BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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| SOFIA RODRIGUEZ,<br><br>Claimant,<br><br>vs.<br><br>DHL SUPPLY CHAIN a/k/a DPWN HOLDINGS, INC.,<br><br>Employer,<br><br>and<br><br>NEW HAMPSHIRE INSURANCE COMPANY,<br><br>Insurance Carrier,<br>Defendants. | File No. 5064266<br><br>ARBITRATION DECISION<br><br>Head Note Nos.: 1108.50, 1402.10, 1402.20, 1402.40, 1403.30, 1803, 2209, 2402, 2501, 2907 |

## STATEMENT OF THE CASE

Sofia Rodriguez, claimant, filed a petition in arbitration seeking workers' compensation benefits from DHL Supply Chain a/k/a DPWN, employer and New Hampshire Insurance Company, insurance carrier as defendants. Hearing was held on July 9, 2019 in Des Moines, Iowa.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

Sofia Rodriguez and Jose Vargas were the only witnesses to testify live at trial. The evidentiary record also includes Joint Exhibits JE1-JE5, Claimant's Exhibits 1-3 and 5-10, and Defendants' Exhibits A-E. It should be noted that Claimant's Exhibit 5 had the following pages removed prior to the start of the hearing: 43, 48-50, and 54-68. All exhibits were received without objection. The evidentiary record closed at the conclusion of the arbitration hearing.

The parties submitted post-hearing briefs on August 6, 2019, at which time the case was fully submitted to the undersigned.

## ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant sustained an injury which arose out of and in the course of employment. If so, the appropriate date of injury.

2. Whether claimant's claim is barred by operation of Iowa Code section 85.26.

3. Whether claimant sustained permanent disability as a result of the work injury? If so, the extent of industrial disability claimant sustained.

4. The appropriate commencement date for any permanent partial disability benefits.

5. Whether defendants are responsible for payment of medical expenses.

6. Whether claimant is entitled to be reimbursed pursuant to Iowa Code section 85.39 for the independent medical evaluation (IME).

7. Assessment of costs.

## FINDINGS OF FACT

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

Claimant, Ms. Rodriguez, was a 48-year-old resident of Osceola, Iowa at the time of the arbitration hearing. She was born in Mexico in 1970. Ms. Rodriguez was educated in Mexico through the sixth grade. She moved to the United States in 1988. Ms. Rodriguez speaks Spanish. She speaks very little English. She is able to understand some basic work instructions in English. She is able to read basic English words on her work computer on the forklift that she operates. She is not able to understand documents written in English and has her children translate English documents for her. (Testimony)

Ms. Rodriguez has alleged an injury to her right shoulder and a sequela injury to her left shoulder. She has alleged a cumulative injury with an injury date on or around October 7, 2016.

Ms. Rodriguez has a limited work history. She did not work while she lived in Mexico. The first few jobs she held involved working in tortilla factories in California. She counted tortillas and labeled the packages. She earned around $250-$300 per week. These jobs did not involve any significant lifting or overhead work. She believes she could still perform this type of work, but she is not aware of any jobs like this around Osceola, Iowa. (Testimony; Claimant's Exhibit 3, page 36)

Ms. Rodriguez moved to Iowa in 2001 and began working for DHL Supply Chain a/k/a DPWN (hereinafter "DHL") in 2006. Prior to working for DHL, Ms. Rodriguez did not have any problems with either of her shoulders. She had not received any treatment for either shoulder and did not have any restrictions placed on her activities because of her shoulders. (Testimony)

The first position Ms. Rodriguez held at DHL was box picking. She performed this job for approximately four or five years. This job required operating a forklift from a standing position. Ms. Rodriguez's job was to pick or move boxes in the warehouse. It was not unusual for her to have to exit the forklift to manually lift boxes of food which ranged in weight from 2 to 90 pounds. Most of the boxes weighed 25-30 pounds and she sometimes had to lift these above head level. Ms. Rodriguez would typically lift approximately 100 boxes above her head per hour for 8 hours per day. (Testimony)

The next job Ms. Rodriguez worked at DHL was the high reach position. She performed this job for approximately five years. During those five years she also worked the box picking position about once per week. Ms. Rodriguez was working the high reach job on October 7, 2016. This job was basically a 3-position rotation, the throw away, F10, and pallet picking which was also referred to as waste. (Testimony)

The first position in the rotation was referred to as the throw away. This position involved operating a forklift to move pallets from trucks to particular areas in the warehouse. This job did not require any manual lifting, but she did have to reach overhead approximately 30 times per hour, for 8 hours of a day to enter data into a computer which was located above her head. She also had to manually scan boxes on pallets with a scan gun, this required her to lift the scan gun over her shoulder at least 30 times per hour. Ms. Rodriguez is right-hand dominant and she used her right hand to scan and enter data. (Testimony)

