BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RHONDA CONNER,

Claimant,

vs.

UNITED PARCEL SERVICE,

Employer,

and

LIBERTY INSURANCE CORP.

Insurance Carrier,
Defendants.

File No. 5051783

ARBITRATION

DECISION

Head Note Nos.: 1108; 1801; 1802; 1803; 2209; 2401

STATEMENT OF THE CASE

Rhonda Conner, claimant, filed a petition in arbitration seeking workers' compensation benefits against United Parcel Service, employer, and Liberty Insurance Corp., insurer, for an accepted work injury date of February 18, 2014.

This case was heard on March 30, 2017, in Des Moines, Iowa. The record was kept open until April 17, 2017, to allow claimant to submit a response from Dr. Sullivan. The case was considered fully submitted on April 28, 2017, upon the simultaneous filing briefs.

The record consists of joint exhibits 1-15, claimant's exhibits 16-25, defendants' exhibits A-M, and the testimony of the claimant.

ISSUES

1. Whether claimant sustained an injury to her left shoulder, bilateral wrists, right elbow and/or neck on February 18, 2014, which arose out of and in the course of employment;

2. Whether claimant's claim for benefits for injuries to left shoulder, bilateral wrists, right elbow and/or neck is barred for failure to give timely notice under Iowa Code section 85.23.

3. Whether the alleged injury to the left shoulder, bilateral wrists, right elbow and/or neck is a cause of temporary disability and, if so, the extent;

4. Whether the alleged injury to the left shoulder, bilateral wrists, right elbow and/or neck is a cause of permanent disability and, if so;

5. The appropriate commencement date of permanent disability benefits;

6. The extent of claimant's industrial disability;

7. Whether there is a causal connection between claimant's left shoulder, bilateral wrists, right elbow and/or neck injury and the medical expenses claimed by claimant.

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.

The parties agree that claimant sustained a right shoulder injury after a fall which occurred on February 18, 2014, arising out of and in the course of her employment. On or about February 18, 2014, claimant's gross earnings were $819.00 per week. She was single and entitled to one exemption. Based on those foregoing numbers, the weekly benefit rate is $505.55.

They further agree that should the claimant's left carpal tunnel syndrome, right carpal tunnel and cubital tunnel syndrome, left shoulder, and neck symptoms be found compensable, defendants are entitled to a credit under Iowa Code section 85.38(2)(a) against any temporary benefits awarded.

Claimant was off work between November 5, 2014, and February 13, 2015, for her left carpal tunnel surgery and off work from December 2, 2015, through March 24, 2016, for her right carpal tunnel and right cubital tunnel syndrome.

During this period of time, claimant was paid short-term disability. Short-term disability was paid until June 4, 2016, and then converted into long-term disability payments.

FINDINGS OF FACT

Rhonda Jean Connor was a 55 year old person at the time of the hearing. She graduated from high school and attended DMACC from 2003 through 2005, seven credit hours short of a degree.

Her last working day was December 1, 2015. Her title at the time of her last date of employment was administrative assistant 3. She began working for defendant employer as a part-time employee in 2005. She transitioned to a fulltime position in

January 2011. Her salary at the time of her last working day was around $18.00 an hour. Her average weekly hours were 40 per week.

Her duties included customer service and data entry. It is not a vigorous physical position. Her past relevant work history included a position with Maximus as an inbound call center worker and supervisor of the payment center at Broadlawns Hospital. At ADP, she worked in the human resources division as well as the employee service center. (Claimant's Exhibit 21:3) Her relevant work experience has been primarily sedentary.

On February 18, 2014, claimant fell in the work parking lot, landing on her right side, striking her shoulder as well as her elbow and right upper arm. She was taken to the emergency room at Unity Point Health with complaints of right shoulder and right elbow pain. (Joint Exhibit 1:2) X-rays revealed a comminuted mildly displaced fracture of the proximal right humerus. (JE 1:3)

Her care was transferred to Jason Sullivan M.D., at Des Moines Orthopaedic Surgeons. (JE 2) Dr. Sullivan advised that no surgery was necessary at this time and provided a sling and an immobilizer. (CE 2:2)

At one point, Dr. Sullivan understood claimant's job to include loading jets for UPS. (Ex. 2:4) But he later learned that her position was mostly desk and phone work. (CE 2:10)

On March 18, 2014, claimant returned to Dr. Sullivan. He noted that her prognosis appeared good:

> Physical Exam
>
> Right shoulder: She has some swelling in the proximal aspect of the shoulder. Mild tenderness to palpation over the proximal shoulder. No tenderness through the arm or the elbow. She has full range of motion to the elbow and wrist. She is distally neurovascularly intact. She has axillary nerve sensation. She is able to fire her deltoid.

