BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ROBERTA MULL, Claimant, vs. B & G FOODS, INC., Employer, and ZURICH NORTH AMERICA, Insurance Carrier, Defendants.	:	File No. 20004338.01 ARBITRATION DECISION Head Note Nos: 1100; 1108; 1400; 1402.30; 1402.50; 1403.30; 1801; 1802; 1803.1; 2209; 2401; 2402; 2501; 2502; 2601.10; 2803; 2902; 2907; 3000

STATEMENT OF THE CASE

Claimant Roberta Mull filed a petition in arbitration seeking worker's compensation benefits against B & G Foods, Inc., employer, and Zurich North America, insurer, for an alleged work injury date of January 9, 2018. The case came before the undersigned for an arbitration hearing on July 28, 2020. This case was scheduled to be an in-person hearing occurring in Des Moines. However, due to the outbreak of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via video means, using Court Call. Accordingly, this case proceeded to a live video hearing via Court Call with all parties and the court reporter appearing remotely. The hearing proceeded without significant difficulties.

The parties filed a hearing report prior to the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibit 1, consisting of 232 pages, Claimant's Exhibits 1 and 2, and Defendants' Exhibits A through J.

Claimant testified on her own behalf. Ashley Mull and Dustin Mull also testified on behalf of the claimant. The evidentiary record closed at the conclusion of the evidentiary hearing on July 28, 2020. The parties submitted post-hearing briefs on August 20, 2020, and the case was considered fully submitted on that date.

ISSUES

1. Whether claimant sustained an injury that arose out of and in the course of employment;
2. If claimant did sustain a work injury, the correct date of injury (defendants allege September 24, 2017, claimant contends the date of injury is January 9, 2018 by application of the discovery rule);
3. Whether the alleged injury is the cause of any temporary disability;
4. Whether the alleged injury is the cause of any permanent disability;
5. Whether the alleged disability is a scheduled member disability or industrial disability;
6. The proper weekly benefit rate;
7. Whether claimant provided timely notice of the injury pursuant to Iowa Code section 85.23;
8. Whether claimant brought a timely claim pursuant to Iowa Code section 85.26;
9. Payment of certain medical expenses;
10. Reimbursement of claimant's Independent Medical Evaluation; and
11. Taxation of costs.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

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

Claimant Roberta Mull was 55 years of age at the time of hearing. (Hearing Transcript, p. 26) She has two adult children and is not married. She lives in Pleasantville, Iowa. (Tr., p. 12) Claimant works for defendant B & G Foods, better known locally as Tone's Spices, which is located in Ankeny, Iowa. (Tr., p. 26) At the time of hearing, claimant had worked at Tone's for 33 years. (Tr., p. 26)

Claimant's position at Tone's for the majority of her 33 years was working as a miller-blender. Her job consisted of sizing, measuring, and blending various spice mixes. She testified that each batch of a blend would have to be made 8 times, and some blends contained up to 30 items. The blending machines that mix the spices hold "thousands of pounds at a time." (Tr., pp. 26-27) As a miller-blender, claimant was most recently paid $23.71 per hour, and worked both voluntary and mandatory overtime. (Tr., p. 47)

In February of 2020, claimant decided to bid into a different job, and at the time of hearing she was working in the sanitation department. (Tr., pp. 47-48) The sanitation

job is less physically demanding than the miller-blender position, with less overhead work. (Tr., p. 48) Claimant's hourly wage is lower in the sanitation department. She could not remember the exact pay, but testified it is "$22 and something." (Tr., p. 49) She continues to work some overtime, including mandatory overtime, but tries not to do as much anymore. (Tr., pp. 47-48)

In April of 2014, claimant was performing her duties as a miller-blender, which includes measuring spices and oils using a large industrial scale. (Claimant's Exhibit 2, p. 1) The valve that allows oil to flow into a container was sticking, so claimant had to apply more pressure to turn the valve. (Tr., pp. 27-28) Claimant testified that the head of the scale is at her chin level, and she had to reach up and over the head to reach the valve. (Tr., p. 28) When she was turning the valve, "everything just popped." She had pain in her right shoulder and shoulder blade, right lower neck, and down her right arm. She also began to experience headaches. She reported the injury to her supervisor. (Tr., p. 28)

A physical therapist named Jason came into the plant about a day and a half later to evaluate whether claimant needed treatment. (Tr., p. 30) Jason determined that claimant needed to see a doctor, so she was sent to Nicholas Bingham, M.D. (Tr., p. 30; Joint Exhibit 1, p. 1) Dr. Bingham ordered a cervical x-ray, which showed mild disc space narrowing at C5-6 and C6-7, with small vertebral body osteophytes, and mild bilateral neural foraminal narrowing at C4-5 and C5-6. (Jt. Ex. 1, p. 1) Claimant was diagnosed with cervical sprain/strain. Dr. Bingham provided temporary light duty work restrictions, prescribed medications, and sent claimant to physical therapy. Claimant testified that she only saw Dr. Bingham a couple of times related to the 2014 injury, but she was not comfortable with him, and he did not seem like a very good doctor. (Tr., p. 31)

Claimant attended physical therapy at 21st Century Rehab for about ten days, from April 16, 2014 until April 25, 2014. (Jt. Ex. 1, pp. 2-13) By the time she was discharged from physical therapy, she reported 100 percent reduction of symptoms. She was discharged and released to return to work with no restrictions. (Jt. Ex. 1, p. 10) Claimant testified that her headaches returned after leaving physical therapy, so she sought chiropractic care on her own intermittently until 2016. (Tr., pp. 33-35) She stopped seeing a chiropractor in December of 2016, because at that point she could no longer afford the treatments. (Tr., p. 35)

Claimant testified that she did not have any problems with her neck, right shoulder, or right arm following physical therapy in 2014. (Tr., p. 35) In the fall of 2017, claimant was performing the same job duties as she was when she was injured in 2014. She was getting oil to add to a spice blend, and the valve was again sticking. She "had to really force it," and when she did "everything just popped and shot red-hot fire up my neck, down my arm, up my shoulder, on my neck." (Tr., p. 35) Claimant is unable to remember the exact date of injury but knows that it occurred in late September or early October of 2017. (Tr., p. 35)

Claimant has two adult children, both of whom testified at hearing. Both witnesses demonstrated appropriate demeanor and gave the undersigned no reason to doubt their credibility. Claimant's daughter, Ashley Mull, testified that her mother told her she was injured at work in the fall of 2017, in September or October. (Tr., pp. 14; 17) Claimant's son, Dustin Mull, also testified that his mother told him she was injured at work in 2017. (Tr., pp. 21-22)

Claimant testified that she reported the injury to her supervisor, Randy Augustine, when it happened. (Tr., p. 36) Mr. Augustine advised that he would inform the safety manager, Gary Kluecall. Claimant testified that she saw Jason again, the same in-house physical therapist she saw in 2014. Jason's therapy treatments unfortunately made claimant's pain worse. (Tr., p. 36) Claimant was reluctant to seek additional care through her employer, because she felt her prior experience with Dr. Bingham was inadequate. (Tr., pp. 36-37) Additionally, claimant was hopeful that her symptoms would improve as they had in 2014. (Tr., p. 38) However, claimant's symptoms continued to worsen, and eventually she started to have radiating pain down her right arm. (Tr., p. 37) The pain became constant by January of 2018, so at that point, she asked her employer to send her for treatment. (Tr., pp. 37-38) Claimant testified that it was at that point, in January of 2018, that she realized her symptoms were serious and were not going to improve without treatment. (Tr., p. 38)

Claimant was sent to Methodist Occupational Health and Wellness, where she saw Von L. Miller, MPAS, PA-C, on January 10, 2018. (Jt. Ex. 1, p. 168) Mr. Miller's record indicates that claimant was there for a follow-up of her neck, right shoulder, and right arm pain/strain that did get better since her 2014 injury but "has come back again in the same areas with just normal activities. She denies any new injury, having anything hit her, fall on her, or her falling." (Jt. Ex. 1, p. 168) Mr. Miller gave claimant a Depo-Medrol injection, started her on a muscle relaxer, and set her up with a short course of physical therapy. (Jt. Ex. 1, p. 168) She was allowed to return to full duty work with no restrictions. (Jt. Ex. 1, p. 169)

