BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ANA DAVIS,	:	
Claimant,	:	File Nos. 5066321 5066322 5066323
vs.	:	
KRAFT HEINZ COMPANY,	:	ARBITRATION DECISION
Employer,	:	
and	:	
INDEMNITY INS. COMPANY OF N.A.,	:	
Insurance Carrier, Defendants.	:	Head Note Nos.: 1108, 1803, 2500

STATEMENT OF THE CASE

The claimant, Ana Davis, filed three petitions for arbitration and seeks workers' compensation benefits from Kraft Heinz Company, employer, and Indemnity Insurance Company of North America, insurance carrier. The claimant was represented by Andrew Bribriesco. The defendants were represented by Lori Utsinger.

The matter came on for hearing on February 16, 2022, before Deputy Workers' Compensation Commissioner Joe Walsh in Des Moines, Iowa via Zoom videoconferencing system. The record in the case is voluminous. It consists of Joint Exhibits 1 through 7; Claimant's Exhibits 1 through 16; and Defense Exhibits A through M. The claimant testified at hearing. Victoria Fickel served as the court reporter. Steven Rhodes served as the Spanish language interpreter. The matter was fully submitted on April 8, 2022, after helpful briefing by the parties. The issues and stipulations are the same for all three files.

ISSUES

The parties submitted the following issues for determination:

1. Whether the claimant sustained a cumulative injury which arose out of and in the course of employment, and, if so, the correct date of manifestation.

2. Whether the alleged injury is a cause of any temporary or permanent disability.

3. Claimant seeks payment of temporary disability benefits from January 25, 2019, through July 5, 2021. Defendants dispute this.

4. Claimant seeks permanent partial disability benefits as well. Defendants dispute claimant's entitlement to any permanency. The nature of the alleged disability is disputed as is the commencement date for any such benefits. In fact, defendants contend that claimant is still in a period of recovery and the issue of permanency is not ripe.

5. Defendants assert a notice defense under Iowa Code section 85.23. Claimant asserts the discovery rule is applicable.

6. Whether claimant is entitled to medical expenses set forth in Claimant's Exhibit 15. Defendants dispute responsibility for these expenses.

7. Whether claimant is entitled to an independent medical examination (IME) under Iowa Code section 85.39.

8. Whether claimant is entitled to alternate medical care.

STIPULATIONS

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship.

2. The weekly rate of compensation is $677.52.

3. Defendants have paid and are entitled to a credit under Iowa Code section 85.38(2), as set forth in paragraph 9 of the hearing report.

4. Affirmative defenses, other than timely notice, have been waived.

FINDINGS OF FACT

Claimant Ana Gloria Davis was 60 years old as of the date of hearing. She testified live and under oath at hearing through a Spanish language interpreter. Her primary language is Spanish. I find her testimony to be highly credible. Her answers were thoughtful and straightforward. She was a good historian. There was nothing about her demeanor which caused me any concern regarding her truthfulness.

Ms. Davis has worked for the employer, Kraft Heinz, since May 2000. She contends that she sustained a cumulative trauma injury to her bilateral arms and hands, as well as her right shoulder from working at Heinz. Specifically, she testified that her position as a labeler contributed to the onset of her difficulties. She described her job duties in this position at hearing. (Transcript, pages 17-19) Her sworn testimony is generally consistent with the employer's job description. (Defendants' Exhibit A, pages 9-13) Ms. Davis testified she also performed cleaning functions and did some

packaging. (Tr., pp. 19-23) I find there is really no doubt that Ms. Davis was using her upper extremities in a forceful, frequent manner, often for 12 hours per day during this timeframe.

Ms. Davis testified in her deposition that she began developing symptoms in her bilateral upper extremities back in 2014 or 2015. (Def. Ex. L, Davis Depo, pp. 15-16) This corresponds roughly with the time that she began the labeler position. She testified at hearing that she began reporting the symptoms to a plant nurse named Sandy sometime in 2016. (Tr., pp. 24-25) She testified that Sandy did not fill out any paperwork but just told her to use ice and provided a brace. She testified she went to Sandy "several times." (Tr., pp. 41-42)

On March 9, 2017, Ms. Davis was examined by her primary medical provider at the University of Iowa Hospitals and Clinics who took the following history:

> 55 y.o. female returns for re evaluation of her neck and BUE pain and pain that progresses to make her entire spine sore, arms tingling and pain in both shoulders at rest. . . . She reports that she is awaiting worker's [sic] compensation eval through her employer for her arm weakness and pain but has not yet been given any assistance but has spoken to company nurse.

