BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PEGGY A. OTTERPOHL, Claimant, vs. ARAMARK UNIFORM SERVICES, Employer, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier, Defendants.	File Nos. 5058096, 5058097 A R B I T R A T I O N D E C I S I O N Head Note Nos.:1108, 1803, 2500, 2401, 2800, 4000

STATEMENT OF THE CASE

Claimant, Peggy Otterpohl, filed two petitions for arbitration seeking workers' compensation benefits from Aramark Uniform Services, the employer and Indemnity Insurance Company of North America, the insurance carrier.

The matter came on for hearing on December 5, 2017, before deputy workers' compensation commissioner Joseph L. Walsh in Sioux City, Iowa. The record in the case is voluminous. It consists of claimant's exhibits 1 through 11; defense exhibits A through C; joint exhibits 1 through 19; as well the sworn testimony of claimant, Peggy Otterpohl, her husband, David Otterpohl, and defense witness, Tracy Ramarez. Carolyn Plueger was appointed as the court reporter for the proceedings. The parties briefed this case and the matter was fully submitted on May 14, 2018.

ISSUES AND STIPULATIONS

The following issues and stipulations were submitted.

The stipulations presented in the hearing report are accepted and are binding upon the parties. It is stipulated that claimant suffered an injury which arose out of and in the course of employment on January 9, 2015, and a second injury on July 9, 2015.

The parties stipulated that these work injuries are a cause of some permanent disability. The primary issue is the extent of the claimant's entitlement to permanent partial disability. Claimant is seeking either a running award of healing period benefits or an award of permanent total disability for her January 9, 2015, injury. There is no claim for additional temporary disability benefits regarding her July 9, 2015, injury.

For the January 9, 2015, work injury, claimant alleges she is entitled to a running award of benefits and that her disability is industrial. Defendants contend her disability is limited to the left leg only. The parties stipulate that the July 9, 2015, work injury is an industrial disability. The parties do not agree upon the commencement date for permanency benefits for either injury.

The parties have stipulated to all of the elements of the rate of compensation for both injuries. Defendants have waived affirmative defenses with the exception of notice under Section 85.23, for the January 9, 2015, injury. Claimant alleges defendants waived the notice defense.

The claimant seeks payment of medical expenses as set forth in Claimant's Exhibit 6. The defendants have raised a variety of defenses to these bills including whether the prices are fair and reasonable, causal connection and authorization.

The claimant seeks payment of IME expenses as set forth in Joint Exhibit 19, pages 106-108.

The claimant further seeks alternative medical care for her January 2015, work injury. Defendants deny she is entitled to further medical care.

The parties have agreed upon all of the benefits which have been paid to the claimant and those are summarized in Defendants' Exhibit B.

Claimant seeks penalties on a variety of grounds and the parties have asked for a specific taxation of costs.

FINDINGS OF FACT

Peggy Otterpohl is a pleasant, 58 year-old lifelong resident of Sioux City, Iowa. She testified live and under oath at hearing. I find her testimony to be generally credible. Her testimony was consistent with her deposition testimony. (Claimant's Exhibit 8) Her testimony was consistent with the medical documentation in the file. There was nothing about her demeanor which caused me any concern about her truthfulness.

Ms. Otterpohl is married to David Otterpohl. They have one grown son. Ms. Otterpohl graduated from South Sioux City High School in 1978. She testified she was an average student. She began working for Aramark in March 2001. At first, much of her work was in data entry. She later became a janitor and also performed duties in

shipping and receiving. She also regularly filled in for other employees and she was familiar with most of the jobs in the facility. She was a valuable employee. Aramark is a commercial Laundromat. Ms. Otterpohl testified the building she worked in is old and is not in excellent condition.

Prior to working at Aramark, Ms. Otterpohl performed a variety of other jobs in the region. During high school she worked as a grocery clerk, babysitter, waitress and she cleaned hotel rooms. After her son was born, she took some time off to raise him. When she re-entered the workforce, she returned to grocery work, before working at a hospital, performing meal preparation and dietary aid work. She worked at the IBP plant for a time as a meat trimmer, performed some telemarketing work at MCI and phone collection work for Gateway as well. She did supervise other employees at MCI and she utilized computers at MCI and Gateway.

