. 59)

Defendants' rate calculation for claimant's weekly workers' compensation benefits results in an average weekly rate of $1,429.24 and a weekly workers' compensation benefit rate of $875.72. (Ex. D, p. 2) Claimant's rate calculation for claimant's weekly workers' compensation benefits results in an average weekly rate of $1,485.00 and a weekly workers' compensation benefit rate of $906.96. (Ex. 4, p. 1)

Claimant has medical expenses of $46,388.50 due to the surgeries and treatments she received for her thumb/hand conditions. Claimant has paid $5,361.08 out of pocket and had a balance due of $9.44 for one medical bill. (Ex. 6, pp.1, 2) Claimant has requested medical mileage of $218.19. (Ex. 7, pp. 1, 2) I find the medical and mileage costs are related to claimant's bilateral hand condition and the expenses are reasonable.

Claimant has requested costs in the total amount of $1,058.62 based upon the following expenses:

FILING FEES	**$100.00**
Original Notice and Petition filed on 3/13/17	$100.00
SERVICE	**$13.12**
Service of Petition on Quaker Oats	$6.56
Service of Petition on Indemnity Ins. Co. North America	$6.56
MEDICAL EVIDENCE	**$945.00**
Medical Records from PCI on 5/3/17	$36.00
Medical Records from Surgery Center of Cedar Rapids 6/22/17	$45.00
Pre-Payment Phone Conference Dr. Peter Pardubsky	$117.00
Dr. Pardubsky charge for reviewing and signing 8/7/17 letter	$50.00
Medical Records from PCI 12/12/17	$67.00
Medical Records from PCI 3/30/16	$57.50
Medical Records from PCI 4/4/18	$23.00
Permanent Disability Evaluation 4/9/18	$550.00
TOTAL COSTS:	**$1,058.62**

(Ex. 8, pp. 1, 2)

Defendants paid claimant $14,816.52 in net benefits pursuant to a short-term disability policy. (Ex. B, p. 2) Claimant did not present any evidence to show to the contrary or not argue in her brief that defendants' calculation was incorrect. I find defendants paid $14,816.52 in short-term disability payment and defendants are entitled to a credit of this amount.

RATIONAL AND CONCLUSIONS OF LAW

Timely notice and statute of limitations

Defendants asserted that claimant failed to provide notice to the employer pursuant to Iowa Code section 85.23 and failed to timely bring an action within the statute of limitations pursuant to Iowa Code section 85.26. Claimant asserts she provided timely notice of her bilateral cumulative injury claims.

Iowa Code section 85.23 provides:

> Notice of injury — failure to give. Unless the employer or the employer's representative shall have actual knowledge of the occurrence of an injury received within ninety days from the date of the occurrence of the injury, or unless the employee or someone on the employee's behalf or a

> dependent or someone on the dependent's behalf shall give notice thereof to the employer within ninety days from the date of the occurrence of the injury, no compensation shall be allowed.

Section 85.26(1) provides:

> An original proceeding for benefits under this chapter . . . shall not be maintained in any contested case unless the proceeding is commenced within two years from the date of the occurrence of the injury for which benefits are claimed or, if weekly compensation benefits are paid under section 86.13, within three years from the date of the last payment of weekly compensation benefits.

Iowa Code section 85.23. Iowa Code section 85.26(1) requires an employee to bring an original proceeding for benefits within two years from the date of the occurrence of the injury if the employer has paid the employee no weekly indemnity benefits for the claimed injury. If the employer has paid the employee weekly benefits on account of the claimed injury, however, the employee must bring an original proceeding within three years from the date of last payment of weekly compensation benefits.

That the employee failed to bring a proceeding within the required time period is an affirmative defense which the employer must plead and prove by a preponderance of the evidence. See Dart v. Sheller-Globe Corp., II Iowa Industrial Comm'r Rep. 99 (App. 1982).

