BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

AMY CHRISTENSEN, Claimant, vs. K & B INVESTMENTS d/b/a SUBWAY, Employer, and FOREMOST INSURANCE COMPANY, Insurance Carrier, Defendants.	FILED FEB 07 2019 WORKERS COMPENSATION	File No. 5059873 ARBITRATION DECISION Head Note Nos.: 1402.30, 1402.40, 1802, 1803, 2501, 2701, 2907

Claimant Amy Christensen filed a petition in arbitration on October 18, 2017, alleging she sustained an injury to her right shoulder, upper extremity, and body as a whole on July 14, 2016, while working for the defendant, K & B Investments, d/b/a Subway ("Subway"). Subway and its insurer, the defendant, Foremost Insurance Company ("Foremost"), filed an answer on February 21, 2018, denying Christensen sustained a work injury.

An arbitration hearing was held on October 8, 2018, at the Division of Workers' Compensation, in Des Moines, Iowa. Attorney Joanie Grife represented Christensen. Christensen appeared and testified. Attorney Stacy Morris represented Subway and Foremost. Robert Allebach appeared and testified on behalf of Subway and Foremost. Joint Exhibits ("JE") 1 through 6, Exhibits 7-15, and Exhibits A through G were admitted into the record. At the conclusion of the hearing the parties agreed the record would be held open through November 16, 2018, for receipt of Exhibit H and post-hearing briefs only. Exhibit H and the briefs were received and the record was closed.

Before the hearing the parties prepared a hearing report, listing stipulations and issues to be decided. Subway and Foremost waived all affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed between Christensen and Subway at the time of the alleged injury.

2. If the injury is found to be a cause of permanent disability, the disability is an industrial disability to the right shoulder.

3. At the time of the alleged injury, Christensen's gross earnings were $255.35 per week, she was single and entitled to one exemption, and the parties believe the weekly rate to be $197.92, based on the state minimum.

4. Costs have been paid.

ISSUES

1. Did Christensen sustain an injury on July 14, 2016, which arose out of and in the course of her employment with Subway?

2. Is the alleged injury a cause of temporary disability during a period of recovery?

3. Is Christensen entitled to temporary disability benefits from July 14, 2016 through November 8, 2017?

4. Is the alleged injury a cause of permanent disability?

5. What is the commencement date for permanency?

6. Is Christensen entitled to payment of medical expenses?

7. Is Christensen entitled to recover the cost of an independent medical examination?

8. Should penalty benefits be awarded to Christensen?

9. Should costs be assessed against either party?

FINDINGS OF FACT

Christensen is single and lives in Springville. (Transcript, pages 9-10) Christensen graduated from high school in 1993. (Ex. 11, p. 156; Tr., p. 10) Christensen was held back in the second grade. (Tr., p. 11) In 1995 Christensen obtained a certificate in computer science in computer operations from Kirkwood Community College. (Ex. 11, p. 156; Tr., pp. 10-12) Christensen also attended real estate school with Iowa Realty. (Ex. 11, p. 156) Christensen failed the test for her real estate license and did not re-take the test. (Tr., p. 12) At the time of the hearing Christensen was forty-four. (Tr., p. 10)

Starting in high school and continuing after her graduation from college, Christensen worked for Casey's as a cashier. (Tr., p. 13) Christensen stocked shelves and coolers, changed the fountain soda, and took out the garbage. (Tr., pp. 13-14) In 1995, Network Data Processing hired Christensen as a computer operator. (Tr., pp. 13-15) Christensen backed up computers, ran reports on computers, printed programs, watched programs on computers, updated systems, and mounted computer tapes. (Tr.,

p. 15) Christensen worked for Network Data Processing for almost four years. (Tr., p. 15)

Christensen next worked for AdTrack Corporation as a graphic artist, where she designed forms for companies. (Tr., p. 15) Christensen reported she had to lift fifty pounds of paper, but most of her job was sedentary. (Tr., p. 16) Christensen worked for AdTrack for one year. (Tr., p. 16) After leaving AdTrack, Christensen accepted a job with the City of Cedar Rapids Water Department. (Tr., p. 16) Christensen assisted the City of Cedar Rapids in converting the mainframe computer to a Windows-based system. (Tr., p. 16) Christensen contacted customers with multiple accounts to see if customers wanted to receive their bills on the same or separate forms. (Tr., p. 16) After the conversion, Christensen worked in customer service billing. (Tr., p. 17)

Norm Stevenson with Re/Max Realtors Associates hired Christensen as an administrative assistant. (Tr., p. 17) Christensen went to real estate school, but she did not pass her licensing exam and Stevenson retired. (Tr., p. 17)

Christensen next worked for GC Services as an operator for MCI. (Tr., pp. 17-18) Christensen provided listings to individuals who called. (Tr., p. 18) The business closed after a year. (Tr., p. 18)

J & P Cycles hired Christensen to answer the telephone. (Tr., p. 19) Shortly after her hiring Christensen started working in the showroom, she relieved the receptionist, and she mentored new employees. (Tr., p. 19) Christensen worked for J & P Cycles for approximately two years. (Tr., p. 19) J & P Cycles terminated Christensen when she tested positive for methamphetamine. (Tr., p. 128)

From January 2008 through September 2009 Christensen worked for Murphy Oil USA as an assistant manager where she earned $11.10 per hour plus monthly commissions. (Ex. 11, p. 155) Christensen was responsible for checking gas prices, bookkeeping, stocking coolers, cleaning the gas pumps, and operating the cash register. (Tr., p. 19) Christensen quit her job with Murphy Oil USA and she did not work from 2009 through 2011. (Tr., pp. 20-21)

Since 2011 Christensen has worked as a receptionist for the Dog House, as needed, earning $8.50 per hour. (Ex. 11, p. 155) From October 2011 through June 2012 Christensen worked for Dollar General as a cashier, earning $8.50 per hour, where she operated the cash register and stocked and cleaned the store. (Ex. 11, p. 155; Tr., p. 22) From October 31, 2012 through April 19, 2014, Christensen worked as a cashier for Springville Station, full-time, and earned $10.50 per hour, stocking the store, cleaning the store, and operating the cash register. (Ex. 11, p. 155; Tr., p. 22)

In June 2014, Subway hired Christensen as a sandwich artist. (Ex. 11, p. 155) Christensen was responsible for making sandwiches for customers, prepping food, handling money, customer service, sweeping, trash removal, cleaning, and washing dishes. (Ex. 11, p. 155; Tr., p. 23) The job description provides the position requires the ability to lift ten pounds frequently and up to thirty pounds occasionally. (Ex. 12, p. 157) Christensen worked part-time and earned $7.25 per hour. (Ex. 11, p. 155; Tr., pp.

25-26) Some weeks she worked forty hours. (Tr., p. 25) Christensen received regular raises while working for Subway. (Tr., p. 26)

Christensen reported July 14, 2016, was a fairly slow day. (Tr., p. 30) Christensen testified she was working with Josie and Sarah and she had completed all of her vegetable prep work and she did not have anything to do, but she wanted to stay for her shift that was to end at 4:00 p.m. (Tr., p. 30) Christensen testified,

> [s]o I asked Sarah and Josie, you know, if I could – if there was something that I could do for them. And, you know, so I went ahead and was changing the garbage.
>
> And we started basically in the back room, then we come – come from the back room and we go behind the sandwich station, which we call the bain.
>
> And so we was collecting the trash from there, and then we went out into the customer area and we collected the trash from by the front door and underneath the – or by the fountain machine.
>
> And that day the trash was pretty – pretty full. And anyways, I had taken the garbage from the fountain area, and we just dumped it into the other trash from the garbage by the front door. And as I was lifting up the trash to put it into the rolling trash cart that we use to collect all of our trash in, when I was lifting up the bag, I heard by arm pop or my shoulder pop.