Ms. Otterpohl testified that she slipped and fell on a puddle of water which had formed on the ground while working for Aramark on January 9, 2015. (Transcript, pages 57-60) She testified the fall was witnessed by a co-worker, Jay Liesner. (Tr., pp. 59-60) The injury itself is not in dispute. That is to say, the defendants do dispute that they had notice of an injury. (Tr., pp. 12-16) Specifically, defendants contend that they did not know the claimant alleged that she injured her back and hip in the accident. By way of a First Report of Injury, the defendants fully concede, however, that they knew she had suffered an injury on that date. (*See* Defendants' Exhibit C) The specific dispute revolves around whether the claimant provided notice of which specific body parts were injured. Ms. Otterpohl's supervisor, Tracey Ramarez, acknowledged that she informed him of the injury, but he understood it was only a knee injury. Mr. Ramarez took notes of her injury and reported it to the insurance carrier. In all likelihood, he threw away his handwritten notes. (Tr., pp. 155-156) Very little investigation was performed into Ms. Otterpohl's injury thereafter.

The defendants raised the affirmative defense of notice in their Answer. In their answers to interrogatories, however, defendants did not submit a notice defense. (Cl. Ex. 10, pp. 10-12) Claimant specifically asked about the defendants' Iowa Code section 85.23 defense. Defendants responded that there were no "facts known to Defendants at this time." (Cl. Ex. 10, p. 12) Defendants further stated that the defendants continue to "investigate the applicability of these affirmative defenses, and this answer will be supplemented as necessary." (Cl. Ex. 10, p. 12) Claimant's counsel stated that he understood this to mean that the defense had been waived. Defendants never formally updated their answers up to and including the date of hearing. For their part, however, defendants contended that the interrogatories were essentially updated when they went over the hearing report in advance of the hearing date. (Tr., pp. 14-15) I find that the defendants did not intend to waive the notice defense, however the defendants did not properly respond to the interrogatory sufficiently to allow claimant to respond appropriately to the notice defense. In spite of all of this, I find it highly unlikely that the claimant would have proceeded differently with discovery had defendants informed her of the notice defense in the interrogatories.

In any event, the claimant initially treated with Siouxland Medical Education Foundation. She attended appointments at Siouxland Medical Education several times between her date of injury until she was referred to an orthopedic surgeon at Tri-State Specialists in April 2015. Those records document her work-related right knee injury and do not specifically mention low back or left hip pain. (Jt. Ex. 5)

On April 7, 2015, 88 days after the work injury, she filled out a Patient Medical History Form. She clearly listed symptoms in her right knee, her low back and her left hip. (Jt. Ex. 7, pp. 1-2) She was evaluated by Kevin Liudahl, M.D., who diagnosed right knee osteoarthritis and recounted a generally accurate history of events leading up to that time. (Jt. Ex. 7, p. 3) This treatment was authorized and directed by the defendants. Interestingly, although claimant had clearly indicated she had low back and left hip symptoms from the injury at this visit, Dr. Liudahl did not document anything about these problems in his initial notes. Dr. Liudahl provided an injection for pain and took over the care at that time. A few weeks later he recommended surgery. (Jt. Ex. 7, p. 4) In July 2015, Dr. Liudahl opined that claimant's ongoing right knee symptoms were caused by her work injury. (Jt. Ex. 7, p. 5)

Between April and July 2015, Ms. Otterpohl had been taken off of light-duty for her January 2015 work injury. On July 9, 2015, she suffered an injury, which arose out of and in the course of her employment, to her left shoulder. The injury is described in great detail at hearing. (Tr., pp. 75-77) She felt a sudden, loud pop in her shoulder while she was swinging a large bag into a cage. She immediately reported the injury and it was processed as a work injury. The symptoms were severe. She began medical treatment through the Siouxland Medical Education Foundation, whose records are not in evidence.

On August 19, 2015, Dr. Liudahl performed surgery on Ms. Otterpohl's right knee. (Jt. Ex. 8) Dr. Liudahl also referred claimant to Leonel Herrera, M.D., for treatment of her right hip and low back. (Jt. Ex. 7, p. 7) Dr. Herrera ultimately declined to see her until she was released from her shoulder surgery. (Jt. Ex. 7, p. 8) She was also referred to Benjamin Bissell, M.D., an orthopedic shoulder specialist at CNOS on September 3, 2015. (Jt. Ex. 3, pp. 8-11) He immediately recommended left shoulder surgery which was performed on September 25, 2015. (Jt. Ex. 10, pp. 1-3) Her diagnosis was "left shoulder rotator cuff tear and impingement with SLAP type II tear and biceps tendinosis." (Jt. Ex. 10, p. 1) A second left shoulder surgery was performed on January 29, 2016. (Jt. Ex. 10, pp. 4-6) She had follow up care but the results of the surgeries were less than optimal. (Jt. Ex. 3, pp. 31-42)

