BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

STEPHANIE L. YOUNG f/k/a STEPHANIE L. MOORE,

Claimant,

vs.

BRIDGESTONE/FIRESTONE,

Employer,

and

OLD REPUBLIC INSURANCE COMPANY,

Insurance Carrier,

and

SECOND INJURY FUND OF IOWA,

Defendants.

File Nos. 5035165, 5052462, 5052463, 5060059

ARBITRATION/REVIEW-REOPENING

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Stephanie L. Young, f/k/a Stephanie L. Moore, the claimant, seeks workers' compensation benefits from defendants, Bridgestone/Firestone, the alleged employer; its insurer, Old Republic Insurance Company; and, the Second Injury Fund of Iowa as a result of alleged injuries on July 26, 2010, May 31, 2013, August 29, 2013 and August 25, 2014. Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on March 30, 2016, but the matter was not fully submitted until the receipt of the parties' briefs and argument on April 22, 2016. Oral testimony and written exhibits received into evidence at hearing are set forth in the hearing transcript.

Defendants Bridgestone/Firestone and Old Republic Insurance Company shall hereafter be referred to as defendants BF. Defendant, the Second Injury Fund of Iowa, shall hereafter be referred to as SIF.

The claim for the injury date of July 26, 2010 is a review-reopening from an Agreement for Settlement entered into by claimant and defendants BF on May 28, 2014 and approved by this agency on May 30, 2014. According to the agreement for settlement, claimant suffered additional permanent partial disability from the work injury

consisting of a 3.32 percent loss of use to both arms from a single accident entitling claimant to 16.6 weeks of additional benefits under Iowa Code section 85.34(2)(s).

The agency file also shows a prior Agreement for Settlement between claimant and defendants BF dated February 17, 2012, which was approved by this agency on February 20, 2012, for the same July 26, 2010 injury in which claimant received healing period benefits for times off work in 2010 and permanent partial disability benefits for a 15 percent loss of the left upper extremity entitling claimant to 37.5 weeks of compensation. Prior to this agreement for settlement, there was an arbitration decision issued by another deputy commissioner on January 26, 2012 in which claimant was awarded much of the same benefits contained in the agreement for settlement, except defendants BF in the arbitration decision were ordered to pay a 50 percent penalty for unreasonable denial of healing period benefits. The penalty benefits were eliminated in the agreement for settlement which occurred while the arbitration decision was on appeal.

There was no assertion by claimant that his entitlement to benefits set forth in these prior agreements for settlement were not paid by defendants BF.

The proceedings for the remaining alleged injury dates in this case are arbitration proceedings.

Claimant's exhibits were marked numerically. Exhibits from defendants BF were marked alphabetically. Exhibits from SIF were marked at hearing with triple letters for some reason. I re-marked them with double letters for the sake of simplicity. References in this decision to page numbers of an exhibit shall be made by citing the exhibit number or letter followed by a dash and then the page number(s). For example, a citation to claimant's exhibit 1, pages 2 through 4 will be cited as, "Ex 1-2:4." Citations to a transcript of testimony such as "Tr-4:5," either in a deposition or at hearing, shall be to the actual page number(s) of the original transcript, not to page numbers of a copy of the transcript containing multiple pages.

The parties agreed to the following matters in a written hearing report submitted at hearing:

1. An employee-employer relationship existed between claimant and Bridgestone/Firestone at the time of the alleged injuries.

2. On July 26, 2010, claimant received an injury arising out of and in the course of employment with Bridgestone/Firestone.

3. Claimant is seeking temporary total or healing period benefits only from August 25, 2014 through March 30, 2016, and defendants agree that she was off work during this period of time.

4. Claimant and defendants BF agreed that the injury on July 26, 2010 was a cause of a permanent scheduled member disability to the right and left arms. All parties

agreed that if the remaining alleged work injuries were found to have occurred and to have caused permanent disability, all were scheduled member disabilities to the left arm.

5. All parties agreed to the following weekly rates of compensation:

a. $497.18 for the July 26, 2010 injury;

b. $357.38 for the alleged May 31, 2013 injury;

c. $312.06 for the alleged August 29, 2013 injury; and,

d. $357.95 for the alleged August 25, 2014 injury.

Claimant seeks medical treatment benefits set forth in Exhibit 8 and reimbursement for two independent medical evaluations by Sunil Bansal, M.D. set forth in Exhibit 7. The parties stipulated that the fees charged by the providers set forth in these exhibits were reasonable. Also, the parties agreed that the providers listed in Exhibit 8 would testify as to the reasonableness of the medical treatment provided and defendants were not offering contrary evidence. Finally, the parties agreed that the expenses listed in Exhibit 8 were causally connected to the medical condition(s) upon which the claim herein is based, but the issue of their causal connection to any of the alleged work injuries remains an issue to be decided herein.

