BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ANA DAVIS, Claimant, vs. KRAFT HEINZ COMPANY, Employer, and INDEMNITY INS. COMPANY OF N.A., Insurance Carrier, Defendants.	File No. 5066322 A P P E A L D E C I S I O N Head Notes: 1402.20; 1402.30; 1402.40; 1402.50; 1403.10; 1403.30; 1703; 1802; 1803; 2206; 2401; 2402; 2501; 2502; 2700; 2801; 2802; 2907;

Defendants Kraft Heinz Company, employer, and its insurer, Indemnity Insurance Company of North America, appeal from an arbitration decision filed on September 30, 2022. Claimant Ana Davis responds to the appeal. Three cases were consolidated for hearing, File Numbers 5066321, 5066322, and 5066323. Because the decisions in Files 5066321 and 5066323, were not appealed, this appeal pertains only to File Number 5066322. The case was heard on February 16, 2022, and it was considered fully submitted in front of the deputy workers' compensation commissioner on April 8, 2022.

In the arbitration decision, the deputy commissioner found claimant met her burden of proof to establish she sustained a cumulative injury to her bilateral arms and right shoulder, which manifested on March 9, 2017. The deputy commissioner found claimant is entitled to healing period benefits from December 20, 2019, through March 22, 2020, and from May 24, 2021, through July 5, 2021. The deputy commissioner found defendants are entitled to a credit for disability income paid to claimant. The deputy commissioner found defendants are responsible for the medical expenses set forth in Exhibit 15, and for reasonable and necessary future medical care for claimant's bilateral arms and right shoulder conditions. The deputy commissioner found claimant sustained 30 percent industrial disability, which entitles claimant to receive 150 weeks of permanent partial disability benefits commencing on July 6, 2021. The deputy commissioner found that pursuant to Iowa Code section 85.39, claimant is entitled to reimbursement from defendants for the cost of the independent medical examination (IME) of claimant performed by Richard Kreiter, M.D. The deputy commissioner found

that pursuant to rule 876 IAC 4.33, claimant is entitled to reimbursement from defendants in the amount of $100.00 for the filing fee, $13.28 for the cost of service of the petition, $72.15 for the cost of the deposition transcript, $330.00 for the cost of Thomas VonGillern, M.D.'s report, and $2,909.00 for the cost of Sunil Bansal, M.D.'s report.

Defendants assert on appeal that the deputy commissioner erred in finding claimant proved she sustained a work-related injury. Defendants assert the deputy commissioner erred in assigning an injury date of March 9, 2017, and defendants assert the deputy commissioner erred in finding claimant provided timely notice of the work injury under Iowa Code section 85.23, and in finding claimant complied with the statute of limitations under Iowa Code section 85.26. Defendants assert the deputy commissioner erred in finding claimant is entitled to receive healing period benefits. Defendants assert the deputy commissioner erred in failing to address whether claimant had achieved maximum medical improvement (MMI) and in failing to address whether permanency is ripe for adjudication. Defendants assert even if permanency is ripe for adjudication, the deputy commissioner erred in finding claimant sustained 30 percent industrial disability. Defendants assert the deputy commissioner erred in finding defendants are responsible for claimant's medical expenses. Defendants assert the deputy commissioner erred in finding defendants should reimburse claimant for the cost of Dr. Kreiter's IME and for costs.

Claimant asserts on appeal that the arbitration decision should be affirmed in its entirety.

Those portions of the proposed arbitration decision pertaining to issues not raised on appeal are adopted as part of this appeal decision.

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 17A.15 and 86.24, the arbitration decision filed on September 30, 2022, is affirmed in part, and is reversed in part, with my additional and substituted analysis.

Without further analysis, I affirm the deputy commissioner's finding that claimant is entitled to received healing period benefits from December 20, 2019, through March 22, 2020, and from May 24, 2021, through July 5, 2021. I affirm the deputy commissioner's finding that defendants are entitled to a credit for disability income paid to claimant. I affirm the deputy commissioner's finding that defendants are responsible for the medical expenses set forth in Exhibit 15, and for reasonable and necessary future medical care for claimant's bilateral arm and right shoulder conditions. I affirm the deputy commissioner's finding that defendants should reimburse claimant for the $1,000.00 cost of Dr. Kreiter's IME under Iowa Code section 85.39. I affirm the deputy commissioner's finding under rule 876 IA 4.33, claimant is entitled to reimbursement from defendants in the amount of $100.00 for the filing fee, $13.28 for the cost of service of the petition, $72.15 for the cost of the deposition transcript, $330.00 for the cost of Dr. VonGillern's report, and $2,909.00 for the cost of Dr. Bansal's report.

With my additional and substituted analysis, I affirm the deputy commissioner's finding that claimant proved she sustained a cumulative trauma to her bilateral arms and right shoulder, but I reverse the deputy commissioner's finding the injury manifested on March 9, 2017. With my additional and substituted analysis, I affirm the deputy commissioner's finding that claimant sustained 30 percent industrial disability as a result of the work injury, which entitles claimant to receive 150 weeks of permanent partial disability benefits, commencing on July 6, 2021.

FINDINGS OF FACT

Claimant lives in Muscatine with her husband and son. (Hearing Transcript p. 16) At the time of the arbitration hearing claimant was 60 years old. (Tr. p. 16) Claimant is right-hand dominant. (Tr. p. 18) Claimant is five feet, two inches tall, or 62 inches tall. (Ex. 2, p. 11; Tr. p. 19) Claimant completed the ninth grade in El Salvador. (Ex. 12, p. 60) Claimant has not attended any additional schooling beyond the ninth grade.

Claimant commenced employment with defendant-employer on May 22, 2000, as a machine operator. (Tr. pp. 16, 28; Ex. 12, p. 61) At the time of the alleged cumulative injury claimant was working as a labeler and packager. (Tr. p. 16) Claimant worked regular overtime, 12 hours per day and six days per week at the time of the alleged injury. (Tr. p. 18) Claimant continued to work for defendant-employer at the time of the hearing. (Tr. p. 28)

Claimant sustained a prior work injury while working for defendant-employer. On December 14, 2007, claimant fell at work and sustained a burst fracture of her first lumbar vertebrae. (JE 1, pp. 2-5, 51) Claimant also complained of neck pain following the fall. (JE 1, p. 1) Claimant also was involved in a motor vehicle accident in 2002 and sustained an odontoid fracture. (JE 1, p. 3)