Claimant testified that she explained to Mr. Miller that she had a new incident in 2017, and that over the past couple of months it had gotten worse. (Tr., p. 38) Claimant believes the reason Mr. Miller related her symptoms back to the 2014 incident was because when she reported the injury to her supervisor, he said, "just like last time?" and she said "yes." (Tr., p. 39) As such, when claimant's supervisor reported the injury to the safety manager, Gary Kluecall, Mr. Kluecall told the doctor that her injury was not new but was a continuation of the 2014 injury. (Tr., p. 39) Claimant testified that she tried to explain to Mr. Miller that it was a new injury, stating "it has nothing to do with 2014 other than I was doing the same thing when it happened." (Tr., p. 39) Claimant testified that she was surprised to see in his note that he continued to refer back to the 2014 incident. (Tr., p. 39)

Claimant was again sent to physical therapy at 21st Century Rehab. (Tr., pp. 39-40) The physical therapy note from January 12, 2018, notes an onset date of September 1, 2017. (Jt. Ex. 1, p. 14) The therapist also notes that claimant reported that

her recent symptoms "began back in September with no specific mechanism of injury." (Jt. Ex. 1, p. 14) Claimant testified that statement is incorrect, as she advised the therapist what had happened. (Tr., p. 40)

Claimant continued with physical therapy and periodic follow up visits with Mr. Miller until March 2, 2018. (Jt. Ex. 1, pp. 14-48; 169-175) She also continued to work full duty. Overall, it appears the therapy helped reduce some of claimant's symptoms, but she continued to have numbness and tingling in her right arm. At her final visit with Mr. Miller on March 5, 2018, he noted claimant reported her symptoms were much the same, although she had some relief with respect to her muscular pain. Mr. Miller referred claimant to physiatry, as he had nothing further to offer. (Jt. Ex. 1, p. 174)

Claimant was sent to Iowa Ortho to see Kurt A. Smith, D.O. (Jt. Ex. 1, p. 176-193) Her first visit took place on March 23, 2018, at which time she completed a patient information form. On the form, claimant noted that the injury occurred in October 2017, when she had to raise her arms above shoulder level to turn a valve. (Jt. Ex. 1, p. 178) However, in his note, Dr. Smith indicates the initial injury occurred in 2014, when turning a valve. (Jt. Ex. 1, p. 181) He goes on to state that claimant's "symptoms improved after a short course of treatment. She documents onset of these symptoms in September/October 2017. There is no documentation of an injury." (Jt. Ex. 1, p. 181)

X-rays taken that day showed multilevel degenerative disease of the cervical spine with loss of disc height and spurring. Dr. Smith noted progression since the prior x-rays in 2014. (Jt. Ex. 1, p. 183) After his examination, he advised claimant that the degenerative changes were not related to the work injury of 2014. He recommended a cervical MRI, as well as light duty work restrictions. (Jt. Ex. 1, p. 184)

Prior to receiving the MRI results, Dr. Smith corresponded with Brenda Ivey, claims representative from Sentry Insurance.[1] (Defendants' Exhibit C) It appears from the records and the post hearing briefs that Sentry Insurance provided workers' compensation coverage to the predecessor to B & G Foods, which owned Tone's Spices at the time of claimant's 2014 injury. Ms. Ivey's letter to Dr. Smith is dated March 23, 2018, and notes claimant sustained a work injury on April 9, 2014, which resulted in a cervical sprain with right upper extremity pain. After conservative treatment, she was released at MMI on April 29, 2014. (Def. Ex. C, p. 10) The letter further indicates that claimant's symptoms have returned, and that claimant indicated that it is related to the initial 2014 injury. Ms. Ivey asked Dr. Smith to respond to a series of questions regarding causation of the current symptoms, and whether they were related to the 2014 injury. (Def. Ex. C, p. 10)

Dr. Smith's response is dated March 28, 2018. (Def. Ex. D) Dr. Smith repeated Ms. Ivey's statement that claimant indicated the pain has returned and is related to the initial injury of April 9, 2014. (Def. Ex. D, p. 12) Dr. Smith opined that he cannot relate claimant's current symptoms to the incident of April 9, 2014. He noted that x-rays

[1] Sentry Insurance is not a party to this suit.

demonstrated progression of the degenerative changes in her cervical spine, which may be causing cervical radiculopathy, and that is related to a degenerative process of the cervical spine and "not a work-related injury, specifically the one of April 9, 2014." (Def. Ex. D, p. 12) With respect to the question of whether claimant's job duties resulted in a material aggravation, exacerbation, or lighting up of her underlying condition, Dr. Smith stated:

> In light that Ms. Mull is specifically relating it to the April 9, 2014, incident, and no specific additional injury is identified, I am unable to relate her present symptoms to a material aggravation, exacerbation, or lighting up of her underlying condition.

(Def. Ex. D, p. 13) (emphasis added)

Claimant had a cervical spine MRI on March 29, 2018. (Jt. Ex. 1, pp. 194-195) She returned to Dr. Smith on April 5, 2018, to review the results. (Jt. Ex. 1, p. 188) Dr. Smith advised that the MRI showed moderate to severe cervical spondylosis with neural foraminal stenosis at C4-5 and C5-6. (Jt. Ex. 1, p. 189) Dr. Smith further opined that the findings "are consistent with a degenerative process of the cervical spine and not a work-related injury." He noted that claimant was frustrated with that answer. Dr. Smith recommended an EMG of the right upper extremity, along with a referral to interventional pain management and follow up with claimant's primary care physician. (Jt. Ex. 1, p. 189)

Claimant testified that after the visit with Dr. Smith on April 5, 2018, she met with human resources and was advised that her workers' compensation claim was denied, and she would not be provided with any additional services. (Tr., p. 42) Claimant then received a letter dated April 11, 2018, from Brenda Ivey at Sentry Insurance, advising that based on Dr. Smith's opinion, her symptoms are not related to the original incident on April 9, 2014. As such, further care would not be authorized by Sentry. (Cl. Ex. 2, p. 10)

Claimant testified that after her claim was denied, she treated with her primary care provider, Brandi Booth, ARNP. She saw Ms. Booth on April 6, 2018, at which time she was "very tearful with pain in her right arm and shoulder." (Jt. Ex. 1, p. 94) She advised that the pain was constant and medications were not helping, and stated "I cannot deal with this anymore." Ms. Booth recommended an injection, which was performed that day, and adjusted claimant's medications. (Jt. Ex. 1, p. 98)

Claimant returned to Ms. Booth on April 12, 2018 and advised that the injection did not help. (Jt. Ex. 1, p. 100) On that date, Ms. Booth's record indicates that claimant's symptoms started in September of 2017, when she was working above her head at work and had a sudden onset of hot shooting pain down her arm. She noted that claimant's symptoms had "waxed and waned" since that time, she had some physical therapy, and was ultimately sent to physiatry. After the MRI, the claim was deemed not to be work related. (Jt. Ex. 1, p. 100) Ms. Booth reviewed the MRI, and recommended

an EMG and spine center consultation. She again adjusted claimant's medications. (Jt. Ex. 1, p. 104)

Pursuant to Ms. Booth's recommendation, claimant was seen at Pain Specialists of Iowa on April 27, 2018. (Jt. Ex. 1, p. 199) She saw Jolene M. Smith, D.O., who noted that claimant reported the onset of pain beginning in late September or early October 2017, while reaching overhead at work. Claimant reported the pain at that time was constant with varying intensity. Dr. Smith reviewed the EMG and MRI, and noted that the EMG identified active right C5 and C6 radiculopathies.[2] She recommended a cervical epidural injection at the C6-7 level, which was completed that day. (Jt. Ex. 1, pp. 200; 196-197)