The second position of the high reach job was referred to as F10. Ms. Rodriguez ran the same forklift as in the high reach to move pallets to the box picking location. In this job she was required to lift and move empty pallets weighing 50-70 pounds. She did this approximately 15 times per hour for 8 hours per day. This job also involved reaching overhead to input data into a computer. She had to do this about 15-20 times per hour and use the scan gun overhead another 15-20 times per hour. (Testimony)

The third rotation of the high reach job was referred to as pallet picking or waste. This rotation required breaking down pallets and operating the forklift to take the pallets to trucks. This position involved lifting and moving pallets weighing 50-70 pounds. She had to reach overhead approximately 20 times per hour to use the scan gun and an additional 20 times per hour to input dates into the computer. (Testimony)

It should be noted that there are photographs in evidence of the box picking job. However, the photos do not depict that job as it was performed when Ms. Rodriguez was in this position. Ms. Rodriguez credibly testified about the inaccuracies of the photographs. (Testimony; Defendants' Ex. E)

Ms. Rodriguez testified that she began having shoulder pain in 2014 or 2015. Her primary pain was in her right shoulder. The pain developed gradually at work while she was performing the high reach position. At that time, her pain would come and go. (Testimony)

In 2014, Ms. Rodriguez saw Thomas Lower, M.D. for some low back issues and mentioned fright shoulder pain to him. (JE1, p. 5) In October of 2014 she saw Kirk Green, D.O. at Orthopedic Services of Clark County for low back and knee pain. Dr. Green also noted complaints of right shoulder pain, especially with activities above shoulder height. Dr. Green noted right shoulder impingement syndrome. (JE2, pp. 48-49; Cl. Ex. 1, pp. 6-7)

In May of 2015, Ms. Rodriguez saw Dr. Lower for right and left shoulder pain. The doctor noted that she worked 8 hours per day, 6 days per week on the high reach machine. Ms. Rodriguez continued to work full duty. (JE1, pp. 5-6; Testimony)

During the summer of 2015, Ms. Rodriguez went to Unity Point Family Clinic (Dr. Hicks' office) with bilateral shoulder pain, right greater than left, which was getting worse. She reported that she performed repetitive work with her arms and drove a forklift. The assessment was bilateral shoulder pain. X-rays suggested possible chronic shoulder impingement. She received an injection for her right shoulder. The doctor did not assign her any weight restrictions but he did suggest that it might be beneficial to vary her job duties to limit repetitive shoulder motion. (JE2, p. 49; Cl. Ex. 9, pp. 94, 101; Testimony) Ms. Rodriguez continued to spend a significant portion of her time in the high reach position until August of 2016. (Testimony of claimant and Jose Vargas)

Ms. Rodriguez continued to treat with Dr. Hicks' office. In September of 2015 he noted that the injection did help her right shoulder a little. He recommended a referral to rheumatology if her symptoms did not improve in the next two weeks. By December of 2015, Ms. Rodriguez reported she still had pain in her right shoulder and that her left shoulder also bothered her a bit. Dr. Hicks refilled her tramadol pending a rheumatology appointment to rule out a rheumatoid process as the cause of her symptoms. (JE2, p. 49; Testimony)

Ms. Rodriguez was seen at Iowa Arthritis and Osteoporosis Center on February 19, 2016. She saw Lawrence Rettenmaier, M.D. He noted three years of right shoulder pain worse in the last year. He also noted left shoulder pain. She reported that she performed repetitive activities at work above heart level. The doctor's assessment included impingement syndrome primarily right shoulder, probably work related, less symptomatic on the left, bilateral carpal tunnel syndrome probably work related. (JE2, pp. 49-50)

In March of 2016, Ms. Rodriguez returned to Dr. Rettenmaier. She reported she was somewhat better and was willing to think about mentioning her shoulder symptoms again to work. Dr. Rettenmaier felt the issue should be handled by workers' compensation. His assessment included impingement syndrome primarily right

shoulder probably work related less symptomatic on the left with x-ray highly compatible with rotator cuff problems likely work related, bilateral carpal tunnel syndrome probably again work related improved likely spill-over effect of steroid shot. (JE2, p. 50)

Ms. Rodriguez testified that Dr. Rettenmaier told her that her shoulders were not the result of a rheumatological process, but that her shoulder problems were related to her repetitive work. This is why he encouraged her to speak with her employer. Ms. Rodriguez talked to Jennifer Guseman at the employer in March of 2016. However, Ms. Rodriguez said that after they spoke with the workers' compensation insurance people nothing happened. She was eventually told that her problems were related to her age, not her work. Ms. Rodriguez continued to work in the high reach position. This testimony is consistent with the November 30, 2016 denial letter that Sedgwick, the third party workers' compensation administrator, sent to Ms. Rodriguez. (Testimony; Claimant's Ex. 5, p. 69)