(Tr., pp. 31-32) Christensen is five feet and two inches tall. (Tr., p. 36) Christensen reported the top of the rolling trash can was slightly above her waist and the trash was extending above the top of the trash can when she placed the garbage in the can. (Tr., pp. 36-37) Christensen relayed she felt the pop when she was lifting the trash into the trash can. (Tr., pp. 37-38) Christensen relayed she had lifted her arm about head-level. (Tr., p. 38)

Christensen reported she continued to wheel the trash can around the restaurant to collect additional trash and she had a difficult time getting the bag out. (Tr., p. 39) Christensen testified Josie and Sarah were in the back room, she yelled for help, Sarah came out, and Sarah gathered up the trash from her and took it outside to the dumpster. (Tr., p. 39) Normally Christensen asked her coworkers to take out the trash or she would set it by the back door because of her pre-existing lower back problems, and her coworkers would lift the trash into the dumpster outside. (Tr., pp. 39-40)

Christensen relayed after Sarah took the trash Christensen walked into the back room to wash her hands where Josie was washing the dishes. (Tr., p. 41) Christensen testified when she reached into the sink she heard her shoulder pop again and she asked Josie if she heard her shoulder pop, and Josie said she did not. (Tr., pp. 41-42) Christensen reported she conversed with her coworkers for a few minutes and clocked out a little before 4:00 p.m. (Tr., p. 42) Christensen did not tell Sarah about her shoulder. (Tr., p. 42)

After leaving work Christensen went to her boyfriend's home and noticed the right side of her neck was hurting. (Tr., p. 43) Christensen rested at his home, but she could not sleep, so she went home around 9:00 p.m. and used a heating pad and took a muscle relaxer. (Tr., pp. 43-44) Christensen reported she was feeling pain in her right upper shoulder. (Tr., p. 44)

The next morning, on July 15, 2016, Christensen reported her work injury to her manager, Kayla Sproston. (Ex. 15; Tr., p. 44) Christensen documented she injured herself on the front door entrance trash can around 2:55 p.m. to 3:05 p.m. (Ex. 15, p. 1) Christensen reported she was

> [c]hanging an overfull trash bag, new employee used smaller sized bags had problems getting bag out. Once I lifted bag onto over full trash can my right arm popped. It was overly heavy for me, lifted [unintelligible]. Yelled to Sarah to come help me after second trash was too much for me to handle.

(Ex. 15, p. 1) Christensen documented no one was around when she was injured and after the injury she was standing next to her coworker, Josie, and asked Josie if she heard Christensen's shoulder pop and Christensen relayed Josie reported she did not hear it pop. (Ex. 15, p. 1) Christensen further documented the part of her body affected involved her "[r]ight shoulder into shoulder blade popped & sharp pains in moving my right arm to do anything. Shoulder swelling." (Ex. 15, p. 1) Sproston documented Christensen was injured when she "was changing trashes after lunch & tried to pull the trash out using one hand." (Ex. 15, p. 2)

In her answers to interrogatories, Christensen documented:

> [c]laimant was alone when the injury occurred, but believes there is surveillance video of the incident. Claimant requested copies of the video from the owner, Bobby, and the manager, Kayla, but never received a response. However, after the injury she went to the kitchen to wash her hands when her shoulder popped again. Her co-worker, Josie Springman, was washing dishes at the time. Claimant asked Josie if she heard the pop. Josie did not hear the pop, but Claimant believes she will recall the conversation.

(Ex. D, p. 39)

The week of July 13, 2016 through July 19, 2016, Christensen worked 14.32 hours for Subway. (Ex. 14, p. 170) Her time punch report shows she worked on Wednesday, July 13, 2016, Thursday, July 14, 2016, and Monday, July 18, 2016. (Ex. 14, p. 170) The time punch report shows she clocked out at 3:53 p.m. on July 14, 2016. (Ex. 14, p. 170)

Prior to her right shoulder injury, Christensen had treated with Dennis Bradley, D.C., a chiropractor, for cervical, upper thoracic, left and right trapezius pain, radicular

arm pain and hand numbness and discomfort, and low back pain in February, March, and April 2016. (Ex. E, pp. 42-51)

On July 15, 2016, Christensen attended an appointment with Dr. Bradley, complaining of a shoulder injury while lifting the day before that "caused a return of cervical, upper thoracic, left trapezius and right trapezius pain, and radicular right arm and hand numbness and pain." (JE 2, p. 17) Dr. Bradley documented Christensen reported she may go see a medical doctor after her appointment "because her shoulder is in so much pain and it has been interfering with sleep." (JE 2, p. 17) Christensen described the pain as sharp, shooting, aching, and tightness with episodes of numbness and tingling. (JE 2, p. 17) Dr. Bradley performed manipulations on Christensen's spine. (JE 2, p. 17)

The evening of July 15, 2016, Christensen went to Mercy Medical Center, complaining of right shoulder pain after lifting a heavy bag of garbage the day before. (JE 1, p. 1) Kimberly Ferrante, PA-C examined Christensen, and documented Christensen reported she was lifting a heavy garbage can with her right arm "and felt a sharp pain in her shoulder." (JE 1, p. 1) Ferrante documented on examination Christensen exhibited decreased range of motion, tenderness, and pain, and no bony tenderness, swelling, effusion, or deformity, and she had normal strength. (JE 1, p. 3) Ferrante ordered an x-ray, which the radiologist noted was normal, and diagnosed Christensen with right shoulder pain. (JE 1, pp. 4-5)

Christensen testified she did not go to work that weekend, and she returned to work on Monday, July 18, 2016. (Tr., pp. 61-62, 113) Christensen reported the hospital gave her a sling to wear to work. (Tr., p. 61) Subway assigned Christensen to operate the cash register, which she reported was difficult. (Tr., p. 61)

On July 21, 2016, Christensen returned to Dr. Bradley reporting she had gone to the emergency room the day before for her "right shoulder region injury." (JE 2, p. 19) Christensen complained of cervical, upper thoracic, left trapezius, and right trapezius pain with radicular right arm and hand numbness and pain. (JE 2, p. 19) Dr. Bradley performed manipulations on Christensen's spine. (JE 2, p. 19)

On July 22, 2016, Christensen attended an appointment with Carla Schulz, M.D., a family medicine physician specializing in urgent care, with Mercy Occupational Health. (JE 3, p. 27) Dr. Schulz documented Christensen reported

> 7/14 lifted trash that was too full. Hard time lifting and right shoulder popped. Seen at ER 7/15 after the girl next to her heard the shoulder pop again and it was extremely painful. Went to Chiro also. . . .

(JE 3, p. 27) Dr. Schulz noted on July 18, 2016, Christensen returned to work and she could only stay three hours and she could not take the pain anymore and she was tearful. (JE 3, p. 27) Dr. Schulz assessed Christensen with a right shoulder strain, prescribed metaxalone and meloxicam, ordered physical therapy and recommended occupational therapy, and restricted Christensen from working until her next appointment. (JE 3, pp. 28-29)

Christensen returned to Dr. Bradley on July 25, 2016, complaining of consistent, intense pain in her right shoulder. (JE 2, p. 21) Dr. Bradley documented Christensen reported her shoulder was "slightly less painful" and her ability was improving, but her "shoulder is still causing her cervical, upper thoracic, left trapezius and right trapezius pain and radicular right arm and hand numbness and pain to be intense." (JE 2, p. 21) Dr. Bradley performed manipulations on Christensen's spine, and noted her shoulder "continues to be a significant factor in her neck and arm pain and this injury is complicating her progress." (JE 2, p. 21)

On July 27, 2016, Christensen attended an appointment with Nicholas Bingham, M.D., an occupational medicine physician, with Mercy Occupational Health. (JE 3, p. 30) Dr. Bingham noted Christensen

> was placing a bag of garbage into dumpster, which necessitated in lifting it above shoulder level, she felt a pop and then shot of pain. She did not think too much of it and attempted to go back to work, while reaching for ingredients at the Sandwich make station however she felt another pop, and as the shift wore on she became more and more painful. . . .