Claimant returned to Dr. Jolene Smith on May 15, 2018. (Jt. Ex. 1, p. 202) Claimant reported that the cervical injection had not provided any relief. She continued to describe "very severe" neck and right arm pain down to the wrist. Dr. Smith's note indicates claimant was very tearful and "desperate for relief," and feeling very overwhelmed. Medications were not helping. Dr. Smith recommended a neurosurgical opinion. (Jt. Ex. 1, p. 202)

Claimant was referred to Mercy Neurosurgery, where she saw Esmiralda Henderson, M.D., on May 18, 2018.[3] Dr. Henderson performed anterior cervical discectomy and fusion (ACDF) surgery from C4 to C7 on July 2, 2018. (Cl. Ex. 1, p. 18) Claimant testified that the surgery "took away that 'I want to kill myself' pain, but I still have quite a bit of pain." (Tr., p. 44)

Claimant started physical therapy at Pella Regional Health Center on July 19, 2018. (Jt. Ex. 1, p. 204) At a follow up visit on August 8, 2018, Dr. Henderson noted that claimant was 6 weeks post C4-7 ACDF for right upper extremity radiculopathy and mild myelopathy. (Jt. Ex. 1, p. 121) At that time, claimant's right upper extremity pain had resolved, but she still had some neck pain. Dr. Henderson instructed claimant to follow up in one year. (Jt. Ex. 1, p. 123) Claimant continued with physical therapy until August 29, 2018. (Jt. Ex. 1, p. 220) Claimant testified that she returned to work on September 19 or 20, 2018. (Tr., p. 45)

Claimant returned to Dr. Henderson for her one-year follow up on July 15, 2019. (Jt. Ex. 1, p. 221) Cervical x-rays from that day show anterior cervical spinal fusion hardware extending from C4 through C7, without change in alignment or evidence of instrumentation failure. (Jt. Ex. 1, p. 221) Claimant apparently returned to ARNP Booth at some point thereafter, as the next record in evidence indicates she returned to physical therapy at 21st Century Rehab on October 16, 2019. (Jt. Ex. 1, p. 51) At that

[2] The EMG report is not included as an exhibit. However, the list of medical records provided to Dr. Sassman prior to her IME indicates that it was performed at Mercy Ankeny on April 17, 2018. (Cl. Ex. 1, p. 4)

[3] Dr. Henderson's records are not included in their entirety, but it appears from claimant's account statement that she first saw claimant on this date. (Jt. Ex. 1, p. 126)

time, claimant expressed her belief that she may have returned to work too quickly following surgery. She reported pain at a level 5 out of 10, with a dull ache and difficulty holding her head up. She stated that while working her pain could reach 8 of 10. Essentially, claimant stated that after completing physical therapy, she felt the same symptom-wise as she did one year prior. (Jt. Ex. 1, p. 51)

Claimant was provided with several exercises to help improve posture and work on "calming her system." (Jt. Ex. 1, p. 53) Claimant was tearful throughout the session secondary to pain and "overwhelming feelings of deficits." Skilled therapy was recommended to improve her function for daily and work-related activities. Under prognosis, however, it is noted that claimant reported the co-pay would limit her ability to attend therapy at the suggested two-times per week. It further notes that she may be able to attend one time per week, "however, does not respond confidently that she will be able to make this work." (Jt. Ex. 1, pp. 53; 56) In reviewing the patient ledger provided, it does not appear that claimant returned for additional therapy. (Jt. Ex. 1, p. 60)

When claimant returned to work in 2018, she was performing her regular job duties as miller-blender with no restrictions. Claimant testified, however, that she frequently had to take time off due to her injury. (Tr., p. 45) At first it was two or three times each month, but eventually it became more frequent. (Tr., p. 45) If claimant was out of vacation time, she would take short-term FMLA leave. (Tr., p. 46) Claimant testified that she receives 5 weeks of vacation per year. At the time of hearing on July 28, 2020, claimant had already used all 5 weeks of her vacation time for the year. (Tr., p. 47)

Claimant continued to work in her original position of miller-blender until February of 2020. At that time, she decided she needed a different job, and bid into a less physically demanding job in the sanitation department. (Tr., pp. 47-48) Claimant testified that she does not know how long that will last, as it is "just getting to where I can't physically do very much." (Tr., p. 48)

Claimant returned to see ARNP Booth on June 5, 2020. (Jt. Ex. 1, p. 110) She reported ongoing neck and back pain. She advised that she had recently called her surgeon, who ordered an x-ray and advised her hardware was stable 2 years post-operatively. Claimant was to obtain an updated EMG study, but it was postponed due to the COVID-19 pandemic. Claimant reported right-sided neck pain with paresthesias in the bilateral arms, and pain to bilateral forearms. She reported difficulty with gripping with both hands and felt like she had less dexterity in her hands. She reported constant neck pain at 4 or 5 of 10. (Jt. Ex. 1, p. 110)

Ms. Booth noted that claimant needed to see rheumatology as she believed many of claimant's symptoms were due to rheumatoid arthritis. She advised claimant to get the EMG rescheduled, and she ordered a cervical MRI. (Jt. Ex. 1, pp. 110-112) Claimant returned to Ms. Booth on June 19, 2020. She reported that the EMG showed carpal tunnel syndrome bilaterally. She was unable to proceed with the MRI due to

claustrophobia and inability to lay flat. Ms. Booth recommended rescheduling the MRI with sedation, followed by a consultation with pain management. (Jt. Ex. 1, p. 114)

Claimant had an independent medical evaluation (IME) with Robin L. Sassman, M.D., on May 18, 2020 (Cl. Ex. 1) Dr. Sassman's report is dated June 17, 2020. She indicated that prior to the evaluation, she reviewed 380 pages of medical records, and she spent about 1.25 hours examining claimant. (Cl. Ex. 1, pp. 10-11)

Dr. Sassman outlined claimant's recitation of her history, which is consistent with claimant's testimony. When asked to describe how her symptoms were different in 2017 as compared to the first time it happened in 2014, claimant stated that the symptoms in 2017 were worse in the arm and neck. She further states that she had numbness in some of her fingers after the 2017 incident. (Cl. Ex. 1, p. 14) Claimant reported that the initial physical therapy with Jason at the plant did not help, and she thinks it made her symptoms worse. Claimant advised that by January of 2018, she could no longer stand the symptoms, so she asked for additional treatment. (Cl. Ex. 1, p. 14)

Dr. Sassman outlined claimant's treatment history in detail. (Cl. Ex. 1, pp. 14-19) She further noted that claimant returned to work in September of 2018 without restrictions, and that claimant stated she did not think the surgeon understood how physically demanding the miller-blender job was. (Cl. Ex. 1, p. 18) Claimant told Dr. Sassman that when she returned to work it did not go well, and she would go home every day and cry. There was a lot of overhead work and heavy work. She "stuck it out" because she had bills coming in related to her medical care. (Cl. Ex. 1, p. 18)

At the time of Dr. Sassman's examination, claimant reported current symptoms of ongoing headaches, which did not change after surgery. With respect to her neck, she stated that it is hard to hold her head up, and it always hurts on the right side. She notices increased pain with changes in the weather. She feels off balance at times and has a loss of strength. She noted some ongoing numbness and tingling in her hands, and difficulty washing her hair. In fact, she stated that she cut her hair short because of her symptoms. (Cl. Ex. 1, p. 19) Claimant noted difficulty sleeping, and waking up with her shoulders hurting and arms tingling. She stated that if she tries to hold up her tablet, she has pain in her arms. She cannot play ball with her grandchildren and limits other activities with them. She can no longer crochet. Driving is difficult, and driving a forklift at work causes pain. She had difficulty looking up and it also causes pain. She used to go to her son's house and go out to eat with friends frequently and does not any longer due to her symptoms. (Cl. Ex. 1, p. 19) All of this is consistent with claimant's and her children's testimony at trial. (Tr., pp. 11-24; 48-49)

Claimant explained her job duties to Dr. Sassman. She noted that in the miller-blender position she had to carry 75-pound containers of oil and dump them into a blender. She also has to work overhead frequently. (Cl. Ex. 1, p. 20) To the contrary, her current position in sanitation does not require much, if any, overhead work, and the heaviest item she has to lift is a 20 to 25-pound bag of recycled bottles or garbage. (Cl. Ex. 1, p. 20)