In May of 2016, Ms. Rodriguez returned to see Dr. Hicks. He noted that she continued to have bilateral shoulder pain, right greater than left, no known injury but knew it was related to work. The notes indicate that Ms. Rodriguez had contacted her employer and was waiting to hear if they would accept it under workers' compensation. (JE2, p. 50)

On June 6, 2016, Dr. Hicks noted claimant's chief complaint as her shoulders with painful range of motion, especially with activity above heart level. The relief she received from the steroid shot was short lived. Dr. Hicks noted that Ms. Rodriguez's employer told her the problem was aging. Dr. Hicks' diagnoses included bilateral shoulder impingement syndrome, primarily right shoulder probably work related and bilateral carpal tunnel syndrome. He recommended an orthopedic referral. (JE2, p. 50)

Ms. Rodriguez saw orthopedic surgeon, Dr. Patrick Sullivan at DMOS on June 22, 2016. The notes indicate she complained of shoulder pain, that had been denied by workers' compensation. He ordered physical therapy. Ms. Rodriguez testified that she could not afford to attend therapy. (JE2, p. 50; Testimony)

During the summer of 2016, Ms. Rodriguez continued in the high reach position and the pain in her shoulders continued to get worse and more constant. She reported the problem several times to her employer. In August of 2016, DHL removed her from the high reach position and placed her in the box picking job for one month. However, that position hurt her shoulder and the pain became really strong. Ms. Rodriguez was then moved to the exports job. This job was better for her shoulders because she did not have to perform overhead reaching. However, she did still have to lift boxes that ranged in weight from 6 to 90 pounds. She was able to get help from co-workers when lifting heavier items. Ms. Rodriguez was still working in the exports job at the time of hearing. (Testimony)

On September 7, 2016, Dr. Hicks noted that Ms. Rodriquez had stopped using the forklift due to shoulder pain and was now moving boxes from place to place. Her shoulder pain decreased initially after her change in work activity but increased again

after two weeks. His assessment included chronic right shoulder pain and chronic pain syndrome related to repetitive work. He prescribed medications and noted that she could not afford physical therapy. Dr. Hicks gave her instructions for some home exercises. He noted that she may need long-term tramadol and consider changing occupations but he was not sure if that was an option for her. He ordered an MRI of her right shoulder. (JE2, p. 51) On October 7, 2016, an MRI or the right shoulder demonstrated findings consistent with a mild supraspinatus tendinosis. (JE2, pp. 7-8)

On November 17, 2016, Ms. Rodriguez saw Benjamin J. Hicks, M.D. The notes indicate she still had ongoing pain in her shoulders, neck, and hands. She had previously seen rheumatology for these issues. She was taking tramadol once daily for her shoulders and that helped a great deal. The diagnosis was chronic pain of both shoulders. (JE2, pp. 9-12)

On November 28, 2016, Ms. Rodriguez saw Jeffrey P. Davick, M.D. at DMOS for evaluation of her shoulders and upper extremities. She reported bilateral shoulder pain, right greater than left for approximately four years. She denies any injury but does a lot of repetitive work. She has continued to work full duty. She also described numbness and tingling in her hand and fingers, left greater than right. Dr. Davick's impression was bilateral shoulder pain with some neck discomfort and numbness and tingling in her hands and fingers. Dr. Davick felt that her lack of response to the cortisone injection and therapy in her shoulder suggested that her pain was not coming from her shoulder. They discussed an MRI of the neck, but decided on an EMG and NCVs to look for the source of her hands and fingers because that is what was most bothersome for her. (JE3, pp. 59-60; Testimony)

On December 13, 2016, an MRI of the cervical spine was performed. The impression was mild spondylitic changes. There were no findings of significant central canal stenosis or nerve root impingement. (JE3, p. 61) The next day she saw Dr. Davick to review the MRI. He noted cervical pain with bilateral shoulder pain and numbness/tingling in her hands, left greater than right. He again recommended EMG/NCVs. Dr. Davick informed Ms. Rodriguez that her symptoms were coming from her shoulder, not her neck. (JE3, p. 62; Testimony)

