BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
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WORKERS' COMPENSATION

PATTY FUNK, Claimant, vs. GENERAL MILLS, INC., Employer, and LIBERTY MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	File Nos. 5054697; 5054698; 5054699; 5054700; 5054701 ARBITRATION DECISION
PATTY FUNK, Claimant, vs. GENERAL MILLS, INC., Employer, and LIBERTY MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	File No. 5018157 REVIEW - REOPENING DECISION Head Notes: 1108, 1803, 2206, 2207, 2209, 2403, 2501, 2905

STATEMENT OF THE CASE

The claimant, Patty Funk, filed a petition for review-reopening and five petitions for arbitration seeking workers' compensation benefits from General Mills, Inc., employer, and Liberty Mutual Insurance Company, insurance carrier. The claimant was represented by Christoph Rupprecht. The defendants were represented by Peter Thill.

The matter came on for hearing on January 9, 2016, before Deputy Workers' Compensation Commissioner Joe Walsh in Cedar Rapids, Iowa. The record in the case consists of Joint Exhibits AA through ZZ, Claimant's Exhibits 1 through 12 and Defense

Exhibits A through X. The claimant testified under oath at hearing, in addition to defense witnesses, Nathan Pritchard, Tim Dougherty, Stacy Porter and James Shell. Mary Thomasson was appointed the court reporter for these proceedings. The matter was fully submitted on March 6, 2016, after helpful briefing by the parties.

ISSUES AND STIPULATIONS

Through the hearing report the parties entered a number of stipulations and listed various issues to be decided. All six hearing reports were approved at the start of the hearing. Those reports were signed and became orders. All of the stipulations in those reports are enforceable at this time.

File No. 5018157

The claimant alleges she is entitled to an increase in permanency benefits under the review-reopening standard as set forth in Iowa Code section 86.14. She alleges her permanent condition in her lungs and respiratory system from a May 27, 2004, work injury, worsened following her February 28, 2007, arbitration decision such that an increase in benefits is warranted. The defendants deny this and contend the standard for review-reopening has not been met. The claimant also seeks out-of-pocket transportation expenses under section 85.27, and lost wages for medical treatment and evaluation under sections 85.27 and 85.39. The defendants assert the affirmative defense that the claim is untimely under Iowa Code section 85.26.

File No. 5054697

Claimant alleges she suffered a new injury to her lungs/whole body which occurred or manifested on October 27, 2013. Defendants dispute the injury and deny the alleged injury is a cause of any permanency. Claimant seeks industrial disability benefits, which is disputed. Claimant's gross wages are disputed. Defendants assert the affirmative defense of lack of timely notice under section 85.23. Defendants assert that, if benefits are awarded, section 85.34(7) credit provisions apply. Claimant seeks payment for lost wages under section 85.39.

File No. 5054698

Claimant alleges she suffered a new injury to her lungs/whole body which occurred or manifested on March 23, 2015. Defendants dispute the injury and deny the alleged injury is a cause of any permanency. Claimant seeks industrial disability benefits, which is disputed. Claimant's gross wages are disputed. Defendants assert the affirmative defense of lack of timely notice under section 85.23. Defendants assert that, if benefits are awarded, section 85.34(7) credit provisions apply. Claimant seeks payment for lost wages under section 85.39.

File No. 5054699

Claimant alleges she suffered a new injury to her lungs/whole body which occurred or manifested on July 13, 2015. Defendants dispute the injury and deny the alleged injury is a cause of any permanency. Claimant seeks industrial disability benefits, which is disputed. Claimant's gross wages are disputed. Defendants assert the affirmative defense of lack of timely notice under section 85.23. Defendants assert that, if benefits are awarded, section 85.34(7) credit provisions apply. Claimant seeks payment for lost wages under section 85.39.

File No. 5054700

Claimant alleges she sustained an injury which arose out of and in the course of her employment on October 6, 2015. The proper date of manifestation is disputed. Claimant alleges her exposure to loud noise caused her to develop the condition of tinnitus. At the commencement of hearing, claimant withdrew her hearing loss claim associated with the tinnitus and sought to proceed solely on the tinnitus claim. The defendants dispute that claimant sustained an injury which arose out of and in the course of her employment and further deny the alleged injury is a cause of any permanent disability. On the record, defendants further argued that claimant's tinnitus claim is "derivative of the hearing loss claim." If the hearing loss claim is dismissed, defendants argue the tinnitus claim must be dismissed as well. (Transcript, page 5) Claimant seeks alternate medical care for her tinnitus. Defendants contend that if benefits are awarded, section 85.34(7) credit provisions apply. Claimant seeks payment for lost wages under section 85.39.

File No. 5054701

Claimant alleges she sustained an injury which arose out of and in the course of her employment on October 13, 2015. Claimant alleges this condition resulted in permanent partial disability in her bilateral hips. The defendants dispute that claimant sustained an injury which arose out of and in the course of her employment and further deny the alleged injury is a cause of any permanency. Claimant seeks medical expenses as set forth in Claimant's Exhibit 8. Defendants deny these expenses because claimant did not sustain an injury which arose out of and in the course of her employment, the fees charged were not fair and reasonable, the treatment was not reasonable and necessary, and the condition is not causally connected to her work injury. Claimant seeks alternate medical care for her alleged bilateral hip condition. Defendants contend that if benefits are awarded, section 85.34(7) credit provisions apply. The claimant also seeks out-of-pocket transportation expenses under section 85.27, and lost wages for medical treatment and evaluation under sections 85.27 and 85.39.