After her examination, Dr. Sassman's diagnosis was "cervical pain with radiculopathy status post C4-C7 anterior cervical fusion on [July 2, 2018] by Esmiralda Henderson, M.D." (Cl. Ex. 1, p. 22) In response to questions from claimant's attorney, Dr. Sassman opined that the incident in 2014 resulted in no permanent impairment, as claimant's symptoms following that incident resolved with conservative treatment. It was not until the "late 2017 or early 2018" injury that claimant had right upper extremity radicular symptoms that persisted and necessitated the surgery that occurred in 2018. As such, Dr. Sassman opined that the incident that occurred in late 2017 or early 2018 when claimant was turning the valve proximately caused impairment to her cervical spine and right upper extremity. (Cl. Ex. 1, pp. 22-23)

Dr. Sassman further optioned that because claimant's neck and right upper extremity symptoms resolved after the 2014 incident, and did not return until after the 2017/2018 incident, she would consider the 2014 symptoms to have resolved. Further, the MRI from March 29, 2018 noted that claimant had facet joint arthritis that caused moderate bony dominant central canal stenosis at C4-5 and C5-6, and to a lesser extent C6-7. This caused neural foraminal stenosis at those levels, most pronounced on the right side. Therefore, Dr. Sassman opined that the valve incident of 2017/2018 was a substantial aggravating factor of the degenerative changes in the cervical spine, aggravating her condition to the point of her needing surgery in 2018. This opinion is supported by the fact that shortly after the 2014 incident, claimant's neck and upper extremity symptoms resolved. (Cl. Ex. 1, pp. 23-24)

Dr. Sassman concluded that claimant's injury arose out of and in the course of her employment when she felt the pop in her neck and pain in her shoulder down her arm while turning the valve in late 2017 or early 2018. (Cl. Ex. 1, p. 24) This incident necessitated the surgery performed by Dr. Henderson in July 2018.

With respect to permanent impairment, Dr. Sassman provided a combined total impairment of 31 percent of the whole person for her cervical spine injury. (Cl. Ex. 1, p. 25) Using the AMA Guides to the Evaluation of Permanent Impairment, Dr. Sassman opined claimant had a 20 percent range of motion impairment, 12 percent impairment related to the cervical fusion, and 1 percent impairment related to dysesthesias associated with the C5 dermatome. Using the combined values chart, the total impairment comes to 31 percent of the whole person. This impairment is relative to the late 2017 or early 2018 valve incident. (Cl. Ex. 1, pp. 24-25)

With respect to permanent restrictions, Dr. Sassman recommended that claimant limit lifting, pushing, pulling, and carrying to 20 pounds from floor to waist and waist to shoulder on an occasional basis. She recommended limiting lifting, pushing, pulling, and carrying with her arms away from her body to 10 pounds occasionally. Finally, she advised claimant to limit the use of vibratory or power tools to a rare basis. (Cl. Ex. 1, p. 26) Dr. Sassman placed claimant at maximum medical improvement (MMI) one year after the date of surgery, on July 2, 2019, and suggested that claimant might be

evaluated by a pain management specialist to see if any type of injection would benefit her ongoing symptoms. (Cl. Ex. 1, pp. 26-27)

In a letter dated June 30, 2020, defendants asked Dr. Kurt Smith to review additional medical records, including Dr. Sassman's report, and provide updated opinions and answers to questions. Defendants' letter is not in evidence, but Dr. Smith's response, dated July 8, 2020, repeats the questions defendants posed. (Def. Ex. E, pp. 14-16) In his response, Dr. Smith opined that claimant's medical records delineate evidence of degenerative changes dating back to at least 2014, with multilevel degenerative changes and osteophyte formation consistent with "wear and tear" over a prolonged period of time. Dr. Smith stated that his opinion continues to be that claimant has degenerative disease of the cervical spine involving multiple levels, related to the aging process. (Def. Ex. E, p. 14)

When asked whether he believes claimant's current condition is related to "repetitive work duties manifesting in an injury in January 2018," Dr. Smith replied as follows:

> Ms. Mull related no specific injury in 2018, to this physician provider, and I do not believe that her condition and cervical findings are related to repetitive work duties, but more to an aging process.

(Def. Ex. E, p. 15) The next question noted that when claimant first saw Dr. Smith in March of 2018, he noted "symptoms returned in September or October 2017, without any known injury." The question then asked if Dr. Smith believes claimant's current condition is related to a traumatic event occurring in September of October of 2017. Dr. Smith replied as follows:

> The patient related no specific traumatic injury to her on the job site in September or October 2017, so I am unable to relate her symptoms to any form of trauma.

(Def. Ex. E, p. 15)

Dr. Smith went on to opine that the cervical fusion surgery was not work-related, that claimant "had been at maximal medical improvement," has not sustained any permanent impairment for a work-related condition, and that she does not have any permanent restrictions "because this is not a work-related condition." (Def. Ex. E, p. 15)

The final question invites Dr. Smith to add any additional comments he believes to be necessary to evaluate this claim. Dr. Smith stated as follows:

> It is documented in the additional medical records, the patient had treatment for cervical spine conditions. Specifically, in 2016, with a chiropractor. At that time, it was not a work-related condition, which would be more consistent with the degenerative processes of her cervical spine

> causing intermittent pain and ultimately progressing to the point of irritation to the exiting nerves, all of which are related to the age-related process of the cervical spine, and there is no specific trauma in 2017, that would cause advanced progression of the disease process. It continues to be my opinion that she has a degenerative process of her cervical spine, which will continue to progress as the patient ages.

(Def. Ex. E, p. 16) (emphasis added)

It is clear from Dr. Smith's letter that he had not been informed that claimant was, in fact, reporting a specific trauma in 2017 that resulted in worsening symptoms. While claimant testified that she told him what happened in 2017, and the evidence shows that she also wrote it on the initial patient information form, for whatever reason Dr. Smith does not appear to have this information. On the other hand, Dr. Sassman was provided with a detailed letter from claimant's attorney, as well as 380 pages of medical records. (Cl. Ex. 1, pp. 1-9) Dr. Sassman understood the claimant's medical history and the fact that claimant did have a specific traumatic incident in late 2017 that initially triggered her symptoms. I find that Dr. Sassman's opinions are based on more accurate and complete information and are therefore entitled to greater weight. Dr. Smith was not provided with complete or accurate information regarding claimant's injury. His opinion is subsequently rejected.

Looking at the evidence as a whole, and based on Dr. Sassman's opinion, I find that claimant sustained an injury arising out of and in the course of her employment in late September or early October of 2017. The exact date of the incident is unknown. Claimant reported the injury when it occurred, and saw the company's in-house physical therapist, Jason. Claimant reasonably believed that the injury would improve, as she had experienced a similar injury performing the same task in 2014. That injury resolved within 2 to 3 weeks. Unfortunately, this time claimant's condition continued to worsen. By January 9, 2018, claimant was no longer able to tolerate her symptoms, and came to the realization that her injury was serious and not going to improve as it had in 2014. At that time she requested additional medical care from her employer. Her injury therefore manifested on that date, and she had two years, or until January 9, 2020, in which to file a petition for benefits.

CONCLUSIONS OF LAW

The parties have presented several disputed issues for consideration. The first issue to be determined is whether the claimant sustained an injury arising out of and in the course of her employment. Claimant alleges a cumulative injury to her neck that manifested on January 9, 2018. Defendants argue that claimant did not sustain an injury arising out of her employment, and if she did, Iowa Code sections 85.23 and 85.26 bar her claim.

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3)(e).

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

Defendants' argument regarding causation is based on the opinions of Dr. Kurt Smith, who opined that claimant's condition is degenerative in nature and not related to a work injury. The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Community School v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The deputy commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Systems. Inc. v, Prince, 366 N.W.2d 187, 192 (Iowa 1985).

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).