(JE 3, p. 30) Dr. Bingham noted Christensen had seen Dr. Schulz in urgent care, who referred her to him. (JE 3, p. 30) Christensen complained of pain, mostly when performing activities like driving, and noted "[s]he is fairly comfortable with her arms at or near waist level but admits she approaches chest level and above she is quite painful." (JE 3, p. 30) Christensen denied having a prior shoulder injury. (JE 3, p. 30) Dr. Bingham noted on exam Christensen exhibited decreased range of motion, tenderness, pain, and decreased strength in her right shoulder, and documented "[t]he mechanism of injury and the symptoms noted today are consistent with an acute strain/sprain of the supraspinatus," opined it was appropriate for her to begin physical therapy the next day, and released Christensen to return to work with restrictions. (JE 3, p. 31)

Christensen attended a physical therapy appointment on August 3, 2016. (JE 4, p. 36) The physical therapist noted Christensen had reported "onset of right shoulder pain that began after 7/14 after lifting bag of trash at work at Subway. Pain is across top and front of right shoulder." (JE 4, p. 36) Christensen reported it was painful to work light duty and she had used a sling on her right arm at work the previous week, which seemed to bother her neck. (JE 4, p. 36) Christensen denied having a history of shoulder pain. (JE 4, p. 36) The physical therapist documented Christensen had a lifting restriction of ten pounds with no overhead lifting and she was struggling working on the register with her sling at work. (JE 4, p. 38)

Christensen returned to Dr. Bingham on August 12, 2016. (JE 3, p. 32) Dr. Bingham noted Christensen had attended four sessions of physical therapy and she had found it to be very helpful. (JE 3, p. 32) Dr. Bingham documented Christensen complained of having pain, but her function had improved greatly and she had "worked a little bit, under restrictions, with some difficulty." (JE 3, p. 32) Dr. Bingham diagnosed

Christensen with a right rotator cuff strain, and continued Christensen's restrictions and physical therapy. (JE 3, p. 33) Dr. Bingham documented,

> [t]o reiterate, the mechanism of the patient's injury and the physical signs and symptoms I have observed are consistent with an acute supraspinatus strain, with possible impingement syndrome as a result. Her positive response to standard treatment for the above named problems supports this. Her prior treatment with a chiropractor has absolutely no relevance to her current complaints.

(JE 3, p. 33)

On August 18, 2016, Foremost sent Christensen a letter stating her claim had been placed under investigation, and after receiving the necessary information Foremost would be reviewing her claim and making a decision concerning compensability. (Ex. H, p. 55)

Christensen testified she had been taken off the schedule for a while, and then Roberta Allebach, the owner, told her Subway could use her to train new hires in August 2016. (Tr., p. 66) Christensen reported she worked on a Thursday and told Ariel, an employee who does the schedule, she had medical appointments on Friday and she could not come to work. (Tr., pp. 66-68)

Subway documented Christensen was a no call, no show on Friday, August 19, 2016 for her shift. (Ex. C, pp. 28, 35) Subway documented on Saturday, August 20, 2016, Christensen came to work, left early, and told her coworkers her shoulder hurt and she had to leave. (Ex. C, p. 28) Subway documented Christensen was a no call, no show on August 19, 2016, August 22, 2016, August 23, 2016, and August 27, 2016. (Ex. C, pp. 28, 35-36) Sproston, Christensen's manager, documented she was a no call, no show on August 19, 2016 and August 22, 2016. (Ex. C, pp. 35-36) Sproston documented Christensen was terminated on August 23, 2016. (Ex. C, p. 36) Christensen did not sign the warnings and denied receiving the warnings at hearing. (Ex. C, pp. 35-36) No one from Subway testified Christensen received the warnings for the absences on August 19, 2016 and August 22, 2016.

Christensen testified she received a voicemail message from a person named Lisa. (Tr., p. 69) Christensen reported she did not call Lisa back right away, but when she did, Lisa told her she was her new manager. (Tr., p. 69) Christensen testified she said, "I don't know any Lisa, and you're not my manager," and hung up on her. (Tr., p. 70) Subway presented what appears to be a text message from "Lisa" to Allebach stating "[s]o, that any [*sic*] just called me wasted, I didn't say I was with Subway when I left a message. She said, your [*sic*] who from Subway. F—k subway. I don't work there anymore." (Ex. C, p. 29) Christensen did not admit making the statement with the vulgar language. Lisa did not testify at hearing. Christensen reported she went in the next day and Sproston told her Sproston was quitting. (Tr., p. 70)

Subway documented Christensen was terminated on August 23, 2016. (Ex. C, p. 36) Christensen did not sign the termination notice, and denied receiving it. Christensen did not return to work at Subway. (Tr., p. 70)

Christensen received positive performance reviews during her employment with Subway. (Ex. 13) During her June 9, 2015 review, Subway documented, "Amy has great customer services. Always talks to customers and makes them fell welcomed," and "Amy does a great job on keeping the store clean. She does her part of the cleaning list." (Ex. 13, pp. 158-59) Subway also documented Amy "[d]oes a great job on night counts. Going to start teaching her other manager task [*sic*]." (Ex. 13, p. 161) Her signed review from January 7, 2016, and an unsigned review from May 18, 2016 are both positive. (Ex. 14, pp. 162-69)

Christensen received discipline in April, May and June 2016. (Ex. C) Christensen received a verbal warning on April 14, 2016, for not staying for her whole shift and leaving work early, another warning on May 2, 2016, for taking the verbal warning out of Subway and refusing to return it, another warning on May 2, 2016 for leaving a coworker alone to close and failing to show up for her shift, and another warning on June 21, 2016 for leaving the store without finishing her shift. (Ex. C, pp. 30-34)

During an appointment on August 23, 2016, Dr. Bradley documented Christensen's shoulder pain had improved. (JE 2, p. 23) Dr. Bradley performed manipulations on Christensen's spine. (JE 2, p. 23)

On August 26, 2016, Christensen attended a follow-up appointment with Dr. Bingham, reporting she believed she had benefitted from physical therapy, but she had stopped improving. (JE 3, p. 34) Dr. Bingham recommended magnetic resonance imaging and continued her restrictions. (JE 3, p. 34)

Christensen testified Subway and Foremost denied her claim after Dr. Bingham recommended she undergo magnetic resonance imaging. (Tr., pp. 49-50) Christensen wanted additional medical treatment, but she did not have a family medical doctor. (Tr., pp. 51, 55) Christensen testified it took her a while to find a new doctor who would accept Medicaid. (Tr., p. 51)

On November 1, 2016, Christensen attended an appointment with Jaclyn Price, D.O., a family practice physician, complaining of right shoulder pain that began four months ago. (JE 5, p. 74) Christensen described the pain as achy to stabbing and shooting pain that radiates to the posterior side of her shoulder, and increased pain when raising her arm above her shoulder, when wearing a bra, when reaching for things, and when driving. (JE 5, p. 74) Dr. Price diagnosed Christensen with a right rotator cuff strain and tobacco dependence. (JE 5, p. 75)

On November 10, 2016, Christensen attended an appointment with Dr. Bradley, reporting her cervical, upper thoracic, left trapezius and right trapezius pain, and radicular right arm and hand numbness and pain had "sharply increased last week

again" after she used her neck to try to roll over in bed. (JE 2, p. 25) Dr. Bradley performed manipulations on Christensen's spine. (JE 2, p. 25)

During a subsequent appointment with Dr. Price on November 16, 2016, Christensen reported she was experiencing low back pain that was not precipitated by a known injury in her left lumbar spine with swelling in her right hip. (JE 5, p. 76) Dr. Price diagnosed Christensen with chronic neck pain, and sacroiliitis, and right hand numbness, and ordered physical therapy. (JE 5, pp. 78-79) Dr. Price recommended magnetic resonance imaging for Christensen's shoulder pain. (JE 5, p. 76)

Christensen underwent right shoulder magnetic resonance imaging on November 30, 2016. (JE 5, p. 80) The reviewing radiologist listed an impression of an exam that was limited by motion artifact, acromioclavicular joint osteoarthritis, and "[m]ild increased T2 signal distention of the subdeltoid/subacromial bursa, which may be due to bursitis or recent injection." (JE 5, p. 81) At hearing Christensen testified she moved her left foot during the scan and it ruined the scan of her left shoulder. (Tr., p. 52)

On January 10, 2017, Christensen attended an appointment with Dr. Price, for treatment of hypertension, anxiety, and depression, and complaining of right hand numbness, back pain, and right outer thigh numbness for several years. (JE 5, pp. 82-83) Dr. Price referred Christensen to a hand surgeon, and for appointments to evaluate her back pain and shoulder pain. (JE 5, pp. 84-85)