FINDINGS OF FACT

Claimant, Patty Funk, was 56 years old as of the date of hearing. She lives in Cedar Rapids, Iowa, having graduated from Jefferson High School in 1978. She took some college level courses in industrial maintenance robotics from Kirkwood Community College, but has no other formal education. (Tr., p. 10)

Ms. Funk began working for the employer in this case, General Mills, in 1982. She is obviously smart and highly motivated. She is undoubtedly an excellent employee with a good attention to detail and understanding of the employer's operations. Her employment evaluations demonstrate that overall she exceeds the employer's expectations. (Defendants' Exhibit M) Over the past couple of years, the only area where the employer has sought improvement of her work performance is in her working relationships with her peers. Ms. Funk has significant knowledge of operations and appeared to be a worker who takes great ownership and pride in her work.

She testified live at hearing and I find her to be a highly credible witness. Her testimony was direct and concise. She is a good historian. Her testimony was consistent with the other evidence in the record, including earlier sworn testimony and medical documentation.

Claimant started working in the cereal packaging department in 1982. She worked a number of different jobs throughout the plant until finally landing in the "Fruit by the Foot" department in 1999. She remained in this department through 2002, although her jobs have changed some over that time. In 2002 she began working in the "Fruit Shapes" department where she continued working through the date of hearing. (Tr., p. 47) Her job title is fruit packaging A operator. (Tr., p. 11)

Claimant's 2004 Respiratory Injury

A snapshot of Ms. Funk's injury and disability was effectively taken on February 26, 2007, the date of her arbitration hearing before Deputy Commissioner Helenjean Walleser. (Def. Ex. J) Deputy Walleser made the following findings of fact in an arbitration decision dated February 28, 2007.

> Claimant is a bright 46-year-old high school graduate who has worked in the employer's plant since 1982. She has completed 12 credit hours in a community college robotics industrial maintenance course. Her goal is to obtain an associate of arts degree in industrial maintenance in order to enhance her skill level in her current job.
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> On May 27, 2004, claimant worked in the plant's fruit products division. The facility's Memorial holiday weekend shutdown was beginning. Shut down activities included a full cleaning of the production area and equipment. Claimant was actively involved in cleanup. Through

coworker error, double the amount of the food contact surface sanitizer, Vortexx, was used to clean the "gusher." Claimant became conscious of a pungent odor and then noticed that her eyes hurt and her lips were numb. After about five minutes, she left the area.

Vortexx contains a high concentration of Acetic acid as well as hydrogen peroxide and Peroxyacetic and Octanoric acids. Inhalation of concentrated Vortexx vapors will irritate the respiratory tract, and, depending on the exposure, may cause bronchitis or pneumonia. (Exhibit 13, pages 1-4)

Claimant experienced continuing fatigue and exhaustion as well as chest pain throughout the holiday weekend. After returning to work on Tuesday, June 1, 2004, she sought medical care with Brian K. MacGillivray, M.D. Spirometry indicated moderate obstructive changes. The chest was hoarse with mild end expiratory wheezing, which resolved after breathing treatment. The assessment was chemical bronchitis. The doctor prescribed an Albuterol inhaler for 10 days and stated that the plant should provide claimant with a sealant mask to use during the "washout" procedure. (Ex. 1, p. 1)

Dr. MacGillivray again saw claimant on June 11, 2004. Claimant then reported that she was feeling much better. She continued to use the inhaler at times although she questioned whether she needed to use it. She felt she was then able to take a full deep breath. She denied having wheezing or chest pain. Her spirometry was normal and well improved from June 1, 2004. The doctor restricted claimant from working wash down/cleanup unless she used a sealant mask, but otherwise released her to work without restrictions and medically released her to return as needed. (Ex. 1, p. 2)

Claimant treated with Bradley J. Beer, M.D. throughout 2006 in an attempt to medically stabilize her condition, which he assessed variously as chemically induced asthma/bronchitis or industrial bronchitis. (Ex. 2, pp. 1-3) On April 5, 2006, claimant told Dr. Beer that she was doing better, but she still needed to use her inhaler frequently, especially after activity, such as running or playing volleyball. She noted that she continued to have tightness in her chest, especially if she was around chemicals in the plant. (Ex. 2, p. 3) These remarks are consistent with claimant's testimony at hearing. The doctor advised claimant to use her inhaler prior to exercise and as needed.

On May 26, 2006, Dr. Beer placed claimant at maximum medical improvement and described her as "back at her baseline and well-controlled." (Ex. 4, p. 1) On August 2, 2006, claimant complained to Dr. Beer about upper throat irritation. He felt this was a likely side effect of

Advair, a medication he had prescribed as part of the regimen to control her chronic respiratory condition. The doctor switched her to Spiriva instead.