(JE2:6) The plan was to continue with the immobilizer and follow that with physical therapy. Claimant testified that she used her left arm even after Dr. Sullivan allowed her to discontinue use of the immobilizer and sling for the right.

Passive and active physical therapy began after the April 3, 2014, injury. (JE2:8) Dr. Sullivan returned claimant to full-duty work on May 26, 2014. (JE2:11) Claimant continued with physical therapy. She complained of left shoulder pain on July 11, 2014. (JE 3:9)

After claimant returned to work, she testified she began feeling more pain and discomfort along her upper back, left shoulder and left arm. These left shoulder pains were not included Dr. Sullivan's reports until May 2015 and not reported to any doctor until August 2014.

Dr. Sullivan did not treat claimant's other complaints. Claimant testified that Dr. Sullivan told her that she came to him with right shoulder problems and that was the issue he was going to treat her for.

Throughout the summer of 2014, claimant returned to Dr. Sullivan for treatment of her right shoulder. (JE 2:13-16) During her July 22, 2014, visit, she described constant pain into her hands and fingers and was in tears during her visit. (JE 2:17) He ordered a new MRI which showed rotator cuff tendinosis and moderate glenohumeral joint degenerative changes. (JE2:19) He gave her an injection. (JE 2, p. 19)

She attended more therapy. (JE 3) Therapy had only moderate results and sometimes no progress at all. (JE 3:12) At her discharge in September, she had a reduction of pain but still maintained problems with use. (JE 3:15) She was returned to work with restrictions on August 12, 2014, although the restrictions were listed as "may return to same duties prior to right shoulder injury." (JE 2:21)

On September 16, 2014, claimant returned to Dr. Sullivan.

History of Present Illness

> Rhonda is a 53-year-old female. She is a little over six month out from a right proximal humerus fracture. She has been back to her normal position of data entry. This has made her much happier. She still has some fatigue at mid-week with some dull achy pain in her shoulder. An MRI last time revealed some arthritic changes.

(JE 2, p. 22) He recommended she return to full-duty work and found her to be at MMI. He believed she might need a total shoulder arthroplasty in the future due to arthritic changes. (JE 2 p. 23)

On October 7, 2014, Dr. Sullivan wrote an opinion letter setting her impairment rating at 4 percent. (JE 2, p. 25)

Claimant then consulted with Kyle S. Galles, M.D., for left shoulder pain on November 4, 2014. (JE 5:13) She reported that the onset of pain was approximately seven months prior and she believed that it was a result of overuse when she was compensating for the right shoulder injury. (JE 5:13) Dr. Galles gave her the option of treating the injury conservatively or proceeding with surgery. (JE 5:10) She elected to proceed with injection therapy and physical therapy. She attended 27 appointments. (JE 6:1) She was discharged on March 24, 2016, after plateauing. (JE 6:2)

> Plan: Patient is being discharged to a home program at this time from therapy as she has plateaued with OT services. Patient does not tolerate hand, wrist forearm strengthening due to ongoing symptoms. Pt is now under care of Metro Pain for cervical spine disease and will continue treatment with them with next follow up in 3 months.

(JE 6:2)

On April 7, 2015, she returned to Dr. Sullivan for treatment of her persistent right shoulder pain. (JE 2:26) This time, Dr. Sullivan performed an intra-articular synvisc injection and released her to work without restrictions. (JE 2:31) Per a record notation a year later, this injection did not help. (JE 2:33)

In August 2014, claimant sought treatment with Eugene Cherny, M.D., for numbness and tingling in her hands. (JE 4) She was diagnosed with bilateral carpal tunnel syndrome. (JE 15) Dr. Cherny recommended a surgical release. (JE 4:3) She underwent left carpal tunnel release on November 5, 2014. (JE 4:4; JE 9) Five months after surgery, she still maintained weakness, limited range of motion, and pain. (JE 4:12) Dr. Cherny recommended a MRI of the cervical spine. (JE 4:12)