ISSUES

At hearing, the parties submitted the following issues for determination:

Claims Against Defendant BF:

I. Whether claimant received the alleged injuries after July 26, 2010 arising out of and in the course of employment;

II. Whether claimant has suffered a significant change of condition from his condition that formed the basis of the Agreement for Settlement on May 28, 2014;

III. The extent of claimant's entitlement to weekly temporary total or healing period benefits and permanent disability benefits; and,

IV. The extent of claimant's entitlement to medical benefits under Iowa Code section 85.27 and an independent medical examination pursuant to Iowa Code section 85.39.

V. The extent of claimant's entitlement to penalty benefits for an unreasonable delay or denial of weekly benefits pursuant to Iowa Code section 86.13.

Claim Against SIF:

1. Whether claimant suffered qualifying first and second injuries; and,

2. The extent of claimant's entitlement to Fund benefits.

FINDINGS OF FACT

In these findings, I will refer to the claimant by her first name, Stephanie, and to the defendant employer as BF.

From my observation of her demeanor at hearing including body movements, vocal characteristics, eye contact and facial mannerisms while testifying in addition to consideration of the other evidence, I found Stephanie credible.

Stephanie was 46 years old at the time of the hearing. She is left hand dominate. She finished the 10th grade in high school and then obtained her GED at the Iowa Juvenile Home in Toledo, Iowa in 1986. She obtained training as a nurse's aide, earning a CNA certificate in the 1990s. Her employment history includes monitoring children at the Boys and Girls Club in Waterloo, working as a CNA at Parkview Gardens, caring for elderly persons, and line work at IBP in Waterloo. She then worked at another nursing home before returning to IBP on the cleaning crew. She then worked at Walmart in Des Moines as a cashier.

Stephanie began working for BF, a tire manufacturer, in 1997. She technically is still employed at Firestone, but she has not physically worked there since August 25, 2014, which is the same date of the last alleged work injury. Her first job was in department 139 where she trimmed and inspected tires. This required standing and lifting big tires, both manually and with a power lift. Following a back injury in 1998, she received a permanent 50-pound lifting restriction, but was able to return to work receiving assistance from co-workers. She then moved to department 312 where she stacked, weighed and carried sacks of pigment materials. She then moved to department 793 as a warehouser in 2000 and continued in this job until 2014. This job involved driving a powered forklift called a jeep, manually placing and pulling out upright posts located on a pallet used to transport tires, selecting orders and getting them ready to be loaded for shipment. Handling the poles required vigorous gripping and twisting. (Exhibit 2) Stephanie testified at hearing that in a single shift she was often required to remove approximately 700 poles, requiring repetitive grabbing and upward pulling.

The initial July 26, 2010 injury involved both elbows while Stephanie was performing the job of warehouser. Stephanie asserts that the three alleged subsequent injuries to the left hand/arm occurred while performing this same job. At the time of the last alleged injury date or Stephanie's last day of work at BF, August 25, 2014, Stephanie had been on light duty restrictions since May 14, 2014 on orders of her treating orthopedist basically doing nothing but sitting in a break room. She was allowed to leave on August 25, 2014 by her supervisor when she informed her supervisor that she needed to leave because her pain medication was making her sleepy and she did not want to fall asleep at work and be fired. She has not returned to

BF since. Why BF has not formally terminated Stephanie is unclear since the temporary restrictions by the treating physician which took her off the warehouser job were made permanent on September 17, 2014. (Ex. 2-37)

The first injury date in this case, 07/26/10, occurred while driving a forklift when she started having pains up and through her hands and arms. EMG studies revealed bilateral cubital tunnel syndrome in both elbows. She had corrective surgeries on the left arm on 08/13/10 and on the right arm on 09/17/10 by Scott Neff, D.O., the treating orthopedist, who attributed the conditions to driving the forklift at BF. (Ex. EE-58:61) There was no transposition of the nerve during the left elbow surgery. (Ex. EE-61) According to the arbitration decision on January 26, 2012, the only impairment rating at the time came from an IME physician, Eugene Cherny, M.D. who opined Stephanie has suffered a 5 percent permanent partial impairment to the left upper extremity from the injury. This doctor found no impairment for the right arm condition, and claimant did not express any right arm complaints at hearing. Again, as previously stated, the injury claim was settled in February 2012 on the basis of the arbitration award, absent the penalty.

Following her surgeries and the first Agreement for Settlement, she continued to have persistent symptoms from flare-ups in her left elbow from doing her warehouser duties, especially fork lift driving, between August 29, 2011 and May 31, 2013 as noted in numerous office records of Dr. Neff, Jerrold Flatt, D.O., claimant's family doctor, and Todd Troll, M.D., the plant doctor at BF. Most of these office notations are only in this record by references in an IME report by Dr. Bansal. (Ex. AA-2:6; BB & GG) Claimant was apparently off work occasionally due to these flare-ups. A repeat EMG testing on April 1, 2013 revealed mild, but continued left cubital tunnel syndrome. (Ex. AA-5) The second alleged injury, on 05/31/13, was one of the episodic flare-ups which Stephanie states was due to driving the forklift. (Tr. p. 44) Dr. Flatt took her off work again at that time. (Ex. DD-43)

Finally, Stephanie saw John L. Gaffey, M.D., an orthopedic surgeon on July 10, 2013. Again, the only record we have of this visit comes by reference in Dr. Bansal's report. Dr. Gaffey's assessment was recurrent cubital tunnel syndrome. (Ex. AA-7) On August 29, 2013, Dr. Gaffey performed a left ulnar nerve decompression at the left elbow, but this time with transposition of the nerve. Dr. Gaffey initially returned Stephanie back to work without restrictions on December 9, 2013.