As of August 2, 2006, claimant's medical regimen for her industrial bronchitis included: Albuterol Inhaler, two puffs every four hours as needed; Singulair, 10 MG daily; Spiriva, 0.018/inhaled daily; and Zyrtec, 10 MG daily. Claimant's lungs were clear to auscultation on that date. (Ex. 2, p. 7) Claimant underwent a methachlorine challenge on August 31, 2006. The results indicated normal bronchial reactivity. (Ex. 7, p. 1) Claimant underwent spirometry pre- and post-exercise on November 2, 2006. The pre-exercise spirometry was normal and the post-exercise spirometry was not considered as having worsened. (Ex. 9, p. 1)

As of November 7, 2006, claimant had stopped using Singulair due to muscle aches. She was able to walk two miles at her usual pace without using her inhaler, but was increasingly short of breath when she walked more than two flights of stairs. She also noted shortness of breath during startup days, cleanup days and in hot, moist or cold temperatures. An exercise laryngoscopy was positive for vocal cord dysfunction. Katie Kavanaugh, ARNP, assessed claimant with vocal cord dysfunction and irritation induced bronchospasm. Nurse practitioner Kavanaugh opined that both conditions likely related to occupational exposure to organic dusts. She referred claimant to speech therapy and recommended claimant avoid potential irritants. (Ex. 6, pp. 1-3)

The employer subsequently restricted claimant from both the cereal area and the Mogul area, as both contain large quantities of airborne dust. Claimant continues to work as a fruit A. operator in the fruit products area and has received regular hourly raises since May 27, 2004. Claimant contends that her restriction from airborne dust areas effectively disqualifies her from 50 percent of the jobs in the facility, however. She also states that she is able to work required regular time, including being scheduled for 19 straight days of work before having two days off. Claimant also testified that at times she is too fatigued to accept Saturday or Sunday overtime and that this has resulted in a steady decline in her overall income. Saturday overtime pay is at time and one-half; Sunday overtime pay is at double time. Neither claimant's pre- nor her post-injury actual earnings are in the record.

Claimant testified that she feels her job performance is not up to the standard it was prior to May 27, 2004. Claimant's supervisor for the past 20 years stated he has noticed no change in claimant's job performance. He also testified that fruit production overtime hours decreased for all workers when a competing company introduced its own fruit product line and when the employer began to use temporary workers where possible

> instead of paying overtime to regular employees.
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> Both claimant and her spouse testified about substantial changes in claimant's recreational activities that followed the May 27, 2004 exposure. That testimony overall was consistent with the medical records and the complaints recorded in them. It is also consistent with the substantial level of medication claimant now needs to maintain her overall respiratory well-being.
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> Claimant is a bright woman who continues to be able to do the work she has done for the employer for almost a quarter of a century. In other words, she has residual industrial capacity as a production worker in its plant. Her respiratory problems do preclude her from working in high dust areas of its plant, however.
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> Practically, that fact impacts on her ability to sustain employment with the employer. Claimant's education and training are such that her highest earning capacity is likely as a production worker for the employer. Should a reduction in its force require her to go into the general labor market, the pool of jobs available within her overall physical capacities and suitable given her work experience, education and training certainly would pay considerably less than she earns with the employer. Therefore, that she sustain employment with the employer is highly desirable. Yet her respiratory problems and the resulting preclusion from jobs in high dust areas certainly decreases claimant's opportunity to transfer to other jobs within the plant and thereby increases claimant's vulnerability to job loss, even given her long work history and excellent work record with the employer. That fact practically impacts on claimant's capacity to earn.
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> Claimant is expressly found to have 20 percent loss of earning capacity.

Funk v. General Mills, File No. 5018157 (Arb. Dec. Feb. 28, 2007). These findings of fact constitute the first snapshot of claimant's condition as of the date of that hearing. These findings are binding and cannot be altered.

On March 8, 2007, defendants made a lump-sum payment to claimant for the entire 20 percent industrial disability. (Def. Ex. K, pp. 1-2) This is the only payment claimant ever received for her work injury. (Tr., p. 114) The claimant filed her review-reopening petition on October 23, 2015.

Claimant's Reactive Airways Dysfunction Syndrome (RADS) Since the First Injury

Since February 2007, claimant has continuously treated with Joel Kline, M.D., at the University of Iowa Hospitals and Clinics (UIHC) for her reactive airways dysfunction

Syndrome (RADS). (Jt. Ex. FF) He specifically diagnosed RADS and provided restrictions as follows: minimize exposure to irritants and dust; use a canister respirator when around acid sanitizer; avoid dusty and cold environments. (Jt. Ex. FF, p. 5) He stated that these restrictions were permanent and provided a variety of medicines to control her symptoms. (Jt. Ex. FF, p. 5)