On December 1, 2015, Dr. Cherny recommended open carpal tunnel release and open cubital tunnel release for both upper extremities. (JE 4:15) The right upper extremity carpal tunnel release and cubital tunnel release occurred on December 2, 2015. (JE 4:16; JE 10) Four months post-surgery, she still had pain, weakness, and loss of strength in the right upper extremity. (JE 4:19) On February 5, 2015, she was returned to work with restrictions of no repetitive gripping, pinching, typing or lifting. (JE 4:19; DE E:1)

On March 16, 2016, claimant presented at Metro Anesthesia and Pain Management at Dr. Cherny's recommendation. (JE 7:1) Claimant identified the origin of the pain as March 2014 and the cause as a fall. (JE 7:1) The MRI showed disc herniation C6/7 with disc material extending into foramen. (JE 7:2; JE 11) A steroid injection was administered into the C7-T1 space. (JE 7:6) The injection provided only minimal relief. (JE 7:7) Another injection was attempted on July 7, 2016. (JE 7:14)

Dr. Cherny opined that the fall caused an acute onset of right carpal tunnel and cubital tunnel symptoms and that her left upper extremity symptoms were, more likely than not, caused by overuse. (CE 24: 1)

Throughout 2014, 2015, and 2016, claimant sought occasional treatment from her family physician, Dawn M. Schissel, M.D. In those records, there was no mention of neck pain. In the "Review of Symptoms" section, Dr. Schissel recorded no neck pain. (See generally JE 8) Claimant testified that she did not go to Dr. Schissel for neck pain and would not have reported it to her, but the records appear to indicate that the neck issue was discussed. For example, during the October 27, 2015, visit claimant had regarding anxiety and her FMLA papers, she described no neck pain or neck stiffness.

(JE 8:22) While claimant maintains she did not seek treatment for neck pain, she did report numbness in fingers and hands on May 12, 2014. (JE 8:1)

There were a few mentions of right sided stiffness with neck rotation during the physical therapy appointments. (JE 3: 2, 3:7 and 3:11)

While claimant maintained she had a partial rotator cuff tear, Dr. Sullivan's notes contradict that. He did not diagnose her with a tear.

Claimant returned to Dr. Sullivan on May 19, 2016, for shoulder pain.

> On physical exam today, Rhonda has active forward flexion to approximately 140 degrees of the right shoulder. She has 5/5 abduction, external rotation, internal rotation strength. She has pain at the extremes of range of motion. She externally rotates approximately 40 degrees today with the arm at the side. She is distally neurovascularly intact.

(JE 2:34)

He wanted her to wait for the total shoulder arthroplasty as long as she could. He concluded that her glenohumeral joint arthrosis has worsened and stated that he had no other recommendations other than a symptomatic injection. (JE 2:34) On December 27, 2016, he opined that the claimant's right shoulder symptoms were the result of the February 18, 2014, work incident. (CE 23:2) He did not agree that the left upper extremity problems were related to the right shoulder injury and recovery therefrom. (DE A:1)

Claimant underwent an IME with Sunil Bansal, M.D., on April 17, 2015. (CE 16:3) He concluded that she sustained right proximal humerus fracture and right carpal tunnel syndrome (CTS) as a result of the fall. Specifically in regard to the right CTS, he stated,

> RIGHT HAND/WRIST:
>
> In my opinion, Ms. Conner also developed acute carpal tunnel syndrome from her fall on February 18, 2014. The mechanism of forcibly falling and landing on her right hand would acutely inflame the carpal ligaments and increase the carpal tunnel pressure, thereby increasing the intraneural median nerve pressure and causing significant carpal tunnel syndrome.