While Ms. Otterpohl was recuperating from her left shoulder injury, she was sent for an independent medical evaluation with Jacqueline Stoken, D.O., on May 23, 2016. Dr. Stoken evaluated both her left shoulder and her right knee and prepared a report dated June 1, 2016. (Jt. Ex. 13) Her diagnoses essentially agreed with those of the treating physicians. (Jt. Ex. 13, p. 22) With regard to the right knee, she indicated Ms. Otterpohl was at maximum medical improvement (MMI) and assessed a 2 percent impairment of the right leg. (Jt. Ex. 13, p. 23) For the left shoulder, she indicated

claimant was not at MMI. She recommended sedentary work restrictions. (Jt. Ex. 13, p. 24) Ms. Otterpohl testified credibly that Dr. Stoken told her she had been directed to not evaluate either her hip or back. (Tr., pp. 70-71)

Thereafter, Ms. Otterpohl continued to follow up with Dr. Bissell for her left shoulder, including physical therapy, additional diagnostic tests, injections, medications and restrictions. (Jt. Ex. 3, pp. 43-50) In August 2016, he recommended a functional capacity evaluation (FCE). (Jt. Ex. 3, p. 51) The FCE was performed in September 2016. (Jt. Ex. 15) It placed her in the sedentary work category in addition to providing a number of specific restrictions and limitations. (Jt. Ex. 15, p. 9) On September 29, 2016, Dr. Bissell seemed to both endorse the FCE restrictions and note specific restrictions related to the left shoulder condition. (*See* Jt. Ex. 3, pp. 53; 55-56) He stated that she should infrequently lift greater than 5 pounds with the left shoulder and perform no overhead work. (Jt. Ex. 3, p. 55)

Ms. Otterpohl first had her low back and hip symptoms evaluated in January 2017 by Quentin Durward, M.D., at CNOS. He documented her January 9, 2015, work injury and noted she has had severe low back and left hip pain since then. (Jt. Ex. 3, pp. 67-69) "I think definitely it has been a long time since her work injury, which I believe should be covered by workers' compensation but she does need further treatment." (Jt. Ex. 3, p. 68) He recommended physical therapy and bracing at that time.

Ms. Otterpohl had treated with Dr. Durward for a motor vehicle accident which affected her low back in the mid-1990's. In fact, Ms. Otterpohl underwent a two-level surgical fusion with Dr. Durward, and another physician, in October 1998. (Jt. Ex. 2, pp. 4-8) In November 1999, Dr. Durward documented the following:

> She is still getting a significant amount of movement related back pain. Despite what appeared to be excellent films previously I am wondering whether she has got a pseudoarthrosis at one of the interfaces. I am getting another MRI scan and I will see her back after this. The question comes up as to whether she would benefit from placement of pedicle screws and a postrolateral fusion.

(Jt. Ex. 3, p. 1) Ms. Otterpohl testified that she could not recall receiving any further treatment and that the result was ultimately very good. There are no records of further treatment. She testified that she was able to work without limitations. She did receive a settlement from the motor vehicle accident.

In February 2017, Ms. Otterpohl was evaluated by Douglas Martin, M.D. Dr. Martin reviewed relevant medical files and evaluated her. He opined that she did suffer a minor permanent impairment to her left shoulder resulting from the July 2015, work injury. (Jt. Ex. 18, pp. 9-11) He, however, strongly disagreed with the treating surgeon's restrictions, as well as those set in the FCE. (Jt. Ex. 18, p. 12) With regard to her right knee, he opined that while it was possible that her knee condition

accelerated as a result of the January 2015, work injury, but, he could not find any "acute traumatic-type situation." (Jt. Ex. 18, pp. 9-10) Regarding her low back pain, he diagnosed mechanical low back pain and stated that this was not causally connected to her work injuries. (Jt. Ex. 18, p. 18) Overall, the opinions of Dr. Martin do not comport with the remainder of the file. His opinions dismiss and diminish Ms. Otterpohl's well-documented ongoing symptoms and are ultimately inconsistent with the well-documented medical records in evidence. His report is given little weight.