Dr. Kline evaluated Ms. Funk at UIHC a few times each year through the date of this hearing in January 2017. She saw a variety of other treatment providers as well, including John Cowden, M.D., Respiratory Care & Critical Care Associates (Jt. Ex. CC), various medical providers at Mercy Care BlairsFerry (Jt. Ex. BB, pp. 16-68), various providers at MercyCare South Urgent Care (Jt. Ex. LL), Holly Brown M.D., Allergy Partners, P.A. (Jt. Ex. DD, pp. 11-20), Jeffrey Krivit, M.D. (Jt. Ex. NN), Dean Abramson, M.D. (Jt. Ex. PP), Suzanne Cassel, M.D. (Jt. Ex. RR). In addition, she had significant diagnostic testing during this period of time. She missed substantial amounts of time from work for treatment purposes. (Cl. Ex. 10) It is noted that the claimant's treatment for her work injury since February 2007 has been extensive and substantial. She testified that her asthma attacks have become more frequent. She wears a respirator as needed. (Tr., p. 29)

Moreover, she also had several specific flare-ups or episodes of her RADS due to additional exposures at work. On October 27, 2013, she had an asthma attack following inhaling diesel truck fumes. (Tr., p. 17) This resulted in a visit to Mercy Care BlairsFerry. (Jt. Ex. BB, p. 39) On March 23, 2015, her asthma symptoms were exacerbated by cold weather and a co-worker's perfume. (Tr., p. 18) She sought treatment and evaluation from Dr. Kline. (Jt. Ex. FF, p. 56) This incident led to Dr. Kline drafting a letter essentially restricting claimant from working around co-workers with "significant amounts" of perfume. (Jt. Ex. FF, p. 61) On July 13, 2015, she inhaled cleaning chemical fumes at work. (Tr., p. 18) This is documented by Dr. Kline. (Jt. Ex. FF, p. 63)

The claimant alleges that these incidents constitute new, acute workplace injuries which arose out of and in the course of employment. She alleges the evidence demonstrates that these three episodes amount to a material aggravation of her underlying work-related condition. Claimant relies upon the expert medical opinion of Dr. Kline, claimant's treating pulmonologist. Dr. Kline is a highly-qualified expert and treating pulmonologist. He is a Professor of Internal Medicine at the University of Iowa College of Medicine and a Professor of Occupational and Environmental Health at the University of Iowa College of Public Health. (Cl. Ex. 2, p. 8)

In September 2016, Dr. Kline signed off on the following opinions.

1. Your diagnosis of Patty's pulmonary condition is reactive airways dysfunction syndrome/occupational asthma.

2. It is more likely than not that Patty's exposure to Vortexx sanitizer in 2004 led to her current increased sensitivity to scented body products such as

perfume, cologne, deodorant, and hairspray.

3. There has been a decline in Patty's pulmonary function since 2009. From 2007 to 2009, Patty's pulmonary function test (PFT) results were within the range of 90% to 100% of predicted. Patty's most recent PFT results from July 2016 were close to 80% of predicted.

4. It is more likely than not that Patty's exposure to both occupational irritants (e.g. dust, steam, fumes, chemicals) and non-occupational irritants (e.g. scented body products worn by her co-workers) at General Mills contributed to this decline in her pulmonary function.

5. You consider the acute asthma exacerbations Patty has experienced due to exposure to chemicals and perfume at General Mills to be discreet episodes of worsening function that have contributed to the overall decline in her pulmonary function.

6. Patty's pulmonary function will likely continue to deteriorate if she continues to have acute exacerbations of her asthma. The more acute exacerbations Patty experiences, the greater the risk of a permanent decline in her pulmonary function.

7. On September 7, 2016, Patty experienced an acute exacerbation of her asthma after being exposed to cleaning chemicals at work. I have attached a copy of a September 7 record from MercyCare South. I understand it is your opinion that if Patty continues to experience such exacerbations, it would be dangerous for her to continue working at General Mills.

(Cl. Ex. 2, pp. 1-2) Dr. Kline went on to recommend the same medical restrictions that she has had since February 2007. (Cl. Ex. 2, p. 2) Dr. Kline signed off that he agreed with all of these opinions. (Cl. Ex. 2, p. 3)

Defendants retained Shirley Conibear, M.D., as their expert witness. Dr. Conibear is a well-qualified occupational medicine physician from Chicago. (Def. Ex. C, p. 1) She is also a Board Certified Independent Medical Examiner. (Def. Ex. C, p. 2) She evaluated Ms. Funk in a one-time evaluation in November 2016. (Def. Ex. A, p. 1) She was notably thorough in her review of the medical records and history. (Def. Ex. A, pp. 2-28)

Dr. Conibear diagnosed reactive airways dysfunction syndrome (RADS). (Def. Ex. A, p. 28) Dr. Conibear then related the diagnosis of RADS exclusively to her 2004 work injury and then provided a well-reasoned impairment rating for her condition. (Def. Ex. A, pp. 29-30) She specifically opined that the subsequent "exacerbations of respiratory symptoms are due to the underlying condition of RADS." (Def. Ex. A, p. 29) She ultimately provided medical restrictions which are quite similar to the restrictions claimant has had since her original injury. (Def. Ex. A, p. 30)

In her brief, claimant argues that Dr. Conibear used a faulty analysis to determine that claimant's RADS had not worsened substantially since her original injury. (Cl. Brief, pp. 41-43) I generally agree with Dr. Kline's opinion that claimant's condition has worsened to some degree since her original injury. The ultimate factual question, however, relates back to the causal connection analysis, that is, whether the claimant has proven that any of the claimant's alleged work exposures, materially or substantially aggravated her underlying condition.