Claimant received treatment for the 2007 injury at the University of Iowa (UIHC). (JE 1, pp. 1-54) Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. (2001) (AMA Guides), Joseph Chen, M.D., a physiatrist who was working for UIHC, found claimant fell into Lumbar Category IV, and assigned claimant 23 percent impairment of the whole person due to a greater than 50 percent compression fracture. (JE 1, p. 40) Dr. Chen issued permanent restrictions of no lifting, pulling, or pushing over 20 pounds of force, occasional walking, standing, bending, and above-shoulder reach or work, no kneeling, crawling, squatting, or climbing ladders, frequently do one to five stairs and sit as needed. (JE 1, p. 54)

Christine Tisinger, ARNP, is claimant's primary care provider at UIHC. (JE 1, p. 55) During an annual appointment on September 30, 2016, claimant complained of joint aches, and increased hand tingling and paresthesias since she started working mandatory overtime six days per week. (JE 1, p. 55) Tisinger assessed claimant with Type 2 diabetes mellitus with stage 1 chronic kidney disease and numbness and

tingling in both hands and ordered an x-ray of claimant's spine due to the increased numbness and tingling. (JE 1, p. 58)

On October 20, 2016, claimant returned to Tisinger complaining of being chronically tired and having back aches when working all day, and arm soreness and paresthesias with her chronic neck pain. (JE 1, pp. 59-60) Tisinger assessed claimant with acquired hypothyroidism, atherosclerosis of the arteries, other chronic pain, cervical spine, status post trauma years ago, from the 2002 motor vehicle accident, and recommended claimant follow up for her chronic pain with a local pain center. (JE 1, p. 61)

When claimant returned to Tisinger on March 9, 2017, claimant reported her neck and bilateral upper extremity pain made her entire spine sore, and she reported tingling and pain in both shoulders and in her face. (JE 1, p. 62) Tisinger assessed claimant with other chronic pain, neck pain, pain of both shoulder joints, numbness and tingling in both hands, and left low back pain with radiation. (JE 1, p. 64) Tisinger advised claimant to work with her employer's workers' compensation representative, and/or call the workers' compensation hotline which is usually well-displayed on a poster at work. (JE 1, p. 65)

Claimant prepared an employee incident investigation report on May 9, 2017. (Ex. 9) Claimant reported she sustained injuries to both hands, pain, right shoulder pain, and low back pain from overuse while performing the labeler and cleanup functions of her job. (Ex. 9, p. 54)

On June 8, 2017, claimant attended an appointment with Camilla Frederick, M.D., an occupational medicine physician at the direction of defendants. (JE 2) Claimant reported she had been a labeler machine operator for three years and engaged in a lot of lifting and pulling of products. (JE 2, p. 125) Dr. Frederick documented as follows:

> 1/15/2017 she states the right and left shoulders and hands started hurting more while working on the line. She says she cannot sleep and has constant pain. Even before her accident in 2007 she was working in 60 gals. She had to pull the plastic bag and the box at 45 boxes/hour. She noted both hand [*sic*] went numb. She reported it but then had the accident so was off work for a year and the problem resolved. She returned to work in 2008. The hand started bothering her again in 2009, told nursing. She saw the physical therapist and had a short course of care. She was given a HEP. She was moved to a machine where she didn't have to use her hand much. Then 2-3 years ago she was put on gravy labeler. She has to keep magazine full with labels. She had to use her hand to fan open the pile. She had to use 20 boxes of labels in a day. They each had 8 bundles and they loaded one bundle at a time then went to do something else. In between had to inspect, had to keep area clean and move boxes. She admits lots of time down just watching. She had to put in a new label bundle

> every 10 min. She ran the gravy labeler nearly 100% of time. Only pulled if her line down, rare, or some other job needed to get done. She says once a week for 8 hours she hosed down the entire area, machine not operating. Her symptoms area [*sic*] present every day but it resolves on the weekend. At night on a work day the RT shoulder to hand hurt and can't even open a water bottle. She says that it is numb all through the week, entire hand volar side no fingers more prominent. On days she doesn't work this will go away. It cramps up frequently. The LT elbow, lateral to hand pain. She has some NT every day but not all the time. It is much less of a problem than the Rt. She wears braces day and night.

(JE 2, p. 125)

Claimant reported her primary problem was pain in her right shoulder and her secondary problem was pain located in her right hand, both of which began on January 15, 2017. (JE 2, p. 125) She also complained of pain in her left shoulder and left hand. (JE 2, p. 126)

Dr. Frederick examined claimant, diagnosed her with other lesions of the median nerve in the right and left upper limb, chronic low back pain and stable burst fracture of the first lumbar vertebra. (JE 2, p. 129) Dr. Frederick found causation was undetermined, she released claimant to return to regular duty, and noted "HER DESCRIPTION OF HER JOB DOESN'T SOUND REPETITIVE AND CERTAINLY NOT FORCEFUL. I recommend a JOB EVALUATION for RF for CTS to determine work relatedness and an EMG." (JE 2, p. 129)

On July 26, 2017, Koel Brooks, PT, DPT, observed an employee working as a labeler on Line 10 at defendant-employer where claimant worked. (Ex. B, pp. 25-28) The therapist identified the essential job functions as standing for job completion, loading label stacks into a magazine tilt, and watching for broken/damaged products, and found the job requires frequent lifting to load stacks of labels onto the magazine tilt. (Ex. B, p. 25) When examining the critical demands of the job, the therapist noted:

> 3. Lifting: (Frequently) Lifting is required to load stacks of labels onto the magazine tilt. Each stack weighs 3# on this date as the station is labeling 12 oz. jars of Homestyle Gravy. A stack of 18 oz. labels weighs 4# which was reported as "heavy" by the employee but was not being utilized on this date. The employee also reports that they have to clean their work station 1x per week and states they use a "heavy hose" head to do this – when weighed the hose head registered at 4#.
>
> 4. Pushing/Pulling: (Frequently) The labeler needs to pull the flaps on the magazine tilt to load the labels. There are two of these flaps that are pulled (one on the L and one on the R) to load each label stack. Each flap requires 10# of force to pull on this date. Employees do

not lift the boxes of labels or boxes of label glue as reported as these are handled and placed by utility.

5. Reaching: (Occasionally) Station 10 requires lifting the stacks of labels onto the loader area of the magazine tilt. This is 45" tall. No lifting above shoulder height or below knee height was observed on this date.

6. Grasping/Handling: (Frequently) This is done with the various items such as the stacks of labels, a knife to cut label plastic, doing paperwork, and checking of jars at various times. . . .