(CE 16:7) He assessed a 6 percent impairment for the right shoulder and 4 percent upper extremity impairment to the right wrist. (CE 16:8) He also diagnosed claimant as having left shoulder tendonitis and left CTS as a result of the fall. (CE 16:8) He found that the left sided injuries were the result of overcompensation. (CE 16:8) He assessed a 3 percent impairment for the left shoulder and 4 percent for the left upper extremity. (CE 16:9)

He performed a second IME on January 9, 2017. (CE 17) He concluded that both the cubital tunnel symptoms as well as the CTS on both sides were related to the fall and assessed an additional impairment of 8 percent to the upper extremity for the right elbow and wrist. (CE 17:11) He also determined that since claimant's neck pain had been an "ongoing aspect of her constellation of symptoms, with the focus of treatment on the upper extremity symptomatology" that her neck pain and disc extrusion was a result of the fall. (CE 17:11) In the 2015 IME, she complained of "aching pain in her neck that has not been explained to be part of the injury" along with occasional sharp shooting neck pain. (CE 16:4) Dr. Bansal did not address any causal link between the neck pain in 2015 and the fall. (CE 16)

It was not until asked specifically about the neck that Dr. Bansal examined claimant's neck and issued a causation and impairment rating for the neck. (CE 17:13) It is unknown how long Dr. Bansal understood claimant to have used the sling, but according to the medical records, she was out of the sling and returned to work as of May 26, 2014. (DE C:4)

He recommended she avoid lifting over 10 pounds, avoid work or activities that require repeated neck motion or that place her neck in a posturally flexed position for greater than 15 minutes, avoid tasks requiring repeated or sustained elbow flexion and avoid frequent turning or twisting with the right arm. (CE 17:13)

Dr. Sullivan strongly disagreed with the conclusion that the neck injury was related to the fall:

> I am in receipt of your recent letter and attachments. Ms. Conner was under my care and treatment for a right proximal humerus fracture spanning over a two year time period – from February 20, 2014, through May 19, 2016. During the course of that care and treatment, there is nothing to suggest – either by way of history or physical examination – that her fall caused a herniated cervical disc or lighted up and aggravated any pre-existing degenerative condition in her neck. Her fall from a standing position, which is a low-velocity injury, broke her right humerus, and the energy generated from that fracture would have dissipated such that a second acute injury – for example, to a cervical disc – would be highly unusual. It is my opinion to a reasonable degree of medical certainty that such a highly unusual occurrence did not happen with Ms. Conner. Just the opposite is true. The history taken from Ms. Conner, the pertinent parts of the "Review of Systems" charted in my clinical notes, and the physical examinations conducted over the course of two years do not support the conclusion that Ms. Conner's fall on February 18, 2014, caused a herniated cervical disc or an acute and/or permanent aggravation of age-related cervical spondylosis. This is my opinion to a reasonable degree of medical certainty.

(DE A:6)

On January 26, 2017, claimant was seen for an IME with Michael A. Gainer, M.D., a hand and upper extremity orthopedic specialist. (DE B) He did not believe that the right CTS was caused by the fall due to the fact that symptoms did not begin until four months or so later. He also did not find that the left upper extremity problems were related to the fall but did not provide an explanation for the opinion. (DE B:4-5) He did note that the EMG of September 4, 2014, did not show any cubital tunnel issues. (DE B:4)

Carma Mitchell, MS, performed a vocational evaluation of the claimant on February 9, 2017. (CE 19) She used Dr. Bansal's restrictions and impairment ratings for the shoulder, bilateral CTS, and the neck along with claimant's subjective reports. (CE 19: 4-5) Claimant's personal account of her abilities is much more limiting than the restrictions imposed by Dr. Bansal:

> Ms. Connor reports continued pain and loss of strength and cramping in her hands. She has pain, numbness and tingling in her shoulders that radiates down her arms. Self-care and activities of daily living take her longer to perform. Light tasks are performed for about 15 minutes at her own pace after which she rests her neck, shoulder, hands and arms. She finds it hard to keep up with housework and she gets assistance with more physically demanding tasks such as deeper cleaning, carrying groceries, lawn care and snow removal. She continues to have neck pain and does not lift her right arm above shoulder level and tries to keep her right arm close to her body.

(CE 19:5) Claimant also maintains she can only type for 20 minutes at a time, requiring a 20-minute rest period.

As a result, Ms. Mitchell concluded that claimant was limited to less than a full range of sedentary work based on her limited ability to use her arms, hands, fingers, and move her neck. (CE 19:15)

Defendants maintain that when claimant returned to work in February 2015, she performed well and picked up more duties. (DE C:3)

When claimant reported the wrist injuries to Aetna seeking disability, she did not indicate that these were work related. See generally Ex. F and G.