The two-year statute of limitations for original proceedings and the 90-day notice period does not began to run until the injured worker, acting as a reasonable person, knew or should have known that his or her physical condition was serious enough "to have a permanent adverse impact on the claimant's employment or employability. Herrera v. IBP, Inc., 633 N.W.2d 284, 288 (Iowa 2001). This rule is applicable to both traumatic and cumulative work injuries. Baker v. Bridgestone/Firestone, 872 N.W.2d 672 (Iowa 2015); Baker v. Bridgestone/Firestone, File Nos. 5040732 & 5040733 (Remand, April 13, 2016).

> A cumulative injury is manifested when the claimant, as a reasonable person, would be plainly aware (1) that he or she suffers from a condition or injury, and (2) that this condition or injury was caused by the claimant's employment. Upon the occurrence of these two circumstances, the injury is deemed to have occurred. Nonetheless, *by virtue of the discovery rule, the statute of limitations will not begin to run until the employee also knows that the physical condition is serious enough to have a permanent adverse impact on the claimant's employment or employability, i.e.,* the claimant *knows or should know the "nature, seriousness, and probable compensable character" of his injury or condition.*

Herrera v. IBP, Inc., 633 N.W.2d 284, 288 (Iowa 2001) (emphasis added) (quoting Orr v. Lewis Cent. Sch. Dist., 298 N.W.2d 256, 257 (Iowa 1980)). Claimant's knowledge of the three triggering factors "may be actual or imputed from the record." See Larsen Mfg. Co., Inc. v. Thorson, 763 N.W.2d at 854-55 (2009), (stating claimant "deemed to know" the three factors "when she knows her physical condition is serious enough to have permanent adverse impact on her employment or employability"). (See Herrera, 633 N.W.2d at 288) "The question of whether a claimant knew, or should have known, of the nature, seriousness, and probable compensability of her injury is a question of fact to be determined by the commissioner." Midwest Ambulance Serv. v. Ruud, 754 N.W.2d 860, 866 (Iowa 2008).

The time period both for giving notice and filing a claim does not begin to run until the claimant as a reasonable person, should recognize the nature, seriousness, and probable compensable character of the injury. The reasonableness of claimant's conduct is to be judged in light of claimant's education and intelligence. Claimant must know enough about the condition or incident to realize that it is work connected and serious. Claimant's realization that the injurious condition will have a permanent adverse impact on employability is sufficient to meet the serious requirement. Positive medical information is unnecessary if information from any source gives notice of the condition's probable compensability. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Orr v. Lewis Cent. Sch. Dist., 298 N.W.2d 256 (Iowa 1980); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

For time limitation purposes, the discovery rule does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

In this case claimant did not miss work due to her bilateral thumb pain. When claimant had symptoms in 2012 they diminished with the use of over-the-counter medication. Claimant was able to perform her work for years. There is no record of any medical provider informing claimant that her symptoms were work related, and that her symptoms could be permanent and adversely affect her ability to work. When claimant went to the Quaker Oats Health Center she was told that her condition was not work related. The claimant was working at Quaker Oats using her hands as part of work through a lot of her employment at Quaker Oats. It was not until December 5, 2016 when claimant was not getting sufficient relief with over-the-counter medicine that claimant realized that her bilateral hand injury might have an adverse impact on her ability to work. I find that claimant's injury manifest on December 5, 2016.

Claimant was reasonably put on notice about the potential seriousness of her injury on December 5, 2016. I find that the discovery date for these injuries is December 5, 2016.

Defendants have failed to prove late notice or a statute of limitation defense.

Permanent injury.

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).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

Dr. Jameson did not explicitly discuss whether claimant's work permanently aggravated or accelerated claimant's symptoms. Dr. Jameson did opine that claimant's thumb/hand conditions were not caused by work at Quaker Oats. While Dr. Jameson did not explicitly address whether claimant's work at Quaker Oats accelerated or

aggravated her arthritis, implicit in his opinions are that work did not permanently accelerate or aggravate claimant's symptoms.