(Ex. B, pp. 25-26)

The therapist found there were no risk factors for vibration, contact stress, awkward postures, repetition, or force the date of his visit, noting "the primary job duty is loading labels into the magazine tilt" and he observed "downtime between loading labels. (Ex. B, p. 26) The therapist stated that during 45 minutes, he observed the employee load 15 stacks of labels into the magazine tilt. (Ex. B, p. 26) The therapist opined there were no risk factors present on the OSHA Ergonomic Checklist, and due to the lack of risk factors the AMA Guide to Injury and Disease Causation "does not show evidence that would make the complaints of R carpal tunnel work related." (Ex. B, p. 26)

On July 28, 2017, claimant underwent electromyography with Rodney Short, M.D. (JE 3) Dr. Short listed an impression that the findings are consistent with bilateral carpal tunnel syndrome, moderate on the right and mild on the left. (JE 3, p. 142)

On August 17, 2017, claimant attended a follow-up appointment with Dr. Frederick. (JE 2, p. 130) Dr. Frederick documented electromyography performed on July 28, 2017 revealed bilateral carpal tunnel syndrome. (JE 2, p. 131) Dr. Frederick noted "[claimant's] job eval showed no risk factors for CTS. She reports that she did another job at Heinz in 2005 and 2007 60 Gallon line. She is not sure it caused her BL CTS. We could certainly be happy to do another job evaluation if the company agrees. I asked her to tell me now if she has another job she wants us to look at as well and she says no." (JE 2, p. 131) Dr. Frederick diagnosed claimant with other lesions of the median nerve for the right and left upper limbs and low back pain, opined the condition was not caused by claimant's work, and released her to regular duty. (JE 2, p. 134)

Dr. Frederick wrote an addendum to her record on August 25, 2017, stating "Heinz has decided not to do second Job Evaluation. Therefore within a reasonable degree of medical certainty, based on job evaluation and the AMA Guides to the Evaluation of Disease and Injury Causation, her Bilateral CTs is NOT related to her work at Heinz." (JE 2, p. 134)

Tisinger referred claimant to Heather Bingham at UIHC for electromyography. (JE 1, p. 84) Dr. Bingham performed the testing on September 6, 2017, and listed an

impression of electrophysiologic evidence of bilateral median neuropathy at the wrist, right greater than left. (JE 1, p. 85)

On October 17, 2017, claimant attended an appointment with Britt Marcussen, M.D., a physician specializing in family medicine and orthopedics and rehabilitation at UIHC, for her bilateral wrist pain with associated numbness and tingling in the first three fingers of both hands and right shoulder pain. (JE 1, p. 100) Dr. Marcussen documented claimant stated she did a lot of repetitive work with her hands at work and that "[s]he injured her shoulder reaching for a drum that was heavy at work and has had pain in the anterior lateral shoulder since that time." (JE 1, p. 100) Dr. Marcussen examined claimant, assessed her with carpal tunnel syndrome and right shoulder pain, and found "[b]oth of these conditions seem to be work related or the very least aggravated by work," and recommended claimant go to the workers' health clinic. (JE 1, pp. 102-03)

Defendants' representative sent Dr. Frederick additional records to review, including Dr. Marcussen's opinion. (JE 2, p. 135; Ex. C) On May 16, 2018, Dr. Frederick responded, stating:

> 1) He doesn't have results of job evaluation that contradict her history that her job is repetitive or even has RF for CTS.
>
> 2) He has a history of her shoulder pain that I have never seen. The history she gave me on initial presentation was arm, wrist and both shoulder pain. Plan flares up. No mention of any injury regarding reaching for a drum. As I was looking back at the review of the previous medical records I see a mention of neck, shoulder and arm pain that she felt was coming out of the neck in past and RT shoulder pain she felt coming out of her neck in past. She has had a MVA in 2002 with neck pain and in 2007 had an odontoid fracture. I have asked Heinz if they have any prior record of an incident with a drum and this is Rachel Ball, RN's response: I looked through all of her medical records and found no such mention of the below claimed right shoulder injury. Not history below. It is my opinion that her shoulder pain is chronic and related to her neck pain.

(JE 2, p. 139; Ex. C, p. 35)

On August 20, 2018, claimant attended an appointment with Tisigner complaining of right should pain and carpal tunnel syndrome. (JE 1, p. 117) Claimant reported on August 16, 2018, that defendant-employer placed her at a new job station where she had to hand tighten jars repeatedly and engage in repetitive motions requiring reaching with her right arm. (Id.) Claimant requested a referral to Thomas VonGillern, M.D., an orthopedic surgeon, for her arm and right shoulder pain. (JE 1, pp. 117, 120)

Claimant attended her first appointment with Dr. VonGillern on September 17, 2018. (JE 4, p. 143) Claimant completed a medical history form stating the problems with her hand and right shoulder began in July 2017. (Id.) Dr. VonGillern examined claimant, listed an impression of bilateral hand numbness and tingling, possible bilateral carpal tunnel syndrome, possible bilateral cubital tunnel syndrome, right shoulder impingement and possible right shoulder rotator cuff tear, and recommended an MRI arthrogram. (JE 4, p. 146)

On October 2, 2018, claimant underwent a right shoulder MRI arthrogram. (JE 4, p. 147) The reviewing radiologist listed an impression of:

> 1. No discrete high-grade rotator cuff tear. Low-grade articular surface fraying and intrasubstance tear with possible articular surface communication to the anterior leading edge supraspinatus with low grade articular surface fraying and small tears distal superior fibers subscapularis as described with small distal superior fiber intrasubstance tear subscapularis.
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> 2. Intact nonsubluxed long head biceps tendon.
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> 3. Probable variant anterosuperior labral ligamentous complex with degenerative blunting posterosuperior glenoid labrum.
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> 4. Mild to moderate posterior decentering humeral head.
>
> 5. Early glenohumeral and mild to moderate acromioclavicular joint arthrosis with mild lateral acromial downsloping.
>
> 6. Findings suggest subacromial subdeltoid bursitis.

(JE 4, pp. 148-149)

Claimant returned to Dr. VonGillern on October 9, 2018, complaining of right shoulder pain and bilateral hand numbness. (JE 4, p. 150) Dr. VonGillern reviewed claimant's MRI arthrogram and listed an impression of bilateral carpal tunnel syndrome, right shoulder impingement, right shoulder low grade articular surface fraying and intrasubstance tear with possible articular surface communication to the anterior leading edge supraspinatus with low grade articular surface fraying and small tears distal superior fibers subscapularis with small distal superior fiber intrasubstance tear subscapularis, and right shoulder mild to moderate posterior decentering humeral head, and Dr. VonGillern discussed treatment options with claimant. (JE 4, pp. 150-151)

Dr. VonGillern ordered physical therapy for claimant's right shoulder. (JE 4, p. 152) During a follow-up appointment on November 15, 2018, claimant reported her right shoulder was doing better, but she was still having right hand numbness and tingling. (Id.) Dr. VonGillern found claimant's condition was stable and he recommended electromyography. (Id.)

