BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARGARITA De LEANOS, Claimant, vs. PINE RIDGE FARMS, Employer, and GREAT AMERICAN ALLIANCE INSURANCE COMPANY, Insurance Carrier, SECOND INJURY FUND OF IOWA, Defendants.	File No. 5067831 ARBITRATION DECISION Head Note Nos.: 1100, 1801, 1802, 1803, 2800, 2500, 3200

STATEMENT OF THE CASE

Claimant, Margarita De Leanos has filed a petition for arbitration seeking worker's compensation benefits against Pine Ridge Farms employer, Great American Alliance Insurance Company insurer, and Second Injury Fund of Iowa, all as defendants, for a disputed work injury.

In accordance with agency scheduling procedures and pursuant to the Order of the Commissioner in the matter of the Coronavirus/COVID-19 Impact on Hearings, the hearing was held on April 1, 2020, via Court Call. The case was considered fully submitted on April 27, 2020, upon the simultaneous filing of briefs.

The record consists of Joint Exhibits 1-5; Claimant's Exhibits 1-9 except for p. 64 which was stricken for being duplicative; Defendants Exhibits A-H, Fund Exhibits AA-BB and the testimony of claimant and Nicole Sams.

ISSUES

1. Whether claimant sustained an injury which arose out of and in the course of her employment;

2. Whether the injury was the cause of temporary disability;

3. Whether the injury was the cause of permanent disability, and, if so, the extent;

4. Whether claimant failed to give timely notice under Iowa Code section 85.23;

5. Whether claimant is entitled to reimbursement of medical expenses itemized in Claimant's Exhibit 6;

6. Whether claimant is entitled to Second Injury Fund benefits and, if so, the amount of benefits.

STIPULATION

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.

The parties agree at the time of the alleged injury date the claimant was an employee of the employer. The defendants further agree that the claimant was off work between December 22, 2017 through September 21, 2018.

If benefits are awarded, the parties agreed the commencement date of permanent partial disability benefits is September 22, 2018.

At all times material hereto, the claimant's gross earnings were $664.00 per week. The claimant was married and entitled to two exemptions. Based on the foregoing numbers, the weekly benefit rate is $442.09.

While the parties dispute the claimant is entitled to reimbursement of medical expenses, they will agree that the medical providers would testify as to the reasonableness of their fees and/or treatment set forth in the listed expenses and will not offer contrary evidence. Further the defendants will agree that the listed expenses are causally connected to the medical condition upon which the claimant's injury is based.

FINDINGS OF FACT

At the time of the hearing, claimant was a 57-year-old person. She was married with four adult children. Claimant is a non-English speaker with twelve years of primary and secondary education. While she knows some English words or phrases, she used an interpreter to communicate at the hearing. She testified that while working, she was able to communicate using some words or phrases along with the use of an interpreter. She cannot read or write English and needs assistance with documents. She is not comfortable with the use of a computer.

Past work history includes general housekeeping and meatpacking work. (Claimant's Exhibit 3:29) As a housekeeper she would have to lift garbage and tubs of water weighing around 20 to 30 pounds. In her position as a meatpacker, she would have to lift bags of meat and put them into a box. She does not believe she could return to the meatpacking job as she cannot bend her neck forward to look down more than 15 minutes.

She began her employment with the defendant employer on May 12, 2009, packing ribs. (Ex. 3:29) Claimant testified that her work required her to look down frequently, and reach frequently with her right hand. The pain first started around November in her right hand and then worsened in her ring and small fingers to the point of locking up. She asked for a co-worker to interpret for her and placed a request with her supervisor to move to another job as the current one was causing her too much pain. (Ex. 1:7) The supervisor sent her to the plant nurse. After working the bellies job, she developed neck and shoulder pain from the lifting. (Ex 1:7) As part of the rotation at work, claimant would work the bellies 2 to 3 hours each morning. In this position, she was required to stand at the table. Bellies would drop from above and she would reach or extend her right arm to grab the bellies and stretch them before lifting them to her chest level to place them on a metal piece and then push them into packages. The bellies range in weight from 20 to 45 pounds each and she lifted approximately 100 bellies per hour. In the afternoons, claimant would work the packaging rib position. Ribs weighed less, approximately 10 to 15 pounds each. She would stand at a line and a conveyor would move the ribs in front of her. She would then be required to lift the ribs off the line to chest level to place them into packages. Typically, she lifted 150 to 200 ribs per hour.