Prior medical history includes blood pressure issues, sleep apnea problems, numbness and tingling in her hands. (See e.g. JE 13) She bought a tray for her keyboard to address her hand problems.

She also suffered some serious mental injury in 2004 which negatively impacted her ability to work. In May 20, 2004, James Corcoran D.O., wrote a letter indicated that claimant was "unemployable at any level that would require executive decision making

or supervisory abilities." (DE J:5) This was due to severe anxiety and depression. (DE J:5)

Currently she has pain every day across the top of her shoulders, in her shoulders, and in her upper back. The right is more painful than the left. She feels she cannot do her full time job with her right shoulder problems. Dr. Sullivan recommended she not undergo right shoulder replacement until after 60 but due to the pain, she might opt to undergo surgery sooner rather than later.

She receives pain medication, pain management therapy and injections to cope with her pain.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

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).

The claimant asserts right shoulder, bilateral carpal tunnel syndrome, right cubital tunnel syndrome, neck and left shoulder injuries. The defendants accept and admit that the claimant sustained a right shoulder injury but deny the remainder of the injuries.

As for the neck, only the subsequent report of Dr. Bansal supports the theory that there is a causal link between claimant's injury and neck pain. Dr. Schissel's records show that claimant did not have neck pain in 2014, 2015, and 2016. The claimant has

failed to meet her burden as to the claim for neck injury.

Dr. Bansal, and Dr. Cherny opine that the claimant's overuse of the left upper extremity led to the left shoulder injury, bilateral carpal tunnel syndrome as well as the right cubital tunnel syndrome. Defendants argue that claimant's convalescence stage was only a few months and therefore could not be the cause of any overcompensation on the right. They urge the undersigned to rely on the opinion of Dr. Gainer and Dr. Sullivan. There is no medical opinion that affirmatively states overuse can only happen after a set period of time. In this particular case, more than one expert—both treating and paid for—have arrived at the conclusion that the bilateral CTS of the wrist as well as the right cubital tunnel injury arise out of overuse.

Moreover, simply because the claimant was out of a sling after six weeks does not discount a heavier reliance on the non-injured limb. Dr. Cherny is the one doctor who treated and operated on claimant for the bilateral CTS and right cubital tunnel injury and more reliance is given to his opinion than the other examiners. It is determined that the claimant sustained bilateral CTS and right cubital tunnel syndrome arising out of the work injury.

As for the left shoulder injury, the claimant relies solely on Dr. Bansal to provide the causal link. Dr. Galles treats the claimant with injections, but does not provide an opinion as to the causation of the left shoulder. Dr. Sullivan rejects that there is a causal connection. (DE A:1) Given that the claimant's left upper extremity was injured from the overuse, it is consistent to find that the left shoulder injury was as a result of overuse as well, despite Dr. Sullivan's report. He did not treat claimant for the left shoulder injury. His medical records are solely focused on the right shoulder.

It is determined that the claimant sustained a left shoulder injury arising out the work injury.

Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

The notice issue was not briefed by either party although defendants make an allusion to it on page 8 of defendants' brief. The first step in an analysis of a notice defense is to determine the manifestation date of the injuries. According to the Iowa Supreme Court, the manifestation date is the date on which the claimant knew of the seriousness of her injury and the likelihood it would impact her work.

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).

As for the left shoulder and left carpal tunnel syndrome, the manifestation date is set as of November 5, 2014, when she consulted with Dr. Galles. She informed Dr. Galles that she believed her left shoulder injury was the result of overcompensation on the right. She proceeded to undergo injection therapy and physical therapy.

As for the right cubital tunnel syndrome and right carpal tunnel syndrome, Dr. Bansal made the causal connection between the right wrist issues in his April 17, 2015 examination but the report of Dr. Bansal is not dated and signed until February 23, 2016. As of April 17, 2015, she knew or should have known at that time of the seriousness of her injury and the likelihood her ability to work would be impacted by her injury.

Claimant testified she informed her supervisor, Jeff Brady, that she would be having CTS in November 2014 and that it was related to her work. (Transcript pp. 4:19) Mr. Brady did not testify. Defendants' point to written answers to interrogatories wherein Mr. Brady admits to knowing that claimant was having surgery but not that it was work related. During an interview for short-term disability, she was asked whether her injury was work-related and the answer given was no. (DE F:4) Claimant stated that it was because she was told it was not work related by Mr. Brady.