Christensen continued to treat with Dr. Price for low back pain and right shoulder pain. (JE 5, p. 86) During an appointment on January 26, 2017, Dr. Price documented Christensen reported her pain was dull and "[t]he onset of the pain was sudden, starting about 7 months ago while lifting garbage at Subway. She did hear popping during and after the injury" and noted the pain was located in the acromioclavicular joint and deltoid area and is continuous. (JE 5, p. 86) Christensen reported her symptoms were aggravated by reaching, lifting, performing activities of daily living, repetitive use, dressing, work at or above shoulder height, wearing a bra, and she reported she had difficulty sleeping. (JE 5, p. 86) Dr. Price diagnosed Christensen with right subacromial bursitis and administered a right glenohumeral corticosteroid injection. (JE 5, p. 88)

In March 2017, Christensen underwent a right carpal tunnel release. (Ex. A, p. 2) Christensen did not pursue a workers' compensation claim with respect to her carpal tunnel syndrome. (Tr., pp. 56-57)

Dr. Price administered another steroid injection on April 24, 2017. (JE 5, pp. 90-92) During an appointment on July 6, 2017, Christensen reported the first injection provided relief, but the second one did not, and she requested a referral to an orthopedic surgeon. (JE 5, p. 94) Dr. Price documented Christensen's pain increased with motion, her abduction was limited to 100 degrees, and she had crepitus on motion. (JE 5, p. 95)

On June 23, 2017, Christensen returned to Mercy Medical Center, complaining of pain in the right fifth metacarpal. (JE 1, p. 6) Melissa Olthoff, PA-C examined

Christensen and noted she denied having any wrist, elbow, shoulder, back, or neck pain. (JE 1, pp. 6, 8)

On July 18, 2017, Foremost sent Christensen a letter informing her it was maintaining the denial of her claim "in light of several inconsistencies." (Ex. H, p. 56)

On August 7, 2017, Christensen attended an appointment with David Hart, M.D., an orthopedic surgeon. (JE 6, p. 98) Dr. Hart documented Christensen injured her right shoulder while working for Subway on July 14, 2016, when "she was lifting a heavy trash bag out of the trash container with the arm extended in front of her. She felt something 'pop' in the shoulder and had immediate pain" that had persisted for over a year. (JE 6, p. 98) Dr. Hart documented Christensen's pain was aggravated by reaching, lifting, pulling, and pushing, and interferes with dressing and above head activities. (JE 6, p. 98) Dr. Hart assessed Christensen with persistent right shoulder pain with a differential diagnosis to include partial rotator cuff tear, biceps tendon tear, labral tear, and impingement syndrome, morbid obesity, and bipolar disorder. (JE 6, pp. 100-02) Dr. Hart documented a right shoulder x-ray taken that day was normal. (JE 6, p. 101) Dr. Hart recommended surgery. (JE 6, p. 102)

On September 7, 2017, Dr. Hart performed a right shoulder arthroscopic extensive debridement torn labrum, torn rotator cuff and biceps tenotomy, and arthroscopic subacromial decompression on Christensen. (JE 6, p. 103) Dr. Hart listed postoperative diagnoses of a right shoulder torn superior labrum, partial rotator cuff tear, and impingement syndrome. (JE 6, p. 103)

Following shoulder surgery, Christensen attended physical therapy from September through November 2017. (JE 4, pp. 59-73) Christensen attended a follow-up appointment with Dr. Hart on September 27, 2017, reporting she had significantly improved and physical therapy was going well. (JE 6, p. 106) Dr. Hart released Christensen from care without restrictions on November 8, 2017. (Tr., p. 55; JE6, pp. 108-09) At the time of the hearing Christensen had not received any additional medical treatment for her right shoulder. (Tr., p. 55)

John Kuhnlein, D.O., an occupational medicine physician, performed an independent medical examination for Christensen in March 2018, and issued his report on April 13, 2018. (Ex. 7) Dr. Kuhnlein reviewed Christensen's medical records and examined her. (Ex. 7) Dr. Kuhnlein documented:

> Ms. Christensen denies any prior right shoulder injuries and relates she was working without restrictions prior to the incident. She states that on or about July 14, 2016, she was lifting trash to a rolling trash bin, and when lifting trash over her shoulder, the right shoulder popped. She developed pain and says that she tried to continue to work but was unable to do so because of the right shoulder discomfort. She says that later when she was washing her hands, the right shoulder popped again. She went home after her shift, but still had pain in the right shoulder area that did not

> respond to a muscle relaxant or a heating pad. When her symptoms had not improved the next day, she called Subway to report the injury.

(Ex. 7, p. 111) Dr. Kuhnlein listed diagnoses of right shoulder superior labral and partial rotator cuff tears and impingement syndrome, and September 7, 2017, arthroscopic debridement of labral and rotator cuff tears with biceps tenotomy and subacromial decompression. (Ex. 7, p. 114)

With respect to causation, Dr. Kuhnlein opined:

> Ms. Christensen denies prior right shoulder pain and describes a specific incident that occurred while she was working at a Subway restaurant. She was evaluated shortly after for right shoulder pain. Conservative treatment failed to resolve her symptoms. The MRI scan was limited by both her obesity and motion, but at surgery, she was noted to have a torn superior labrum and rotator cuff. The labral and rotator cuff tears and impingement syndrome were directly and causally related to the July 14, 2016, work related injury she sustained while working for Subway.

(Ex. 7, p. 114) Dr. Kuhnlein found Christensen reached maximum medical improvement on March 7, 2018, six months after surgery. (Ex. 7, p. 114)

Dr. Kuhnlein documented his findings on exam of Christensen's right and left shoulders. (Ex. 7, p. 113) Dr. Kuhnlein found Christensen's flexion to be 140 degrees and 140 degrees, extension to be 60 degrees and 70 degrees, abduction to be 150 degrees and 160 degrees, adduction to be 30 degrees and 30 degrees, internal rotation to be 70 degrees and 80 degrees, and external rotation to be 80 degrees and 70 degrees. (Ex. 7, p. 113) Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Kuhnlein opined:

> [t]urning to Figures 16-40, 16-43 and 16-46, and when comparing the right to the unaffected left shoulder, there is a total of 2% right upper extremity impairment for deficits in the range of motion. She still has objective changes within the shoulder even though the surgery was effective in resolving her condition. I believe that section 2.5G, page applies. I would assign 2% right upper extremity impairment.
>
> Turning to the Combined Values Chart on page 604, when these values are combined (2% x 2%) this is a 4% right upper extremity impairment. Turning to Table 16-3, page 439, this would convert to a 2% whole person impairment.

(Ex. 7, pp. 114-15) Section 2.5G of the AMA Guides at page 20, addresses adjustments for effects of treatment or lack of treatment, and provides:

> [i]n certain instances, the treatment of an illness may result in apparently total remission of the person's signs and symptoms. Examples include the treatment of hypothyroidism with levothyroxine and the treatment of

> type I diabetes mellitus with insulin. Yet it is debatable whether, with treatment, the patient has actually regained the previous status of normal good health. In these instances, the physician may choose to increase the impairment estimate by a small percentage (eg, 1% to 3%).

Dr. Kuhnlein recommended lifting restrictions of forty pounds occasionally from floor to waist and from waist to shoulder occasionally, and twenty pounds over the shoulder occasionally, and a restriction of working at or above shoulder height occasionally. (Ex. 7, p. 115)

Joseph Chen, M.D., a physiatrist with the University of Iowa Hospitals and Clinics ("UIHC"), performed an independent medical examination of Christensen for Subway and Foremost on August 20, 2018. (Ex. A) Dr. Chen examined Christensen and reviewed her medical records, her deposition, and Dr. Kuhnlein's report. (Ex. A) Dr. Chen documented:

> [s]he reports that on July 14, 2016 she was working part-time for Subway in Marion, IA. She had completed her tasks and asked her coworkers if there were any other tasks that she could perform for them as she wanted to continue to get a few more hours of work that day. She was told that she could take the trash out. She reports that while lifting a large bag of trash out of a trash can, she felt her right shoulder pop. She reports that she was able to finish up and went to wash her hands and she felt her right shoulder pop again. She recalls driving to her boyfriend's home and continued to feel pain her shoulder but she didn't take any medications. She reports that when her shoulder didn't improve the next morning, she called her supervisor to report her work injury.