Ms. Rodriguez saw Dr. Hicks again on March 21, 2017, for follow-up of chronic shoulder pain and hand numbness. The notes stated that this was chronic for her and appeared to be related to her work. She reported that taking tramadol once daily continues to help her work. She was still working at DHL but was no longer driving a forklift, she was instead reboxing which was better. The doctor noted chronic shoulder pain and bilateral carpal tunnel which appeared to likely be related to her repetitive work and only started after she began her job. He noted she began her job over 11 years ago and her shoulder pain started 3-4 years ago. He advised her it was permissible to increase the tramadol to twice daily, as needed. (JE2, pp. 13-15)

When Ms. Rodriguez returned to see Dr. Hicks on April 21, 2017, she reported that the increased tramadol had helped her symptoms. (JE2, pp. 16-18)

By June 20, 2017, Ms. Rodriguez reported to Dr. Hicks that her pain had calmed down for a while. Her MRI showed some supraspinatus tendonitis. He noted that Ms. Rodriguez had been told by work that it did not qualify as workers' compensation. She had tried multiple NSAIDs in the past, and had also seen rheumatology and orthopedics. She had tried physical therapy, but stopped due to the cost. She did have a home exercise program. The diagnoses included chronic pain of both shoulders and chronic pain syndrome. She was given prednisone and Flexeril. (JE2, pp. 19-21)

On July 14, 2017, Ms. Rodriguez reported to Dr. Hicks that her shoulders felt weak and painful when holding things up. The symptoms were bilateral, right was greater than the left. The assessment was chronic pain of both shoulders, chronic pain syndrome, and neck pain. (JE2, pp. 22-24)

Ms. Rodriguez continued to treat with Dr. Hicks for pain management related to chronic neck and shoulder pain. By October of 2017 she reported that her pain had remained the same. She reported continued pain at work with motion of her shoulders, right greater than left. The notes indicate that the tramadol might be affecting Ms. Rodriguez's concentration. Her medication was changed. (JE2, pp. 25-27)

On November 29, 2017, Ms. Rodriguez was seen by Dr. Rettenmaier, at the Iowa Arthritis and Osteoporosis Center. The notes state she was there for management monitoring multiple musculoskeletal complaints. She had been seen a year earlier for what appeared to be mechanical musculoskeletal problems, many of them overuse. Her chief complaint remained bilateral shoulder pain, worse with activities above heart level. The doctor's assessment included impingement syndrome, primarily right shoulder, probably work related, less symptomatic left, x-ray report highly compatible with rotator cuff problems, likely work related. And bilateral carpal tunnel syndrome probably again work-related. Neck pain, no radicular symptoms, more myofascial. (JE4)

On April 6, 2018, Ms. Rodriguez reported to Dr. Hicks that she continued to perform the same job at DHL that had a lot of lifting. She typically took tramadol twice daily on work days. He noted that her last refill was on January 30, 2018 and filled #60. The doctor noted she had chronic pain in her shoulders and bilateral carpal tunnel which was almost certainly related to repetitive activities at work. He recommended an orthopedic consult. For the first time the doctor provided her with lifting restrictions to try and ease her discomfort. He noted she has been to Rheumatology but they did not think she needed to return to them. (JE2, pp. 28-30) The doctor authored the following note, "It is my medical opinion that Sofia Rodriguez may return to work on 4/9/18. She has chronic rotator cuff impingement, likely work related. I recommend lifting no more than 20 lbs. with her arms and shoulders. Will return in 1 month to see how she is doing on 5/4/18." (JE2, p. 31)

The restrictions from Dr. Hicks in April was the first time a doctor had assigned specific weight restrictions for her shoulders. The employer modified Ms. Rodriguez's duties to accommodate the restrictions. The employer was still accommodating the restrictions at the time of the hearing. (Testimony)

Ms. Rodriguez returned to Dr. Hicks on May 17, 2018. She reported that her pain was stable. She was scheduled to see an orthopedist on June 12 for her shoulder pain. She wanted to continue her restrictions, because when she did lift heavy boxes her shoulder pain increased. Her restrictions were continued. (JE2, pp. 32-34)

On May 22, 2018, Ms. Rodriguez returned to Dr. Hicks' office and was seen by William M. Ralston, D.O. The notes indicate that her bilateral shoulder pain had been ongoing since 2015. She stated that she used to drive a forklift at work, but now she just worked lifting boxes. Ms. Rodriguez reported that her right shoulder had hurt since 2015. She denied injuring her shoulder, she believes the problem is due to repetitive motion. Dr. Ralston reviewed the 2006 MRI that showed tendonitis of the rotator cuff but no tear. The doctor explained that the tendonitis got irritated with work and lifting her arms. He advised her to start doing her exercises at home again and to try another injection. The doctor also explained that surgery was an option. Ms. Rodriguez did receive an injection into her right shoulder which she testified helped for about two months. (JE2, pp. 35-42)