(Jt. Ex. 1, p. 62) Ms. Davis had reported tingling and paresthesias in her hands to her primary provider in September 2016. "Reports working now mandatory overtime 6 days per week at Heinz in town. Reports increase in joint aches while working these hours. Increased hands tingling and parasthesias." (Jt. Ex. 1, p. 55) This appears to be the first time any symptoms in claimant's hands, arms or shoulders are mentioned in the records. Ms. Davis did have prior injuries and resulting disability in both her lumbar spine (burst fracture) from a work injury and her cervical spine from an automobile accident. (Jt. Ex. 1, pp. 1-54) In March 2017, her primary provider recommended she follow up with her employer's workers' compensation representative regarding her arms and hands. (Jt. Ex. 1, p. 65)

Ms. Davis filled out an accident report at Heinz on May 9, 2017, contending her work as a labeler had resulted in injury to both hands, right shoulder and low back. (Cl. Ex. 9)

In June 2017, Ms. Davis was directed to an evaluation with Camilla Frederick, M.D., at Quad City Occupational Health. (Jt. Ex. 2) She documented the following history:

> DEMOGRAPHICS
>
> Ana Davis is a 55 year old female who is right handed and works for Heinz. She is on the line. She does a lot of lifting and pulling of products. She has worked there for 18 years. She has been a labeler machine operator for the past 3 years.

> CHIEF COMPLAINT
>
> bilateral forearms, right shoulder and low back pain
>
> PATIENT DESCRIPTION OF ACCIDENT
>
> 1/15/17 she states the right and left shoulders and hands started hurting more while working on the line. She says she cannot sleep and has constant pain. . . .
>
> She admits the LBP is chronic due to a fall at work and she is on PERMANENT RESTRICTIONS OF 20 LIFTING AND 10# OVERHEAD. She was released from care 2008 it ranged from 4-6/10. It is unchanged and still has pain that goes down the RT leg, lateral side down to great and 2nd toe. That has not changed. There is no change in this issue and she understands per out [sic] conversation that I will not be reopening care for the low back.
>
> HISTORY OF PRESENT ILLNESS
>
> Ana's primary problem is pain located in the right shoulder. The problem began on 1/15/2017. She considers it to be medium. She has noticed that it is made worse by lifting, pulling. Ana says that it seems to be constant. It is improved with rest, medications. Her pain level, on a scale of one to ten, is 7. She states that she cannot open bottles anymore and has to ask for help. She describes it as sticking, hot.
>
> Ana's secondary problem is pain located in the right hand. She describes it as burning, deep ache. She considers it to be moderate. The problem began on 1/15/2017. Ana says that it seems to be constant. She has noticed that it is made worse by twisting, bending. It is improved with rest, medication. Her pain level, on a scale of one to ten, is 7[.] Says she cannot open bottles anymore.

(Jt. Ex. 2, p. 125) Dr. Frederick ultimately diagnosed "lesions of the median nerve" in both upper extremities, in addition to stable chronic low back pain. She did not comment on medical causation. (Jt. Ex. 2, p. 129)

During this timeframe, Ms. Davis also continued to follow up with her primary care provider, who examined her bilateral hands, right shoulder, neck and back. (Jt. Ex. 1, pp. 74-81) On June 29, 2017, the following is documented. Here "to discuss worker comp finding of CTS while c/o increased pain and numbness in her BUE with heavy work and strenuous activity at her job." (Jt. Ex. 1, p. 79) Her primary care provider agreed to refer her to an orthopedist for evaluation of the carpal tunnel and noted that she may need to "consider another line of work for ongoing issues, not willing to keep giving her time off for work without this being supported by expert opinion as necessary." (Jt. Ex. 1, p. 81)