At the request of her attorney, Stephanie was evaluated by Sunil Bansal, M.D. on January 24, 2014. Dr. Bansal's assessment was that claimant suffered a new injury on March 13, 2013 due to her work at BF, which was the same type of work that led to the 2010 injury. (Ex. AA-14) His diagnosis for the new injury was a recurrent cubital tunnel syndrome eventually surgically addressed by Dr. Gaffey. (Ex. AA-11:12) Dr. Bansal placed claimant at MMI for the left arm condition on December 9, 2013 and assigned a 10 percent permanent impairment rating to Stephanie's left upper extremity due to sensory and motor deficits. (Ex. AA- 12) He also opined that she had a 5 percent permanent partial impairment to the right upper extremity due to sensory and motor

deficits, but the MMI date for the right arm injury was March 16, 2011. Clearly, the right arm assessment was not for her condition in January 2014, but her condition before the first Agreement for Settlement in February 2012. (Id) Dr. Bansal recommended permanent work restrictions of no lifting greater than 20 pounds occasionally with the left arm, 30 pounds frequently with the right arm. (Ex. AA-14) Stephanie was told to avoid tasks that required repeated or sustained arm flexion. (Ex. AA-14:15) However, he opined that she is capable of returning to her warehouse job, as she had already done so prior to his evaluation. (Ex. AA-15)

On May 12, 2014, Dr. Gaffey imposed temporary restrictions of limited use of the left hand consisting of a 20 pound lifting restriction using both hands and avoidance of repetitive vigorous grasping, pinching, pushing, pulling & twisting including no forklift driving and no overhead throwing. The record only has a copy of the work limitations. (Ex. BB-31) The office notes that generated this restriction and subsequent changes in the restrictions are not in the record, except for the references to those records by Dr. Bansal in his IME report of December 19, 2014. (Ex. AA-18) At the request of defendant's medical department, Dr. Gaffey was asked to just limit motions or weights, rather than the fork lifting job, as the forklift driving was like driving a car, and the left arm is used only to change gears. Dr. Gaffey then stated that Stephanie should avoid vigorous repetitive grasping, pinching, pulling & twisting and to avoid repetitive motions. (Ex. BB-33)

Claimant and BF then entered into the second Agreement for Settlement on May 28, 2014 for the original work injury of July 26, 2014. Attached to the settlement agreement was a copy of a report from Dr. Gaffey dated January 10, 2014 indicating Stephanie was doing well and had no restrictions. Also, this report states that the doctor told Stephanie that if she ever had flare-ups in the future they would be covered by workers' compensation and "we would just re-open the case." Also, attached to the settlement agreement was Dr. Bansal's IME report of January 24, 2014. The basis for the 3.32 percent body as a whole loss of function was not set forth in the Agreement for Settlement. If the parties used Dr. Bansal's ratings, the result pursuant to Iowa Code section 85.34(2)(s) would be 9 percent. Under this Code section the bilateral arm ratings are converted to body as a whole rating using Table 16-3, page 439 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, and then combined. One would think that the only increased impairment would involve the left arm, as nothing happened to the right arm since the last Agreement for Settlement, except that Bansal's rating was less than the 15 percent impairment upon which the 2012 agreement was based. I must conclude that the only new impairment rating was to the right arm by Dr. Bansal of 5 percent which formed the basis for the 2014 agreement for settlement.

Following the May 28, 2014 Agreement for Settlement, Stephanie states that her symptoms again worsened. She continued to receive treatment and was unable to perform her job tasks. On July 11, 2014, Dr. Gaffey changed the previous work restrictions to no lifting over 25 pounds frequently, but again directed that she avoid repetitive vigorous grasping, pinching, pushing, pulling & twisting. (Ex. BB-33) On

August 22, 2014, Dr. Gaffey not only continued the restrictions, but re-imposed the restriction against forklift driving and then ordered a functional capacity evaluation. (FCE) (Ex. BB-34) The FCE evaluation was performed on September 2, 2014. The evaluator reported that claimant was shown capable of medium work, but that she failed 5/7 validity criteria and viewed the testing as invalid. (Ex. JJ) Despite this testing results, Dr. Gaffey on September 17, 2014 opined that claimant reached maximum medical improvement and imposed permanent activity restrictions of lifting no more than 30 pounds floor to waist and waist to chest; no lifting beyond 20 pounds chest to above head; and no repetitive forceful grasping with the left hand over 20 pounds. (Ex. BB-37) Upon further inquiry by Stephanie's counsel, the doctor added that she may drive with her left hand, operating with the right hand. He also stated he does not believe that any job requiring her to lift more than 20 pounds on a consistent basis is a good job for her. (Ex. BB-38)