I found that Dr. Smith was not provided with complete or accurate information regarding claimant's injury and rejected his opinions. When Dr. Smith initially saw claimant in March of 2018, he was under the mistaken impression that claimant had not sustained any intervening traumatic injury since her original injury in 2014. Claimant credibly testified that she explained the 2017 incident to Dr. Smith, and the evidence

shows that she wrote "October 2017" as the date the condition occurred or began on the patient information form. (Jt. Ex. 1, p. 178) However, when the insurance adjuster from Sentry wrote to Dr. Smith, she referenced the 2014 incident, and did not mention that the same thing had happened to claimant again in 2017. Without this crucial information, Dr. Smith could not provide an accurate opinion regarding causation.

Again, when Dr. Smith was asked to review additional records in 2020, it does not appear he was provided with this additional fact. His opinions are clearly based, at least in part, on his understanding that claimant sustained "no specific trauma in 2017, that would cause advanced progression of the disease process." (Def. Ex. E, p. 16) He notes on at least three separate occasions in his 2020 letter that because claimant did not sustain any traumatic injury between 2014 and the present, he cannot relate her symptoms to any trauma. He further points to chiropractic care claimant had in 2016, which claimant testified was specifically related to headaches, as opposed to neck pain. Had Dr. Smith understood the accurate facts regarding the incident in late 2017, his opinion may have changed. As I cannot speculate as to what that opinion would be, I must reject his opinions in whole. Looking at the evidence as a whole, and based on Dr. Sassman's opinion, I find that claimant sustained an injury arising out of and in the course of her employment.

The next issues to determine involve the date of injury, and whether claimant provided timely notice pursuant to Iowa Code section 85.23, and filed her petition within the statute of limitations found in Iowa Code section 85.26.

The issue of notice under Iowa Code section 85.23 was raised in the hearing report, but defendants failed to address it in their brief. In short, claimant testified that when the injury occurred in late September or early October of 2017, she reported it to her supervisor the same day. (Tr., p. 36) She was then provided with in-house physical therapy. Defendants have not presented any evidence to the contrary. I found claimant to be a credible witness. As such, I find that claimant provided timely notice of her claim pursuant to Iowa Code section 85.23.

With respect to the statute of limitations, defendants allege that claimant failed to file her petition timely under Iowa Code section 85.26. 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. In this case, the employer has not paid claimant any benefits. As such, the two-year time period for filing applies.

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). As an initial matter, it is noted that defendants did not plead this defense in their

answer. However, it was included as an issue on the hearing report, which the parties agreed to, and the undersigned approved. Therefore, the arguments are considered.

As noted above, claimant alleges that she sustained a cumulative injury, which is essentially a permanent and material aggravation of her degenerative cervical spine condition. A cumulative injury is an occupational disease that develops over time, resulting from cumulative trauma in the workplace. Baker v. Bridgestone/Firestone, 872 N.W.2d 672, 681 (Iowa 2015); Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842, 851 (Iowa 2009); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368, 372-74 (Iowa 1985). "A cumulative injury is deemed to have occurred when it manifests – and 'manifestation' is that point in time when 'both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person.'" Baker, 872 N.W.2d at 681.

It is well-established in workers' compensation that "if a claimant had a preexisting condition or disability, aggravated, accelerated, worsened or 'lighted up' by an injury which arose out of and in the course of employment resulting in a disability found to exist," the claimant is entitled to compensation. Iowa Dep't of Transp., State of Iowa v. Van Cannon, 459 N.W.2d 900, 904 (Iowa 1990). The Iowa Supreme Court has held:

> [A] disease which under any rational work is likely to progress so as to finally disable an employee does not become a "personal injury" under our Workmen's Compensation Act merely because it reaches a point of disablement while work for an employer is being pursued. It is only when there is a direct causal connection between exertion of the employment and the injury that a compensation award can be made. The question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause.

Musselman v. Cent. Tel. Co., 261 Iowa 352, 359-60, 154 N.W.2d 128, 132 (1967).

Having accepted the medical causation opinion of Dr. Sassman, I found that claimant proved she sustained a cumulative injury to her neck arising out of and in the course of employment with defendant. Determining the precise date of a cumulative injury can be difficult, and there are not necessarily bright-line factors or tests that establish the date of injury such as lost time from work, receiving medical care, or other factors. Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992). Instead, the Iowa Supreme Court has held:

> [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.

Herrera v. IBP, Inc., 633 N.W.2d 284, 288 (Iowa 2001).

Claimant testified that in late September or early October of 2017, while performing her work duties, she had to forcefully turn an overhead valve, and when she did "everything just popped and shot red-hot fire up my neck, down my arm, up my shoulder, on my neck." (Tr., p. 35) She reported the injury to her supervisor, Randy Augustine, when it happened. (Tr., p. 36) Both of claimant's adult children testified that their mother told each of them about her injury when it happened, in September or October of 2017. (Tr., pp. 14; 17-18; 21-22) Claimant clearly knew, or should have known, that she sustained a work-related injury in late September or early October of 2017.

Claimant filed her petition for benefits on October 18, 2019. Defendants argue that the proper date of injury is September 24, 2017, making her petition untimely under Iowa Code section 85.26(1). Defendants further argue that claimant sustained a distinct, identifiable traumatic injury, and as such the discovery rule does not apply. Defendants cite no authority for that position.

The Iowa Supreme Court has stated:

> Whether a work-related injury arises cumulatively because of repetitive trauma or from a singular traumatic event, the agency must apply the discovery rule when it is properly raised and substantial evidence supports it. In cumulative injury cases, the agency applies the rule by deciding "whether the statutory period commenced on [the manifestation] date or whether it commenced upon a later date." Herrera, 633 N.W.2d at 288. In cases alleging injuries arising from a singular event, the agency must apply the rule in deciding whether the limitation period commenced on the date of the singular event or at some later time. If the claimant did not know—or did not have knowledge of facts sufficient to trigger a duty to investigate— "the nature, seriousness[,] and probable compensable character" of their injury, Orr, 298 N.W.2d at 261, the discovery rule tolls the limitation period until the claimant gains that knowledge. The fact an initial accident is traumatic does not necessarily provide immediate notice of seriousness or compensability. See Ga. Pac. Corp. v. Taplin, 586 So.2d 823, 827 (Miss. 1991).

Baker, 872 N.W.2d at 683.

Given that the discovery rule applies regardless of whether claimant sustained a traumatic injury or cumulative injury, I must address whether claimant's petition was timely filed on October 18, 2019. Claimant argues that the discovery rule tolled the statute of limitations until January 9, 2018, when she became aware of the seriousness of her condition.

The discovery rule is applicable to workers' compensation claims. Baker, 872 N.W.2d at 680-81. Under the discovery rule, the limitations period "does not begin to run

until the claimant knows or in the exercise of reasonable diligence should know 'the nature, seriousness[,] and probable compensable character' of his or her injury." Id. at 684-85. These three factors are sometimes summarized by the Iowa Supreme Court stating that the claimant must have knowledge, as a reasonable person, that the injury will have a "permanent adverse impact" on his or her employment. Larson Mfg. Co., 763 N.W.2d at 854-855. However, "not every ache, pain, or symptom will satisfy the seriousness component of the discovery rule." Baker, 872 N.W.2d at 682. Instead, the claimant must have actual or imputed knowledge of the nature, seriousness, and probable compensable character of the injury before the statute begins to run. Swartzendruber v. Schimmel, 613 N.W.2d 646, 650-51 (Iowa 2000).

The Iowa Supreme Court has held:

> [U]nder the imputed knowledge prong of the discovery rule, the statute of limitations begins when a claimant gains information sufficient to alert a reasonable person of the need to investigate, Thus, a claimant's knowledge is judged under the test of reasonableness. The need to investigate arises when a reasonable person has knowledge of the possible compensability of the condition. This knowledge must include all three characteristics of the condition. As of that date, the duty to investigate begins and the claimant has imputed knowledge of all the facts that would have been disclosed by a reasonable diligent investigation. Thus, a claimant has two years from that time to gather the facts and file a petition.

Id. (internal citations omitted).