On December 6, 2018, claimant returned to Dr. VonGillern regarding her bilateral hand numbness. (JE 4, p. 153) Dr. VonGillern noted electromyography from November 27, 2018, showed right median neuropathy at the wrist, he discussed treatment options with claimant, and claimant elected to proceed with surgery. (Id.)

Dr. VonGillern performed a right median nerve lysis on claimant on January 25, 2019. (JE 4, p. 155; JE 5, p. 184)

Claimant attended a follow-up appointment with Dr. VonGillern on February 11, 2019, reporting her right hand was doing well, but she still had some right hand pain and right shoulder pain. (JE 4, p. 156) Dr. VonGillern found claimant's arm was healing well, and she had right shoulder pain with range of motion. Dr. VonGillern administered an injection into claimant's right shoulder, and the doctor restricted claimant from working until February 18, 2019. (JE 4, pp. 156-157) Dr. VonGillern released claimant to return to work on February 18, 2019, with no use of her right hand until February 25, 2019. (JE 4, p. 158)

Defendants requested Dr. Frederick provide an opinion on whether any bilateral carpal tunnel syndrome, repetitive cumulative injuries, or shoulder injuries "would not be casually related to her work at Heinz," regardless of injury date. (Ex. C, pp. 37-38) On March 7, 2019, Dr. Frederick responded, stating "[s]he has continued to work in the same job for past 3 as of my visit 8/17/17 – labeler machine operator. In my opinion we have answers to this question for the timeframe of all 3 petitions. Her bilat CTS is not work-related condition a reasonable degree of medical certainty." (Ex. C, p. 38)

On July 29, 2019, claimant attended an appointment with Dr. VonGillern regarding her right arm and right shoulder. (JE 4, p. 159) Claimant reported her right hand was doing better and she did not have any numbness, but she relayed she had pain in her right shoulder. (Id.) Dr. VonGillern administered a right shoulder injection. (Id.)

Richard Kreiter, M.D., an orthopedic surgeon, conducted an IME for claimant on July 30, 2019. (Ex. 2) Dr. Kreiter reviewed claimant's medical records and examined her. (Id.) Dr. Kreiter diagnosed claimant with post right carpal tunnel release, right shoulder adhesive capsulitis with degenerative acromioclavicular and glenohumeral joints and rotator cuff impingement, subacromial bursitis, left mild carpal tunnel, and right mild ulnar nerve entrapment or cubital tunnel syndrome. (Ex. 2, p. 12) Dr. Kreiter opined claimant's work for defendant-employer over more than 18 years, "which was highly repetitive with lifting, grasping, with manual exertion of the distal upper limbs and frequently with long overtime hours led to an aggravation of the median nerve." (Ex. 2, p. 8) With respect to her right shoulder Dr. Kreiter opined, "[t]he repetitive work with excessive overtime has obviously aggravated and accelerated a pre-existing condition in the right shoulder." (Id.)

Defendants sent Dr. VonGillern a letter asking for his opinion on claimant's condition. (Ex. D) On July 30, 2019, Dr. VonGillern signed the letter without providing any written comments agreeing he could not determine to a reasonable degree of medical certainty or probability whether claimant's work for defendant-employer "would materially/substantially aggravate her right shoulder." (Ex. D, p. 40)

Claimant returned to Dr. VonGillern on October 31, 2019, regarding her right shoulder pain. (JE 4, p. 160) Claimant relayed her right shoulder pain was keeping her from working and engaging in recreational activities and the pain was keeping her awake at night. (Id.) Dr. VonGillern administered another shoulder injection and restricted her from working for one day. (JE 4, pp. 160, 164)

On November 20, 2019, William Boulden, M.D., an orthopedic surgeon, conducted a records review IME for defendants without examining claimant. (Ex. E) Dr. Boulden criticized Dr. Kreiter's opinion stating there was no way to determine whether claimant's work aggravated or accelerated preexisting shoulder problem given there were no pre or post MRIs or injuries to her shoulder and the labeler job analysis did not show any risks that would cause carpal tunnel syndrome, noting Dr. Frederick did not causally relate her carpal tunnel syndrome to her work and Dr. VonGillern did not causally relate her shoulder problems to her work. (Ex. E, p. 42)

Dr. Boulden did not list any diagnoses, stating he was not aware of any specific injuries on December 1, 2016, May 9, 2017, or July 1, 2017. (Id.) Dr. Boulden opined claimant's carpal tunnel syndrome is not related to her work because the job analysis and the orthopedic literature do not "highly support repetitive accumulative trauma causing carpal tunnel syndrome." (Id.) Dr. Boulden did not cite to any literature in reaching his conclusion. He also found claimant's job description did not identify that her job required heavy repetitive activities that would "cause a carpal tunnel. I think there would be many other reasons for why that occurred, but not her work." (Id.) Dr. Boulden did not identify the "other reasons." Dr. Boulden opined claimant's work for defendant-employer did not cause claimant's problems, noting the October 2, 2018, MRI arthrogram showed chronic, but no acute changes. (Id.) Dr. Boulden stated he did not believe claimant's complaints and diagnoses of carpal tunnel syndrome and right shoulder impingement syndrome are related to work, but based on "other personal problems," noting claimant has a history of diabetes and underlying arthritis. (Ex. E, p. 43)

On April 30, 2020, claimant attended an appointment with Dr. VonGillern for her right shoulder pain. (JE 4, p. 165) Claimant reported she was attending physical therapy, but not receiving any relief. (Id.) Dr. VonGillern administered a shoulder injection. (Id.)

On July 16, 2020, claimant returned to Dr. VonGillern reporting the injection alleviated her pain for approximately three weeks and then her pain returned. (JE 4, p. 167) Claimant stated her pain was interfering with her ability to work. (Id.) Dr. VonGillern recommended an MRI arthrogram. (JE 4, p. 167)

Dr. VonGillern received and reviewed the imaging, noting it showed severe AC joint arthropathy, a SLAP tear, and undersurface fraying in the anterior supraspinatus tendon. (JE 4, p. 168) Dr. VonGillern administered another injection and imposed a restriction of not working more than 40 hours per week. (Id.)

Claimant's counsel sent Dr. VonGillern a letter on October 12, 2020, asking for his opinion on claimant's condition, after reviewing medical records from Dr. Marcussen and Dr. Krieter. (Ex. 4) On November 15, 2020, Dr. VonGillern signed the letter without providing any written comments, agreeing with Dr. Kreiter's opinion that the highly repetitive work with lifting, grasping, and manual exertion of the distal upper limbs and frequently with long overtime hours led to an aggravation of claimant's median nerve and that her repetitive work with excessive overtime obviously aggravated and accelerated a pre-existing condition in the right shoulder. (Ex. 4, p.16) He further agreed with Dr. Marcussen's opinion that claimant's carpal tunnel syndrome and right shoulder pain are work-related. (Id.)