By May 2017, Dr. Durward recommended surgery for Ms. Otterpohl's low back. (Jt. Ex. 3, p. 81) For a variety of insurance reasons, Ms. Otterpohl has been unable to schedule the surgery. Ms. Otterpohl has undergone several pre-operative examinations. In December 2017, she was found to be at significant risk for multiple pulmonary issues which had not been treated. (Jt. Ex. 11, p. 4) Since the claim was formally denied, Ms. Otterpohl has sought treatment on her own for her low back with her primary physicians, as well as with Siouxland Pain Clinic. (Jt. Ex. 9; Jt. Ex. 16) She has received pain injections, medications and a cane. She has not received further care for her right knee. A summary of her claimed medical expenses are outlined in Claimant's Exhibit 6.

Dr. Durward and Dr. Bissell both provided well-reasoned expert medical opinions, including causation, prior to hearing. In August 2017, Dr. Durward opined that Ms. Otterpohl sustained a material aggravation of her preexisting back condition on January 9, 2015, and that he recommended surgery to correct this. (Jt. Ex. 3, p. 91) Dr. Bissel opined that Ms. Otterpohl sustained an injury to her left shoulder on July 9, 2015, which required two surgical interventions. (Jt. Ex. 3, p. 102) He assessed a 7 percent body as a whole rating.

Claimant also sought an independent medical examination from Sunil Bansal, M.D., in October 2017. (Jt. Ex. 19) Dr. Bansal reviewed the relevant portions of the medical file and thoroughly examined the claimant. Dr. Bansal's opinions regarding the right knee and left shoulder, largely confirmed the opinions of the other treating and evaluating physicians. Regarding the low back, he agreed with Dr. Durward on medical causation and recommended the surgery suggested. (Jt. Ex. 19, p. 100)

Ms. Otterpohl testified that she is significantly disabled as a result of her work injuries. She testified she began using a cane in August 2015, when she had her right knee surgery. She testified she is unable to walk long distances without it. She has difficulty bending and performing a variety of activities of daily living. Claimant's husband also testified regarding her inabilities.

Defendants utilized surveillance on claimant in June and December 2016, as well as September and November 2017. (Def. Ex. A) She was video recorded. The surveillance footage does not show her doing much, but it does show her walking without a cane, bending and performing a variety of daily activities around her home.

Ms. Otterpohl was referred by her primary physician to see a therapist for depression type symptoms in April 2016. (Jt. Ex. 9, p. 12) "PT has had 3 surgeries in the last year and her pain limits her ability to do many things she wants to do. Pt is very tearful." (Jt. Ex. 9, p. 11) He diagnosed situational depression, which he characterized as severe, and placed her on Cymbalta to help control the pain. He noted that she was worried about being on so many pain medications.

In February 2017, defendants directed claimant to see Bruce Gutnick, M.D., for a psychiatric evaluation. Dr. Gutnick diagnosed mild adjustment disorder with depressed mood, somatic symptoms disorder and mild opioid use disorder. (Jt. Ex. 17, pp. 12-13) He could not relate any of these conditions to her work injury. (Jt. Ex. 17, p. 13) There are no restrictions on claimant for her mental health conditions. She has continued to receive medications from her family doctor.

Ms. Otterpohl has not returned to work for the employer. She last worked for Aramark in approximately September 2015. She has not worked anywhere since she left work. She has not looked for work. (Tr., p. 54) She was eventually awarded Social Security Disability. (Tr., pp. 53-54; Cl. Ex. 2) Ms. Otterpohl offered vocational evidence through Rick Ostrander, dated January 2018. Mr. Ostrander opined Ms. Otterpohl has suffered a 100 percent loss of earning capacity and employability. (Cl. Ex. 4, pp. 15-16)

CONCLUSIONS OF LAW

File No. 5058096

The first question is notice.

Defendants assert that claimant failed to give timely notice within 90 days from the date of the injury (January 9, 2015), per Iowa Code section 85.23 for her low back and hip complaints. Defendants concede claimant gave notice that she suffered an injury to her right knee. Claimant argues forcefully that defendants waived the notice defense. Secondarily, claimant argues that she did provide notice of all of her injuries but that defendants failed to properly investigate her claims.

The burden of proving that claimant failed to provide notice within 90 days of the date of injury rests upon the defendant. IBP, Inc. v. Burress, 779 N.W.2d 210, 219 (Iowa 2010); DeLong v. Highway Comm'n, 299 Iowa 700, 295 N.W. 91 (1940).

The applicable code section regarding notice states:

> Unless the employer or the employer's representative shall have actual knowledge of the occurrence of an injury received within ninety days from the date of the occurrence of the injury, or unless the employee or someone on the employee's behalf or a dependent or someone on the

> dependent's behalf shall give notice thereof to the employer within ninety days from the date of the occurrence of the injury, no compensation shall be allowed.