Defendants argue that this position could not have resulted in the injuries the claimant currently alleges she suffers. A job analysis was performed on February 26, 2020, of the ribs position. (Ex A:2-3)

Claimant left defendants' employ in December 2017. She argues that this position required more lifting as the bellies weighed more than the ribs.

Her past medical history is significant for bilateral Madelung deformity. She received treatment on her left wrist sometime in 2001 or 2002. She testified that the left wrist was not bothering her but agreed to the surgery because of a bone cyst. (JE 1:1) Since the surgery, she suffered loss of strength and stiffness. (Ex. 1:8) Despite this weakness in her left hand, claimant was able to work without restrictions for years. On July 17, 2014, claimant was seen for bilateral wrist pain with Jose Angel, M.D. (JE 1:2) Prednisone and Diclofenac was prescribed. Id. Claimant testified that it was only for the right wrist.

On August 30, 2016, claimant was seen by Jose Angel, M.D., for varicose veins with leg pain. (JE 1:3) Her condition improved with knee-high compression socks. (JE 1:3) During this visit, it was noted that her right wrist showed a prominent bones spur along with worsening right wrist pain. (JE 1:3) Her job duties included standing all day

and heavy physical labor while packing ribs at the meatpacking plant. (JE 1:3) Dr. Angel believed the right wrist bone spur was likely work-related and recommended she follow up with the doctors through her employer. (JE 1:3) Claimant testified that she complained of right wrist and shoulder pain but that the pain went away and she continued to work.

A job analysis was performed by John Kruzich, MS, OTR/L, who determined that based upon claimant's job duties, there were no sustained awkward postures of the right shoulder, highly repetitive work activities, or excessive force exerted through the right upper extremity which may lead to the development of a shoulder disorder. (Ex. A, p. 4).

On December 6, 2017, she presented at Broadlawns with weakness and numbness in the right pinky and ring finger. (JE 2:17) There was a mass on her right wrist and an X-ray suggested an old fracture with misalignment. (JE 2:19) Claimant had no acute injury complaints but did report repetitive work packing boxes. (JE 2:17) The plan was for claimant to begin a trial of NSAIDs and stay off of work through December 8, 2017. (JE 2:19, 22) At hearing, claimant testified that she complained of wrist, arm, shoulder and neck pain but it was not documented in the medical records.

On December 22, 2017 claimant returned to Broadlawns and was seen by Gautam Käkade, M.D., for complaints of increasing paresthesias and tingling in the fingers as well as in her thumb. She was currently taking meloxicam. (JE 2:25) She had discomfort over the dorsal aspect of the wrist at the location of the deformity that grew more painful with use of her right hand. (JE 2:25) On examination, there was a significant deformity over the dorsal aspect of the wrist with a prominent ulnar styloid. There was mild wasting of the thenar muscles and diffuse tenderness over the distal radioulnar joined in the dorsal lateral aspect of the wrist. (JE 2:25) Sensation was reduced in the thumb, index and long finger, restricted motion of the wrist and fingers. (JE 2:25) Dr. Käkade diagnosed claimant with a congenital anomaly of the right wrist with subluxation of the distal radioulnar joint and ulna plus median and dorsal angulation of the distal radius. (JE 2:25) In addition to the congenital disorder, claimant presented with mild carpal tunnel syndrome symptoms. (JE 2:25) Dr. Käkade recommended the claimant seek out a hand and wrist surgeon. (JE 2:25) In the meantime, claimant was ordered to lift no more than 10 pounds and remain on light duty work for the next two months. (Joint Exhibit 2:27)

At hearing, claimant again testified she reported pain in her neck, shoulder, and arm but that the doctor was focused on her wrist.

On January 18, 2018, claimant established care with DMOS for her right upper extremity. (JE 3:32) Her initial encounter was with Charles Graham, PA-C, who diagnosed claimant with right wrist osteoarthritis in a bony deformity. (JE 3:32) X-rays showed severe degenerative changes in the radioulnar carpal joint and postoperative changes consistent with a distal ulna excision. (JE 3:32) Dr. Graham also recommended surgical consultation. On January 19, 2018, Andrew J. Taiber, M.D., concluded claimant

had a Madelung type deformity on the left wrist with associated dorsal dislocation of her distal ulna. (JE 3:38) Dr. Taiber noted claimant had intermittent numbness that went from her shoulder down to her fingertips. (JE 3:37-39) Because of the complex situation with both of her wrists, Dr. Taiber recommended claimant be treated at the University of Iowa Hospitals and Clinics. (JE 3:39)