On November 25, 2020, Dr. VonGillern performed a right shoulder coracoacromial ligament resection with partial excision of the acromion and excision of greater than one centimeter distal clavicle rotator cuff repair. (JE 7, p. 187) Dr. VonGillern listed a postoperative diagnosis of right shoulder chronic subacromial bursitis with supraspinatus tendinitis, impingement syndrome, osteoarthritis, and rotator cuff tear. (Id.)

Claimant returned to Dr. VonGillern following surgery, reporting her shoulder was doing well and Dr. VonGillern continued claimant's physical therapy. (JE 4, p. 175)

On February 4, 2021, claimant attended an appointment with Lauren Haas PA-C with Dr. VonGillern's office, reporting she was doing well, but she still had tenderness especially with physical therapy. (JE 4, p. 176) Haas continued claimant's physical therapy to work on range of motion. (Id.)

On April 14, 2021, Curtis Witt, PT, with Genesis At Work, performed another Functional Job Analysis of the labeler position performed by another employee. (Ex. B, pp. 28-30) The therapist's analysis was similar to that of Brooks. Witt noted that lifting of the labels was to 45 inches and the nozzle used on cleaning days weighs less than 10 pounds and the nozzle is waist height on any employee under 72 inches in height. (Ex. B, p. 28) Witt found lifting, pushing/pulling, and grasping/handling occur occasionally as opposed to frequently. (Ex. B, pp. 28-29) Witt noted the employee is required to push/pull the hose around the production floor with forces of 25 pounds or less when the hose is fully unrolled on the floor. (Ex. B, p. 29) With respect to the labeling duties, Witt found most reaching is done in front of the body from waist level to 45", with less than 20 reaches per hour, "[t]he employee may also reach above shoulder level on rare occasions to grab a jar of gravy that has tipped on the time. This reach is no higher than 66" measured on the date and in 20 minutes of observing the line was only done once." (Ex. B, p. 29) Witt opined claimant's carpal tunnel symptoms and

shoulder pain are not work-related because there were no risk factors present in the job and the injuries would require at least two combined risk factors. (Id.)

During an appointment with Haas on May 6, 2021, claimant complained of pain in her right shoulder and difficulty sleeping. (JE 4, p. 181) Haas recommended claimant work on range of motion at home and imposed restrictions of no lifting over 20 pounds, no overhead lifting with her right upper extremity, and no climbing. (JE 4, pp. 181, 183)

Claimant attended an appointment with Hass on July 15, 2021. (JE 4, p. 178) Claimant stated she was doing well, she had returned to work without restrictions, and she was experiencing a mild ache in her shoulder, especially at night. (Id.)

On October 22, 2021, Sunil Bansal, M.D., an occupational medicine physician, conducted an IME for claimant and issued his report on January 6, 2022. (Ex. 7) Dr. Bansal reviewed claimant's medical records and examined her. (Id.) Dr. Bansal diagnosed claimant with a right shoulder rotator cuff tear, status post right shoulder coracoacromial ligament resection with partial excision of the acromion, excision of greater than 1 cm of the distal clavicle, and rotator cuff repair, right carpal tunnel syndrome, status post right median nerve lysis, and left carpal tunnel syndrome. (Ex. 7, p. 48)

Dr. Bansal opined both the right shoulder and bilateral carpal tunnel injuries manifested on March 9, 2017, the date "she first presented to her medical provider detailing her shoulder pain and bilateral hand numbness/tingling." (Id.) Dr. Bansal casually related claimant's right shoulder injury to her work finding her position required her to perform activities that would stress the rotator cuff from repetitive lifting, pulling, and reaching. (Ex. 7, p. 48) Dr. Bansal also found claimant's "job tasks would place significant pressure on the wrists based on repetition and the angle in which she would position her wrists while grabbing, turning, gripping, lifting, pushing, and pulling. (Ex. 7, p. 49) Dr. Bansal opined claimant reached maximum medical improvement for her right carpal tunnel syndrome and right shoulder as of the date of his examination, and in the absence of further treatment for her left carpal tunnel syndrome, she also reached maximum medical improvement on the date of his examination. (Id.)

Dr. Bansal imposed permanent restrictions of no lifting greater than 10 pounds with the right hand and 15 pounds with the left hand, no overhead lifting with the right arm, and no frequent reaching with the right arm. (Id.)

Using Figures 16-40 through 16-46 of the AMA Guides, Dr. Bansal assigned the following impairment for claimant's right shoulder:

Impairment	RANGE OF MOTION	% UE
Flexion:	153, 152, and 153 degrees	2
Abduction:	97, 98, and 98 degrees	4

Adduction:	44, 46, and 45 degrees	
External Rotation:	50, 51, and 50 degrees	1
Extension:	46, 48, and 44 degrees	
Internal Rotation:	86, 88, and 83 degrees	

This equals a 7% upper extremity impairment.

Furthermore, per Table 16-27 she is assigned a 10% upper extremity impairment for her distal clavicle resection.

Combined total = 7 + 10 = 16% upper extremity impairment, or 10% impairment of the body as a whole.

(Ex. 7, p. 50)

For her right wrist and hand, using Tables 16-10 and 16-15 of the AMA Guides, Dr. Bansal found:

Severity of sensory deficit is 10% for the first, second, and third digits.

Severity of motor deficit is 0%.

Maximum upper extremity impairment due to sensory deficit of the median nerve below the mid forearm involving the radial and ulnar palmar digital nerves of the index and long fingers is 9%, and the thumb is 18%.

Multiplied together: (10% x 18%) + (10% x 9%) + (10%x 9%) = 4% upper extremity impairment, or 2% impairment of the body as a whole.

For claimant's left wrist and hand, Dr. Bansal found:

Severity of sensory deficit is 20% for the third digit, 10% for the first digit and 10% for the second digit.

Severity of motor deficit is 0%.

Maximum upper extremity impairment due to sensory deficit of the median nerve below the mid forearm involving the radial and ulnar palmar digital nerves of the index and long fingers is 9%, and the thumb is 18%

Multiplied together: (10% x 18%) + (10% x 9%) + (20%x 9%) = 5% upper extremity impairment, or 3% impairment of the body as a whole.(Id.)

CONCLUSIONS OF LAW

I. Arising Out of and in the Course of Employment

The deputy commissioner found claimant sustained a cumulative injury to her bilateral upper extremities and right shoulder arising out of and in the course of her employment, which manifested on March 9, 2017. Defendants assert the deputy commissioner erred in finding claimant sustained an injury arising out of and in the course of her employment and erred in finding the injury manifested on March 9, 2017.