Iowa Code section 85.23.

The purpose of the 90-day notice requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. "[T]he notice requirement of section 85.23 protects the employer by insuring he is alerted 'to the *possibility of a claim* so that an investigation can be made while the information is fresh.'" Dillinger v. City of Sioux City, 368 N.W.2d 176, 180 (Iowa 1985) (quoting Robinson v. Department of Transportation, 296 N.W.2d 809, 811 (Iowa 1980)).

There is no requirement in the plain language of section 85.23 which requires an injured worker to provide notice of an injury to a specific body part. Jermaine Daye v. Pine Ridge Farms, File Nos. 5042953 & 5042954 (Arb. June 17, 2014) (citing Workers' Compensation - Iowa Practice, 15 (2013-2014), Section 10.5, p. 104). In the recent case, Hansen v. Corvel Corp., File No. 5062631 (Arb. March 5, 2019), Deputy Gordon held that an injured worker who withheld information regarding which body parts were injured, could be barred by notice provisions. This case is obviously distinguishable in that there is no allegation Ms. Otterpohl intentionally withheld information about her injury.

I have rejected the claimant's contention that defendants waived the notice defense. I agree with claimant that the defendants did not properly answer interrogatory No. 28. The answer was misleading and stated that there were no "facts known to the Defendants" about a notice defense. Claimant's counsel contended that this response effectively modified the defendants' answer where the notice defense was asserted. While I am sympathetic to claimant's position, I find that the defendants did not intentionally waive its notice defense. It was likely a technical mistake. I further find that the claimant was not prejudiced by this response as it appears highly unlikely that claimant would have altered the manner in which she pursued her claims had the defendants answered the interrogatory properly. While the defendants did not formally amend their interrogatory answer, they did notify the claimant in advance of the hearing of their intent to pursue to the notice defense. Therefore, I consider the merits of the notice defense.

In this case, Ms. Otterpohl testified credibly that she told her supervisor, Mr. Ramarez, about the fact that an injury occurred and the body parts she injured. Mr. Ramarez testified that he only remembered her discussing the knee, not the back (or hip). If he took any notes, he did not save them. I find that defendants have failed to meet their burden of proof on the notice defense.

The defendants point to the fact that the first treatment provider, Siouxland Medical Education, did not document or record any issues other than the right knee symptoms. Nevertheless, 88 days after the injury, Ms. Otterpohl filled out a full medical questionnaire for the defendants' authorized treating physician, Dr. Liudahl. (Jt. Ex. 7, pp. 1-2) This appears to be the first time that any agent of the defendants actually asked Ms. Otterpohl to explain exactly which body parts were injured in the accident. In other words, even if the claimant had not reported her back and hip symptoms to the defendants initially, they acquired actual knowledge of those symptoms when she saw Dr. Liudahl. Like Siouxland Medical Education, Dr. Liudahl did not mention the back symptoms in his treatment note, even though she had clearly reported those symptoms to him in the medical questionnaire. The defendants, of course, could have clarified all of this by performing a better contemporaneous investigation and by appropriately documenting the precise injury after it initially occurred.

In summary, I find the following: (1) there is generally no requirement for an injured worker to report the exact body part which was injured when providing notice under section 85.23; (2) the greater weight of evidence supports a finding that claimant did report symptoms in her low back and hip when she reported her injury shortly after it occurred; (3) in any event, the defendants conclusively had actual knowledge of symptoms in claimant's low back and hip 88 days after the injury, as reported to their authorized treating physician; and (4) any confusion in the precise body parts which were injured in January 2015, were primarily the result of a substandard investigation by the defendants. For all these reasons, I find the defendants have failed to meet their affirmative notice defense on the merits.

The next issue is the nature of the claimant's injury.

The defendants contend that claimant only injured her right knee. Claimant alleges she also suffered an injury to her low back and left hip.

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

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

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).