On July 6, 2018, Dr. Hicks issued a missive which stated: "It is my medical opinion that Sofia Rodriguez has chronic rotator cuff impingement, likely work related. I recommend she continue her current restrictions, lifting no more than 20 lbs with her arms and shoulders." (JE2, p. 43)

At the request of her attorney, Ms. Rodriguez saw Sunil Bansal, M.D. for an IME on July 17, 2018. She reported continued pain in her shoulders, especially with overhead activities. Her right shoulder was more painful than her left. She could lift more weight with her left arm, but overhead and reaching was difficult with either arm. Dr. Bansal's diagnoses were right shoulder rotator cuff tendonitis and aggravation of right shoulder impingement and aggravation of left shoulder impingement. He felt she had reached maximum medical improvement (MMI) as of December 14, 2016. He causally related her conditions to her repetitive work at DHL. For the right shoulder, Dr. Bansal assigned 6 percent upper extremity impairment, which is the equivalent of 4 percent of the whole person. For the left shoulder, Dr. Bansal assigned 3 percent upper extremity impairment, which is the equivalent of 2 percent of the whole person. Dr. Bansal assigned permanent restrictions as follows: no lifting greater than 20 pounds floor to table with both arms, no lifting greater than 10 pounds over shoulder level occasionally, and avoid frequent over shoulder level lifting and reaching. He felt claimant should could require some maintenance injections. After reviewing additional records, Dr. Bansal issued a supplemental report dated February 11, 2019. (Cl. Ex. 1) Dr. Bansal indicated that he stood by all of his prior opinions. He further stated:

> [r]egardless of any speculated systemic rheumatologic condition that Ms. Rodriguez has, it does not negate or dismiss the objective rotator cuff (supraspinatus) tendinopathy noted on MRI and confirmed by Dr. Vinyard himself. Moreover, Ms. Rodriguez has already been evaluated by a rheumatologist, Dr. Rettenmaier who has also opined that Ms. Rodriguez has work related bilateral shoulder impingement.

(Cl. Ex. 1, p. 22)

Dr. Bansal issued another supplemental report in June of 2019, after reviewing additional documents. He again stood by his prior opinions. Dr. Bansal felt that the detailed job analysis that he was provided supported Ms. Rodriguez's claim that her symptoms were related to her repetitive work for DHL. (Cl. Ex. 1, pp. 24-26)

On October 15, 2018, at the request of the defendants, Ms. Rodriguez saw Timothy R. Vinyard, M.D. for an independent medical evaluation. She reported bilateral shoulder pain, right worse than left. She denied a specific injury at work, but believes her symptoms began around 2015 and increased in 2016. She believes her symptoms are due to repetitive motions at work. She reported that her symptoms are worse with repetitive lifting and moving her arm. Dr. Vinyard did not have what he felt was an accurate diagnosis for her symptoms. He felt the objective findings on her MRI were consistent with mild supraspinatus tendinosis. But that would not explain the excessive amount of pain she appeared to have in her bilateral shoulders. He noted that she had extremely limited active range of motion, but she did not appear to have impaired passive range of motion. He felt that her symptoms in multiple joints and other skin changes potentially suggested an undiagnosed rheumatological condition. Dr. Vinyard stated that he did not think she had an acute orthopedic condition related to her work duties. Dr. Vinyard opined that her current symptoms were not related to her duties at work. He felt Ms. Rodriguez was at MMI. He felt that she did not qualify for any impairment rating. He noted that she had very poor active range of motion, but he did not think she was giving her maximal effort. Dr. Vinyard did not think Ms. Rodriguez's condition warranted additional orthopedic treatment or therapy. He recommended she follow up with a rheumatologist to continue to search for a more systemic cause of her multiple joint complaints. (JE5)

On November 5, 2018, Kathleen R. Patterson, DNP opined that Ms. Rodriguez should remain out of work until her next appointment in one week. (JE2, p. 44) She released her to return to work on November 13, 2018 with no lifting, pushing, or pulling with her right arm. (JE2, pp. 45)

On November 16, 2018, Dr. Hicks released Ms. Rodriguez to return to light duty work. He restricted her to no lifting greater than 20 lbs., floor to table with both arms, no lifting greater than 10 lbs. over shoulder level occasionally, and avoid frequent over shoulder level lifting and reaching. He continued these restrictions on November 28, 2018. (JE2, p. 46-47)