In July 2017, Heinz had Midwest Therapy Centers perform a job analysis. (Def. Ex. B) In the analysis, the therapist noted frequent lifting, grasping, pushing and pulling but concluded that there were no "areas of concern" from an ergonomic perspective. (Def. Ex. B, p. 26) The therapist did not observe Ms. Davis performing any cleaning tasks on this date. (Tr., p. 21) In that function, she performed overhead work with a pressure hose which required significant force. (Tr., p. 21) In addition, Ms. Davis underwent nerve conduction studies which confirmed bilateral carpal tunnel syndrome. (Jt. Ex. 3, p. 142)

Ms. Davis returned to Dr. Frederick on August 17, 2017, and repeated her clinical history and examination. (Jt. Ex. 2, pp. 130-132) Dr. Frederick noted that EMG testing in July revealed bilateral carpal tunnel syndrome. (Jt. Ex. 2, p. 131) This time, Dr. Frederick provided the same diagnoses, but concluded that the cause of the diagnoses were "non work related." (Jt. Ex. 2, p. 134) Dr. Fredrick noted that "her description of her job doesn't sound repetitive and certainly not forceful." (Jt. Ex. 2, p. 129) It appears Dr. Frederick deferred to the "job evaluation" from the physical therapist concluding that it showed "no risk factors" for carpal tunnel syndrome. (Jt. Ex. 2, p. 131)

At this point, it appears that the claim was denied, although there is no official record of denial of the claim until June 2018. (Def. Ex. G, p. 49)

Ms. Davis continued to treat through the University of Iowa Hospitals and Clinics thereafter. (Jt. Ex. 1, pp. 79-116) The treatment was primarily for her bilateral hands and arms. She was also evaluated by Patrick Hitchon, M.D., in October 2017, for her neck and low back symptoms. (Jt. Ex. 1, pp. 106-107) My impression from Dr. Hitchon's report is that she had not sustained any new injury or pathology to either her neck or low back from her ongoing work activities. She was also evaluated by orthopedic surgeon, Britt Marcussen, M.D., in October 2017. After he examined her, he diagnosed carpal tunnel syndrome and right shoulder pain and opined that "both of these conditions seem to be work related or the very least aggravated by work." (Jt. Ex. 1, p. 103) He recommended she return to the worker's health clinic for treatment, concerned that her personal insurance may not cover treatment. Eventually, her primary medical provider referred her to an orthopedist outside of UIHC for the bilateral carpal tunnel and right shoulder symptoms. (Jt. Ex. 1, p. 120)

Thomas VonGillern, M.D., evaluated Ms. Davis on September 17, 2018. (Jt. Ex. 4) Ms. Davis submitted a Medical History Form for Dr. VonGillern on the same date indicating the reason for her visit was both hands and her right shoulder which she described as progressively worsening. (Jt. Ex. 4, pp. 143-144) For the "problem start date" she listed July 2017. (Jt. Ex. 4, p. 143) Dr. VonGillern documented the following history in his first visit:

> A 56-year-old female presents today for right shoulder pain, bilateral hand numbness. The patient has had her symptoms since July of 2017, with them progressively worsening. She has a sharp 6/10 constant pain that does radiate down the arm and wake her from sleep. Symptoms are worse with lifting. Symptoms are better with compression, bracing and

> pain pills. Her numbness and tingling are in the ring, long, index and thumb on bilateral hands, more severe on the right. She has associated weakness. She has had nerve conduction studies conducted at The University of Iowa but does not have the results with her today.