On December 2, 2014, Stephanie reported to Dr. Flatt that driving the forklift aggravated her left hand and arm symptoms and she wanted a permanent restriction against driving the jeep. The doctor then imposed a permanent work restriction of "no jeep driving". (Ex. DD-50)

Stephanie was re-examined by Dr. Bansal on December 19, 2014. Dr. Bansal reported a substantial change in Stephanie's condition, both subjectively and objectively, since his last examination of Stephanie in January 2014. (Ex. AA-21) Dr. Bansal described the change as two-fold. First, the treating doctor, Dr. Gaffey, had now imposed permanent restrictions. Second, from his examination at this time, the doctor found a decrease in Stephanie's left hand grip strength indicating a deterioration of the ulnar nerve. He states that it is not uncommon for patients with nerve surgeries to experience a worsening and complications due to multiple factors such as scarring. Dr. Bansal then opined that claimant could not return to driving the jeep because it necessitated keeping the elbows in a sustained flexion posture and could not pull the poles because it required forceful elbow motion. (Ex. AA-23) However, he did not provide an impairment rating despite his finding of a loss of grip strength. There is no explanation in the record for the lack of an impairment rating by this doctor despite the fact that this was a scheduled member disability claim.

Stephanie testified that she had no prior hand or arm problems before her injuries in this case. (Tr-71:72) She had no physical restrictions or permanent impairment before her employment with BF. (Tr-73:74) Stephanie obtained a 50 pound restriction before July 26, 2010 from a 1998 back injury. She broke her nose in 1999 and cannot wear a mask at work. Stephanie has other chronic medical conditions. Since 2000 she has had anxiety and depression which has aggravated her current medical conditions. She injured her right knee in 2010 after falling down a basement stairway at home. Dr. Neff performed an arthroscopy to repair a meniscus tear at that time. In November 2013, she sought treatment for her right knee again from Ian Lin M.D. due to increased symptoms. (Ex. HH-85:86) Dr. Lin performed another right knee arthroscopy and a meniscectomy and decompression of a meniscal cyst on December 24, 2013. (Ex. HH-88) Stephanie testified she has been taking Vicodin for

ongoing right knee pain since that time. Dr. Flatt indicated in his office note of May 31, 2013 concerning the left arm problems that Stephanie was already on Vicodin for her knee when he continued the prescription at that time. (Ex. DD-44) Defendants assert her sleepiness which precipitated her leaving work on August 25, 2014 is related to the knee injury, but Dr. Flatt states that she is given other medications for her arm condition that can cause drowsiness. (Ex. DD-56)

As noted by Dr. Flatt, Stephanie has had continuing problems with migraine headaches. (Ex. DD-44:45) In September 2014, Stephanie began complaining of low back pain to Dr. Flatt. (Ex. DD-46) On referral by Dr. Flatt, Stephanie was seen in June 2015 by Anthony Stark, D.O., an orthopedist, for persistent low back pain. (Ex. II-91:92) An MRI indicates a bulging disc in the lower spine, but no nerve root impingement. Dr. Stark performed a left sacroiliac joint injection on June 8, 2015. (Ex. II-94) According to Dr. Flatt, as of September 2015, Stephanie continues to suffer chronic low back pain, migraines and knee pain in addition to her bilateral hand and arm pain. (Ex. DD-56:57) These conditions have been asserted when Stephanie has applied for group disability benefits at BF and for Social Security benefits. (Tr-82:83) She received physical therapy for chronic back pain from Mercy Urbandale Physical Therapy in August 2015. (Ex. KK)

On June 6, 2015, Stephanie began treating with Benjamin Paulson, M.D., another orthopedist, for right hand pain that began two months earlier. The doctor reports a history that the pain is aggravated by movement and driving and is gradually worsening. The doctor's assessment was trigger finger of the middle or long finger. (Ex. FF-63:71) On July 26, 2015, Dr. Paulson performed a surgical release of this finger. (Ex. FF-75) In December 2015, due to ongoing symptoms, the doctor prescribed physical therapy. (Ex. FF-82) Stephanie received this therapy form Mercy West Physical Therapy in January and February 2016. (Ex. LL)

Dr. Bansal evaluated Stephanie's right long finger condition on March 28, 2016. The doctor describes this injury as follows:

> Ms. Moore started having pain in her right long finger in 2011, with an increase into 2015, with a resultant trigger finger release in July 2015. She reports that for the most part it is doing well, with occasional stiffness. (Ex. AA-26)