ARNP Pilcher did not believe claimant's condition was work related, but encouraged claimant to pursue a claim. Dr. Goren's opinion that claimant's work did not cause or accelerate or aggravate claimant's arthritis. Dr. Goren did not speak to or examine claimant and was provided a partial description of her current work at Quaker Oats.

Dr. Pardubsky indicated on two FMLA forms that claimant did not have a work injury. Given the context of the FMLA forms and the fact that I find Dr. Pardubsky's last opinion concerning causation —that claimant's work was a material aggravating factor—is the controlling opinion by Dr. Pardubsky.

Dr. Pardubsky was claimant's treating orthopedic surgeon. Dr. Pardubsky had the opportunity to see the claimant's injuries and had the most contact with claimant. Dr. Pardubsky opined that claimant's repetitive use of her hands with gripping and fingering throughout the workday materially aggravates her condition and the need for the two surgeries.

I do not find Dr. Jameson, Dr. Goren and ARNP Pilcher opinions convincing. Claimant's employment history with Quaker Oats required extensive use of hands and thumbs. The job description of storeroom keeper, claimant's last job at Quaker Oats, shows very significant use of hands. I find Dr. Pardubsky's opinions that claimant's work was a material aggravating factor in claimant's condition and need for surgery convincing.

I find claimant has proven by a preponderance of the evidence that her work at Quaker Oats materially aggravated her arthritis in her hands and also led to her need for surgery.

Body Part Injured and Impairment Schedule

The parties stipulated that claimant's injury is a bilateral injury to the upper extremities (Hearing Report). However, the defendants' attorney stated when the undersigned was going over the Hearing Report with the parties there was a dispute as to whether claimant's injuries were to the bilateral upper extremities or bilateral thumbs and whether there was a single accident. (Tr. p. 5) Claimant did not disagree the defendants placing these issues in dispute. I will rule on these issues.

The CMC joint is located at the proximal end of the metacarpus where it attaches to the trapezium bone in the carpus. It is located proximal to the metacarpal joint and is well into the base of the hand near the crease of the wrist. The actual situs of the claimant's permanent impairment is the right and left hand, not the right and left thumb. It is also not part of the wrist. . See Anson v. IBP, Inc. and Second Injury Fund of Iowa,

File Nos. 5003174 and 5003175 (App. March 25, 2005). I find that claimant has an injury to the right and left hand.

Claimant has proven that she has a loss to both hands. While it is possible that there was an injury to the wrist due to the need to work on the tendons, there is no explicit statement from a medical expert that the situs of the injury is in the wrist or arms.

Defendants dispute whether claimant's injuries occurred due to a single accident.

Claimant injuries arose out of a single cumulative process. The claimant developed symptoms in her hands due to work at Quaker Oats. Claimant has proven that she is entitled to benefits based upon Iowa Code 85.34(s).

Iowa Code section 85.34 (s) (2016)[2] provides;

> *s.* The loss of both arms, or both hands, or both feet, or both legs, or both eyes, or any two thereof, caused by a single accident, shall equal five hundred weeks and shall be compensated as such; however, if said employee is permanently and totally disabled the employee may be entitled to benefits under subsection 3.

The claimant has shown that the work injury involved a permanent impairment to two upper extremities occurring by a single accident. This is viewed by this agency to be caused from a single accident. Fichter v. Griffin Pipe Products[3], File No. 941434, (App. April 29, 1993). Therefore, the extent of disability is measured pursuant to Iowa Code section 85.34(2)(s).