The discovery rule does not require "exact knowledge of the seriousness of an injury," nor does it require an expert opinion "to establish knowledge of the characteristics of the injury," rather, the claimant has a duty to investigate when the claimant is aware of the problem. Id. "[I]f it is reasonably possible an injury is serious enough to be compensable as a disability, the seriousness component of the test is satisfied." Id. at 651.

Defendants further argue that the discovery rule no longer applies due to the 2017 amendment to Iowa Code section 85.26. For injuries occurring after July 1, 2017, the statute now reads:

> An original proceeding for benefits under this chapter or chapter 85A, 85B, or 86, 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. For the purposes of this section "date of the occurrence of the injury" means the date that the employee knew or should have known that the injury was work-related.

Iowa Code 85.26(1) (emphasis added).

Again, defendants do not cite any authority to support the position that the 2017 amendment to section 85.26(1) has changed the application of the discovery rule such that it would not apply to claimant's claim. However, the plain language of the statute includes the "knew or should have known" language, which has been used by the Iowa Supreme Court for decades in applying the discovery rule. There is a presumption that the legislature is aware of the courts' prior holdings when crafting new legislation. Roberts Dairy v. Billick, 861 N.W.2d 814, 821 (Iowa 2015) (as amended); State v. Fluhr, 287 N.W.2d 857, 862 (Iowa 1980). From the face of the statute, the legislative intent appears to have codified the discovery rule.

In Baker, the Iowa Supreme Court laid out the history of the workers' compensation statute and described it as a grand bargain between the employee who gives up certain tort rights in exchange "for a system designed to provide compensation benefits and medical services promptly, without protracted and expensive litigation." Id. at 677. Further, we are to "liberally construe workers' compensation statutes in claimants' favor to effectuate the statute's humanitarian and beneficent purpose." Id. at 679. Therefore, without specific language rejecting the discovery rule, the discovery rule still applies to the application of Iowa code § 85.26(1).

In this case, claimant had an incident in 2014 while performing the exact same work duties of forcefully turning a sticky overhead valve, in which she experienced pain in her right shoulder and the right side of her neck. Following that incident, claimant had approximately 2 to 3 weeks of conservative treatment, and her symptoms resolved. She continued working with no serious problems. In the fall of 2017, when the exact same thing happened, claimant reasonably believed, based on her prior experience, that her symptoms would again improve in a short period of time. However, claimant's symptoms continued to worsen, and eventually she started to have radiating pain down her right arm. Claimant testified that the pain became constant by January of 2018, when she asked her employer to send her for additional treatment. Claimant testified that it was at that point, in January of 2018, that she realized her symptoms were serious, and she needed to investigate further. (Tr., pp. 37-38) Claimant's first appointment with Methodist Occupational Health took place on January 10, 2018. (Jt. Ex. 1, p. 168)

Prior to January 2018, even defendants did not believe claimant's condition was serious enough to warrant medical attention by a physician, given that claimant was only sent to the in-house physical therapist, Jason. Considering that, along with claimant's prior experience in 2014, it is not realistic or reasonable to expect claimant to have immediately realized that her condition was serious enough to be compensable, or have a permanent adverse effect on her employment. Therefore, I conclude that the statute of limitations did not commence when the injury occurred in September or October of 2017, but was tolled by the discovery rule until January 9, 2018, when claimant became aware of the need to investigate the seriousness of her condition.

Claimant filed her original notice and petition on October 18, 2019, which is within two years of the date when claimant became aware of the need to investigate the seriousness of her condition. Therefore, I find the discovery rule applies and the statute of limitations did not expire before claimant filed her petition.

Having determined that claimant's petition was timely filed under section 85.26, the next issue is whether claimant's injury caused any temporary and/or permanent disability.

Claimant alleges she is entitled to healing period benefits from July 2, 2018, through September 18, 2018,[4] as she was taken off work during that time while she recovered from surgery.

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).

Defendants argue that if claimant's claim is found compensable, she is not entitled to healing period benefits because there is no evidence she was restricted from working during the time period alleged. Claimant testified that she was off work during this period of time, and defendants did not offer any evidence to contradict that testimony. (Tr., pp. 44-45) In addition, medical records indicate that claimant was released to return to full-duty work on or around September 17, 2018. (Jt. Ex. 1, p. 215) As such, I find that claimant is entitled to healing period benefits from July 2, 2018, through September 18, 2018, which is 11 weeks and 1 day.

The next issue is whether claimant's injury caused permanent disability, and if so, the nature and extent of that disability. The hearing report indicates a dispute with respect to whether claimant's injury caused a scheduled member disability, versus industrial disability.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(u), or as an unscheduled injury pursuant to the provisions of section 85.34(2)(v). As claimant's injury was to her neck, it extends to the body as a whole, and should be compensated pursuant to Iowa Code section 85.34(2)(v).

Iowa Code section 85.34(2)(v) (2017) provides:

[4] The hearing report states healing period benefits are sought through September 18, 2019. The undersigned has determined that the hearing report contains a typographical error with respect to the year, as claimant testified she returned to work in September of 2018.

> In all cases of permanent partial disability other than those hereinabove described or referred to in paragraphs 'a' through 't' hereof, the compensation shall be paid during the number of weeks in relation to five hundred weeks as the reduction in the employee's earning capacity caused by the disability bears in relation to the earning capacity that the employee possessed when the injury occurred. A determination of the reduction in the employee's earning capacity caused by the disability shall take into account the permanent partial disability of the employee and the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury. If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity.

Defendants argue that claimant was released to return to work with no restrictions, and her recovery is therefore limited to her functional impairment rating pursuant to Iowa Code section 85.34(2)(v). Claimant argues that she is entitled to industrial disability beyond the functional impairment rating, but did not address how the amendment to section 85.34 might affect that claim.

In this case, claimant did initially return to work with no restrictions from her surgeon. She returned to the same job as miller-blender, making the same salary. Her most recent hourly wage as a miller-blender was $23.71 per hour. (Tr., p. 47) Claimant continued in that position until February of 2020, when she decided to bid into a different job. At the time of hearing, claimant was working in the sanitation department. (Tr., pp. 47-48) The sanitation job is less physically demanding than the miller-blender position, with less overhead work. (Tr., p. 48) Claimant could not remember her exact pay at the time of hearing, but testified it is "$22 and something." (Tr., p. 49) She continues to work some overtime, including mandatory overtime, but tries not to do as much anymore. (Tr., pp. 47-48)

It is undisputed that claimant was not making the same hourly wage at the time of hearing as she was on the date of injury. However, when she initially returned to work, she was in the same position making the same wage. The question, therefore, is at what point is the agency to measure whether claimant is receiving the same or greater salary, wages, or earnings.

The Workers' Compensation Commissioner has recently addressed this issue on appeal. In McCoy v. Menard, Inc., File No. 1651840.01 (App. April 9, 2021), the commissioner addressed whether a claimant's wages should be looked at in isolation, or whether an overall reduction in claimant's earnings would trigger an industrial disability analysis given the amendment. In that case, the defendants argued that

because the claimant was making a higher hourly wage than he was at the time of the injury, his recovery was limited to the functional rating. The Commissioner stated:

> [T]his interpretation implies that the hours worked by the claimant post-injury are irrelevant so long as the employer maintains the pre-injury hourly wage. Though the legislature clearly intended to limit the scenarios under which industrial disability benefits are owed, such an interpretation would lead to illogical and absurd results. See Janson v. Fulton, 162 N.W.2d 438, 442 (Iowa 1968) ("It is a familiar, fundamental rule of statutory construction that, if fairly possible, a construction resulting in unreasonableness as well as absurd consequences will be avoided."); see also Sherwin–Williams Co. v. Iowa Department of Revenue, 789 N.W.2d 417, 427 (Iowa 2010) ("'[E]ven in the absence of statutory ambiguity, departure from literal construction is justified when such construction would produce an absurd and unjust result and the literal construction in the particular action is clearly inconsistent with the purposes and policies of the act.'" (quoting *Pac. Ins. Co. v. Or. Auto. Ins. Co.,* 490 P.2d 899, 901 (1971)).
>
> For example, under an extreme application of this interpretation, so long as the employer offers a claimant even one hour of work at the same or greater pre-injury hourly wage, a claimant's compensation would be limited to functional impairment. Given the potential for such an absurd and illogical outcome, I reject the deputy commissioner's interpretation of Iowa Code section 85.34(2)(v).