(Ex. A, p. 1)

Dr. Chen documented his findings on exam of Christensen's right and left shoulders. (Ex. A, pp. 4-5) With respect to the right shoulder, Dr. Chen found Christensen's flexion to be 180 degrees, abduction to be 180 degrees, internal rotation to be 80 degrees, adduction to be 20 degrees, and extension to be 30 degrees. (Ex. A, pp. 4-5) With respect to the left shoulder, Dr. Chen found Christensen's flexion to be 180 degrees, abduction to be 180 degrees, internal rotation to be 80 degrees, and external rotation to be 90 degrees. (Ex. A, p. 5) Dr. Chen offered no findings on adduction and extension with the left shoulder. (Ex. A., p. 5)

Dr. Chen diagnosed Christensen with chronic right shoulder pain following an arthroscopic decompression in September 2017 with near complete resolution of her pain. (Ex. A, p. 7) Dr. Chen found no evidence of rotator cuff impingement and full range of motion on examination. (Ex. A, p. 7)

With respect to causation, Dr. Chen opined:

> [i]t is my medical opinion within a reasonable degree of medical certainty that Ms. Christensen's chronic right shoulder pain is **not** directly related to

> her employment at Subway. Ms. Christensen sustained an **acute right supraspinatus strain** as a result of her work incident of July 14, 2016. The video time stamped 2:08:07 and 2:09:01 (see attached) indicate that Ms. Christensen did elevate her right arm to a level at or above her head when emptying the trash can.
>
> Ms. Christensen was appropriately diagnosed and treated by Dr. Nicholas Bingham with conservative medication management and physical therapy. After a month of treatment without resolution of her pain, an MRI of the right shoulder was appropriately ordered in August 2016. She reports her work comp claim was disputed and she had to wait about 3 months until her MRI was authorized. I have reviewed her MRI of the right shoulder images and report of November 30, 2016 that **did not show any evidence of a complete rotator cuff tear.**

(Ex. A, p. 7) Dr. Chen documented while Christensen told him she had constant pain from the date of her injury in July 2016 through September 2017, "I reviewed Dr. Price's medical notes and Dr. Bradley's chiropractic clinic notes that **did not** record any mention of worsening of her right shoulder pain during this time." (Ex. A, p. 7) Dr. Chen further opined:

> [i]t is well known by physicians that chronic musculoskeletal pain can develop in patients who have numerous medical or mental health problems including pain, anxiety, and depression. Dr. Hart's arthroscopic surgical findings of a 20% partial thickness tear was an incidental degenerative finding that [*sic*] quite a common finding in adults of Ms. Christensen's age.

(Ex. A, p. 7) Dr. Chen further opined Christensen reached maximum medical improvement on October 14, 2016, she had sustained no impairment under the AMA Guides, and she does not need any permanent work restrictions, and noted she told him she was not interested in returning to Subway because she needs to care for her personal medical conditions. (Ex. A, p. 8)

The attorney for Subway and Foremost sent Dr. Chen additional video footage and he issued an addendum on August 30, 2018, as follows:

> 1. It is now my medical opinion that the mechanism of injury reported by Ms. Christensen in her deposition is not consistent with the video footage cited that shows her using only her left arm to lift the trash bag from the floor into the trash can. The video images show that her right arm is **not** at a level where injury to her supraspinatus muscle would be expected. It is now my medical opinion within a reasonable degree of medical certainty that Ms. Christensen's acute right supraspinatus strain is **unrelated** to her work activities of July 14, 2016.
>
> 2. My review of Ms. Christensen's deposition testimony and the additional security camera footage changes my opinion regarding

> causation of Ms. Christensen's right shoulder diagnosis and prognosis. It is now my medical opinion that Ms. Christensen's right supraspinatus strain is unrelated to her work activities of July 14, 2016.
>
> 3. After reviewing the additional surveillance video and summary as noted from Cameras 1, 2, 5, 6, and 7 from time stamp 2:08:33 to 2:57:05, [i]t is also my medical opinion that Ms. Christensen's subsequent activities is [*sic*] **not consistent** with a claim of an acute right shoulder injury that occurred during her July 14, 2016 work shift.

(Ex. A, p. 10)

Christensen testified her job at Subway involved a lot of repetition, reaching, grabbing, pulling, and lifting. (Tr., p. 71) Christensen relayed after her work injury and before her surgery she could not do her job. (Tr., p. 71)

During the hearing Christensen testified she does not have as much pain, but there are certain things she cannot do with her right shoulder. (Tr., p. 72) Christensen reported she has difficulty reaching behind her back, and she cannot lift over a gallon of milk with her right arm. (Tr., pp. 72-73) Christensen stated she cannot reach above her head to stock a cooler or to grab food out of a refrigerator or freezer. (Tr., p. 73) Christensen reported she does not try to carry too many things with her right arm. (Tr., p. 74)

Subway and Foremost submitted Exhibit G, which is a video that is date-stamped July 14, 2016, which depicts recordings from seven video cameras in the restaurant. Christensen testified the video was not from the day she injured her shoulder, noting

> [t]hat's not what happened that day in the video. For one, Josie was not doing the dishes. Josie was doing prep work. And I was doing counts that day. And also, I had asked Bobbi for a copy of that video on a text message, and she never responded or provided me with that video. And I also – when I went into work, I asked Kayla for a copy of that video. And when she went in and logged in, she said that day had been deleted.

(Tr., pp. 80-81) Christensen further reported the video shows Kayla and Ariel working and they were not working the day of her injury. (Tr., pp. 82, 86) Subway and Foremost did not call Kayla, Ariel, or Josie as witnesses or provide affidavits from the women at hearing to rebut Christensen's testimony. Christensen further testified the video shows her leaving around 3:00 p.m. that day, and on her timesheet she worked until 3:53 p.m. the day of the injury. (Tr., p. 141; Ex. 14, p. 170)

Allebach reported the video runs twenty-four hours per day at the store. (Tr., p. 159) Allebach testified Exhibit G contains video from the date of Christensen's alleged work injury. (Tr., p. 158) Allebach was not at the restaurant on July 14, 2016, or the day before or after Christensen's alleged work injury. (Tr., pp. 156-57) Allebach did not pull the video herself. (Tr., p. 158) Allebach did not offer any explanation for the discrepancy between the time on the video and the time Christensen clocked out for the

day on July 14, 2016. During the hearing Subway and Foremost did not request to call a rebuttal witness or to submit additional documentation concerning the video before the record was closed with the exception of Exhibit H and post-hearing briefs only. Subway and Foremost filed a motion to depose additional witnesses and to submit additional evidence on October 12, 2018. Christensen resisted the motion. Christensen's counsel noted she had informed Subway and Foremost of discrepancies in the footage before the hearing and asserted Christensen would be prejudiced if the motion was granted. Rule 876 Iowa Administrative Code 4.31 provides, "[n]o evidence shall be taken after the hearing." Allowing the requested evidence to be admitted would be contrary to rule 876 IAC 4.31. Moreover, Subway and Foremost knew of the discrepancies at the time of the hearing and made no motion or request at the time of the hearing to hold the record open for additional evidence concerning the video. Therefore, the motion was denied. I do not find Exhibit G is a video of the day of Christensen's work injury.

At the time of the hearing Christensen had not worked since she last worked for Subway. (Tr., p. 74) Christensen testified she had not looked for work and did not have plans to look for work. (Tr., p. 136)

CONCLUSIONS OF LAW

I. Applicable Law

This case involves several issues, including entitlement to temporary benefits, refusal of suitable work, extent of disability, recovery of the cost of an independent medical examination, and interest under Iowa Code sections 85.33, 85.34, 85.39, and 535.3. In March 2017, the legislature enacted changes (hereinafter "Act") relating to workers' compensation in Iowa. 2017 Iowa Acts chapter 23 (amending Iowa Code sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.45, 85.70, 85.71, 86.26, 86.39, 86.42, and 535.3). Under 2017 Iowa Acts chapter 23 section 24, the changes to Iowa Code sections 85.33, 85.34, and 85.39 apply to injuries occurring on or after the effective date of the Act. This case involves an injury occurring before July 1, 2017. Therefore, the provisions of the new statute involving entitlement to temporary partial, temporary total, and healing period benefits, refusal of suitable work under Iowa Code sections 85.33 and 85.34, extent of disability under Iowa Code section 85.34, and recovery of the cost of an independent medical examination under Iowa Code section 85.39 do not apply to this case.