On March 27, 2019, Dr. Hicks signed a check-the-box letter authored by claimant's counsel. Dr. Hicks indicated whether he agreed with certain statements set forth by counsel and then signed the letter indicating that his opinions were within a reasonable medical certainty. Dr. Hicks indicated that he was board certified in family practice medicine and that he regularly treated shoulder pain and shoulder injuries. Dr. Hicks indicated that his diagnoses of Mr. Rodriguez's shoulder injury were right shoulder rotator cuff tendonitis and aggravation of right shoulder impingement and aggravation of left shoulder impingement. He opined that these were casually related to

overuse syndrome from her workplace due to her repetitive upper extremity work coming forward to October of 2016 when she received her right shoulder MRI results. Dr. Hicks indicated that he was not specifically trained to assign impairment ratings but he felt it was likely that she did have some level of permanent impairment due to the work injury. Dr. Hicks did not agree that Ms. Rodriguez would have reasonably realized the permanent nature of her injury to her shoulders when she was informed of her right shoulder MRI results in October of 2016. He stated that as of October of 2016 Dr. Hicks would not have assumed the injury was permanent. However, by 2019 given the extreme evaluation and multiple treatments he now agrees that it is permanent. He opined that permanent restrictions were warranted as the result of her bilateral shoulder work injury. He restricted her to no lifting more than 20 pounds floor to table with both arms, no lifting more than 10 pounds over shoulder level occasionally, avoid frequent over the shoulder lifting and reaching. He opined that Ms. Rodriguez would likely need, at a minimum, chronic pain management for her shoulders. (JE2, pp. 48-58)

Ms. Rodriguez testified that she continues to treat for her shoulders with Dr. Hicks. She takes Tramadol twice per day. She described the pain in her shoulders as constant, right greater than left. She feels she can continue to perform her accommodated job in exports. (Testimony)

The first issue that must be addressed is whether Ms. Rodriguez sustained an injury that arose out of and in the course of her employment. Ms. Rodriguez began working for DHL in 2006. At that time, she did not have any problems with her shoulders. During her employment with DHL she has worked in positions that require repetitive use of her shoulders and work that was often over shoulder height. (Testimony)

Several medical experts have rendered their opinion with regard to causation in this matter. Dr. Rettenmaier causally connects Ms. Rodriguez's bilateral shoulder problems to her work for DHL. (JE2, pp. 49-52) Dr. Bansal diagnosed Ms. Rodriguez with right shoulder rotator cuff tendonitis and aggravation of right shoulder impingement and aggravation of left shoulder impingement. Dr. Bansal opined that these conditions are causally connected to her repetitive work for DHL. Defendants rely on the opinion of Dr. Vinyard. Dr. Vinyard did not think Ms. Rodriguez's problems were related to her work. Instead, he encouraged her to see her rheumatologist to look for a more systemic cause of her multiple joint complaints. However, I do not find the opinions of Dr. Vinyard to be persuasive because Ms. Rodriguez had previously seen Dr. Rettenmaier at the Iowa Arthritis and Osteoporosis Center. Dr. Rettenmaier's diagnosis included bilateral shoulder impingement syndrome, primarily right shoulder, probably work-related. He encouraged Ms. Rodriguez to report a work injury, he did not relate her shoulder problems to a systemic problem. Furthermore, I do not find the opinions of Dr. Vinyard to be terribly persuasive because his deposition testimony demonstrated that he did not have a complete and accurate medical history. (Cl. Ex. 10) I find that the opinions of Dr. Rettenmaier, Dr. Hicks, and Dr. Bansal carry greater weight than that of Dr. Vinyard. Based on the expert opinions, I find Ms. Rodriguez has established that she sustained a cumulative injury.

The next issue to be determined is the date of claimant's injury. Claimant has plead a cumulative injury date of October 7, 2016. This is the date of claimant's MRI of her right shoulder. It was at this point in time when Dr. Hicks explained to Ms. Rodriguez that she had tendinitis and that it was a serious condition. However, claimant testified that she knew as early as 2014 or 2015 that her shoulder pain was related to her work. On August 25, 2015, Ms. Rodriguez saw Susan Gilbert, ARNP with bilateral shoulder pain. She reported that her right side was worse than her left and that her symptoms increased at work. (Cl. Ex. 10, p. 120) I find that claimant's injury manifested by August 25, 2015.