Thus, the factual fighting issue in these three material aggravation cases is whether any or all of the claimant's subsequent work exposures materially contributed to claimant's condition. While this case is close, I do not find that the claimant has met her burden of proof. Based upon the record of evidence before the agency, the claimant has experienced some additional exposures at work which have caused temporary flare-ups of her underlying RADS.

I do not find that claimant has met her burden of proof that these exposures meet the causation standard to prove any increase in her permanent disability. Dr. Kline's own opinion fails to demonstrate that the flare-ups substantially or materially aggravated the underlying permanency of her condition. To the extent that Dr. Kline has opined that the underlying condition has worsened to some degree since the original adjudication of her 2004 work injury claim, it is unclear whether this was from the normal course of her RADS or whether the new exposures substantially or materially changed the condition.[1] Therefore, as a matter of fact, I find that the claimant has failed to meet her burden of proof that any of the three new alleged injuries contributed, in any material or substantial way, to her overall underlying impairment or disability.

Factual Background Regarding Claimant's Tinnitus Claim

Ms. Funk testified extensively about the various, loud or extremely loud locations she has worked at General Mills. (Tr., pp. 35-55) As mentioned previously, she has worked at General Mills since 1982. She has always worked in noisy areas. Since approximately 2006, she has worked in the Shapes Packaging. (Tr., p. 50) She testified there are four different areas, each on a different level. She testified about the various noise levels in these areas. They are all quite loud. (Tr., pp. 50-55) Ms. Funk has always worn ear plugs at General Mills, however, she has to take them out on average of two to three times per day to talk on the phone. (Tr., p. 34) She has to raise her voice to communicate with co-workers.

Ms. Funk began experiencing ringing in her ears in approximately 2014. (Tr., p.

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[1] For example, in paragraph 3 of Dr. Kline's opinion, he noted that her exposure to irritants at work (presumably referring to the three "new" injuries) "contributed to the overall decline in her pulmonary function." (Cl. Ex. 2, p. 2) It is unclear whether it is his opinion that this decline is substantial or material. He certainly did not quantify the change in any meaningful way. I find this is likely because it is extremely difficult to medically discern how much the new exposures truly contributed to the decline in her function.

32) Over time, it has gotten worse. On October 6, 2015, claimant underwent a routine annual hearing test for the employer. (Jt. Ex. YY, p. 1) This test was the first time claimant reported tinnitus to her employer. Claimant has conceded she has suffered no lost wages, lost time, or reduction in pay connected to her diagnosis of tinnitus. (Tr., pp. 121-22)

The claimant's injury claim is based upon the expert testimony of Richard Tyler, Ph.D. Dr. Tyler is a nationally recognized audiologist, professor and Director of Audiology at the University of Iowa Hospitals and Clinics. His curriculum vitae is extensive and impressive. (Cl. Ex. 4, pp. 46-83) He has literally written a textbook on tinnitus. Dr. Tyler performed a comprehensive review of documents, including Ms. Funk's annual hearing test results (1985 to 2016), other medical records, noise maps and surveys fo the areas in the locations where she worked. (Cl. Ex. 4, pp. 9-19) In addition, he took a history from Ms. Funk in a 40 minute phone call. (Cl. Ex. 5, p. 12) He prepared an expert opinion report on November 23, 2016, which diagnosed Ms. Funk with moderate high-frequency binaural hearing loss and tinnitus. (Cl. Ex. 4, p. 25)

> Ms. Funk has a mild bilateral hearing loss consistent with noise exposure. She was exposed to intense noise at General Mills. She worked considerable overtime.
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> Based on the information available to me, I conclude that the sensorineural hearing loss and tinnitus experienced by Ms. Funk was probably a result of her work at General Mills. He condition is unlikely to improve.

(Cl. Ex. 4, p. 31) Dr. Tyler provided a very high impairment rating to claimant's body as a whole (29 percent) and recommended restrictions and treatment. (Cl. Ex. 4, p. 30)

On November 9, 2016, James Milani, D.O., evaluated Ms. Funk for a defense medical evaluation. Dr. Milani is a family medicine physician with little background in audiology. (Def. Ex. F) In addition to reviewing a letter from defense counsel and relevant medical records, Dr. Milani evaluated the claimant and performed his own hearing test. Dr. Milani prepared an expert report dated November 14, 2016. Therein, he commented on claimant's alleged hearing loss which is not part of this decision (although there was a hearing loss claim at the time), concluding that the hearing loss was too "speculative" for him to state with any confidence whether that was related to her employment. (Def. Ex. D, p. 4) "The ringing in the ears/tinnitus definitely can go along with the hearing change, therefore, further investigation into this needs to be performed for both these questions." (Def. Ex. D, p. 4) Dr. Milani suggested that the hearing loss documented between the 2015 and 2016 tests could have been caused by a non-work-related condition. (Def. Ex. D, p. 14) He further suggested that the hearing loss and tinnitus were highly linked together. Overall, Dr. Milani's opinion was somewhat equivocal although he certainly did not independently verify claimant's tinnitus claim.