Dr. Käkade took claimant off of work again on January 23, 2018 anticipating a return to work on March 23, 2018. (JE 2:30)

Claimant established care at the University of Hospital and Clinics on February 7, 2018 with Andrei Odobescu, M.D. (JE 4:41) Claimant reported rapid deterioration in her wrist condition over the past few months causing constant and severe pain along with parasthesias of her first three fingers. (JE 4:41) X-rays confirmed the Madelung deformity as well as metacarpal degenerative disease. (JE 4:45) Surgery took place on March 15, 2018, to address the Madelung deformity. (JE 4:52-55)

> We started with a longitudinal incision overlying the fifth extensor compartment. Dissection proceeded with tenotomy scissors and bipolar cautery down to her extensor compartment while protecting the ulnar nerve branches. Due to the severe subluxation of the distal ulna we could not locate the fifth or sixth extensor compartment. We dissected distally to the caput ulnae and identified the ruptured ends of the extensor digitorum minimi and extensor digitorum communis to the small finger. We note that the fourth compartment was in the groove between the head of the ulna and the radius. The fourth compartment tendons were intact. We then exposed the ulna more proximately and expose the neck of the ulna. We will keep him about 3 cm of distal ulna for the arthrodesis, we performed a circumferential dissection with the Freer elevators around the neck of the ulna and while protecting the surrounding soft tissues with Homan retractors we performed an osteotomy at this site. Based on her ulnar positive variance which exceeded the radius by at least 8 mm, we decided to resect 1.5 cm of ulna. This was also done by protecting the tissues with the Homan retractors. Resecting this ulnar piece allowed reduction of the ulnar head. Under direct vision, we then removed the remnants of cartilage from the DRUJ on both the ulnar head and the radius. The ulnar head was then reduced to the radius and using the guidewires for cannulated screws we placed to [sic] guidewires parallel to each other and to the radiocarpal joint. Reduction of the joint was verified radiologically. Once this was judged adequate we then used a reamer and placed cannulated screws over these guidewires. A 32 mm and a 35 mm cannulated screw were threaded down these wires and then the wires were removed. Good alignment of the radius and the ulnar head was obtained. We then verified the position of the proximal ulna. This showed that after reduction of the ulnar head, there was only about 2-3 mm of gap between the proximal ulna and the ulnar head. We therefore took another wafer of about 5 mm from the proximal aspect of the ulna. We identified

> the extensor carpi ulnaris tendon which was found to be attached to the ulnar head. We traced the tendon proximally as far as we could and then sectioned the tendon. Using a 3.5 mm drill, we drilled a ulnar to radial hole through the proximal aspect of the ulna and passed the ECU tendon, distally based through this hole. The tendon was attached upon itself with 40 Fiber Loop.
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> Using the resected bone, we removed the cancellous portion of the bone and morselized it with a rongeur. Approximately 0.5 cc of bone graft was prepared. This bone was packed at the site of the DRUJ arthrodesis. Position of the hardware and the graft was verified fluoroscopically and judged adequate.
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> Finally, we identified the extensor indicis proprius and traced it distally all the way to the MCP. At this point it was incised and rerouted towards the EDM. A Pulvertaft weave was then performed between the EIP and the ADM. The tendons were secured at the points of wheezing with 4-0 FiberWire horizontal mattress sutures. Tension was set such that the small finger was slightly more extended than this [sic] ring finger. This was in anticipation of some loosening of the extension.

(JE 4:54)

Claimant was placed in an immobilizer brace which she wore for approximately 1 1/2 months.

On March 30, 2018 claimant began physical therapy. (JE 5:80) During the initial visit, the claimant's husband was present to translate and there was no mention of any shoulder, neck or arm pain. Claimant reported "little pain" in her right upper extremity. (JE 5:86)

On April 25, 2018, claimant was sent a letter indicating that she no longer had a position available to her with defendant employer. (Ex 5: 38) The letter was sent in English and was translated by member of her family. It was her understanding that she was terminated and that if she came to work, she would be required to do a normal job and not one within the restrictions recommended by her physicians and surgeons. The letter actually was in follow up to the short-term disability claimant had applied for and received. (Ex 5:38) In the letter, it noted that Human Resources had reached out to claimant on April 7, 2018 and April 17, 2018 with request for additional documentation from her physician as to her disability. (Ex. 5:38) Claimant was informed that she would be placed on inactive status as of May 1, 2018, unless she was able to provide documentation that she could return to work without restrictions. (Ex 5:38)