Dr. Bansal places Stephanie at MMI for this finger injury on October 26, 2015 when she was released by Dr. Paulson. He opines that this injury has resulted in a 1 percent permanent partial impairment to the right upper extremity due to lost range of motion of the MCP joint. He causally relates the trigger finger to Stephanie's work at BF pulling bars or poles which required repetitive gripping. In his first IME report in January 2014, Dr. Bansal did note an office visit with Dr. Neff on October 10, 2011 at which time claimant reported pain and numbness of the dorsum of her right index finger. (Ex. AA-4)

Stephanie testified that she experiences pain during activities of daily living. She states she is unable to hold her arms above her head to fix her hair. She now pays someone to braid her hair, as she is unable to do it herself. Anytime she grips, pulls or pushes things, she experiences pain up her arms. The pain is constant in her left arm, and intermittent in her right arm. She struggles with cooking, one of her favorite hobbies, because she is unable to carry heavy pots and containers. She cannot lift laundry baskets full of clothes. Claimant testified that the pain wakes her up on a regular basis. She cannot do the yard work, shoveling, or mowing that she was able to do before her injuries. She has lost a significant amount of strength in her arms and hands. Claimant's social life has suffered because the pain medication causes so much fatigue she is unable to participate in social relationships. She cannot drive when she is taking pain medication. However, she admits that she takes pain medicine for all of her health conditions, not just for her arms. (See generally Tr-76:80)

Stephanie testified she could not return to nursing home work because she lost over 50 percent of her strength and cannot lift or transfer residents; she cannot return to meat cutting, as such work requires repetitive grasping of knives and animal parts; and she cannot return to any of her prior jobs at BF. (Tr-81:82)

Stephanie has not applied for any jobs since leaving her job at BF. (Tr-91) She and her husband currently operate a home-based business making and selling their own barbeque sauce, called "Young G's Barbecue." Stephanie states that this is primarily her husband's operation, although she admits she is listed as CEO, but only if something happened to him. (Tr-84:85)

I find that the Agreement for Settlement on May 28, 2014 was for Stephanie's bilateral arm condition as of January 2014, given the reports attached to the agreement which were issued in January 2014.

Following the second Agreement, Stephanie's left arm cubital tunnel condition worsened resulting in permanent restrictions by both Dr. Gaffey and Dr. Bansal. Dr. Gaffey in his January 2014 report attached to the settlement agreement opined that any flare-ups thereafter would be the result of the original injury settled on May 28, 2014. Dr. Bansal also attributes the worsened condition to the condition he evaluated in January 2014. This worsened condition was a significant change of condition in that Dr. Gaffey had provided no restrictions in January 2014. Dr. Bansal found a loss of grip strength since January 2014, but his restrictions were not much different than before. I find the views of Dr. Gaffey, the specialist in orthopedics, to be more convincing on this change of restrictions. As a result of Dr. Gaffey's restrictions, Stephanie was removed from her job and placed on light duty in the break room on May 14, 2014 and has never returned to her warehouse job since that time. Indeed, she could never do so with these restrictions because of the gripping and grasping limitations. I do not find any new cubital tunnel injury after January 2014 and no doctor has opined such a new injury.

Although the evidence shows a worsened condition, no doctor has provided an impairment rating for this worsened condition since January 2014. Stephanie has provided lay testimony as to the current status of her arm condition. In her lay testimony she told of adverse impacts of her left arm disability on her activities of daily living. She testified that she has lost 50 percent of her left arm strength. First, we know that Dr. Gaffey had imposed no restrictions in January 2014, so the imposition of his significant permanent restrictions indicates a serious loss of use. She was doing well in January 2014 according to Dr. Gaffey and apparently was not doing so well when he imposed the permanent restrictions.

Given Dr. Gaffey's restrictions and the lay evidence from claimant, which I find credible as to the extent of the functional loss, I find that claimant's worsened condition constituted an additional 35 percent loss of use to the left arm since Stephanie's condition in January 2014 which was settled in May 2014. There was no showing of an additional loss of use to the right arm. I arrived at the left arm loss figure based on Stephanie's testimony that she lost 50 percent of her strength. She previously was assessed and compensated for her 15 percent loss in the 2012 agreement. I found the 2014 agreement only compensated for a right arm loss. Consequently, she suffered an additional 35 percent loss.

Also, Stephanie did not achieve MMI for her mid 2014 flare-up and worsened condition until Dr. Gaffey issued permanent restrictions on September 17, 2014. She had been off work since August 26, 2014. Defendants assert she only left light duty work due to sleepiness from a pain medication prescribed for her knee, not her arms. While she may have initially received pain medication for her knee, the prescriptions for Vicodin after the development of her elbow problems were for both her knee and arms. Also, as pointed out in one of Dr. Flatt's reports, she was receiving other medication for her arms that would have made her drowsy. Therefore, I find that her worsened arm condition from the July 26, 2010 work injury was a significant factor causing her to leave BF on August 25, 2014.

Furthermore, I do not find that BF provided suitable work to accommodate for Dr. Gaffey's restrictions. Just sitting in the break room is not suitable work and appears to be more punitive than accommodating. Consequently, any refusal to perform such activity was reasonable.