As presented, this issue is primarily an issue of medical causation. I find that the greater weight of evidence supports the claimant's contention that she injured her low back in addition to her right knee on January 9, 2015. I am particularly convinced by the medical opinions of Dr. Durward. (Jt. Ex. 3, pp. 89-92) Dr. Durward had treated Ms. Otterpohl's low back in 1996, and fully understood the extent of the preexisting injury in her low back. He began treating her again in 2017, after she healed from her shoulder surgery. He was in a better position, than any other physician, to assess and understand whether she had suffered an aggravation to the condition in her low back. He opined to a reasonable degree of medical certainty that she suffered a material

aggravation of her pre-existing lumbar spine condition due to her January 9, 2015, work injury. (Jt. Ex. 3, p. 91) His opinion is supported by Dr. Bansal, who wrote a thorough and comprehensive report. (Jt. Ex. 19, p. 100)

In contrast, the defendants' primary evidence that she did not damage her back in the accident is the report of Dr. Martin. Dr. Martin opined she suffered from mechanical low back pain, which appears to be plainly wrong. On the basis of his diagnosis of mechanical low back pain, he opined that he did not believe that her "low back complaints have any relationship from an aggravation or work exacerbation perspective." (Jt. Ex. 18, p. 18) "Rather, I think her low back pain is due to a combination of age, anthropomorphic factors, genetics, and the fact that she has undergone a previous two-level fusion procedure of the lumbar spine." (Jt. Ex. 18, p. 18) Dr. Martin is an occupational medicine physician who was hired by defendant for a one-time evaluation. (Jt. Ex. 18, pp. 23-24) I find that Dr. Durward, a spine specialist, who treated the claimant, including surgery, for her preexisting low back condition, as well as her current symptoms, is in a much better position to evaluate her condition. Ultimately, I find the opinion of Dr. Durward, which is supported by the other medical documentation, to be more persuasive.

The defendants urge that Ms. Otterpohl is not credible. They essentially argue that the determination of whether the claimant's low back condition is causally connected to her January 9, 2015, work injury, hinges upon claimant's testimony that she began experiencing back pain immediately after the injury. Defendants contend that since there is no documentation that she had any low back symptoms until three months after the injury, combined with their contentions that claimant's testimony is otherwise not credible for a variety of reasons, the claimant cannot meet her burden of proof.

I find that Ms. Otterpohl is generally credible. Her testimony at hearing is generally quite consistent with the medical evidence presented at hearing. Her hearing testimony was highly consistent with her deposition testimony. While the claimant did appear somewhat nervous at hearing, there was nothing about her demeanor which caused me concern about her truthfulness. I already found that she most likely did tell her supervisor about her low back pain immediately following the injury. Her supervisor could not recall with certainty exactly what she told him. (Tr., p. 151) The first time she was ever asked to fill out a medical questionnaire by the employer or their medical providers, she listed her low back symptoms and related those to her injury. (Jt. Ex. 7, pp. 1-2) There are no medical records in evidence that she had any ongoing issues with her low back after 1998. She was able to work for Aramark without restrictions or limitations, which was occasionally fairly heavy work, since 2001. Likewise, there is nothing in the surveillance videos which significantly directly contradicts any of her sworn testimony. At the very worst, she may have exaggerated how much she uses her cane. Overall, however, I find Ms. Otterpohl to be a credible witness. I believe her without reservation that she began experiencing a new type of low back pain after her January 9, 2015, work injury.

For all of these reasons, I find that she did suffer an injury to her low back on January 9, 2015, and that her current symptoms and need for treatment are causally connected to this injury.

The next issue is medical expenses and alternate medical care.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Iowa Code section 85.27 (2017).

Claimant is entitled to an order of reimbursement only if he has paid treatment costs; otherwise, to an order directing the responsible defendants to make payments directly to the provider. See, Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Defendants should also pay any lawful late payment fees imposed by providers. Laughlin v. IBP, Inc., File No. 1020226 (App., February 27, 1995).

Claimant seeks payment of past medical expenses as outlined in Claimant's Exhibit 6. Claimant's Exhibit 6 includes a comprehensive summary of all of the medical expenses for both files, making it somewhat difficult to follow in terms of what exactly the claimant is requesting for each file at this time. Based upon the summary and corresponding documentation in Claimant's Exhibit 6, the defendants failed to pay the following expenses which correspond to medical records related to claimant's January 9, 2015, work injury:

CNOS	11/7/16 – 12/20/17
Dunes Surgical Hospital	12/6/16 – 11/1/17
UnityPoint Cardiovascular Associates	11/14/17
Diagnostic Radiology	11/1/17
Siouxland Pain Clinic	10/20/16 – 12/28/17
Siouxland Medical Education Foundation	7/22/15

(Cl. Ex. 6, pp. 4-7)

I find that the defendants are responsible for these expenses. Any outstanding amounts shall be paid directly to the provider. Any amounts paid by claimant shall be reimbursed to the claimant. Any amounts paid by another insurance carrier shall be resolved with the carrier and claimant shall be held harmless. In addition, defendants shall pay $123.66 in medical mileage.