The calculation of interest is governed by Gamble v. AG Leader Tech., File No. 5054686 (App. Apr. 24, 2018). (Interest for all weekly benefits payable and not paid when due which accrued before July 1, 2017, is payable at the rate of ten percent; all interest on past due weekly compensation benefits accruing on or after July 1, 2017, is 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). Under Gamble, the interest rate changed for benefits accruing on or after July 1, 2017.

II. Arising Out of and in the Course of Employment

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of and in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment, and not merely incidental to the employment. Koehler Elec. v. Willis, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs "in the course of employment" when:

> it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. *An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of his employer.*

Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979) (emphasis in original).

Whether a claimant's injury arises out of the claimant's employment is a "mixed question of law and fact." Lakeside Casino v. Blue, 743 N.W.2d 169, 173 (Iowa 2007).

The Iowa Supreme Court has held,

> [t]he factual aspect of this decision requires the [trier of fact] to determine "the operative events that [gave] rise to the injury." Meyer v. IBP, Inc., 710 N.W.2d 213, 218 (Iowa 2006). Once the facts are determined, a legal question remains: "[W]hether the facts, as determined, support a conclusion that the injury 'arose out of . . . [the] employment,' under our workers' compensation statute."

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The 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 Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

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. 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).

Subway and Foremost contend Christensen is not a credible witness based on inconsistencies in her reports concerning the alleged injury and based on video evidence. As noted above, I did not find Subway and Foremost established the video, Exhibit G, is video of the date of the injury, given the inconsistencies discussed above. Christensen reported the alleged work injury to her supervisor the day after it occurred.

I find Christensen's reports of the alleged injury remained consistent regarding her actions and the initial pop throughout many medical visits. The alleged inconsistency is with Dr. Bingham. Dr. Bingham documented Christensen relayed she injured herself by lifting her arm above shoulder level and placing the garbage in a dumpster, and that Christensen heard a second pop not while washing her hands, but while reaching for ingredients. (JE 3, p. 30) Christensen testified at hearing she did not make the statement to Dr. Bingham. Dr. Bingham did not testify at hearing or prepare an affidavit concerning the record.

Subway and Foremost aver Christensen reported she injured herself while lifting a large can at the emergency room on July 15, 2016. (Brief at 9) Christensen denied making the statement. The medical record provides, "[p]t reports lifting a heavy bag of garbage yesterday, now has right shoulder pain." (JE 1, p. 1) Later in the same record, one paragraph below and on page four, the hospital staff noted she was lifting a large garbage can. (JE 1, pp. 1, 4) The radiologist who took x-rays that day documented Christensen reported she "lifted heavy garbage into bin and felt a sharp pain this a.m." and "worsening pain whole shoulder as time moves forward." (JE 1, p. 5)

Subway and Foremost also aver Christensen made inconsistent statements in her deposition about whether there were customers in the restaurant. The deposition transcript was not produced at hearing.

I find Christensen's testimony at hearing was consistent with her past representations to her supervisor and medical providers concerning the circumstances leading to the alleged injury. While I have concerns about her use of "we" as opposed to "I" at hearing while describing the work injury, I also observed Christensen maintained direct eye contact, her rate of speech was appropriate, and she did not engage in any furtive movements when testifying concerning the circumstances leading up to the alleged injury. I believe Christensen sustained a work injury at Subway on July 14, 2016.

Two physicians have provided opinions on causation and permanency, Dr. Chen, an occupational medicine physician who performed an independent medical examination for Subway and Foremost, and Dr. Kuhnlein, an occupational medicine physician who performed an independent medical examination for Christensen. Both physicians initially agreed Christensen sustained a work injury on July 14, 2016. After reviewing the video Dr. Chen opined Christensen's shoulder pathology could not have been caused by the work injury. As discussed above, I do not find the video is an accurate recording of the date of the work injury. I find the opinion of Dr. Kuhnlein on causation and permanency most persuasive.

Dr. Chen initially opined Christensen sustained a right acute supraspinatus strain as a result of the work injury, and concluded she was appropriately diagnosed and treated by Dr. Bingham. (Ex. A, p. 7) Dr. Chen reviewed the November 30, 2016 magnetic resonance imaging of Christensen's shoulder and report and found there was no evidence of a complete rotator cuff tear. (Ex. A, p. 7) This is consistent with the report from the radiologist. (Ex. 5, p. 80) The radiologist noted with respect to the rotator cuff there was "[n]o evidence of a full-thickness rotator cuff tear. Normal muscle bulk and signal intensity." (Ex. 5, p. 80) The reviewing radiologist also noted "[a]dequate assessment [of the glenoid labrum was] precluded by the motion artifact." (Ex. 5, p. 80) Nine months later, Dr. Hart performed a right shoulder arthroscopic extensive debridement torn labrum, torn rotator cuff and biceps tenotomy, and arthroscopic subacromial decompression on Christensen, and listed postoperative diagnoses of a right shoulder torn superior labrum, partial rotator cuff tear, and impingement syndrome. (JE 6, p. 103) Dr. Hart did not find a full-thickness tear of the rotator cuff, rather, he found a partial tear and torn superior labrum. Dr. Chen did not address Dr. Hart's findings in his report, concluding it is an "incidental degenerative finding" after noting chronic musculoskeletal pain can develop in patients with numerous medical or mental health problems such as the problems Christensen has. (Ex. A, p. 7)

Dr. Chen also documented the medical records from Dr. Price and Dr. Bradley do not mention any worsening of Christensen's shoulder pain from July 2016 through September 2017. (Ex. A, p. 7) Christensen's medical records document ongoing problems with her shoulder following the work injury. (JE 2, p. 21; JE 3, pp. 27, 30, 32; JE 4, p. 36) During an appointment on August 23, 2016, Dr. Bradley documented

Christensen's shoulder pain had improved, but she continued to complain of sharp pain, shooting pain, achiness, and tightness in her shoulder. (JE 2, p. 23) During an appointment with Dr. Price, Christensen complained of achy to stabbing/shooting pain radiating to the posterior side of her right shoulder, increased pain when raising her arm above her shoulder, when wearing a bra, when reaching for things, and when driving. (JE 5, p. 74) While Christensen complained to Dr. Price about other physical problems, Dr. Price documented she was still experiencing shoulder pain and Dr. Price treated her pain and symptoms, and referred Christensen to Dr. Hart. (JE 5, pp. 76, 84-86, 88, 90-92, 94-95)

With respect to causation, Dr. Kuhnlein opined:

> Ms. Christensen denies prior right shoulder pain and describes a specific incident that occurred while she was working at a Subway restaurant. She was evaluated shortly after for right shoulder pain. Conservative treatment failed to resolve her symptoms. The MRI scan was limited by both her obesity and motion, but at surgery, she was noted to have a torn superior labrum and rotator cuff. The labral and rotator cuff tears and impingement syndrome were directly and causally related to the July 14, 2016, work related injury she sustained while working for Subway.

(Ex. 7, p. 114) The record supports Dr. Kuhnlein's opinion. Subway and Foremost presented no evidence at hearing supporting Christensen had problems with her right shoulder before the work injury. Christensen received conservative treatment with some improvement, but she continued to have symptoms. The November 30, 2016 magnetic resonance imaging was limited by motion and by Christensen's obesity. Surgery confirmed Christensen had a partial rotator cuff tear and a torn superior labrum, as documented by Dr. Kuhnlein. Christensen has established she sustained an injury to her right shoulder arising out of and in the course of her employment with Subway causing labral and rotator cuff tears to Christensen's right shoulder, resulting in a permanent impairment.

III. Extent of Disability

The parties stipulated if the injury is found to be a cause of permanent disability, the disability is an industrial disability. "Industrial disability is determined by an evaluation of the employee's earning capacity." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 852 (Iowa 2011). In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [her] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (Iowa 2010). The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138.

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa

Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u).