I find that the right trigger finger treated by Dr. Paulson and evaluated by Dr. Bansal is a new injury. It is also separate and distinct from any prior cubital tunnel injuries. Apparently, claimant wishes to include this injury in the review-reopening claim for the July 26, 2010 injury because only left arm injuries were plead in the petitions for the subsequent alleged injuries. I really do not see any connection of this injury to the claims filed in this case. In any event, I do not find convincing the view of Dr. Bansal that an aggravation injury in June 2015 is related to her work at BF, her 2010 injury, or any of the other alleged injuries simply because she had similar problems in 2011. Stephanie had not performed warehouse work or any other significant work involving repetitive use of her hands at BF since June 2014, a year before she sought treatment

from Dr. Paulson for pain that arose over the last two months. Therefore, I am unable to find claimant's new trigger finger injury is related to her work at BF.

For the SIF claim, in his post-hearing brief Stephanie's attorney chose to rely on the opinion of Dr. Bansal in January 2014 for asserting a first injury to the right hand at the time of the July 26, 2010 injury. The May 2014 Agreement for Settlement acknowledged both a right and left arm scheduled disability from the July 26, 2010 injury, but that agreement is not binding on the SIF. I do not find Dr. Bansal's views concerning a right arm impairment from the original injury convincing. He opined that MMI for the right arm injury occurred on March 16, 2011, meaning his opinion is based on the facts and circumstances presented to this agency as set forth in the arbitration proceeding in November 2011 and the Agreement for Settlement in February 2012. However, as noted in the arbitration decision in the agency file, Dr. Cherny, did not find any loss of use to the right hand from the July 26, 2010 injury, and claimant had no complaints at that time for the right hand after recovering from the surgery by Dr. Neff. Therefore, I am unable to find that Stephanie suffered a right arm injury that led to any permanent loss of use. I suppose claimant could have asserted some other injury as a first qualifying injury, but this was not done.

Stephanie seeks payment of the medical expenses set forth in Exhibit 8. The first section is charges for treatment by Dr. Paulson for the right trigger finger. As stated above, I cannot find this to be a work injury for which BF is responsible. The next section of Exhibit 8 is charges for treatment by Dr. Flatt. Between October 30, 2014 and January 28, 2015 and again on June 22, 2015, claimant had five office visits to address her elbow pain. Dr. Flatt charged $110.00 for each visit. While Dr. Flatt was likely not an authorized physician, defendants BF had no right to choose the medical treatment because they were denying liability for any worsened condition. Ramirez-Trujillo v. Quality Egg, L.L.C., ____ N.W.2d _____(Iowa 2016), Supreme Court Decision, No. 14-0640, Filed April 15, 2016; R.R. Donnelly & Sons v. Barnett, 670 N.W.2d 190 (Iowa 2003); Trade Professionals, Inc. v. Shriver, 661 N.W.2d 119 (Iowa 2003); West Side Transport v. Cordell, 601 N.W.2d 691 (Iowa 1999); Haack v. Von Hoffman Graphics, File No. 1268172 (App. July 31, 2002); Kindhart v. Fort Des Moines Hotel, Vol. I, No. 3, Industrial Commissioner Decisions, 611 (March 27, 1985); Barnhart v. MAQ Incorporated, I Iowa Industrial Comm'r Report 16 (App. March 9, 1981).

The remaining visits were for her trigger finger condition, again, not found related to work at BF. I find that the treatment for the elbow condition constituted reasonable and necessary treatment of her worsened left arm condition and I shall order defendants BF to pay $550.00 for this treatment.

The final section in Exhibit 8 includes charges from various providers for services on January 7, 2016 including a surgery. There is no evidence to causally connect such services to the worsened condition of the July 26, 2010 work injury.

There is no dispute that defendants BF did not pay healing period benefits or additional permanency benefits after the May 2014 settlement. In their post-hearing

brief, defendants BF argued essentially that they considered the matter closed at the time of the May 2014 settlement. They assert that claimant had reached MMI for the recurrent cubital tunnel syndrome and had no restrictions.

However, Dr. Gaffey told claimant in his January 10, 2014 office note that her injury case would not be closed and if she had a flare-up, "we" would reopen the case and she would still be covered by workers' compensation. As Dr. Gaffey was the authorized physician and this report was attached to the 2014 settlement agreement, the doctor was speaking on behalf of defendants BF. This was a clear enticement for claimant to sign the agreement. But, when claimant did have a flare-up a few months later, the matter was not reopened. While defendants BF apparently did pay for Dr. Gaffey's treatment, as claimant is not seeking payment of his bills in this proceeding, they have ignored the fact that she was taken off the warehouser job due to the restrictions of Dr. Gaffey and has never returned. I found that her leaving work on August 25, 2014 was related to her left arm injury. Defendants BF acted unreasonably in not reconsidering its position and investigated claimant's situation after their physician imposed work restrictions as well as not providing claimant timely notice of the denial of benefits and the reasons for such denial. It is noted that the arbitration decision in January 2012 imposed a penalty for unreasonable conduct, and defendants only avoided the penalty by filing an appeal and getting claimant to agree to a settlement without a penalty. While the arbitration decision was only proposed and was never made final, it was convincing to me that defendants have previously acted unreasonably, and this should be considered in assessing the penalty in this case.