The claimant is also seeking mental health treatment expenses (under both files) which she received through her family physician, Family Health Care, beginning August 16, 2016. I find that the claimant has not carried her burden of proof that her mental health expenses are causally-connected to her work injury (under either File Number). The only mental health provider to opine on medical causation for this condition opined the condition is unconnected to either work injury. (*See* Jt. Ex. 17)

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

The next issue is alternate medical care.

Iowa Code section 85.27(4) provides, in relevant part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

The defendants denied claimant's low back condition as being connected to her January 9, 2015, work injury. After the claim was denied, claimant was free to seek treatment with a physician of her choice. She has established treatment with Dr. Durward. Having found that defendants are responsible for the care and treatment of claimant's low back, I find care should continue with Dr. Durward. Treatment recommended by Dr. Durward shall be deemed authorized by defendants. Prior to hearing, Dr. Durward sought to perform surgery. If the surgery is still recommended, it should be authorized, however, there were other issues which called into question whether surgery is advisable. Ms. Otterpohl should be allowed to return to Dr. Durward for further treatment recommendations at this time.

The claimant also seeks a specific order for other treatment recommended by Dr. Bansal and the Siouxland Pain Clinic. I decline to order such specific treatment at this time. All further treatment for claimant's January 9, 2015, shall be directed by Dr. Durward based upon his medical judgment.

The next issue is healing period benefits.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

It has long been held that a healing period may be intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986). Healing period may terminate and then begin again. Willis v. Lehigh Portland Cement Co., I-2 Iowa Ind. Comm'r Decisions 485 (Review-Reopening 1984).

The claimant argues she is entitled to a running award of healing period benefits since she is not yet at maximum medical improvement. Defendants argue that claimant's low back condition is not connected to her work injury. Having found that the low back condition is connected as set forth above, the next step is to analyze what temporary benefits the claimant is entitled to. Ms. Otterpohl injured and suffered disability to both her right knee and her low back in the January 2015, work accident. While she reached maximum medical improvement for the knee condition in early September 2015. On September 4, 2015, she saw Dr. Liudahl for her knee. "Examination today shows the knee looks fairly normal post-op knee scope." (Jt. Ex. 7, p. 6) He documented mild swelling and tenderness, as well as difficulties with movement and driving. He provided a knee injection and discussed the possibility that the issues with her leg were "from her sciatica" as opposed to post-operative knee issues. (Jt. Ex. 7, p. 6) He referred her to Dr. Herrera and recommended that she perform only desk work. It appears that this is approximately the time that she was taken off work altogether. I find that claimant has been in a healing period for her January 9, 2015 work injury since she has been off work.

I find that claimant is entitled to a running award of healing period benefits, commencing the date that claimant left work up through the date of hearing and continuing until claimant either returns to work, is capable of substantially similar work, or reaches maximum medical improvement. As such, it is not possible to address permanency at this time. The issue of permanency is bifurcated. Either party may file an arbitration petition to assess permanency once there is evidence that any of the three factors set forth in Section 85.34(1) are met.

File No. 5058097

The primary issue surrounding claimant's left shoulder claim is the extent of her industrial disability. The claimant alleges she is permanently and totally disabled as a result of all of her work-related disabilities. She alleged the odd-lot theory. The

defendants have taken the position that she is not. They contend that she merely suffered a scheduled member right leg injury on January 9, 2015, and that her July 9, 2015, left shoulder injury is not as severe as she claims.

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

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

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

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the "odd-lot doctrine." Under that doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id., at 105.

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106. Factors to be considered in determining whether a worker is an odd-lot employee include the worker's reasonable but unsuccessful effort to find steady employment, vocational or other expert evidence demonstrating suitable work is not available for the worker, the extent of the worker's physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried, and only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

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

In this case, the claimant has experienced two, successive industrial disabilities. First, she suffered an injury to her right knee and low back on January 9, 2015. After returning to work for a period of time, she suffered a second industrial disability to her left shoulder. I have awarded a running award of benefits for her January 9, 2015, low back condition based upon the assumption that she will receive further treatment, possibly a fusion at L3/4 as recommended by Dr. Durward. The claimant is at maximum medical improvement for her July 9, 2015, left shoulder disability. Nevertheless, in order to assess her industrial disability for the July 9, 2015, left shoulder condition, I must include the combined effects of both of her disabilities together.