Because she was not able to return to work without restrictions, claimant did not contact the employer. On May 8, 2018, she was placed on inactive status and advised she could reapply if her condition improved. (Ex. 9: 65)

On May 15, 2018, during the physical therapy appointment, it was noted that the range of motion of the right wrist was approaching the left range of motion. (JE 5:86) There were no mentions of deficits in the left wrist or hand. (JE 5:86) The left wrist and hand function and strength and range of motion was tested for purposes of comparisons with the right and there were no mentions of any deficits on the left. (JE 5:88) By June 21, 2018, claimant reported through her husband acting as translator that her hand was "fine" and that she only had pain in the SF/RF when she tried to hold tight to something or pull down into a fist. (JE 5:92)

On June 8, 2018, claimant returned to Dr. Odobescu for follow-up. (JE 4:70) Dr. Odobescu noted claimant had been fired from her place of employment. He recommended she continue with hand therapy and removed all lifting and activity restrictions. (JE 4:70) He returned her to full duty work. Claimant testified that Dr. Odobescu recommended that she return to work an easy job.

On July 5, 2018, the therapy notes mention shoulder pain for the first time. (JE 5:94) She stated that she had shoulder pain ever since the surgery that worsened at night, impacting her ability to sleep, and increased with overhead reaching. (JE 5:94) Treatment was provided to claimant's shoulder. (JE 5:95) The therapist recommended the use of pulleys at home if the claimant chose to purchase them. (JE 5:94) At the July 9, 2018, visit, claimant reported that her shoulder pain was more bothersome than anything else in her arm. (JE 5:96) During this visit, claimant said that her whole arm was painful prior to surgery and that she has had consistent pain since surgery. (JE 5:96) Objectively, claimant showed slightly diminished range of motion along with pain. (JE 5:96) Again, treatment was provided to claimant for the shoulder pain. (JE 5:97) The therapist began measuring the shoulder range of motion. (JE 5:96) Claimant continued to complain of shoulder pain and received treatment for that pain.

On July 11, 2018, claimant returned to Dr. Angel's office reporting depression and significant weakness in both arms. (JE 1:4) Dr. Angel concluded that there was a direct correlation between claimant's work situation and the wrist surgery to claimant's depression and anxiety. (JE 1:5) Dr. Angel also determined she was disabled because she could not use her hands for work. (JE 1:6)

On July 26, 2018, claimant reported soreness in the ulnar digits with composite flexion but that the shoulder pain was improving. (JE 5:104) On July 26, 2018, the therapist wrote to Dr. Odobescu and informed him that the claimant had plateaued and that it was appropriate to discharge her. (JE 5:105) However, claimant's goals were actually in progress according to the therapy notes. (JE 5:105) She had not achieved grip strength of at least 20 pounds to allow for returning to work, she did not have wrist flexion and extension of at least 50 – 50, and she still reported difficulties in cooking and cleaning tasks. (JE 5:105)

On September 21, 2018, claimant returned to Dr. Odobescu for follow up from her Sauve Kapandji procedure. (JE 4:72) Her pain had improved and she had better range of motion but she was unable to "replant work." (JE 4:72) Dr. Odobescu

recommended hand therapy as long as she found it beneficial. (JE 4:72) Due to her bilateral Madelung deformity, however, he opined that she may not be able to return to work and that she would need to have someone else evaluate her disability. (JE 4:72)

Claimant returned to Dr. Angel on November 28, 2018, for a flare of her depression. (JE 1:8) He renewed a lapsed prescription of Trintellix which seemed to help claimant before. (JE 1:8)

Claimant retained Sunil Bansal, M.D., to conduct an IME. (JE 1) The examination took place on February 6, 2019. Dr. Bansal diagnosed claimant with right carpal tunnel syndrome, left wrist advanced Madelung deformity, cervical discogenic pathology, and depression and anxiety. (Ex. 1, p. 10). Dr. Bansal opined that claimant had developed right carpal tunnel syndrome as a result of her work activities. (Ex. 1, p. 11). He could not causally connect claimant's Madelung deformity of her right wrist and need for surgical intervention to her work activities. (Id.). Dr. Bansal further opined that claimant had developed an aggravation of cervical discogenic pathology from cumulative and repetitive lifting at work, manifesting in December 2017. (Id.). Dr. Bansal also opined that claimant's depression was aggravated as a result of her cumulative work injuries. (Ex. 1, pp. 11-12). With regard to impairment, Dr. Bansal assigned 5 percent whole person impairment for claimant's neck, 5 percent upper extremity impairment for right carpal tunnel syndrome, and 3 percent upper extremity impairment for claimant's left wrist. (Ex. 1, p. 12). Dr. Bansal opined that claimant qualified for Class 2 mild impairment due to her mental health, but did not opine as to a specific percentage of impairment. (Ex. 1, pp. 12-13). Dr. Bansal recommended permanent lifting restrictions of 5 pounds with the right hand or 15 pounds with both hands, as well as avoiding work activities that require repeated neck motion or require a flexed position for greater than 15 minutes. (Ex. 1, p. 13). With regard to future care, Dr. Bansal recommended further evaluation with a mental health specialist, possible carpal tunnel release surgery, and an MRI of the cervical spine. (Id.).