Dr. Cherny's medical records indicate that it was unknown whether the condition was work related. (DE E:1)

It is found that notice was given of her left carpal tunnel syndrome. When weighing the ruminations of Mr. Brady in his interrogatories against the live hearing testimony of claimant which was subject to cross examination, greater weight is given to the claimant.

She did not inform Mr. Brady of her left shoulder issues. She did not seek out treatment with a work comp doctor until she returned to Dr. Sullivan on March 2015, which would be beyond the 90 days. She also testified that she only spoke with Dr. Sullivan about her right shoulder and did not mention that she was seeing Dr. Galles for other issues until the 2016 visit. (Transcript p. 55) Therefore, as to the left shoulder, the notice defense is met.

As for the right carpal tunnel and cubital tunnel syndrome, the manifestation date is set as of April 17, 2015. In reviewing the transcript, there does not appear to be any affirmative statement of the claimant to the defendant of any right-sided work injury to the cubital tunnel or carpal tunnel. However, the standard does not require that the claimant affirmatively inform the employer of an injury, but rather that the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work related. The earliest date that the employer was made aware of the injury appears through the medical report of Dr. Bansal.

Claimant argues that defendants have the affirmative obligation to conduct an ongoing investigation. Problematically, claimant did not report problems unrelated to her right shoulder to any workers' compensation doctor until May 19, 2016, when claimant reported she was seeing Dr. Galles for the left shoulder. (JE 2:34) Dr. Sullivan had released claimant to full-duty work on September 16, 2014.

There was one mention of pain and discomfort in the hands and fingers, but Dr. Sullivan related that back to the shoulder pain. (JE 2:16) In the September 16, 2014, medical record, Dr. Sullivan noted that she had full range of motion to the elbow and wrist. (JE 2:22)

Claimant sought out treatment with Dr. Galles and Dr. Cherny on her own. By her own testimony, she did not inform the workers' compensation authorized medical provider of problems unrelated to the right shoulder until May 19, 2016. (Transcript p. 55, JE 2:33) The medical report of Dr. Bansal was not dated until February 23, 2016. Defendants cannot investigate what they do not know about.

Therefore, it is determined that the notice defense is met for the right cubital tunnel and right carpal tunnel syndrome as well as the left shoulder.

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 R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

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

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

The left carpal tunnel syndrome and right shoulder injury is considered for the determination of industrial disability as it relates to claimant's work related injury of February 18, 2014.

Claimant has a lingering right shoulder injury that will likely need total replacement surgery at some point in the future. According to Dr. Sullivan, she does not have any permanent restrictions. Dr. Bansal recommended claimant avoid lifting more than 10 pounds, no frequent overhead lifting, avoid tasks that require repeated or sustained elbow flexion as well as frequent turning or twisting of the right arm.

Based on those opinions and restrictions as related to the left CTS and the right shoulder injury, it is determined claimant has sustained a 50 percent industrial loss. There is work available to the claimant within the work restrictions.

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).

The medical expenses related to the right shoulder and left carpal tunnel syndrome are awarded herein.

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

Claimant was returned to work on September 16, 2014, by Dr. Sullivan. After working for some period of time, claimant underwent surgical repair to her left carpal tunnel on November 5, 2014. Dr. Cherny restricted claimant from work between November 5, 2014, and February 5, 2015.

Therefore, claimant is entitled to temporary benefits up to August 12, 2014, and then again from November 5, 2014, through February 5, 2015.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant two hundred fifty (250) weeks of permanent partial disability benefits at the rate of five hundred five and 55/100 dollars ($505.55) per week from August 12, 2014, interrupted by healing period benefits between November 5, 2014 through February 5, 2015.

That claimant is entitled to healing period benefits between November 5, 2014, through February 5, 2015.

That defendants shall pay accrued weekly benefits in a lump sum.

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

That defendants are to be given credit for benefits previously paid for the right shoulder and left carpal tunnel syndrome.

That defendants shall pay medical expenses and provide future medical care related to the right shoulder injury and left carpal tunnel syndrome.

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

That defendant shall pay the costs of this matter pursuant to rule 876 IAC 4.33.

Signed and filed this 30th day of August, 2017.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JGL/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.