Permanent partial disabilities are divided into scheduled and unscheduled losses. Iowa Code § 85.34(2) (2015). If the claimant's injury is listed in the specific losses found in Iowa Code section 85.34(2)(a)-(t), the injury is a scheduled injury and is compensated by the number of weeks provided for the injury in the statute. Second Injury Fund of Iowa v. Bergeson, 526 N.W.2d 543, 547 (Iowa 1995). "The compensation allowed for a scheduled injury 'is definitely fixed according to the loss of use of the particular member.'" Id. (quoting Graves v. Eagle Iron Works, 331 N.W.2d 116, 118 (Iowa 1983)). If the claimant's injury is not listed in the specific losses in the statute, compensation is paid in relation to 500 weeks as the disability bears to the body as a whole. Id.; Iowa Code § 85.34(2)(u). "Functional disability is used to determine a specific scheduled disability; industrial disability is used to determine an unscheduled injury." Bergeson, 526 N.W.2d at 547.

This case involves an injury to claimant's hands. The schedule provides a maximum award of 500 weeks for an injury to both arms, both hands, both feet, both

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[2] Iowa Code section 85.34 (s) has been moved by the Code Editor to 85.34 (t) in 2018.
[3] The Fichter case was an injury claim for bilateral carpal tunnel.

legs, or both eyes as the result of a single accident, unless the employee is permanently and totally disabled under Iowa Code section 85.34(3). Iowa Code § 85.34(2)(s); Simbro v. Delong's Sportswear, 332 N.W.2d 886, 889 (Iowa 1983). It is necessary to first determine the degree of functional loss. Simbro, 332 N.W.2d at 889. If simultaneous injuries cause a total loss of earning capacity, then the claimant is entitled to an award of permanent total disability benefits. Iowa Code § 85.34(2)(s). If the loss of earning capacity is less than total loss, then the extent of permanent disability is measured functionally as a percentage of loss of use for each extremity, after being converted to a percentage of the whole person and combined. Riley v. Eaton Corp., File Nos. 5037054, 5037055 (Arb. April 27, 2012).

When considering the extent of disability for a scheduled member, the trier of fact may consider medical and nonmedical evidence. Sherman v. Pella Corp., 576 N.W.2d 312, 322 (Iowa 1998). Therefore, lay testimony may be used to buttress medical testimony when determining the extent of an employee's injuries. Id.

In this case it was found that claimant had not suffered a total loss of earning capacity, consequently her entitlement to permanent disability benefits is measured functionally. The combined values chart in the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, page 604, provides a combined value of 22 percent. Based upon the findings herein of a combined 22 percent impairment to the body as a whole as a result of the injury, claimant is entitled as a matter of law to 110 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(s), which is 22 percent of the 500 weeks, the maximum allowable for a simultaneous injury to two extremities in that subsection.

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).

Claimant was recovering from surgery and unable to work due to the right thumb surgery from May 2, 2017 through July 31, 2017. Claimant was recovering for surgery and unable to work due to left thumb surgery from September 14 through December 14, 2017. Claimant was unable to work during this time due to her work injury. Claimant is entitled to healing period benefits for these time periods.

Rate

The next issue is a determination of the applicable rate.

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 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, including shift differential pay but not including overtime or premium pay, 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 86.36(6)

Even though claimant may have worked more or less than 40 hours during some of the weeks before the injury due to unanticipated occurrences, a customary work week schedule should be used to calculate the rate of compensation. Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 619 (Iowa 1995). This customary work schedule rule takes precedence over any averaging of earnings over the 13 weeks prior to the injury set forth in Iowa Code section 85.36(6). Weishaar v. Snap-On Tools Corp., 582 N.W.2d 177 (Iowa 1998). Mercy Medical Center v. Healy, 801 N.W.2d 865 (Iowa App. 2011).

"Ascertainment of an employee's customary earnings does not turn on a determination of what earnings are guaranteed or fixed; rather, it asks simply what earnings are usual or typical for that employee." Jacobson Transp. Co. v. Harris, 778 N.W.2d at 199 (Iowa 2010).

This agency discussed inclusion/exclusion of vacation pay in a recent case. Torres v. A. Y. McDonald, Mfg., File No 5053064 (Arb. October 5, 2017) That decision held;

> Iowa Code section 85.36(6) describes that calculation method for an hourly employee. It states that:
>
> > If the employee was absent from employment for reasons personal to the employee during part of the thirteen calendar weeks preceding the injury, the employee's weekly earnings shall be the amount the employee would have earned had the employee worked when work was available to other employees of the employer in a similar occupation. A week which does not fairly reflect the employee's customary earnings shall be replaced by the closest previous week with earnings that fairly represent the employee's customary earnings.