It was not until the December 17, 2019, that Dr. Angel recorded shoulder pain. (JE 1:10) At this appointment, claimant reported right arm radicular pain radiating from her right neck to her right shoulder and into her right triceps. (JE 1:10) She exhibited breakaway pain and weakness of the right arm, diminished abduction and pain shooting down the posterior triceps across the shoulder and the left base of the neck and trapezius. (JE 1:10) Worried about the possibility of destructive cervical arthritis, Dr. Angel ordered an EMG. (JE 1:10) No testing has taken place. Claimant testified that this was her last visit with Dr. Angel prior to hearing.

In a checklist letter, Dr. Angel rendered his opinions that claimant was currently suffering from right CTS separate and apart from the Madelung deformity on her wrist as well as an aggravation of an underlying degenerative condition in her neck which he would causally relate to the cumulative effect of her repetitive upper extremity and upper body work for the defendant employer. (JE 1: 14) He further opined claimant should undergo further testing such as an MRI to determine the extent of claimant's cervical spine damage, an EMG for the right arm, pain management going forward. (JE 1:14,

15) Additionally, Dr. Angel agreed that claimant developed depression and anxiety as sequelae to her work related injuries. (JE 1:15) He agreed that Dr. Bansal's restrictions were appropriate. (JE 1:15)

Defendants obtained a records review from Charles Mooney, M.D., on February 28, 2020, He noted that there were references to carpal tunnel syndrome but there was no diagnostic testing to confirm or rule out the disease. (Ex C:22) With regard to the right wrist, Dr. Mooney stated claimant suffered from bilateral Madelung deformity, which was a congenital deformity that becomes progressively symptomatic with age, and had been successfully repaired with surgery. (Ex. C, p. 16). He further opined that the work activities had neither objectively advanced or accelerated claimant's condition, nor caused her need for surgery. (Id.). Dr. Mooney opined that there was no specific injury or condition regarding claimant's right shoulder or right arm, outside of her right wrist and hand condition. (Ex. C, p. 18). With regard to claimant's neck, Dr. Mooney noted that the medical record did not support any specific diagnosis for a neck condition- and that due to claimant's age, it would be expected that she would have mild to moderate degenerative changes of the cervical spine. (Ex. C, p. 19). With regard to claimant's mental health, Dr. Mooney opined that while claimant was diagnosed with generalized depression and responded to medication, there was no evidence of a causal relationship between her mental health condition and a physical injury. (Ex. C, p. 21).

Claimant testified that she informed her supervisor, Jose, as well as someone named Larry that she could not work on bellies because there were too heavy and hurt her wrist. Jose told her that if work hurt her, she should go home. She was allowed to stop doing bellies and continue with the rib position. Based on this unrebutted testimony and the credible nature of claimant's overall testimony, it is found that claimant did report she was suffering from pain in her neck, shoulder, arm, hand and wrist to her supervisor in November of 2017.

Her supervisor did not testify at hearing but rather Nicole Sams, the Medical and Wellness Manager for Pine Ridge Farms, appeared on behalf of the defendant. Ms. Sams testified injuries need to be reported within 24 hours. The injuries are to be reported to the medical officer and or supervisors. If an injury is not work-related, the worker is to seek out care from a personal physician and returned to work when restrictions are lifted. At no time did Ms. Sams have any interaction with the claimant. The first that Ms. Sams was aware that the claimant was maintained that she had sustained a work-related injury was in an email on August 3, 2018. All previous correspondence regarding claimant's medical condition signal to Ms. Sams the claimant was suffering a non-work-related injury.

Ms. Sams may not have known of the complaints claimant made to her supervisor because Ms. Sams was not on the work floor with claimant.