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

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

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

A cumulative injury is an occupational disease that develops over time, resulting from cumulative trauma in the workplace. Baker v. Bridgestone/Firestone, 872 N.W.2d 672, 681 (Iowa 2015); Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842, 851 (Iowa 2009); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368, 372-74 (Iowa 1985). "A cumulative injury is deemed to have occurred when it manifests – and 'manifestation' is that point in time when 'both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person.'" Baker, 872 N.W.2d at 681. The Iowa Supreme Court has held:

> a cumulative injury is manifested when the claimant, as a reasonable person, would be plainly aware (1) that he or she suffers from a condition or injury, and (2) that this condition or injury was caused by the claimant's employment. Upon the occurrence of these two circumstances, the injury is deemed to have occurred.

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

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa 1997). When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

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

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

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

The deputy commissioner found claimant sustained an injury to her bilateral upper extremities and right shoulder, relying on the opinions of Dr. Bansal, Dr. Marcussen, and Dr. Kreiter. Relying on the first job analysis and the opinions of Dr. Frederick and Dr. Boulden, defendants assert the deputy commissioner erred in finding claimant sustained an injury arising out of and in the course of her employment because the labeling, packing, and cleaning jobs claimant was assigned to at the time of the alleged work injury did not require claimant to complete the same repetitive tasks and motions each day.

On July 26, 2017, a physical therapist from Midwest Therapy Centers conducted a job analysis of the labeling position. (Ex. B, pp. 25-28) The therapist observed another employee performing the labeling position, but did not observe the cleaning position claimant performed twice per week for eight hours at a time, or the packaging job. (Tr. 20)

The therapist found the labeling position required frequent lifting of stacks weighing three and four pounds, frequent pushing and pulling of the flaps on the magazine tilt to load the labels, which must be pulled using ten pounds of force on the right and left side to load each label stack, frequent grasping and handling of various items, and occasional reaching to load stacks of labels into the magazine tilt at 45 inches with no lifting above shoulder height or below knee height. (Ex. B, pp. 25-26) The therapist concluded there were no risk factors present, such as vibration, contact stress, awkward postures, repetition or force that would create a risk for developing carpal tunnel syndrome, noting the primary job duty is loading labels into the magazine tilt and he observed "downtime between loading labels" noting during the 45 minutes he observed the job, the employee loaded 15 stacks of labels into the magazine tilt. (Ex. B, p. 26)

The physical therapist also noted the employees do not lift the boxes of labels or boxes of label glue as these are handled by utility. (Id.) Claimant testified toward the end utility is not always available and she also lifts the boxes. (Tr. pp. 35-36)

Claimant testified she used her right hand to operate a pressure hose to clean the work area for an eight-hour period when there was a product change. (Tr. pp. 20-21, 37) The machinery was not running while the area was being cleaned. (Tr: p. 38) The labeler machine claimant cleaned is 40 to 50 feet high. (Tr. p. 21) Claimant testified when using the pressure washer she would have to clean above shoulder height. (Tr. p. 21) I find this testimony reasonable and consistent with the other evidence I find believable. No evidence was presented to the contrary.

Claimant also testified that when she was working with the smaller bottles on the labeling machine, some of the smaller bottles fell down into the machine, so she would have to lift up the door above shoulder height to fix the bottles. (Tr. pp. 22-23) I also find this testimony reasonable and consistent with the other evidence I believe.

The deputy commissioner found the opinions of Dr. Bansal, Dr. Marcussen, and Dr. Kreiter more convincing than the opinions of Dr. Frederick and Dr. Boulden:

> [F]or a variety of reasons, but most notably – both of those physicians relied heavily upon the job analysis of Midwest Therapy Centers in July 2017. In fact, Dr. Frederick seems to defer to the physical therapist, refusing to even assess whether claimant's job activities could have contributed to the development of her conditions. "Her job eval showed no risk factors for CTS." Yet the job analysis showed that claimant engaged in frequent lifting, pushing, pulling, grasping and handling. Furthermore, the

> job analysis specifically did not factor in her cleaning duties, which involved the use of a pressure hose with forceful grasping at least one day per week. The analysis also did not reference the substantial hours worked performing mandatory overtime.

(Arbitration Decision, pp. 9-10)

Contrary to the deputy commissioner's finding, Dr. Frederick discussed claimant's work with claimant and Dr. Frederick reviewed the job analysis. Dr. Boulden did not speak with claimant or examine her. The job analysis did not analyze claimant's cleaning duties using a pressure hose for eight hours at a time. Dr. Frederick and Dr. Boulden did not address claimant's cleaning duties or her use of a pressure hose in reaching their conclusions. Defendants did not request the opinions of Dr. Frederick or Dr. Boulden with respect to claimant's cleaning duties. While Dr. Boulden opined claimant's personal conditions are the cause of her problems, he did not identify what personal conditions caused her carpal tunnel syndrome and shoulder problems, nor did he cite to any literature supporting his bare contention.

Dr. Bansal found claimant's repetitive work of lifting, pulling, and reaching would cause stress on the rotator cuff and the repetition and angle she positioned her wrists while grabbing, turning, gripping, lifting, and pushing and pulling could increase her carpal tunnel pressures. (Ex. 7, pp. 48-49) Unlike Dr. Boulden, Dr. Bansal cited to literature supporting his conclusions. I agree with the deputy commissioner that the opinions of Dr. Boulden and Dr. Frederick are not as persuasive as the opinions of Dr. Bansal, as supported by the opinions of Dr. Marcussen and Dr. Kreiter, and claimant's testimony. I find claimant has met her burden of proof to establish she sustained a cumulative injury to her right shoulder and bilateral carpal tunnel syndrome arising out of and in the course of her employment.

II. Manifestation, Notice and Timeliness.

The deputy commissioner found claimant's cumulative injuries to her bilateral upper extremities and right shoulder manifested on March 9, 2017. Defendants contend the deputy commissioner erred in finding the injury manifested on March 9, 2017. Defendants contend the deputy commissioner erred in failing to address whether claimant provided timely notice under Iowa Code section 85.23 and whether claimant complied with the statute of limitations under Iowa Code section 85.26. Defendants assert claimant failed to provide timely notice and failed to comply with the statute of limitations.

The deputy commissioner made findings as to the manifestation date but did not address whether claimant provided timely notice under Iowa Code section 85.23, or whether claimant complied with the statute of limitations under Iowa Code section 85.26. At hearing, defendants asserted lack of timely notice and failure to comply with the statute of limitations as affirmative defenses on the record. The deputy commissioner signed and entered the hearing report order stating defendants had

waived lack of timely notice under Iowa Code section 85.23 and untimely claim under Iowa Code section 85.26. I find defendants raised both affirmative defenses at hearing and the deputy commissioner erred in failing to address both defenses in the hearing report order and by failing to address the affirmative defenses in his decision.