> Defendant argues that the weeks of February 22, 2015, February 1, 2015, January 25, 2015 and January 18, 2015 are properly excluded from their rate calculation because, those weeks include periods of vacation pay. The weeks in question are weeks of 40 or 48 hours of earnings, with the inclusion of vacation pay. Defendant cites no authority for the proposition that the presence of vacation pay alone should result in the exclusion of that particular week from the rate calculation.
>
> Presumably, if an employee is allowed vacation pay, that employee would have been otherwise permitted to work during that same time. Had the employee not taken vacation, she would have worked the scheduled shift available to other similarly situated employees and had the same earnings for purposes of rate calculation.
>
> Vacation pay does not, on its own, necessarily cause an exclusion of a particular week. The question remains whether or not the earnings reflected in that week are "customary earnings." Iowa Code section 85.36(6). "[T]o determine what weeks should be included in the compensation rate calculation one must ask whether the earnings attributable to a particular week are customary . . ." Mercy Medical Center v. Healy, 801 N.W.2d 865, at 873 (Iowa App. 2011).
>
> The weeks included in claimant's rate calculation fairly represent claimant's customary earnings and more appropriately follow Iowa Code section 85.36(6). I conclude that claimant's rate calculation is correct under these circumstances when applying Iowa Code section 85.36(6) and I adopt the same.

Torres at pp. 9, 10.

In this case claimant was paid her vacation pay based upon a contract between her union and Quaker Oats. Certainly it is customary wages when it is part of a negotiated contract that applies to bargaining unit members. I find that claimant's calculation of gross weekly wages and the resulting weekly worker's compensation rate is the correct calculation. I find claimant average weekly wage is $1,485.00 and her workers' compensation rate is $906.96.

Medical expenses

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Iowa Code section 85.27. Holbert

v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Evidence in administrative proceedings is governed by section 17A.14. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence. The rules of evidence followed in the courts are not controlling. Findings are to be based upon the kind of evidence on which reasonably prudent persons customarily rely in the conduct of serious affairs. Health care is a serious affair.

Prudent persons customarily rely upon their physician's recommendation for medical care without expressly asking the physician if that care is reasonable. Proof of reasonableness and necessity of the treatment can be based on the injured person's testimony. Sister M. Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963).

It is said that "actions speak louder than words." When a licensed physician prescribes and actually provides a course of treatment, doing so manifests the physician's opinion that the treatment being provided is reasonable. A physician practices medicine under standards of professional competence and ethics. Knowingly providing unreasonable care would likely violate those standards. Actually providing care is a nonverbal manifestation that the physician considers the care actually provided to be reasonable. A verbal expression of that professional opinion is not legally mandated in a workers' compensation proceeding to support a finding that the care provided was reasonable. The success, or lack thereof, of the care provided is evidence that can be considered when deciding the issue of reasonableness of the care. A treating physician's conduct in actually providing care is a manifestation of the physician's opinion that the care provided is reasonable and creates an inference that can support a finding of reasonableness. Jones v. United Gypsum, File 1254118 (App. May 2002); Kleinman v. BMS Contract Services, Ltd., File No. 1019099 (App. September 1995); McClellon v. Iowa Southern Utilities, File No. 894090 (App. January 1992). This inference also applies to the reasonableness of the fees actually charged for that treatment.