Defendant employer generated a first report of injury, noting that the date of injury was December 21, 2017, to claimant's right hand and wrist. (Exhibit 4:33) This first report of injury was generated on August 31, 2018. (Ex. 4:43) Claimant took the work restriction issued by Dr. Käkade to her employer. She was told that there was no light duty work for her and claimant was sent home. She has not returned to the employ of the defendant. Claimant filed a short-term disability claim supported by a letter completed by Dr. Andrei Odobescu, the plastic surgeon who performed surgery on her unrelated congenital Madelung deformity. (Ex 4:35) In that form, Dr. Odobescu identified the source of claimant's disability as the Madelung deformity.

Currently claimant has quite a bit pain in the right hand. She did not feel that there was significant difference after the surgery. Her shoulder hurts, there is pain that radiates from the neck down into the arm. Her pain is primarily with extension of her hands, grabbing things, and holding things. She takes medication for her depression as well as for her pain. Claimant gave a halfhearted answer that she was looking for jobs, but she did not appear to be motivated to return to work. She has looked at laundromats, processing papers, and dry cleaners. She testified that she filled out applications but that due to her wrist injury, she was unable to obtain employment.

CONCLUSIONS OF LAW

Claimant alleges she has sustained a shoulder, neck, right upper extremity, wrist and hand injury as a result of the repetitive work she performed for the defendant employer. Defendants argue that claimant has not sustained a work-related injury, and if she did, she failed to give proper notice of said injury.

If it is determined that claimant has sustained only a right upper extremity injury, she alleges she is entitled to benefits from the Second Injury Fund of Iowa due to a first qualifying injury to her left wrist. The Fund points to claimant's testimony that she did not have pain or loss of function at the time of her surgery nor any time following and thus does not have a first qualifying injury. Even if the claimant did have a first qualifying injury, the Fund maintains the claimant sustained an industrial disability arising out of her work for defendant employer and thus the fund has no responsibility for the claimant's condition.

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 R. App. P. 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.

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

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

The parties agree claimant suffers from a bilateral congenital condition on her wrists and that she received treatment in the form of surgery and physical therapy in 2018 to address the condition on her right wrist.

However, claimant maintains she suffers from ongoing weakness and pain in the right side from the neck radiating into her shoulder, arm, wrist and hand. She argues that these pains are separate and distinct from her congenital condition.

There are competing expert opinions in this matter. Dr. Angel and Dr. Bansal have issued opinions that claimant has sustained neck, shoulder, and right upper extremity problems arising out of her work for defendant employer. Dr. Mooney disagrees. He acknowledges that there is some reference to carpal tunnel syndrome in the medical records but that since there were no diagnostic tests confirming the existence of carpal tunnel, he could not conclude the claimant was either suffering from carpal tunnel or that the carpal tunnel syndrome arose out of any repetitive work.

Dr. Odobescu did not render any opinion on whether claimant suffers from CTS, but his silence as it relates to the carpal tunnel syndrome is applicable. Dr. Odobescu performed surgery on claimant's wrist, opening the fifth extensor compartment of the wrist. He noted severe subluxation of the distal ulna. The caput ulna was dissected and the ruptured ends of the extensor digitorum minimized and extensor digitorum communism of the small finger were noted. The fourth compartment tendons were intact. Even after opening up her wrist and operating on the ulna, Dr. Odobescu made no mention of any carpal tunnel syndrome.

Following the surgery, claimant appeared to have some relief although even as of the September 21, 2018, medical visit with Dr. Odobescu she had not returned to pre-symptom status nor had she achieved all her physical therapy goals. Despite this surgery, claimant continued to have pain in her hand, wrist, arm, shoulder and neck.

As it relates to alleged carpal tunnel syndrome, Dr. Odobescu is the best source and given that he made no diagnosis of carpal tunnel syndrome, the claimant failed to prove by a preponderance of the evidence that her symptoms are related to carpal tunnel syndrome.

However, claimant credibly testified to shoulder pain as well as right-sided neck, wrist and hand pain both before her diagnosis of Madelung deformity on the right and after the surgery for the deformity. Dr. Angel and Dr. Bansal opined that these symptoms of pain, numbness and weakness arise from the aggravation of a pre-existing, mostly asymptomatic degenerative condition.

The opinions of Dr. Angel and Dr. Bansal are based on the claimant's clinical presentation and the explanation of the type of work she performed for the defendant employer.