Dr. Tyler and Dr. Milani thereafter authored supplemental expert opinions

criticizing one another's opinions. (Def. Ex. D, pp. 11-19; Cl. Ex. 4, pp. 43-45)

I find that the opinion of Dr. Tyler is given greater weight than the opinion of Dr. Milani. This is based upon Dr. Tyler's greater expertise in the field of audiology, as well as his logical assessment of the factors leading to the development of the condition. His opinion was based upon his review of the jobs Ms. Funk had performed in noisy areas, including the substantial overtime she worked, the fact that she had virtually no significant exposure outside of work, as well as her exposure to impulsive noise. (Cl. Ex. 4, pp. 22-23, 30, 40) Based upon a review of all of the evidence in the record, this is the most convincing opinion on medical causation.

Factual Background Regarding Alleged Injury to Claimant's Bilateral Hips

Ms. Funk has a long history of bilateral hip complaints dating back to the mid-2000's. (Tr., p. 59) At hearing, she testified that the first time she received medical attention for this condition was in approximately 2004 with Timothy Quinn, M.D. (Jt. Ex. TT, p. 1) She testified her condition worsened over time. From 2006 through 2010, she sought treatment from various medical providers and was diagnosed with trochanteric bursitis in her hip. (Jt. Ex. CC, p. 1; Jt. Ex. FF, pp. 7-9; Jt. GG, pp. 1-2; Jt. Ex. II, p. 1) In July 2009, Ms. Funk underwent surgery to remove bone spurs from her right great toe. (Jt. Ex. KK, p. 1) Thereafter, she had some insignificant chiropractic care until 2014. In June 2014, she was evaluated by an on-site (General Mills) physical therapist, Amy Wenger, OTR/L. (Jt. Ex. QQ, p. 1) In August 2014, she had a routine physical where she reported right lateral hip pain. (Jt. Ex. BB, pp. 56-59) She returned to her medical provider in October 2014, complaining of symptoms of arthritis. She mentioned that she performed frequent heavy lifting and walked on uneven concrete floors at work. (Jt. Ex. BB, p. 60) X-rays were taken and she was prescribed some medications. (Jt. Ex. BB, p. 61) She continued her physical therapy through Ms. Wenger through 2014 and into 2015.

In October 2015, Ms. Funk visited her family physician, John Brownell, M.D. He diagnosed right hip trochanteric bursitis and attempted an injection for pain. (Jt. Ex. SS, pp. 4-5) After another occupational therapy session with Ms. Wenger, Dr. Brownell referred Ms. Funk to a specialist, David Hart, M.D. In December 2015, she had her first appointment with Dr. Hart. She reported a history of lateral hip pain (primarily right-sided) since 2004. She told Dr. Hart that she felt her hip pain might be related to walking all day long on cement floors and frequently carrying fairly heavy objects. (Jt. Ex. TT, p. 1) Dr. Hart diagnosed bilateral trochanteric bursitis, gave her steroid injections in both hips and prescribed Celebrex. (Jt. Ex. TT, p. 3) Since then, she has continued to receive some occupational therapy and follow up with Dr. Hart.

Ms. Funk contends that her bilateral hip bursitis was substantially caused or materially aggravated by her work activities. In particular, she testified that she walks long hours on concrete floors. She testified she is required to stand in an area with a drain, which is uneven. (Tr., p. 74) She testified that, other than breaks, she is on her feet constantly and she testified that she lifts 34 pound rolls repeatedly for a portion of

the day. Several witnesses testified on behalf of General Mills as well. Nathan Pritchard, her team leader, Tim Dougherty, a tech coordinator, and James Shell, the safety manager, all testified that they do not believe the floors are sloped or uneven. (Tr., p. 150) Photographs of her work area are in evidence. The floors are not uneven; however, there is a drain in the area where claimant works.

Three physicians have weighed in with medical causation opinions. In September 2016, Dr. Hart, her treating orthopedic surgeon, confirmed the diagnosis of greater trochanteric bursitis and related this condition to her work activities. (Cl. Ex. 1, p. 1) He attributed the condition to walking on concrete floors, working overtime and being on her feet constantly. (Cl. Ex. 1, pp. 1-2)

Claimant's counsel arranged an independent medical evaluation (IME) with Farid Manshadi, M.D. He prepared a report in October 2016. Having the same history, he concurred with Dr. Hart regarding the diagnosis and medical causation. (Cl. Ex. 3, p. 12) He attributed the development of her problem to walking on uneven ground and repetitive lifting. (Cl. Ex. 3, pp. 9-12) He assigned a 10 percent impairment rating to each lower extremity and recommended some permanent restrictions, including to avoid walking on uneven surfaces, avoiding repetitious use of stairs, ladders, and avoiding repetitious squatting and crawling. (Cl. Ex. 3, p. 13)