(Jt. Ex. 4, p. 145) Dr. VonGillern began a course of treatment which began with discerning a precise diagnosis for each condition which included further diagnostic testing. By October 9, 2018, he had diagnosed bilateral carpal tunnel syndrome, right shoulder impingement, right shoulder fraying and small tears, and right shoulder mild to moderate posterior decentering humeral head. (Jt. Ex. 4, p. 150) He recommended surgery. (Jt. Ex. 4, p. 151)

Dr. VonGillern performed surgery on the right side, described as right median nerve lysis, on January 25, 2019. (Jt. Ex. 4, p. 155; Jt. Ex. 5, pp. 184-185) She was taken off work and began an ordinary course of surgical recovery. Eventually the treatment began to focus on her right shoulder, including a number of injections of the right shoulder throughout 2019. (Jt. Ex. 4, pp. 156-161) On April 30, 2020, another injection was performed. (Jt. Ex. 4, p. 165) Due to the ongoing complaints of pain and disability in her shoulder, a repeat arthrogram was ordered in July 2020 and performed in early August 2020. This study found the following:

1. Right shoulder severe AC joint arthropathy
2. Right shoulder SLAP tear
3. Right shoulder undersurface fraying in the anterior supraspinatus tendon
4. Right shoulder impingement
5. Right shoulder low grade articular surface fraying and intrasubstance tear with possible articular surface communication to the anterior leading edge supraspinatus with low-grade articular surface fraying and small tears distal superior fibers subscapularis with small distal superior fiber intrasubstance tear subscapularis; and
6. Right shoulder mild to moderate posterior decentering humeral head.

(Jt. Ex. 4, p. 168) After another injection, Ms. Davis underwent arthroscopic surgery on November 25, 2020. (Jt. Ex. 7, p. 188) Post-operative diagnoses included: (1) chronic subacromial bursitis with supraspinatus tendinitis; (2) impingement syndrome; (3) osteoarthritis; (4) rotator cuff. (Jt. Ex. 7, p. 188) Post-operative care continued fairly successfully and Ms. Davis returned to work in July 2021, reporting only mild aches in her right shoulder. (Jt. Ex. 4, p. 178) Her restrictions were no lifting more than 20 pounds. (Jt. Ex. 4, p. 180) Overall, both surgeries were relatively successful. She has been able to return to work successfully for Heinz.

Dr. VonGillern signed conflicting opinion reports for each party. On June 17, 2019, he signed an opinion statement on defense counsel letterhead opining that he could not state to a reasonable degree of medical certainty that claimant's "work at Kraft Heinz would materially/substantially aggravate her right shoulder." (Def. Ex. D, p. 40) On October 12, 2020, he signed an expert opinion on claimant's counsel letterhead,

indicating he agreed with two other medical experts, that her bilateral carpal tunnel and right shoulder condition were related to her work at Kraft Heinz. (Cl. Ex. 4, p. 16)

In addition to the treatment records, there are a number of expert medical opinions in evidence.

Claimant secured an independent medical examination (IME) from orthopedist Richard Kreiter, M.D., on August 7, 2019. (Cl. Ex. 2) Dr. Kreiter reviewed correspondence from claimant's counsel, appropriate medical records and examined Ms. Davis. He opined that her work activities for Kraft Heinz aggravated or accelerated her preexisting conditions. (Cl. Ex. 2, p. 8) He assigned ratings for these conditions, however, it is noted that this was done prior to any shoulder surgery. (Cl. Ex. 2, p. 8)

Defendants secured an expert opinion based upon a records review from William Boulden, M.D., on November 20, 2019. (Def. Ex. E) Upon reviewing a letter from defense counsel and reviewing appropriate records, including claimant's deposition testimony, he answered specific questions from defense counsel, opining that there was no specific work injury for Kraft Heinz on any of the specific dates alleged in the petition. (Def. Ex. E, p. 42) Of course, this is not particularly helpful in a cumulative injury case. Dr. Boulden, however, did go on to opine the following, "I do not believe her work at Kraft Heinz caused any of these problems." (Def. Ex. E, p. 42) He opined her conditions were related to earlier injuries and preexisting conditions such as her diabetes. (Def. Ex. E, pp. 42-44) He never really addressed the appropriate legal standard for a cumulative trauma injury or medical causation. Like Dr. Frederick, he also deferred heavily to the incomplete job analysis performed by the physical therapist.