Defendant employer and insurer argue that Dr. Bansal did not take note of claimant's pre November 2017 complaints. First, the claimant's pre-November 2017 complaints centered primarily in her wrists which is the location of her congenital Madelung deformity. She did have a complaint in 2014 and 2016 wherein she mentioned her work causing neck, shoulder, arm and wrist pain which is consistent with the current allegation that she developed a cumulative injury as a result of the regular movements of her neck, shoulder, and right arm during her work as a packer of bellies and ribs.

Further, while Dr. Mooney does not relate the pain suffered by claimant to her work, his decision was based, in part, on a job site evaluation performed two years after claimant had quit. The job site evaluator's conclusions did not match the tasks he acknowledged claimant was required to perform. She was required to frequently or constantly lift and grasp. She had worked for the defendant doing the same positions on rotation which required reaching, lifting, pulling and placing with her hands. She is right hand dominant and developed pain and discomfort on the right-side.

Dr. Angel and Dr. Bansal's opinions are consistent with each other as well as the claimant's clinical presentation. She did complain of numbness from her shoulder down to her fingertips to Dr. Taiber. After her surgery, she repeated her shoulder and neck complaints, particularly while in therapy following her right wrist surgery. The physical therapist discharged claimant despite claimant not meeting all the therapy goals. Dr. Odobescu released claimant without restrictions after an examination which revealed pain and weakness.

In weighing the evidence for causation, the expert opinions are the guide. While the complaints of shoulder and neck pain appear later in the claimant's course of treatment, both Dr. Angel and Dr. Bansal drew a causal connection between claimant's work and her complaints of pain in the neck, shoulder, arm, wrist and hand.

Dr. Mooney did not. However, Dr. Mooney did not examine the claimant. He concluded that the absence of a diagnosis supported an opinion that the condition must not exist. Finally, he relied on a job analysis performed by the physical therapist, weighing that one day study over claimant's many years of experience. The physical therapist's conclusions did not match the findings that claimant's work required frequent to constant reach, lifting, grasping.

For all of the above reasons, greater weight is given to Dr. Angel and Dr. Bansal's opinions and it is found that claimant has carried her burden to prove that she sustained right sided neck, shoulder, arm, wrist and hand symptoms including pain, numbness and weakness arising out of a repetitive work injury which aggravated her pre-existing degenerative condition that had been symptom free prior to November 2017. As a result of this finding, the claimant is not entitled to any claim for benefits from the Second Injury Fund of Iowa.

In regards to claimant's mental sequelae claim, while Dr. Angel did conclude that claimant suffered depression related to her work injury, there was no opinion from either Dr. Bansal or Dr. Angel that this mental injury impacted claimant's ability to work. Thus claimant has not met her burden as it relates to the mental injury to prove by a preponderance of the evidence that she sustained an industrial disability pertaining to depression.

The next question is the date of manifestation.

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant

medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

The date upon which claimant knew or should have known that the right sided neck, shoulder, arm, wrist and hand symptoms including pain, numbness and weakness arose from her work is December 6, 2017, when she was taken off of work after her visit to Broadlawns. Claimant argues that it is later on December 27, 2017, claimant's last day of work, however, she knew or should have known the impact of her work injury when she was first taken off of work because of her complaints which is December 6, 2017.

Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

Defendant employer and insurer maintain that they were not aware of the injury until August 3, 2018. Claimant testified that she spoke with her supervisor in November 2017 that work was causing her wrist pain. In the findings of fact, it was determined that this was a credible account of what took place in November 2017. Defendants were on notice of the possibility of an injury in November of 2017 and should have investigated it at that time. While Ms. Sams may not have been aware, claimant's supervisor was informed and made a work accommodation of moving claimant off of bellies to solely work the rib line.

Defendants failed to prove by a preponderance of the evidence that they were not given notice of the occurrence of an injury within 90 days of the manifestation date.

The next question is whether claimant is entitled to temporary benefits.

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

When claimant initially sought care and treatment for right-sided pain, the focus was on her right wrist and hand. Dr. Käkade noted that in addition to the Madelung deformity, she also had symptoms of CTS. On December 22, 2017, Dr. Käkade assigned restrictions of no lifting more than 10 pounds with light duty for the following two months. When claimant presented her restrictions to her employer, she was sent home as there was no work within her restrictions. Claimant was released to return to work without restrictions by Dr. Odobescu on June 8, 2018, however, at that time, claimant was still having pain and weakness in her right wrist as well as ongoing pain in her shoulder. She had not met all of her therapy goals.

When claimant returned to Dr. Odobescu, he noted that while claimant had improved she was unlikely to return to plant work and recommended she see someone to evaluate her disability. Dr. Bansal identified that last visit with Dr. Odobescu as the date of her maximum medical improvement.