The defendants had claimant evaluated for a defense IME with Suleman Hussain, M.D., an orthopedic surgeon. Like Dr. Manshadi, Dr. Hussain performed a thorough review of records and evaluation. Dr. Hussain opined that claimant has osteoarthritis of the bilateral hips. (Def. Ex. G, p. 5) He did not believe her condition was caused or materially aggravated by her work activities. (Def. Ex. G, pp. 5-6) Dr. Hussain opined that the condition in claimant's hips were likely the result of claimant's "gait abnormalities related to multiple other injuries and fractures to her lower extremities on both the left and right side." (Def. Ex. G, p. 5) He also received information suggesting Ms. Funk was not required to work overtime, the floors were not truly uneven, and that her lifting was not as much or as she suggested to Dr. Hart or Dr. Manshadi. (Def. Ex. G, p. 6)

I find that the claimant has failed to meet her burden of proof that her work activities caused an injury which arose out of and in the course of her employment. I find the expert opinion of Dr. Hussain is the most convincing expert opinion in the record.

CONCLUSIONS OF LAW

File No. 5018157

The fighting question for this file is whether the claimant has met her burden of

proof for review-reopening.[2]

In a proceeding to reopen an award for payments or agreement for settlement as provided by section 86.14, inquiry shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded or agreed upon. Iowa Code section 86.14(2) (2013). In order to demonstrate eligibility for an increase of compensation under section 86.14(2), the claimant must demonstrate what her physical or economic condition was at the time of the original award or settlement. At a subsequent review-reopening hearing, claimant has the burden to prove that there is a substantial difference in such condition which warrants an increase in compensation. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387 (Iowa 2009). The difference can be economic or physical. Blacksmith v. All-American Inc., 290 N.W.2d 348 (Iowa 1980); Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959). Essentially, two snapshots of the claimant's condition are taken; one in each hearing. The claimant must prove that there is something substantially different between the two snapshots such that it warrants an increase in benefits. Gosek v. Garmer & Stiles Co., 158 N.W.2d 731, 735 (Iowa 1968).

The principles of res judicata apply and the agency should not reevaluate facts and circumstances that were known or knowable at the time of the original action. Kohlhaas at, 392. Review-reopening is not intended to provide either party with an opportunity to re-litigate issues already decided or to give a party a "second bite at the apple." The agency, however, is forbidden from speculating as to what was contemplated at the time of the original snapshot. Id.

The burden remains upon the injured worker to prove by a preponderance of the evidence that the current condition is proximately caused by the original injury. Kohlhaas, 777 N.W.2d at 392. When a work-related injury causes another injury to the worker, this new injury (sequela) may also be considered as a work-related injury under Iowa's workers' compensation laws.

> When an employee suffers from a compensable injury and another condition or injury arises that is the consequence or result of the previous injury, the sequelae rule applies. If the employee suffers a compensable injury and later suffers further disability, which is the proximate result of the original injury, such further disability is compensable. If the employee suffers a compensable injury and thereafter returns to work and, as a result, the first injury is aggravated and accelerated so that the employee is more greatly disabled than they were before returning to work, the entire

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[2] In the hearing report, the extent of industrial disability is listed as an issue for the undersigned to decide. In her brief, claimant retracts this issue, conceding that the statute of limitations has passed and that the review-reopening is not an issue before the agency. (Cl. Brief, p. 38) Since the issue was submitted on the Hearing Report, it is analyzed herein.

> disability may be compensable. The employer is liable for all consequences that naturally and proximately flow from the accident.

Oldham v. Scofield & Welch, 222 Iowa 764, 767-68, 266 N.W. 480, (1936).

Iowa Code section 85.26(2) permits either the employee or the employer to timely bring a review–reopening proceeding after either an award of weekly benefits or an agreement for settlement under section 85.13, provided that the proceeding is commenced within three years from the date of the last payment of weekly benefits under the award or agreement.

That the employee failed to bring a proceeding within the required time period is an affirmative defense which the employer must plead and prove by a preponderance of the evidence. See Dart v. Sheller-Globe Corp., II Iowa Industrial Comm'r Rep. 99 (App. 1982).

In this case, it is clear the claimant was last paid benefits in March 2007. She filed her review-reopening petition on October 23, 2015, more than eight years after her last weekly benefit payment. The claimant can recover no additional weekly benefits for this claim.

By virtue of the Agreement for Settlement, the claimant is, however, entitled to lifetime benefits under Iowa Code section 85.27. See Iowa Code section 85.26(2) (2015).

These benefits include reasonable transportation expenses. Iowa Code section 85.27(1) (2015). These benefits also include wages when claimant is required to leave work for a full day or less for medical treatment. Iowa Code section 85.27(7) (2015). Claimant has provided an affidavit of such costs. (Cl. Ex. 9, 10) I have reviewed these exhibits and they correspond with the medical treatment records in the record. Claimant is entitled to an award for such benefits.

File Nos. 5054697, 5054698, 5054699

The claimant alleges that she has had three separate "exposure" incidents since her original work injury, which should qualify as new injuries under the Iowa Workers' Compensation Act. She contends these three incidents have materially aggravated her underlying condition of RADS.