To avoid this result, the Commissioner concluded "a claimant's hourly wage, considered in isolation, is not sufficient to limit a claimant's compensation to functional disability." The Commissioner explained as follows:

> Iowa Code section 85.34(2)(v) states that the employee's compensation is limited when the employee "receives or would receive the same or greater salary, wages or earnings." Iowa Code section 85.34(2)(v) (emphasis added). This provision says nothing about hourly rates, and the use of the word "receive" implies a comparison of what the claimant was actually paid or offered to be paid both before and after the injury. See "Receive," https://www.merriam-webster.com/dictionary/receive (last visited on April 5, 2021) (defining "receive" as "to come into possession of") Thus, I conclude a claimant's hourly wage must also be considered in tandem with the actual hours worked by that claimant or offered by the employer when comparing pre- and post-injury wages and earnings under section 85.34(2)(v).

With respect to when or how this consideration is to take place, the Commissioner further noted in McCoy:

> [t]he Legislature provided no guidance as to how or when to measure whether an employee is receiving or being offered the same or greater salary, wages, or earnings than what he or she was receiving at the time of the injury. The Legislature did not indicate when this comparison is supposed to take place, nor did the Legislature indicate how many weeks are to be considered in this comparison. Unlike Iowa Code section 85.36, which provides the number of weeks that are to be used when computing a claimant's rate of compensation, there is no instruction in section 85.34(2)(v) for how to take the post-injury "snapshot" of a claimant's salary, wages or earnings. There is also no indication from the Legislature as to whether to replace a week that does not reflect the employee's customary earnings, such as what is contained in section 85.36. See Iowa Code section 85.36(6).

The Commissioner further addressed the issue in Vogt v. XPO Logistics Freight, File No. 5064694.01 (App. June 11, 2021). In Vogt, the Commissioner again noted that due to the recency of the amendment, the agency is without guidance from the appellate courts on the issue. The Iowa Supreme Court has repeatedly stated this agency lacks the legislature's expressly vested authority to interpret workers' compensation statutes. See, e.g., Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 770 (Iowa 2016), reh'g denied (May 27, 2016). Practically speaking, however, this agency acts as the front-line authority in interpreting statutory workers' compensation provisions. Thus, while the appellate courts may have the final say, statutory interpretation by this agency is a necessary inevitability.

When the plain language of the statute is clear as to its meaning, courts apply the plain language and do not search for legislative intent beyond the express terms of the statute. Denison Municipal Utilities v. Iowa Workers' Compensation Com'r, 857 N.W.2d 230 (Iowa 2014). A statute is only ambiguous if reasonable minds could differ or be uncertain as to the meaning of the statute. Iowa Ins. Institute v. Core Group of Iowa Ass'n for Justice, 867 N.W.2d 58 (Iowa 2015). Statutes should be read as a whole, rather than looking at specific words or phrases in isolation. Id.

The Commissioner determined in Vogt that because of the lack of guidance contained in the new provision of section 85.34(2)(v), there is "an ambiguity in the statute pertaining to when and how claimant's post-injury salary, wages, or earnings are supposed to be measured." The Commissioner then stated:

> From the standpoint of logic and fairness, the post-injury "snapshot" of claimant's salary, wages or earnings should occur at the time of the hearing, just as industrial disability is measured as the evidence stands at the time of the hearing. Performing the comparison based on a claimant's initial return to work could lead to unfair and illogical results. See Janson v. Fulton, 162 N.W.2d 438, 442 (Iowa 1968) ("It is a familiar, fundamental rule of statutory construction that, if fairly possible, a construction resulting in unreasonableness as well as absurd consequences will be avoided.");

> see also Sherwin–Williams Co. v. Iowa Department of Revenue, 789 N.W.2d 417, 427 (Iowa 2010) ("'[E]ven in the absence of statutory ambiguity, departure from literal construction is justified when such construction would produce an absurd and unjust result and the literal construction in the particular action is clearly inconsistent with the purposes and policies of the act.'" (quoting *Pac. Ins. Co. v. Or. Auto. Ins. Co.,* 490 P.2d 899, 901 (1971)).

The Commissioner went on to note that claimants frequently return to work for a period of time between an injury occurring and the injury becoming worse or requiring surgery. In other words, "there are many cases in which restrictions that reduce a claimant's salary, earnings, or wages are not imposed until later in the progression of a claimant's treatment." As such, taking a "snapshot" of claimant upon his or her initial return to work may not be a fair representation of whether that claimant is "earning the same or greater salary, earnings, or wages."

The Commissioner then noted:

> Notably, this new provision regarding whether a claimant's benefits are to be limited to functional disability is nestled inside the code section pertaining to industrial disability. Again, this agency measures a claimant's industrial disability as the claimant's condition stands at the time of the hearing. This is important, as there is a presumption that the legislature is aware of the courts' prior holdings when crafting new legislation. Roberts Dairy v. Billick, 861 N.W.2d 814, 821 (Iowa 2015) (as amended); State v. Fluhr, 287 N.W.2d 857, 862 (Iowa 1980). Had the legislature intended to depart from when industrial disability is measured and use a different moment for this snapshot of claimant's post-injury earnings to occur, it could (and should) have said so. Freedom Fin. Bank v. Estate of Boesen, 805 N.W.2d 802, 812 (Iowa 2011) (holding "legislative intent is expressed by omission as well as by inclusion of statutory terms").

The Commissioner concluded, therefore, that "given logic, fairness, and the rules of statutory construction," a claimant's post-injury earnings snapshot should occur at the time of the hearing. The Commissioner declined to address how many weeks to consider in this snapshot, as it was not pertinent to the decision in Vogt.

Applying the Commissioner's conclusions of law in McCoy and Vogt to this case, I find that claimant has experienced a reduction in her average weekly earnings as compared to her average weekly earnings at the time of the injury. This reduction is directly related to claimant's ongoing symptoms following her cervical fusion surgery. While the treating surgeon did not assign any permanent restrictions, claimant advised Dr. Sassman that she did not think the surgeon understood the physical demands of her position as miller-blender. Dr. Sassman recommended permanent restrictions of limiting lifting, pushing, pulling, and carrying to 20 pounds from floor to waist and waist to shoulder on an occasional basis; limiting lifting, pushing, pulling, and carrying with her

arms away from her body to 10 pounds occasionally; and limiting the use of vibratory or power tools to a rare basis. (Cl. Ex. 1, p. 26) Dr. Sassman made these recommendations with the benefit of examining claimant nearly two years post-surgery, when claimant's condition had stabilized. Claimant had attempted to return to the miller-blender position for well over a year and was able to explain her difficulties to Dr. Sassman.

Claimant credibly testified that after she returned to the miller-blender position in September of 2018, she had to take time off two to three times per month. (Tr., p. 45) Eventually, over the course of 2019 and beginning of 2020, she began taking more and more time off, up to twice per week. (Tr., p. 45) When she ran out of vacation time, she used FMLA. (Tr., p. 46) By the time of hearing on July 28, 2020, claimant had already used all 5 weeks of her vacation time for the year. (Tr., p. 47)

Due to her struggles performing her miller-blender position, claimant decided to bid into a different, lower-paying position with the employer. She accepted a new position in the sanitation department in February of 2020. At the time of hearing, claimant was making "$22 and something" per hour. (Tr., p. 49) While claimant still works some overtime, including mandatory overtime, she tries not to work as much overtime as she did prior to the injury. (Tr., pp. 47-48) Based on this, I find that at the time of hearing, claimant was not receiving the same or greater salary, wages, or earnings than she received at the time of her injury, due to the effects of her work injury. As a result, claimant's compensation should be based on her loss of earning capacity and it should not be limited to her functional disability.

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).