In 2017, the Iowa Legislature enacted changes to Iowa Code sections 85.23 and 85.26(1), involving notice and statute of limitations. The changes to the statute went into effect on July 1, 2017. This case involves a work injury occurring before July 1, 2017, therefore, the new provisions of the statute from 2017 do not apply to this case. 2017 Iowa Acts chapter 23.

At the time of the alleged work injury, Iowa Code section 85.23, provided:

> 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 85.26(1) also provided:

> An original proceeding for benefits under this chapter . . . shall not be maintained in any contested case unless the proceeding is commenced within two years from the date of the occurrence of the injury for which benefits are claimed or, if weekly compensation benefits are paid under section 86.13, within three years from the date of the last payment of weekly compensation benefits.

Under the common law, the discovery rule applies to both notice and limitations issues in workers' compensation claims. See Baker v. Bridgestone/Firestone, 872 N.W.2d 672, 684-85 (Iowa 2015). Under the discovery rule the notice and limitations periods do "not begin to run until the claimant knows or in the exercise of reasonable diligence should know the 'nature, seriousness[,] and probable compensable character' of his or her work injury." Id.

While the injury date of a cumulative injury is relevant to notice and limitations issues, the Iowa Supreme Court has clearly stated,

> Although the date of injury is relevant to the notice and statute-of-limitations issues, the cumulative injury rule is not to be applied in lieu of the discovery rule. *McKeever*, 379 N.W.2d at 372-73. As we said in *McKeever*, although "[t]hese two rules are closely related, . . . they are not the same." *Id.* Thus, although an injury may have occurred, the statute of limitations period does not commence until the employee, acting as a reasonable

person, recognizes its 'nature, seriousness and probable compensable character." *Orr v. Lewis Cent. Sch. Dist.*, 298 N.W.2d 256, 257 (Iowa 1980) (applying discovery rule to workers' compensation actions).

The *McKeever* "missed work" test was later refined in *Tasler*, where we endorsed an analysis of more general applicability. In *Tasler*, we adopted the manifestation test, fixing the date of injury "as of the time at which the 'disability manifests itself." 483 N.W.2d 829 (quoting 1B Arthur Larson, *Workers' Compensation Law* § 39.10 (1991). We held that an injury manifests itself when both "the fact of the injury and the causal relationship of the injury to the claimant's employment would have been plainly apparent to a reasonable person." *Id.* (quoting *Peoria County Belwood Nursing Home v. Indus. Comm'n*, 115 Ill.2d 524, 106, Ill.Dec. 235, 238, 505 N.E.2d 1026, 1029 (1987)).

This court had the opportunity to apply the manifestation test in the case of *George A. Hormel & Co. v. Jordan*, 569 N.W.2d 148 (Iowa 1997). In that case we declined to add a third element – compensability – to the test. *Jordan*, 569 N.W.2d. at 152. We also held that a permanency rating is not a prerequisite for meeting the manifestation test. *Id.* Nonetheless, in upholding the agency's date-of-injury finding, we noted that on the date chosen by the agency – October 1, 1991 – the employee had "knowledge of the *permanent* impairment of his shoulder" and realized the "causal *impact* that injury would have on his job." *Id.* (emphasis added); *accord Venega*, 498 N.W.2d at 425 (stating "more is required than knowledge of an injury or receipt of medical care. The employee must realize that his or her injury will have an impact on employment). We also observed that it was not until this date that the employee learned "that he *would not recover* from the cumulative injury to his shoulder and that *permanent* restrictions on his work activities would be required." *Jordan*, 569 N.W.2d at 152 (emphasis added).

Although we accurately stated in *Jordan* that the cumulative injury rule/manifestation test has only two elements – knowledge of the injury and its causal relationship to employment, our discussion addressed essentials of the discovery rule – impact on employment and permanency. We take this opportunity to reaffirm what we said in *McKeever*, that these tests, while related, are distinct. The preferred analysis is to first determine the date the injury is deemed to have occurred under the *Tasler* test, and then to examine whether the statutory period commenced on that date of whether it commenced upon a later date based upon application of the discovery rule.

To summarize, a cumulative injury is manifested when the claimant, as a reasonable person, would be plainly aware (1) that he or she suffers from a condition or injury, and (2) that this condition or injury was caused by

> the claimant's employment. Upon the occurrence of these two circumstances, the injury is deemed to have occurred. Nonetheless, by virtue of the discovery rule, the statute of limitations will not begin to run until the employee also knows that the physical condition is serious enough to have a permanent adverse impact on the claimant's employment or employability, i.e., the claimant knows or should know the "nature, seriousness, and probable compensable character" of his injury or condition.

Herrera, 633 N.W.2d at 287-88.

As discussed in Herrera, application of the cumulative injury rule requires a determination of when claimant knew she suffered from a condition or injury that was caused by her employment. The deputy commissioner found that date to be March 9, 2017.

During an annual appointment with her primary care provider, Tisinger, on September 30, 2016, claimant reported she was experiencing joint aches, and increased hand tingling and paresthesias since she started working mandatory overtime for defendant-employer six days per week. (JE 1, p. 55) Tisinger assessed claimant with Type 2 diabetes mellitus with stage 1 chronic kidney disease and numbness and tingling in both hands and ordered an x-ray of her spine for the increased numbness and tingling. (JE 1, p. 58)

Claimant testified at hearing she believed her condition was related to her work for defendant-employer in September 2016. (Tr. p. 31) Claimant reported she had pain in her arms and shoulder toward the end of 2015, but it was "[k]ind of light, but after 2016 it started bothering her more. (Id.) Claimant stated she believed the light pain she was experiencing in 2015 was related to her work for defendant-employer because when she was home on weekends she could feel there was pain and when she went back to work the pain was worse. (Tr. p. 32) Based on her medical records and testimony, I find claimant's injury manifested on September 30, 2016, when she told Tisinger she was experiencing joint aches and increased tingling and paresthesias after she started working mandatory overtime. Claimant admitted at hearing she knew her condition was related to her work for defendant-employer at that time. I find the deputy commissioner erred in finding claimant's cumulative injury to her bilateral upper extremities and right shoulder manifested on March 9, 2017.

Given claimant's injury manifested on September 30, 2016, it is necessary to determine whether she complied with the notice and limitations provisions of the statute.

During her next appointment with Tisinger, claimant complained of backaches, arm soreness and paresthesias with chronic neck pain. (JE 1, pp. 59-60) Tisinger assessed claimant with acquired hypothyroidism, atherosclerosis of artery, other chronic pain, cervical spine, status post trauma years ago, and recommended she follow up for her chronic pain with a local pain center. (JE 1, p. 61) There was no evidence

presented claimant knew the seriousness or probable compensable nature of her injury at that time.