7. Successive disabilities.

a. An employer is fully liable for compensating all of an employee's disability that arises out of and in the course of the employee's employment with the employer. An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment with a different employer or from causes unrelated to employment.

b. (1) If an injured employee has a preexisting disability that was caused by a prior injury arising out of and in the course of employment

> with the same employer, and the preexisting disability was compensable under the same paragraph of subsection 2 as the employee's present injury, the employer is liable for the combined disability that is caused by the injuries, measured in relation to the employee's condition immediately prior to the first injury. In this instance, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer.

Iowa Code section 85.34(7)(a)-(b)(1) (2017).

At the present time it is impossible to assess claimant's full disability resulting from both injuries because she is not at MMI for her earlier, January 9, 2015, low back disability. As such, I am not in a position to assess her full disability under the statute. All issues of the extent of claimant's disability are bifurcated as set forth above.

Both Files

The claimant has advanced penalty theories on both files.

Iowa Code section 86.13(4) provides:

> a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
>
> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (1) The employee has demonstrated a denial, delay in payment, or termination in benefits.
>
> (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.
>
> c. In order to be considered a reasonable or probable cause or excuse under paragraph "b," an excuse shall satisfy all of the following criteria:
>
> (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 for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

Claimant advances several separate penalty theories which encompass both claims. First, she argues that the impairment rating for her right leg was not paid timely. She reached MMI and stopped treating on the knee in September 2015. The defendants did not even seek a rating until they sent her to Dr. Stoken in May 2016. Payment was not issued until December 2016. Since I have determined that claimant is entitled to a running award of healing period benefits, however, the claimant's injury is deemed to be industrial and permanency is not owed, even as of the date of hearing. As such, no penalty can be awarded under this theory.

Claimant further alleges the following late payments:

8/19/16 – 8/21/15	Paid 9/11/15	(Def. Ex. B, p. 4)
3/6/16 – 3/12/16	Paid 3/22/16	(Cl. Ex. 7, p. 1)
11/30/16 – 12/5/16	Paid 12/19/16	(Def. Ex. B, p. 13)

By a preponderance of evidence these payments do appear to be late without any reasonable excuse. As such, penalty is mandatory.

Claimant further contends that there was a small underpayment of the rate conceded by defendants in their answers to interrogatories. The rate underpayment was corrected in a payment issued, and documented in a correspondence by defense counsel, in April 2017. The total underpayment amounted to $26.63. (Cl. Ex. 5) By a preponderance of evidence I find the rate underpayment was not paid timely. Defendants did not articulate a reasonable excuse for the underpayment.

In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229, 238 (Iowa 1996). In

this case, while a penalty is mandatory since the foregoing payments were technically late, I do not find the defendants' conduct to be particularly egregious. Considering all of the appropriate factors in assessing the amount of the penalty, I find that a penalty of $200.00 is appropriate to deter defendants from engaging in this type of conduct in the future.

The final issue is some minor IME expenses and costs. Claimant seeks an additional $48.13 for various expenses associated with her IME with Dr. Bansal. These are awarded.

Iowa Code section 86.40 states:

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

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

> **Costs.** Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb.

November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010) The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

Claimant seeks costs in the amount of $2,096.08, as attached to the Hearing Report. These costs are reasonable for this case.

ORDER

THEREFORE, IT IS ORDERED:

File No. 5058096:

Claimant is entitled to a running award of benefits. Defendants shall pay the claimant a running award commencing on the date claimant last worked, forward until such time as benefits may cease pursuant to Iowa Code section 85.34(1), at the rate of three hundred and ninety-nine dollars and 48/100 ($399.48) per week.

Either party may file a new petition for arbitration for the purpose of assessment permanent disability, when appropriate.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See. Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018)

Claimant is entitled to alternate medical care. Dr. Durward is claimant's treating physician at this time and shall direct all medical care for her back condition.

File No. 5058097:

For the reasons set forth in the decision, permanency cannot be assessed at this time. Either party may file a new petition for arbitration for the purpose of assessment permanent disability, when appropriate.

For Both Files:

Defendants shall pay a penalty of two hundred and no/100 dollars ($200.00).

Defendants shall pay outstanding IME expenses in the amount of forty-eight and 13/100 dollars ($48.13).

Defendants shall pay the costs of this action in the amount of two thousand ninety-six and 08/100 dollars ($2,096.08).

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

Signed and filed this 4th day of April, 2019.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JLW/kjw

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.