Claimant was 55 years old at the time of hearing. She has worked for the employer for approximately 33 years, the majority of her adult life. Although she has experienced a reduction in earnings due to taking a lower-paying position and working less overtime, her hourly wage decreased by less than $2.00 per hour. In addition, there is no evidence to actually quantify how much less overtime claimant works now as opposed to prior to the injury. She continues to work for the same employer, making a similar hourly wage. The only functional impairment rating in evidence is Dr. Sassman's rating, which is 31 percent.

Based on the foregoing factors, considered under an industrial disability analysis, I find claimant sustained a 40 percent industrial disability. This represents 200 weeks of permanent partial disability benefits.

With respect to the date of commencement of benefits, neither party provided any argument in their briefs as to the correct date. Claimant contended in the hearing report that the correct commencement date is March 28, 2018; however, there is no basis in the record for that date.

The first paragraph of Iowa Code section 85.34(2) provides:

> Compensation for permanent partial disability shall begin when it is medically indicated that maximum medical improvement from the injury has been reached and that the extent of loss or percentage of permanent impairment can be determined by use of the guides to the evaluation of permanent impairment, published by the American medical association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A.

Claimant returned to work in September of 2018, but Dr. Sassman opined that claimant did not reach maximum medical improvement until July 2, 2019, one year after the date of surgery. The date of MMI is the date on which it would be appropriate to rate impairment in this case. Therefore, I find the proper commencement date for permanent partial disability benefits is the date of MMI, July 2, 2019.

The next issue to determine is the proper rate of weekly compensation. Claimant submits that the proper weekly rate is $677.14 based on an average weekly wage of $1,175.33 per week. (Hearing Report; See also Cl. Ex. 2, pp. 2-9) Defendants believe the proper rate is $557.26 based on an average weekly wage of $931.47 per week. (Def. Ex. B, p. 2) Claimant contends in her brief that the difference between the rate calculations comes from defendants' failure to include claimant's "annual bonus" in their calculation. (Cl. Brief, p. 63)

Bonuses are included in the gross earnings of an employee for the purposes of calculating the workers' compensation rate if the bonus is regular. An annual bonus is considered regular if it is regularly paid over a number of years. Ratliff v. Quaker Oats Co., File No. 5046704, p. 11 (App. Dec. 1/5/17). A bonus is regular even if it is discretionary or varies in amount. Id. ("It matters not whether an annual or quarterly bonus payment is discretionary or varies in amount ....") "The division of workers' compensation has determined that when a bonus is clearly an annual expectation and there is in fact a plan governing the bonus, the best policy consistent with the Supreme Court's guidance is to include the annual bonus and include a pro rata weekly amount to claimant's gross earning calculation." Mayfield v. Pella Corp., File No. 5019317 (Remand Dec. 6/30/09).

Claimant's Exhibit 2, p. 9 is a copy of claimant's earning statement from October 21, 2017. The check states that earnings are for a "special bonus" in the amount of $933.15. While claimant's brief states this check is for an annual bonus, there was no testimony regarding an annual bonus, and no other evidence included in the record

from which the undersigned can determine whether this check represents a regular bonus such that it should be included in the rate calculation. As such, I decline to include it in the rate calculation. I adopt defendants' calculation, found at Exhibit B, p. 2. Claimant shall be paid benefits at the weekly rate of $557.26.

The next issue to determine is payment of medical expenses. Claimant seeks payment of medical expenses, including mileage, as itemized in claimant's exhibit 2, pp. 14-18. Iowa law requires that the employer furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all compensable conditions. 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).

On the hearing report, defendants disputed that the treatment was reasonable and necessary, that the listed expenses are causally connected to the work injury, and that the requested expenses were authorized by defendants. Defendants did not provide any further argument regarding these issues in their post-hearing brief. Having determined that claimant did sustain a compensable injury that necessitated her medical treatment and eventual cervical fusion surgery, I find that the requested medical expenses are causally connected and defendants are liable for same.

With respect to reasonableness of the treatment, 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 Mary 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 States 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.

There is no evidence in the record that the fees charged by claimant's medical providers were unreasonable. As such, I find the fees outlined in claimant's exhibit 2 were reasonable and necessary.

Claimant is not entitled to reimbursement for medical bills unless claimant shows that they were paid from her own funds. See Caylor v. Employers Mutual Casualty Co., 337 N.W.2d 890 (Iowa Ct. App. 1983). 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). 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, (Iowa App. 2015) 873 N.W.2d 552 (Iowa App. 2015) (Table) 2015 WL 7574232 15-0323. Claimant has the burden of proving that the fees charged for such services are reasonable. Anderson v. High Rise Construction Specialists, Inc., File No. 850096 (App. July 31, 1990).

Defendants shall reimburse claimant for the portions of the medical bills she paid from her own funds, as outlined in claimant's exhibit 2, pp. 16-18. Defendants shall also reimburse claimant for mileage she has accrued in attending appointments related to her care in the amount of $2,011.18. (Cl. Ex. 2, pp. 14-15)

The next issue to determine is claimant's request for reimbursement for payment of Dr. Sassman's IME. On the hearing report, defendants disputed claimant's entitlement to reimbursement. However, defendants did not address the issue in their post-hearing brief.

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).

Regarding the IME, the Iowa Supreme Court provided a literal interpretation of the plain-language of Iowa Code section 85.39, stating that section 85.39 only allows the employee to obtain an independent medical evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 847 (Iowa 2015) (Hereinafter "DART").

Under the DART decision, an employee can only obtain an IME at the employer's expense if an evaluation of permanent disability has been made by an employer-retained physician.

Iowa Code section 85.39 limits an injured worker to one IME. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842 (Iowa 2009).

In this case, Dr. Kurt Smith issued an initial opinion on March 28, 2018 regarding causation, but that opinion does not contain an impairment rating. (Def. Ex. D, pp. 12-13) In other words, his opinion on March 28, 2018 was not "an evaluation of permanent disability" as required by section 85.39. Dr. Sassman's report is dated June 17, 2020. (Cl. Ex. 1, p. 10) It was only after that, on July 8, 2020, that defendants asked Dr. Smith to revisit his prior report, and also asked about permanent impairment. (Def. Ex. E, p. 15) Because no employer-retained physician had previously evaluated claimant's permanent disability at the time Dr. Sassman issued her report, the IME is not reimbursable under Iowa Code section 85.39.

That being said, the Supreme Court in DART noted that in cases where Iowa Code section 85.39 is not triggered to allow for reimbursement of an IME, a claimant can still be reimbursed at hearing for the costs associated with the preparation of the written report as a cost under rule 876 IAC 4.33. DART, 867 N.W.2d at 846-847. Assessment of costs is a discretionary function of this agency. Iowa Code § 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33.

Dr. Sassman provided an itemized bill breaking down the cost for the IME exam, and the cost for preparing the written IME report. As such, I find that the cost of $3,600.00 for the preparation of Dr. Sassman's written report is reimbursable as a cost pursuant to 876 IAC 4.33.

With respect to the remainder of claimant's requested costs, I find that claimant was generally successful in her claim, and an award of additional costs is appropriate. I exercise my discretion and award claimant the cost of the $100.00 filing fee.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant healing period benefits for eleven weeks and one day (11.143 weeks), representing the period of July 2, 2018, through September 18, 2018.

Defendants shall pay claimant permanent partial disability benefits for two hundred (200) weeks, beginning on the commencement date of July 2, 2019.

All weekly benefits shall be paid at the rate of five hundred fifty-seven and 26/100 dollars ($557.26).

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 pay claimant medical expenses as set forth in this decision.

Defendants shall reimburse claimant's medical mileage in the amount of two thousand eleven and 18/100 dollars ($2,011.18).

Defendants shall reimburse claimant for costs in the total amount of three thousand seven hundred and 00/100 dollars ($3,700.00), representing $3,600.00 for Dr. Sassman's report, and $100.00 for the filing fee.

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

Signed and filed this 3rd day of August, 2021.

JESSICA L. CLEEREMAN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Mark Soldat (via WCES)

Jason Kidd (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.