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

In cases where the employer's medical plan covers the medical expenses, claimant is entitled to an order of reimbursement only if he has paid treatment costs; otherwise, the defendants are ordered to make payments directly to the provider. See Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Where medical payments are made from a plan to which the employer did not contribute, the claimant is entitled to a direct payment. Midwest Ambulance Service v. Ruud, 754 N.W.2d 860, 867-68 (Iowa

2008)("We therefore hold that the commissioner did not err in ordering direct payment to the claimant for past medical expenses paid through insurance coverage obtained by the claimant independent of any employer contribution.") See Also: Carl A. Nelson & Co. v. Sloan, 873 N.W.2d 552 (Iowa App. 2015) (Table) 2015 WL 7574232 15-0323.

As I found the claimant's surgery and care for her hands is causally related to her December 5, 2016 injury, defendants are responsible for all medical costs. Defendants shall pay claimant directly the $5,361.08 of her out-of-pocket expenses as well as the outstanding bill for $9.44. Defendants shall also pay claimant for her medical mileage of $218.19.

IME expense

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991).

I find that the defendants are liable for the cost of Dr. Pardubsky's rating report of April 9, 2018 in the amount of $550.00.

Credit

Defendants have proven that Quaker Oats may payments to claimant under a group disability plan. Under Iowa Code 85.38(2) defendants are entitled to a credit for the net payments defendants made to claimant under their group disability plan of $14,816.52.

Costs

Concerning costs, assessment of costs is a discretionary function of this agency. Iowa Code section 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 conclude that claimant was generally successful in this claim and therefore exercise my discretion and assess costs against the defendant. Claimant has set forth his costs at Exhibit 8. I conclude that the filing fee and service fees of $113.12 are appropriate under 876 IAC 4.33. The costs of obtaining medical records and a telephone conference are not recoverable costs. The $50.00 charge for Dr. Pardubsky is recoverable as a report. I award claimant $163.12 in costs.

Penalty

The last issue is penalty benefits. Claimant has requested penalty due to delay in making a decision, lack of a reasonable basis and failure to inform claimant.

Iowa Code section 86.13(4) provides that:

> (a) If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, of chapter 85, 84A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed or terminated without reasonable or probable cause or excuse.
>
> (b) The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (1) The employee has demonstrated a denial, delay in payment, or termination of benefits.
>
> (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.
>
> (c) In order to be considered a reasonable or probable cause or excuse under paragraph "b", an excuse shall satisfy all the following criteria:
>
> (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.
>
> (2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.
>
> (3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Weekly compensation payments are due at the

end of the compensation week. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229, 235 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commission must impose a penalty in an amount up to fifty percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

Claimant testified that she was told by ARNP Pilcher during her appointment in December that the defendants did not believe her arthritis was related to her work. There was no delay in informing claimant as to why the defendants were denying benefits. Defendants obtained an opinion from Dr. Goren and timely convey that to claimant. While I reached a different conclusion as to causation than the defendants, the defendants' conduct was not unreasonable. I conclude that defendants conducted a reasonable investigation and that their evaluation of the claim was the actual basis for the denial and that they communicated the basis for the denial to claimant contemporaneously with the denial of the claim.

I find the denial of benefits was not unreasonable. No penalty benefits are awarded.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay healing period benefits from May 2, 2017 through July 31, 2017 and September 14, 2017 through December 14, 2017 at the weekly rate of nine hundred six and 96/100 dollars ($906.96).

Defendants shall pay claimant one hundred ten (110) weeks pf permanent partial disability benefits at the weekly rate of nine hundred six and 96/100 dollars ($906.96) commencing March 20, 2018.

Defendants shall pay five hundred fifty dollars ($550.00) for the cost of Dr. Pardubsky's IME.

Defendants are entitled to a credit of fourteen thousand eight hundred sixteen and 52/100 dollars ($14,816.52).

Defendants shall pay the medical expenses identified in Exhibit 6. Defendants pay claimant directly any out-of-pocket or medical expenses.

Defendants shall pay medical mileage to the claimant of two hundred eighteen and 19/100 dollars ($218.19).

Defendants shall pay costs of one hundred sixty three and 12/100 dollars ($163.12).

Defendants 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).

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

Signed and filed this 25th day of January, 2019.

James F. Elliott

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.