The surgery Dr. Hart performed on Christensen was successful. Christensen has not required additional treatment for her right shoulder since Dr. Hart released her from care. Dr. Kuhnlein assigned a two person whole person impairment to Christensen. (Ex. 7, p. 115) Dr. Kuhnlein recommended lifting restrictions of forty pounds occasionally from floor to waist and from waist to shoulder occasionally, and twenty pounds over the shoulder occasionally, and a restriction of working at or above shoulder height occasionally. (Ex. 7, p. 115)

At the time of the hearing Christensen was forty-four. Christensen graduated from high school and obtained a certificate in computer science in computer operations from Kirkwood Community College. While Christensen reported she was held back in school, and failed a real estate licensure exam, she successfully completed a program of study at Kirkwood Community College and obtained employment in her field of study.

Christensen did not return to work at Subway and she has not worked since she left Subway. Christensen has applied for Social Security Disability Insurance benefits and she does not intend to work at this time. Christensen has many conditions, both physical and psychiatric that are unrelated to her work injury. I do not find she is motivated to work. Christensen also has had periods of no employment or underemployment in the past. Considering all of the factors of industrial disability, I find Christensen has sustained a five percent industrial disability, entitling her to twenty-five weeks of permanent partial disability benefits at the stipulated rate of $197.92, commencing on July 18, 2016, the date she returned to work. Evenson v. Winnebago Indus., Inc., 881 N.W.2d 360, 372-74 (Iowa 2016) (the healing period set forth in Iowa Code section 85.34(2) lasts until the claimant has returned to work, has reached maximum medical improvement, or until the claimant is medically capable of returning to substantially similar employment, "whichever occurs first").

IV. Temporary Benefits

Christensen seeks temporary benefits from July 14, 2016 through November 8, 2017. Subway and Foremost aver Christensen is not entitled to temporary benefits because she returned to work after the injury and she also refused suitable work.

Iowa Code section 85.33 (2015) governs temporary disability benefits, and Iowa Code section 85.34 governs healing period and permanent disability benefits. Dunlap v. Action Warehouse, 824 N.W.2d 545, 556 (Iowa Ct. App. 2012).

An employee has a temporary partial disability when because of the employee's medical condition, "it is medically indicated that the employee is not capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability." Iowa Code § 85.33(2). Temporary partial disability benefits are payable, in lieu of temporary total disability and healing period benefits, due to the reduction in earning ability as a result of the employee's temporary partial disability, and

"shall not be considered benefits payable to an employee, upon termination of temporary partial or temporary total disability, the healing period, or permanent partial disability, because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of injury." Id.

As a general rule, "temporary total disability compensation benefits and healing-period compensation benefits refer to the same condition." Clark v. Vicorp Rest., Inc., 696 N.W.2d 596, 604 (Iowa 2005). The purpose of temporary total disability benefits and healing period benefits is to "partially reimburse the employee for the loss of earnings" during a period of recovery from the condition. Id. The appropriate type of benefit depends on whether or not the employee has a permanent disability. Dunlap, 824 N.W.2d at 556.

Temporary total, temporary partial, and healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986); Stourac-Floyd v. MDF Endeavors, File No. 5053328 (App. Sept. 11, 2018); Stevens v. Eastern Star Masonic Home, File No. 5049776 (App. Dec. Mar. 14, 2018). Although permanent partial disability benefits commenced on July 18, 2016, under Evenson, Christensen may be entitled to payment of intermittent healing period benefits that are payable concurrently with permanent partial disability benefits. Stourac-Floyd, File No. 5053328 (App. Sept. 11, 2018).

Under Iowa Code section 85.18, "[n]o contract, rule, or device whatsoever shall operate to relieve the employer, in whole or in part, from any liability created by this chapter except as herein provided." Iowa Code section 85.33(3) provides:

> [i]f an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, and be compensated with temporary partial benefits. If the employee refuses to accept the suitable work with the same employer, the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal. If suitable work is not offered by the employer for whom the employee was working at the time of the injury and the employee who is temporarily partially disabled elects to perform work with a different employer, the employee shall be compensated with temporary partial benefits.

Thus, the statute precludes an employee who refuses suitable work offered by the employer, consistent with the employee's disability, from receiving temporary or healing period benefits during the period of refusal. Iowa Code § 85.33(3); Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 520 (Iowa 2012). The employer bears the burden of providing the affirmative defense. Schutjer v. Algona Manor Care Ctr., 780 N.W.2d 549, 559 (Iowa 2010).

The issue of whether an employer has offered suitable work is ordinarily an issue for the trier of fact. Neal, 814 N.W.2d at 518. The Iowa Supreme Court has held under the express wording of the statute, the offered work must be "'suitable' and 'consistent with the employee's disability' before the employee's refusal to accept such work will disqualify [the employee] from receiving temporary partial, temporary total, and healing period benefits." Id. at 519.

Christensen worked for Subway part-time. The record reflects she returned to work on July 18, 2018. During her appointment on July 22, 2016, Dr. Schulz restricted Christensen from working until her next appointment with occupational health. (JE 3, pp. 28-29) Christensen attended an appointment with Dr. Bingham on July 27, 2016, and he released her to return to work with restrictions. (JE 3, p. 31) Christensen is entitled to temporary benefits during the period she was restricted from working by Dr. Schulz until she was released to return to work by Dr. Bingham.

Christensen returned to Dr. Bingham on August 12, 2016, reporting she had returned to work with restrictions "with some difficulty. But she is finding ways to adapt," and he again released her to return to work under the same restrictions. (JE 3, pp. 32-33)

Subway documented Christensen did not call to report she was not coming to work on Friday, August 19, 2016, for her shift. Christensen relayed she had told her coworker, Ariel, she had a medical appointment and could not attend work that day and she did not attend work. Subway documented on Saturday, August 20, 2016, Christensen came to work, left early, and told her coworkers her shoulder hurt and she had to leave. (Ex. C, p. 28) Christensen did not deny she worked on August 20, 2016. Christensen has not met her burden of proof that she is entitled to temporary benefits from July 28, 2016 through August 20, 2016.

Subway documented Christensen did not report to work on August 22, 2016, August 23, 2015, or August 27, 2016. (Ex. C, pp. 28, 36) Christensen testified she received a voicemail message from a person named Lisa. (Tr., p. 69) Christensen reported she did not call Lisa back right away, but when she did, Lisa told her she was her new manager. (Tr., p. 69) Christensen testified she said, "I don't know any Lisa, and you're not my manager," and hung up on her. (Tr., p. 70) Christensen reported she went in the next day and Sproston told Christensen Sproston was quitting. (Tr., p. 70)

Subway did not produce a copy of the schedule for August at hearing, or call Sproston and "Lisa" as witnesses. While Subway avers it terminated Christensen's employment on August 23, 2016, for failure to report to work, Christensen did not sign the termination notice. (Ex. C, p. 36) At the time of her purported termination, Christensen was still working under restrictions. Subway did not present any documentary evidence showing it offered Christensen work consistent with her restrictions after August 20, 2016. While Allebach testified at hearing Subway had work available for Christensen within her restrictions, Subway did not present any documentary evidence showing it offered Christensen work consistent with her

restrictions after August 20, 2016, or call any witness with knowledge about actual offers of suitable work made by Subway. Subway has not met its burden of proof Christensen refused suitable work.

Christensen did not return to work for Subway or any other employer after August 20, 2016. No treating physician opined she was at maximum medical improvement after August 20, 2016 until the surgery performed by Dr. Hart on November 7, 2017. While Dr. Chen found Christensen sustained a temporary impairment only that resolved within three months, I rejected his opinion for the reasons set forth above. Christensen underwent surgery on November 7, 2017 with Dr. Hart. Christensen is entitled to healing period benefits from July 15, 2016 through July 17, 2016, July 22, 2016 through July 27, 2016, and from August 21, 2016 through November 8, 2017.