Her treatment with Dr. Odobescu, however, was solely related to her Madelung deformity. Dr. Bansal agreed that claimant's Madelung deformity and need for surgical intervention was not related to her work activities. (Ex. 1, p. 11)

Work restrictions were imposed by Dr. Käkade of no lifting more than 10 pounds with light duty of December 22, 2017, and those restrictions were not lifted until June 8, 2018, when Dr. Odobescu returned claimant to work with no restrictions. When presented with these restrictions, defendant employer could not accommodate claimant. Dr. Bansal found claimant to be at maximum medical improvement as of September 21, 2018, which was her last appointment with Dr. Odobescu. Thus, based on Dr. Käkade's restrictions coupled with the defendant employer's inability to accommodate those restrictions, it is determined claimant is entitled to temporary benefits from December 22, 2017, to September 21, 2018.

The next issue is the extent of disability. Because claimant has sustained a whole body injury, she is entitled to be compensated pursuant to Iowa Code section 85.34(2)(v) (2019).

> In all cases of permanent partial disability other than those hereinabove described or referred to in paragraphs “a” through “u” hereof, the compensation shall be paid during the number of weeks in relation to five hundred weeks as the reduction in the employee's earning capacity caused by the disability bears in relation to the earning capacity that the employee possessed when the injury occurred. A determination of the reduction in the employee's earning capacity caused by the disability shall take into account the permanent partial disability of the employee and the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury. If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity. Notwithstanding section 85.26, subsection 2, if an employee who is eligible for compensation under this paragraph returns to work with the same employer and is compensated based only upon the employee's functional impairment resulting from the injury as provided in this paragraph and is terminated from employment by that employer, the award or agreement for settlement for benefits under this chapter shall be reviewed upon commencement of reopening proceedings by the employee for a determination of any reduction in the employee's earning capacity caused by the employee's permanent partial disability.

Claimant did not return to work nor was she offered work nor is she earning the same or similar salary today as she did prior to her work injury. Claimant is not working and has no work salary. Thus, her industrial disability shall be based on her loss of earning capacity.

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

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure

to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Claimant is a 57 year old person who does not speak, read, or write English. Her primary work experience is in the meatpacking industry. Defendant employer did not have a position that could accommodate claimant's work restrictions. There was no evidence at hearing that there was work that she could perform, however, she did not appear motivated to return to work. Dr. Bansal recommended permanent lifting restrictions of 5 pounds with the right hand or 15 pounds with both hands, as well as avoiding work activities that require repeated neck motion or require a flexed position for greater than 15 minutes. It is claimant's burden to prove the extent of disability and while she argues that it is hard to imagine a job that claimant could perform, there was little evidence that she has attempted to return to work or look for positions within her restrictions.

Thus, based on the foregoing, it is determined claimant has sustained a 95 percent loss of earning capacity.

The final issue is whether claimant is entitled to reimbursement of medical expenses. Defendants agreed that the listed expenses are at least causally connected to the medical condition upon which the claim of injury is based. However, none of the medical bills from Dr. Odobescu's office would be causally connected to the work injuries. Thus, claimant is entitled to reimbursement or payment of medical expenses excluding the medical bills of Dr. Odobescu but including the physical therapy bills as claimant received treatment for her shoulder during that period of time.

Claimant also requests an assessment of costs. Rule 876 IAC 4.33 allows for the assessment costs at the discretion of the deputy. Given that claimant has prevailed in this matter, the assessment of costs against defendant employer and insurer are appropriate except for the examination of Dr. Bansal. Only reports are permissible under 876 IAC 4.33.

ORDER

THEREFORE, it is ordered:

That defendants employer and insurer are to pay unto claimant four hundred seventy-five (475) weeks of permanent partial disability benefits at the rate of four hundred forty-two and 09/100 dollars ($442.09) per week from September 22, 2018.

That defendants employer and insurer are to pay unto claimant temporary benefits from December 22, 2107 through September 21, 2018.

That defendants employer and insurer are to pay medical expenses itemized in Exhibit 6 except for the charges of Dr. Odobescu.

That defendants employer and insurer shall pay accrued weekly benefits in a lump sum.

That defendants employer and insurer shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants employer and insurer shall pay the costs of this matter pursuant to rule 876 IAC 4.33 except for the examination performed by Dr. Bansal.

Signed and filed this __17th___ day of June, 2020.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

James Byrne (via WCES)

Lindsey Mills (via WCES)

Meredith Cooney (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.