Although Ms. Rodriguez sustained a cumulative injury that arose out of and in the course of her employment on August 25, 2015, she did not believe her problems were serious or permanent until October of 2016. On October 7, 2016, an MRI of the right shoulder demonstrated findings consistent with a mild supraspinatus tendinosis. (JE2, pp. 7-8) Ms. Rodriguez testified it was at this point, that Dr. Hicks' office informed her that she had tendinitis and that it was a serious problem. She testified that this is when she first believed her injury was serious or permanent. This was the first time that Dr. Hicks' office explained that tendinitis was serious. Before this time, Ms. Rodriguez believed her shoulder were going to improve. Her symptoms had previously improved with medications and Dr. Hicks had told her that her condition could improve. I find based on Ms. Rodriguez's education and intelligence, it is reasonable that she did not realize the seriousness of her injury until at least October 7, 2016. I find that Ms. Rodriguez did not discover or understand that her physical condition was serious enough to have a permanent adverse impact on her employment until at least October 7, 2016. (Testimony)

We now turn to the issue of permanent partial disability. Dr. Hicks stated that while he was not trained to assign specific impairment ratings under the AMA Guides, he felt it was likely that Ms. Rodriguez did sustained permanent impairment as the result of her bilateral shoulder injuries. Dr. Bansal assigned 4 percent permanent impairment to her whole person for the right shoulder, and 2 percent impairment to her whole person for the left shoulder. Thus, according to the combined values table of The Guides, he assigned a total of 6 percent impairment to the whole person. Dr. Vinyard did not address the issue of permanent impairment as he felt her problems were not work related. I find the impairment ratings assigned by Dr. Bansal are most consistent with the record as a whole and carry the greatest weight.

Dr. Bansal and Dr. Hicks both assigned permanent restrictions of no lifting more than 20 pounds floor to table with both arms, no lifting more than 10 pounds over shoulder level occasionally, avoid frequent over shoulder lifting and reaching. (Cl. Ex. 1; JE2) I give greater weight to the opinions of Dr. Bansal and Dr. Hicks. I find that as the result of the work injury, Ms. Rodriguez has permanent restrictions as set forth by Dr. Bansal and Dr. Hicks. Given these restrictions, Ms. Rodriguez is no longer able to perform the jobs she previously performed at DHL. She can no longer work in the box picking job and she can no longer perform the high reach job. She currently works in an exports job. Defendants are accommodating her restrictions. For example, when

boxes are heavier Ms. Rodriguez is able to get help or the employer changes her to a different position.

Ms. Rodriguez can no longer perform the box picking job or the high reach job rotation. However, no medical provider has opined that she cannot work. I find Ms. Rodriguez's restrictions preclude her from a significant number of jobs. However, I find that the preponderance of the evidence does not show that she is permanently and totally disabled. Ms. Rodriguez is currently working in an exports position. To the credit of both the employer and the claimant, the employment relationship has continued. DHL has continued to work with Ms. Rodriguez to accommodate her restrictions. She testified that she believes she can continue to perform this job in exports within her restrictions. Ms. Rodriguez has demonstrated that she has a strong work ethic and desire to remain a member of the workforce. She has experience operating a forklift. I also find that she has sustained a significant loss of future earning capacity as a result of the work injury. Unfortunately, she has significant restrictions. Her prior work history consists of primarily unskilled work. She has lost access to a significant portion of her pre-injury employment opportunities. However, she should be able to expand her employment opportunities through her willingness to work. Considering Ms. Rodriguez's age, educational background, employment history, ability to retrain, motivation to remain in the workforce, length of healing period, permanent impairment, and permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that she has sustained a 60 percent loss of future earning capacity as a result of her work injury with DHL.

Next, the commencement date for the permanent partial disability benefits must be determined. Dr. Bansal placed Ms. Rodriguez at maximum medical improvement as of December 14, 2016. However, Ms. Rodriguez continued to work for DHL following her August 25, 2015 injury. Therefore, permanency shall commence on the date of the injury which is August 25, 2015.

## CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

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.

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 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).

Based on the above findings of fact, I conclude Ms. Rodriguez has carried her burden of proof that she sustained a cumulative injury to her shoulders which arose out of and in the course of her employment with DHL. She did not have any problems with her shoulders at the time she began working for DHL in 2006. Since that time she has performed repetitive work for DHL. The most persuasive medical opinions in this case have causally connected her shoulder problems to the repetitive work she performed at DHL. Ms. Rodriguez has established by a preponderance of the evidence that she sustained a cumulative work related injury.

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

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

Based on the above findings of fact, I conclude Ms. Rodriguez's work injury manifested on August 25, 2015. Claimant testified that she knew as early as 2014 or 2015 that her shoulder pain was related to her work. On August 25, 2015, Ms. Rodriguez saw Susan Gilbert, ARNP with bilateral shoulder pain. She reported that her right side was worse than her left and that her symptoms increased at work. (Cl. Ex. 10, p. 120) I find that claimant's injury manifested by August 25, 2015.

Iowa Code section 85.26(1) requires an employee to bring an original proceeding for benefits within two years from the date of the occurrence of the injury if the employer has paid the employee no weekly indemnity benefits for the claimed injury. If the employer has paid the employee weekly benefits on account of the claimed injury, however, the employee must bring an original proceeding within three years from the date of last payment of weekly compensation benefits.