V. Medical Bills

Subway and Foremost denied Christensen's injury was work-related on September 6, 2016, and paid no additional medical bills after that date. Christensen seeks to recover unpaid medical bills set forth in Exhibit 9. She also requests Subway and Foremost be responsible for a Medicaid subrogation lien of $6,071.95. (Ex. 10)

An employer is required to furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, hospital services and supplies, and transportation expenses for all conditions compensable under the workers' compensation law. Iowa Code § 85.27(1). The employer has the right to choose the provider of care, except when the employer has denied liability for the injury. Id. "The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee." Id. § 85.27(4). If the employee is dissatisfied with the care, the employee should communicate the basis for the dissatisfaction to the employer. Id. If the employer and employee cannot agree on alternate care, the commissioner "may, upon application and reasonable proofs of the necessity therefor, allow and order other care." Id. The statute requires the employer to furnish reasonable medical care. Id. § 85.27(4); Long v. Roberts Dairy Co., 528 N.W.2d 122, 124 (Iowa 1995) (noting "[t]he employer's obligation under the statute turns on the question of reasonable necessity, not desirability"). The Iowa Supreme Court has held the employer has the right to choose the provider of care, except when the employer has denied liability for the injury, or has abandoned care. Iowa Code § 85.27(4); Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010).

Subway and Foremost abandoned Christensen's care when they determined her injury was not work-related. Some of the bills include charges for conditions unrelated to the work injury, including immunizations totaling including $89.00 from November 1, 2018, for unrelated conditions totaling $195.00 on January 26, 2017, and $195.00 on April 24, 2017. (Ex. 9, pp. 129, 132, 135) Christensen is not entitled to recover these charges. I conclude the treatment Christensen received in the remaining bills was reasonable and necessary for Christensen's work injury. Subway and Foremost are responsible for all causally connected medical bills set forth in Exhibit 9, and the lien set forth in Exhibit 10.

VI. Penalty

Christensen seeks an award of penalty benefits. Iowa Code section 86.13 governs compensation payments. Under the statute's plain language, if there is a delay in payment absent "a reasonable or probable cause or excuse," the employee is entitled to penalty benefits, of up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse. Iowa Code § 86.13(4); see also Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996) (citing earlier version of the statute). "The application of the penalty provision does not turn on the length of the delay in making the correct compensation payment." Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 236 (Iowa 1996). If a delay occurs without a reasonable excuse, the commissioner is required to award penalty benefits in some amount to the employee. Id.

The statute requires the employer or insurance company to conduct a "reasonable investigation and evaluation" into whether benefits are owed to the employee, the results of the investigation and evaluation must be the "actual basis" relied on by the employer or insurance company to deny, delay, or terminate benefits, and the employer or insurance company must contemporaneously convey the basis for the denial, delay, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits. Iowa Code § 86.13(4). An employer may establish a "reasonable cause or excuse" if "the delay was necessary for the insurer to investigate the claim," or if "the employer had a reasonable basis to contest the employee's entitlement to benefits." Christensen, 554 N.W.2d at 260. "A 'reasonable basis' for denial of the claim exists if the claim is 'fairly debatable.'" Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 267 (Iowa 2012). "Whether a claim is 'fairly debatable' can generally be determined by the court as a matter of law." Id. The issue is whether the employer had a reasonable basis to believe no benefits were owed to the claimant. Id. "If there was no reasonable basis for the employer to have denied the employee's benefits, then the court must 'determine if the defendant knew, or should have known, that the basis for denying the employee's claim was unreasonable.'" Id.

Benefits must be paid beginning on the eleventh day after the injury, and "each week thereafter during the period for which compensation is payable, and if not paid when due," interest will be imposed. Iowa Code § 85.30. In Robbennolt, the Iowa Supreme Court noted, "[i]f the required weekly compensation is timely paid at the end of the compensation week, no interest will be imposed . . . . As an example, if Monday is the first day of the compensation week, full payment of the weekly compensation is due the following Monday." Robbennolt, 555 N.W.2d at 235. A payment is "made" when the check addressed to the claimant is mailed, or personally delivered to the claimant. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996) (abrogated by Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299 (Iowa 2005) (concluding the employer's failure to explain to the claimant why it would not pay permanent benefits upon the termination of healing period benefits did not support the commissioner's award of penalty benefits)).

Christensen avers she is entitled to an award of penalty benefits because Subway and Foremost failed to convey the reason for the refusal to pay benefits. Exhibit H contains two letters from Subway and Foremost. The first letter, dated August 18, 2016, notified Christensen her claim was under investigation and provided, "[o]nce all the necessary information is received we will be able to review your claim and make a decision regarding compensability." (Ex. H, p. 55) The second letter, dated July 18, 2017, provides "[a]t this time we are maintaining our denial of this claim. After a thorough investigation it was determined that in light of several inconsistencies, Ms. Christensen did not establish that she sustained an injury arising out of her employment with Subway." (Ex. H, p. 56) Subway and Foremost had not obtained an opinion from a physician on causation before denying Christensen's claim. Neither letter identifies any facts supporting the defendants' conclusion. Subway and Foremost refused to pay Christensen both temporary and permanent disability benefits. An award of penalty benefits is appropriate to deter Subway, Foremost and other employers and insurers from engaging in similar conduct in the future. Christensen is awarded $5,000.00 in penalty benefits.

VII. Independent Medical Examination

Christensen seeks to recover the $2,555.00 cost of Dr. Kuhnlein's independent medical examination. (Ex. 8) Dr. Kuhnlein's bill is itemized. (Ex. 8) He charged $1,224.00 for the examination, and $1,331.00 for the report. (Ex. 8, p. 118)

After receiving an injury, the employee, if requested by the employer, is required to submit to examination at a reasonable time and place, as often as reasonably requested to a physician, without cost to the employee. Iowa Code § 85.39. If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes the evaluation is too low, the employee "shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice . . . ." Id.

Dr. Kuhnlein issued an impairment rating in the case before Dr. Chen issued his opinion finding Christensen had not sustained a permanent impairment caused by the work injury. No impairment rating had been issued by a physician retained by Subway and Foremost at the time Christensen retained Dr. Kuhnlein to conduct an independent medical examination. Under the statute, Christensen is not entitled to recover the cost of Dr. Kuhnlein's independent medical examination. Rivas v. Farmland Foods, File No. 5052859 (App. Aug. 16, 2018) (reversing award of cost of independent medical examination where the defendants' had not obtained an impairment rating before the claimant's examination, and finding the first examination could not be awarded as a cost because the bill was not itemized, but awarding the cost of a second examination that occurred after the defendants' obtained an impairment rating).

In the case of Des Moines Area Regional Transit Authority v. Young, the Iowa Supreme Court held:

> [w]e conclude section 85.39 is the sole method for reimbursement of an examination by a physician of the employee's choosing and that the expense of the examination is not included in the cost of a report. Further, even if the examination and report were considered to be a single, indivisible fee, the commissioner erred in taxing it as a cost under administrative rule 876-4.33 because the section 86.40 discretion to tax costs is expressly limited by Iowa Code section 85.39.

867 N.W.2d 839, 846-47 (Iowa 2015).

Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Rule 876 IAC 4.33(6), provides,

> [c]osts taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes.

The administrative rule expressly allows for the recovery of the cost of two doctors' reports. Dr. Kuhnlein's bill is itemized. (Ex. 6, p. 78) Under Young, Christensen is entitled to recover the $1,331.00 cost of Dr. Kuhnlein's report. 867 N.W.2d at 846-47.

ORDER

IT IS THEREFORE ORDERED, THAT:

Defendants pay the claimant intermittent healing period benefits from July 15, 2016 through July 17, 2016, July 22, 2016 through July 27, 2016, and from August 21, 2016 through November 8, 2017, at the stipulated weekly rate of one hundred ninety-seven and 92/100 dollars ($197.92).

Defendants shall pay the claimant twenty-five (25) weeks of permanent partial disability benefits at the stipulated weekly rate of one hundred ninety-seven and 92/100 dollars ($197.92), commencing on July 18, 2016.

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 Tech., File No. 5054686 (App. Apr. 24, 2018).

Defendants are responsible for all causally connected medical bills as set forth in this decision.

Defendants shall pay the claimant five thousand and 00/100 dollars ($5,000.00) in penalty benefits.

Defendants shall pay the claimant one thousand three hundred thirty-one and 00/100 dollars ($1,331.00) for Dr. Kuhnlein's report.

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

Signed and filed this 7th day of February, 2019.

HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Joanie L. Grife
Attorney at Law
PO Box 492
Marshalltown, IA 50158-0492
joanie@walklaw.com

Stacy L. Morris
Attorney at Law
10306 Regency Pkwy. Dr.
Omaha, NE 68114-3708
smorris@ldmlaw.com

HLP/srs

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.