CONCLUSIONS OF LAW

I. The claimant has the burden of proving by of 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.

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact

based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W. 2d 368 (Iowa 1985).

In this case, I did not find any new compensable injuries.

II. A review-reopening claim initiated pursuant to Iowa Code section 86.14(2) requires proof that, after the award or settlement, the claimant's physical disability has increased in a scheduled member case, or his earning capacity has changed in an industrial disability case as a result of a worsened physical or non-physical condition caused by the original work injury. Although we do not require the claimant to demonstrate his change in condition was not contemplated at the time of the original settlement, we emphasize the principles of res judicata still apply—that the agency, in a review-reopening petition, should not reevaluate an employee's level of physical impairment or earning capacity, if all of the facts and circumstances were known at the time of the original action. Kohlhass v. Hog Slat, Inc, 777 N.W.2d 387 (Iowa 2009).

In this case, I found that claimant did suffer a significant worsening of his physical condition that had existed in January 2014, the basis for the Agreement for Settlement in May 2014.

III. The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001);

Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

A treating physician's opinions are not to be given more weight than a physician who examines the claimant in anticipation of litigation as a matter of law. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404, 408 (Iowa 1994); Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

The extent of claimant's entitlement to permanent disability benefits is determined by one of two methods. If it is found that the permanent physical impairment or loss of use is limited to a body member specifically listed in schedules set forth in one of the subsections of Iowa Code section 85.34(2)(a-t), the disability is considered a scheduled member disability and measured functionally. If it is found that the permanent physical impairment or loss of use is to the body as a whole, the disability is unscheduled and measured industrially under Code subsection 85.34(2)(u). Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. Delong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

In this case, the review-reopening claim was against the defendants BF. The greater weight of evidence did show a significant worsening of the left arm condition.

There was no opinion from physicians concerning the percentage of loss of function for the worsened condition. In making assessment of the loss of use of a scheduled member, the evaluation is not limited to the use of a standardized guide. Lay testimony and demonstrated difficulties from claimant must be considered in determining the actual loss of use so long as loss of earning capacity is not considered. Miller v. Lauridsen Foods, Inc. 525 N.W. 2d 417, 420, 421 (Iowa 1994); Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

Given the evidence presented, I found that claimant suffered an additional 35 percent loss of use to the left arm. Based on such a finding, claimant is entitled to an additional 87.5 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(m), which is 35 percent of 250 weeks, the maximum allowable weeks of disability to an arm.

The parties stipulated in the hearing report that claimant was off work after August 25, 2014 and still under treatment by Dr. Gaffey. I found that claimant did not achieve MMI from the worsened condition until September 17, 2014. Therefore, claimant was off work during treatment of her worsened condition from August 26, 2010 through September 17, 2014 and total of 3.429 weeks. Healing period benefits shall be awarded accordingly.

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

In the case at bar, I found that only the five visits ($550.00) with Dr. Flatt constituted reasonable and necessary treatment for the worsened left arm condition. Medical benefits shall be awarded accordingly.

Claimant also seeks reimbursement for two disability evaluations by Dr. Bansal on December 19, 2014 and March 28, 2015. (Ex. 9) Only the December 19, 2014 exam dealt with claimant's elbow problems. The March 2015 exam was for the trigger finger which was not found related to claimant's work at BF. Dr. Gaffey, a doctor chosen by defendants BF, issued permanent restrictions. The imposition of restrictions or lack thereof is viewed as a prior disability evaluation for the purposes of Iowa Code section 85.39. Pella Corporation v. Marshall, ____ N.W.2d ____(CA 2016); CA Opinion, Case No. 14-2121, Filed April 6, 2016. Dr. Bansal's fee of $995.00 shall be awarded.

V. Claimant seeks additional weekly benefits under Iowa Code section 86.13(4), That provision states that if a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the industrial commissioner shall award extra weekly benefits in an amount not to exceed 50 percent of the amount of benefits that were unreasonably delayed or denied if the employee demonstrates a denial or delay in payment or termination of benefits and the employer has failed to prove a reasonable or probable cause or excuse for the denial, delay or termination of benefits. (Iowa Code section 85.13(4)(b). A reasonable or probable cause or excuse must satisfy the following requirements pursuant to Iowa Code section 86.13(4)(c):

> (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee;
>
> (2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits;
>
> (3) The employer or insurance carrier contemporaneously conveyed the basis of the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay or termination of benefits.

The employer has the burden to show a reasonable and probable cause or excuse. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable." City of Madrid v. Blasnitz, 742 N.W.2d 77, 83 (Iowa 2007); Christensen v.

Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996); Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

Despite assurances that future flare-ups would reopen her worker's compensation case made to claimant to entice her into signing an Agreement for Settlement in May 2014, defendants did not and unreasonably denied healing period and permanent disability benefits for a worsened condition caused by a flare-up. Given their actions in this case, the maximum penalty of 50 percent of the benefits denied will be applied. For the denial of healing period benefits, the penalty is 1.714 weeks at the weekly rate of $497.18. For the denial of permanent disability benefits, the penalty is 43.75 weeks at the same weekly rate. The total penalty is $22,603.79.

Finally, claimant also seeks additional disability benefits from the Second Injury Fund under IC sections 85.63--85.69. This fund was created to compensate an injured worker for a permanent industrial disability resulting from the combined effect of two separate injuries to a scheduled member. The purpose of such a scheme of compensation was to encourage employers to hire or retain handicapped workers. Anderson v. Second Injury Fund, 262 N.W.2d 789 (Iowa 1978). There are three requirements under the statute to invoke Second Injury Fund liability. First, there must be a permanent loss or loss of use of one hand, arm, foot, leg or eye. Secondly, there must be a permanent loss or loss of use of another such member or organ through a compensable subsequent injury. Third, there must be permanent industrial disability to the body as a whole arising from both the first and second injuries which is greater in terms of relative weeks of compensation than the sum of the scheduled allowances for those injuries. If there is greater industrial disability due to the combined effects of the prior loss and the secondary loss than equals the value of the prior and secondary losses combined, then the fund will be charged with the difference. Id.

In this case, I was unable to find a first qualifying injury involving a right arm which led to permanent disability. Therefore, claimant is not entitled to benefits from the Second Injury Fund of Iowa.

The May 2014 Agreement for Settlement established a right arm injury for the purposes of future litigation between the parties to that agreement. The Second Injury Fund of Iowa was not a party to that agreement and it is not binding of the Fund in subsequent litigation. Grahovic v. Second Injury Fund of Iowa, File No. 5021995 (App., October 9, 2009).

ORDER

File No. 5035165 (DOI July 26, 2010):

1. Defendants Bridgestone/Firestone and Old Republic Insurance Co., shall pay to claimant eighty-seven point five (87.5) weeks of permanent partial disability benefits at the stipulated rate of four hundred ninety-seven and 18/100 dollars ($497.18) per

week from September 18, 2014. Defendants shall pay accrued weekly benefits in a lump sum.

2. Defendants Bridgestone/Firestone and Old Republic Insurance Company shall pay to claimant healing period benefits from December 26, 2014 through September 17, 2014, at the rate of four hundred ninety-seven and 18/100 dollars ($497.18) per week.

3. Defendants Bridgestone/Firestone and Old Republic Insurance Company shall pay Dr. Flatt's expenses in the amount of five hundred fifty and 00/100 dollars ($550.00). Defendants shall reimburse claimant for any portion she has personally paid of these expenses and hold claimant harmless from the remainder.

4. Defendants Bridgestone/Firestone and Old Republic Insurance Company shall pay to claimant as a penalty for their unreasonable claims activity the sum of twenty-two thousand six hundred three and 79/100 dollars ($22,603.79).

5. Defendants shall pay interest on unpaid weekly benefits awarded herein pursuant to Iowa Code section 85.30.

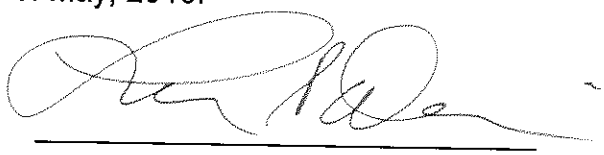
6. Defendants shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33, including reimbursement to claimant for the one hundred and 00/100 dollars ($100.00) filing fee, six and 74/100 dollars ($6.74) in service costs to commence the review-reopening proceeding and the transcription costs of sixty-six and 50/100 dollars ($66.50).

7. Defendants shall file subsequent reports of injury (SROI) as required by our administrative rule 876 IAC 3.1(2).

File Nos. 5052462, 5052463 and 5060059 (DOIs, 5/31/13; 8/29/13 & 8/25/14):

Claimant shall take nothing from either defendants Bridgestone/Firestone and Old Republic Insurance Company or defendant Second Injury Fund of Iowa.

Signed and filed this 20th day of May, 2016.



LARRY WALSHIRE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Robert E. Tucker
Attorney at Law
2400 - 86th St., Ste. 35
Urbandale, IA 50322-4306
robtucker@tuckerlaw.net

Timothy W. Wegman
Attorney at Law
6800 Lake Dr., Ste. 125
West Des Moines, IA 50266
tim.wegman@peddicord-law.com

Sarah Brandt
Assistant Attorney General
Department of Justice-Special Litigation
Hoover State Office Building
Des Moines, IA 50319
Sarah.brandt@iowa.gov

LPW/sam

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.