However, the time period both for giving notice and filing a claim does not begin to run until the claimant as a reasonable person, should recognize the nature, seriousness, and probable compensable character of the injury. The reasonableness of claimant's conduct is to be judged in light of claimant's education and intelligence. Claimant must know enough about the condition or incident to realize that it is work connected and serious. Claimant's realization that the injurious condition will have a permanent adverse impact on employability is sufficient to meet the serious requirement. Positive medical information is unnecessary if information from any source gives notice of the condition's probable compensability. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Orr v. Lewis Cent. Sch. Dist., 298 N.W.2d 256 (Iowa 1980); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Based on the above findings of fact, I conclude Ms. Rodriguez did not discover the seriousness of her injury until October 7, 2016; this is the date the time period for filing a claim began to run. Ms. Rodriguez filed her original notice and petition on June 28, 2018. Therefore, I conclude that her petition is not barred by operation of Iowa Code section 85.26.

We now turn to the issue of permanent partial disability. 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).

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 R. Co., 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).

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).

Based on the above findings of fact, I conclude that Ms. Rodriguez is not permanently and totally disabled. However, I also conclude that she has sustained substantial industrial disability. Considering Ms. Rodriguez's age, educational background, employment history, ability to retrain, motivation to remain in the workforce, length of healing period, permanent impairment, and permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I conclude that she has sustained a 60 percent loss of future earning capacity as a result of her work injury with DHL. As such, she is entitled to 300 weeks of permanent partial disability at the stipulated weekly rate.

There is a dispute regarding the appropriate commencement date. 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. In the present case, Ms. Rodriguez continued working at the time of her August 25, 2015 injury. Thus, the appropriate date for the commencement of permanent partial disability benefits is the date of injury, August 25, 2015.

Claimant is seeking payment of medical expenses. 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. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Defendants make no argument that if claimant's injury is found to be work-related these expenses should not be their responsibility. Based on the above findings of fact, I conclude that claimant's shoulder problems are related to her work for DHL. The treatment for which claimant is seeking payment is related to her work injury. Thus, I conclude defendants are responsible for these medical expenses in the amount of $780.64. (See Exhibit 6)

Claimant is seeking reimbursement for the IME in the amount of $2,743.00, pursuant to Iowa Code section 85.39. Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. Defendants make no argument regarding why reimbursement of the IME should not be ordered under Iowa Code section 85.39. In the present case, claimant sustained a work-related injury. Claimant obtained an impairment rating on July 17, 2018. However, prior to the date of claimant's IME, there was not an evaluation of permanent disability from an employer-retained physician. I conclude that claimant has failed to show reimbursement for the IME under section 85.39 of the Iowa Code.

Finally, claimant is seeking an assessment of costs as set forth in Claimant's Exhibit 7. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. 876 IAC 4.33. Because claimant was generally successful in her claim, I exercise my discretion and find an assessment of costs against the defendants is appropriate. I find that the $100.00 filing fee and $13.86 service fees are appropriate costs. 876 IAC 4.33(3), (7). Claimant is also seeking Dr. Bansal's IME report in the amount of $2,743.00 as a cost under 4.33(6). Only the costs associated with preparation of the written report of a claimant's IME can be reimbursed as a cost at hearing under rule 876 IAC 4.33. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 846-847 (Iowa 2015). The invoice from Dr. Bansal's office

states that the cost of the report was $2,184.00; I find this is an appropriate cost under 876 IAC 4.33(6). Defendants are assessed costs totaling $2,297.86.

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the stipulated rate of six hundred thirty-one and 56/100 dollars ($631.56).

Defendants shall pay three hundred (300) weeks of permanent partial disability benefits commencing on August 25, 2015.

Defendants shall be entitled to credit for all weekly benefits paid to date.

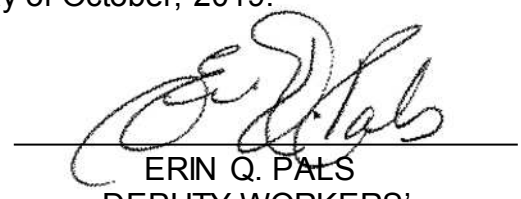
Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable 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 Deciga Sanchez v. Tyson Fresh Meats, Inc., File No. 5052008 (App. Apr. 23, 2018) (Ruling on Defendants' Motion to Enlarge, Reconsider or Amend Appeal Decision re: Interest Rate Issue).

Defendants are responsible for medical expenses as set forth above.

Defendants shall reimburse claimant costs as set forth above.

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

Signed and filed this 11th day of October, 2019.



ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

James Byrne (via WCES)
Eric Lanham (via WCES)