Claimant then secured another IME in January 2022, this time from occupational medicine specialist, Sunil Bansal, M.D. (Cl. Ex. 7) Dr. Bansal reviewed correspondence from claimant's counsel, thoroughly reviewed all appropriate medical records and examined Ms. Davis. Dr. Bansal's review of the records is well-documented and his examination appears thorough. (Cl. Ex. 7, pp. 33-47) He diagnosed right shoulder rotator cuff tear and bilateral carpal tunnel syndrome. (Cl. Ex. 7, p. 48) He opined that these conditions manifested on March 9, 2017, the date she sought treatment "detailing her shoulder pain and bilateral hand numbness/tingling." (Cl. Ex. 7, p. 48) He opined that both conditions resulted from her repetitive work activities for Kraft Heinz. "In my medical opinion, Ms. Davis incurred a chronic injury to her right shoulder coming forward to March 9, 2017 from the continued performance of her job duties at Kraft/Heinz requiring her to perform work and activities that would stress the rotator cuff from her repetitive work of lifting, pulling and reaching." (Cl. Ex. 7, p. 48) "The job tasks would place significant pressure on the wrists based on repetition and the angle in which she would position her wrists while grabbing, turning, gripping, lifting, pushing, and pulling." (Cl. Ex. 7, p. 49) He assigned a 10 percent whole body rating for the right shoulder, 2 percent for the right arm, and 3 percent for the left. (Cl. Ex. 7, pp. 50-51)

The claimant was off work receiving benefits under a group disability policy while in a period of recovery from her work injury during the following periods: December 20,

2019, through March 22, 2020; and May 24, 2021, through July 5, 2021. The claimant is entitled to healing period benefits during these periods.

CONCLUSIONS OF LAW

The first question submitted is whether the claimant sustained a cumulative injury which arose out of and in the course of her employment, and, if so, what is the manifestation date?

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

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.

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily

dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations 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 cumulative trauma injury cases, the issue of whether an injury developed is highly intertwined with issues of medical causation.

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).

By a preponderance of evidence, I find that the claimant sustained a cumulative trauma injury to her bilateral upper extremities, as well as her right shoulder. This is based upon the expert medical opinions of Dr. Bansal, Dr. Marcussen and Dr. Kreiter. I find their opinions more convincing than the opinions of Dr. Frederick or Dr. Boulden for a variety of reasons, but most notably – both of those physicians relied heavily upon the job analysis of Midwest Therapy Centers in July 2017. In fact, Dr. Frederick seemed to defer to the physical therapist, refusing to even assess whether claimant's job activities could have contributed to the development of her conditions. "Her job eval showed no risk factors for CTS." (Jt. Ex. 2, p. 131) Yet the job analysis showed that claimant engaged in frequent lifting, pushing, pulling, grasping and handling. (Def. Ex. B, pp. 25-26) Furthermore, the job analysis specifically did not factor in her cleaning duties, which involved use of a pressure hose with forceful grasping at least one day per week. The

analysis also did not reference the substantial hours worked performing mandatory overtime.

While it is quite possible that claimant's preexisting conditions, including her earlier trauma injuries to her neck and low back, as well as her diabetes, could have predisposed her to developing the conditions in her bilateral arms and right shoulder, I find it highly unlikely that her work activities had no bearing on her development of these conditions. Nevertheless, I find that claimant has carried her burden of proof based upon her credible testimony and the aforementioned expert medical opinions.

The next issue is the date of manifestation. As set forth in the statement of law above, the agency has broad latitude and discretion in fixing the date of manifestation, reviewing the entire record as a whole. In this case, I find that the claimant's injury manifested on March 9, 2017. This is the date she sought treatment from her primary care provider who specifically referred her to present her condition to workers' compensation. "We encourage you to work with your company's worker's comp rep. And or call the worker's comp hotline." (Jt. Ex. 1, p. 65) While Ms. Davis was not formally diagnosed with carpal tunnel syndrome at this time, it would be plainly apparent to a reasonable person that her condition was serious and work connected.

It is noted that, from this record, the manifestation date could, at least theoretically, be earlier than this date. Several factors weigh against this, however. Ms. Davis began developing symptoms all the way back in at least 2016, or possibly even 2014 or 2015, after she began working in the labeler position. Ms. Davis testified credibly that she began complaining to the plant nurse in 2016, and described being strung along by the nurse. She would report symptoms but the nurse would not take any initiative to open a work injury claim or refer her for treatment. It is also noted that initially there was some confusion regarding claimant's symptoms in 2016; specifically whether it was related to her old back injury, or whether it was something new. The most appropriate manifestation date in this record is March 9, 2017.