Claimant testified she told a nurse working for defendant-employer of her pain in late 2016, and the nurse gave her a brace and told her to use ice. (Tr. pp. 24-25) No one testified to the contrary at hearing. There was no evidence presented claimant knew the seriousness or probable compensable nature of her injury at that time.

When claimant returned to Tisinger on March 9, 2017, claimant reported her neck and bilateral upper extremity pain made her entire spine sore, her arms were tingling and she had pain in both shoulders and her face. (JE 1, p. 62) Tisinger assessed claimant with other chronic pain, neck pain, pain of both shoulder joints, numbness and tingling in both hands, and left low back pain with radiation. (JE 1, p. 64) Tisinger advised claimant to work with her employer's workers' compensation representative, and/or call the workers' compensation hotline which is usually well-displayed on a poster at work. (JE 1, p. 65) Tisinger clearly advised claimant she may have a compensable workers' compensation claim during her appointment. I find this is the date the notice and statute of limitations periods started to run.

Claimant completed an employee incident investigation report on May 9, 2017, within 90 days of March 9, 2017. (Ex. 9) Under the discovery rule, claimant's report to her employer was timely under Iowa Code section 85.23.

Claimant filed her petition for benefits on October 11, 2018. The hearing report order indicates defendants paid claimant no weekly workers' compensation benefits prior to hearing. Under the discovery rule, the statute of limitations commenced running on March 9, 2017. Claimant filed her petition within two years of March 9, 2017. I also find claimant timely filed her petition under Iowa Code section 85.26(1).

III. Maximum Medical Improvement and Ripeness

Defendants next contend the deputy commissioner erred in failing to find whether claimant had reached maximum medical improvement and erred in awarding claimant permanency benefits. The deputy commissioner did not make a finding as to whether claimant had reached maximum medical improvement, but found claimant sustained 30 percent industrial disability.

On the hearing report order, claimant alleged the commencement date for permanent partial disability benefits is October 10, 2021. The hearing report order states, "Defendants assert Claimant is not yet at MMI due to continued care at ORA and thus permanency is not yet ripe." I find the deputy commissioner erred in failing to address whether claimant had reached maximum medical improvement.

In his January 6, 2022 report, Dr. Bansal opined claimant reached maximum medical improvement for her right shoulder and right carpal tunnel syndrome as of the date of his examination, October 22, 2021. (Ex. 7, p. 49) With respect to claimant's left

carpal tunnel syndrome, Dr. Bansal opined, "in the absence of further treatment (surgery), she also reached maximum medical improvement at the date of my examination of October 22, 2021." (Ex. 7, p. 49)

At the time of hearing claimant had not undergone surgery for her left carpal tunnel syndrome. (Tr. p. 38) Claimant testified she was still treating with Dr. VonGillern for her right shoulder and Dr. VonGillern had not released her from care. (Tr. pp. 38-39)

Neither party produced any medical records concerning claimant's current or recent treatment. There was no testimony or other evidence presented that claimant was expected to undergo surgery or other treatment for her left carpal tunnel syndrome. Neither party requested an updated opinion from Dr. VonGillern, the treating orthopedic surgeon. Based on Dr. Bansal's opinion, I find claimant reached maximum medical improvement on October 22, 2021.

IV. Extent of Disability

Before the changes to the statute in 2017, an injury to the shoulder was compensated industrially. Iowa Code § 85.34(2)(u) (2016); Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). For injuries after 2017, an injury to a shoulder is compensated based on functional loss. As discussed above, claimant's injury occurred before July 1, 2017. Therefore, claimant's loss is compensated industrially. 2017 Iowa Acts chapter 23.

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

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u).

As discussed above, I found Dr. Bansal's opinion on causation to be the most persuasive. Using the AMA Guides, Dr. Bansal assigned claimant 16 percent upper extremity impairment or 10 percent body as a whole for claimant's right shoulder, four percent upper extremity impairment or two percent body as a whole for her right wrist/hand, and five percent upper extremity impairment or three percent body as a whole for her left wrist/hand. (Ex. 7, p. 50) Dr. Bansal imposed permanent restrictions of no lifting greater than 10 pounds with the right hand and 15 pounds with the left hand,

no overhead lifting with the right arm, and no frequent reaching with the right arm. (Ex. 7, p. 49)

At the time of the hearing claimant was 60 years old. (Tr. p. 16) Claimant attended school through the ninth grade in El Salvador. Claimant has worked for defendant-employer since 2000. (Id.) She continued to work for defendant-employer at the time of hearing. Claimant also has some experience working in a clothing store and for a daycare. (Ex. L, Depo p. 6) Considering all of the factors of industrial disability, I agree with the deputy commissioner's finding that claimant has sustained 30 percent industrial disability as a result of the work injury, given that claimant has been able to return to work for defendant-employer. Claimant's healing period ended on July 5, 2021, and permanent partial disability commenced on July 6, 2021.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on September 30, 2022, is affirmed in part, and is reversed in part, with my additional and substituted analysis.

Defendants shall pay claimant healing period benefits from December 20, 2019, through March 22, 2020, and from March 24, 2021, through July 5, 2021, at the stipulated weekly rate of six hundred seventy-seven and 52/100 dollars ($677.52).

Defendants shall pay claimant 150 weeks of permanent partial disability benefits commencing on July 6, 2021, at the stipulated weekly rate of six hundred seventy-seven and 52/100 dollars ($677.52).

Defendant shall pay accrued weekly benefits in a lump sum together with interest 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.

Defendants shall receive credit for sick/disability pay as set forth in paragraph 9 of the hearing report order.

Defendants are responsible for the medical expenses set forth in Exhibit 15 and for reasonable and necessary future medical care for claimant's bilateral arms and right shoulder conditions.

Defendants shall reimburse claimant one thousand and 00/100 dollars ($1,000.00) for the cost of Dr. Kreiter's IME under Iowa Code section 85.39.

Pursuant to rule 876 IAC 4.33, defendants shall reimburse claimant one hundred and 00/100 dollars ($100.00) for the filing fee, thirteen and 28/100 dollars ($13.28) for the cost of service of the petition, seventy-two and 15/100 dollars ($72.15) for the cost of the deposition transcript, three hundred thirty and 00/100 dollars ($330.00) for the cost of Dr. VonGillern's report, and two thousand nine hundred nine and 00/100 dollars

($2,909.00) for the cost of Dr. Bansal's report, and defendants shall pay the costs of the appeal, including the cost of transcript.

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

Signed and filed on this 14th day of April, 2023.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Andrew Bribriesco (via WCES)

Lori Scardina Utsinger (via WCES)