From a procedural standpoint, the claimant filed three separate alternative petitions alleging various injury dates. None of the alleged dates were March 9, 2017. For purposes of this decision, benefits shall be awarded under File No. 5066322, with an amended injury date of March 9, 2017.

The next issue whether the defendants are responsible for any temporary disability benefits.

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, 312N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

The claimant was off work receiving benefits under a group disability policy while in a period of recovery from her work injury during the following periods: December 20, 2019, through March 22, 2020; and May 24, 2021, through July 5, 2021. The claimant is entitled to healing period benefits during these periods. By stipulation, defendants are entitled to a credit for the disability income paid as set forth in the Hearing Report, paragraph 9.

The next issue is past and future 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. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

I find that the defendants are responsible for the medical expenses set forth in Claimant's Exhibit 15. The defendants are required to provide reasonable and necessary future medical care for claimant's conditions in her bilateral arms and right shoulder.

The next issue is whether claimant is entitled to permanent partial disability benefits. I find that claimant has sustained a permanent disability to her bilateral arms, in addition to her right shoulder. This injury manifested prior to significant changes to the law in July 2017. Consequently, the claimant's disability must be evaluated under Iowa Code section 85.34(2)(u) (2015).

When disability is found in the shoulder, a body as a whole situation may exist. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949). In Nazarenus v. Oscar Mayer & Co., II Iowa Industrial Commissioner Report 281 (App. 1982), a torn rotator cuff was found to cause disability to the body as a whole.

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

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

Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

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

Ms. Davis was 60 years old as of the date of hearing. She has a 9th grade education from El Salvador. Her primary language is Spanish. She is a highly-motivated worker, who has continued to work despite pain and disability. She has sustained functional disability in both arms and her right shoulder, including a long healing period and significant medical workup, including surgeries. She has permanent restrictions of no lifting greater than 20 pounds. Up through the date of hearing, she has been able to maintain employment with Heinz. There are undoubtedly positions that she can no longer perform at the time of hearing. Considering all of the relevant factors to assess industrial disability, I find that the claimant has sustained a loss of earning capacity of 30 percent. I conclude this entitles her to 150 weeks of compensation commencing July 6, 2021.

The next issue is claimant's entitlement to an independent medical examination under Iowa Code section 85.39.

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).

Iowa Code section 86.40 states:

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

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

> **Costs.** Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs

> do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

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

Claimant is entitled to reimbursement for Dr. Kreiter's IME in the amount of $1,000.00. Claimant is entitled to reimbursement of the following case expenses:

Filing Fee	$100.00
Certified Mail	$13.28
Deposition Transcript	$72.15
Medical Report Dr. VonGillern	$330.00
Medical Report Dr. Bansal	$2,909.00
Total	$3,424.43

ORDER

THEREFORE IT IS ORDERED

File No. 5066322:

All weekly benefits shall be paid at the rate of benefits at the rate of six hundred and seventy-seven and 52/100 ($677.52) per week.

Defendants shall pay the claimant healing period benefits during the following periods: December 20, 2019, through March 22, 2020; and May 24, 2021, through July 5, 2021.

Defendants shall pay one hundred fifty (150) weeks of permanent partial disability benefits commencing July 6, 2021.

Defendants shall reimburse or otherwise pay medical expenses as set forth in Claimant's Exhibit 15.

Defendants shall reimburse Dr. Kreiter's IME expense in the amount of one thousand dollars ($1,000.00).

Defendant shall pay accrued weekly benefits in a lump sum.

Defendant shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendant shall be given credit as set forth in the Hearing Report, paragraph 9.

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

Costs are taxed to defendant in the amount of three thousand four hundred twenty-four and 43/100 dollars ($3,424.43).

For File Nos. 5066321 and 5066323:

Claimant shall take nothing further.

Signed and filed this 30th day of September, 2022.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Andrew Bribriesco (via WCES)

Lori Scardina Utsinger (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.