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 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 defendants have asked the agency to rule "as a matter of law" that the claimant cannot bring a new injury claim based upon an exacerbation of her underlying RADS condition.

> The point of having a statute of limitations for review-reopening claims is to provide finality to the litigation on an original injury claim. Allowing Claimant to assert that any aggravation or exacerbation of an original injury is a "new" injury effectively eviscerates the statute of limitations provided in Iowa Code § 85.26 by the legislature. Accordingly, because all three of Claimant's respiratory claims are proximately caused by her original 2004 work injury and are not new, discrete injuries, her 10/27/13, 3/23/15 and 7/3/15 injury claims should be dismissed as a matter of law.

(Def. Brief, p. 19) I disagree. My interpretation of the law is that it is indeed possible to prove a new injury which is based upon a material aggravation or an underlying, previously adjudicated disability. In order to qualify for additional permanent partial disability benefits, however, the burden is on the claimant to demonstrate by a preponderance of evidence that a new injury or exposure resulted in an increase in her overall disability.

Based upon the findings of fact set forth above, I conclude that while the claimant likely aggravated her underlying RADS through various exposures at work, the greater weight of evidence suggests that these exposures only resulted in temporary aggravations of her condition. While these exposures likely qualify legally as "injuries" under the Iowa Workers' Compensation statute, I do not find that any of these injuries resulted in any additional permanent disability. The greater weight of evidence is that none of these exposures resulted in a material or substantial, permanent alteration or acceleration of claimant's condition. I find the medical opinions of Dr. Conibear to be the most compelling medical causation opinion in the record.

For these three files, the claimant shall take nothing. Since I have ruled on medical causation in the manner set forth above, it is unnecessary to address the other issues involved, including notice.

File No. 5054700

The primary issue is whether the claimant sustained an injury (tinnitus) which arose out of and in the course of her employment which manifested on or about October 16, 2015. Claimant has alleged that she developed the diagnosis of tinnitus as a result of her exposure to excessive noise for the employer since 1982. She contends the condition manifested on January 30, 2015, when she was diagnosed with the condition.

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.

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).

Because a cumulative injury has been alleged, the issue of medical causation is significantly linked to the issue of whether he suffered an injury which arose out of and

in the course of his employment.

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).

At the outset, it is noted that claimant has pursued this case much like a standard hearing loss case. She originally filed a hearing loss claim and then dismissed it at the time of hearing.

The claimant's hearing loss claim is not ripe under Iowa Code section 85B.8 (2013). Section 85B.8 states the following:

1. A claim for occupational hearing loss due to excessive noise exposure may be filed beginning one month after separation from the employment in which the employee was subjected to excessive noise exposure. The date of injury shall be the date of occurrence of any one of the following events:

    a. Transfer from excessive noise exposure employment by an employer.

    b. Retirement.

    c. Termination of the employer-employee relationship.

Iowa Code section 85B.8 (2013).

The defendants dispute whether claimant should be allowed to dismiss just her hearing loss claim since it is so closely linked to her tinnitus. I conclude that the claimant is not really "dismissing" anything. She is simply no longer pursuing benefits

for hearing loss. She has a right to limit her claim in this manner.

The diagnosis of tinnitus is a condition which is evaluated as an industrial disability. Ehteshamfar v. UTA Engineered Sys. Div., 555 N.W.2d 450, 454 (Iowa 1996). The Iowa Supreme Court has distinguished between "deafness" or hearing loss and tinnitus as follows:

> Besides deafness, the other major hearing disorder disease of the cochlea and the eighth cranial nerve is tinnitus, a very common symptom thought to be experienced by more than 37 million Americans. The term tinnitus denotes sounds originating in the ear (rather than in the external world) that may be ringing, buzzing, humming, whistling, roaring, hissing, clicking or chirping in character.
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> Rosco N. Gray & Louise J. Gordy, Attorneys' Textbook of Medicine section 84.63 (3d ed. 1996) (citation omitted).
>
> Hearing loss, on the other hand, involves the loss of sensation of sound. "Occupational hearing loss" under the Iowa Code is defined as 'permanent sensorineural loss of hearing in one or both ears in excess of twenty-five decibels.' Iowa Code section 85.B.4(1) Tinnitus thus falls outside the statutory definition of an occupational hearing loss. It is not a "sensorineural loss of hearing in one or both ears" because tinnitus does not cause a person to be unable to hear; instead tinnitus causes a person to perceive sounds that do not exist. For the same reason tinnitus does not qualify for compensation under Iowa Code section 85.34(2)(r) (loss of hearing other than occupational).
>
> . . .
>
> Because tinnitus does not qualify under Code section 85B.4 (occupational hearing loss) nor Code section 85.34(2)(r) (scheduled hearing loss), it should be compensated under Code section 85.34(2)(u), the section for all other cases of permanent partial disability.

Ehteshamfar, 455 N.W.2d at 453-54.

For the reasons set forth in the findings of facts, I conclude claimant has proven that her condition of tinnitus resulted from her exposure to noise at work. This injury and disability manifested on or about October 7, 2015. Dr. Tyler has provided the most credible medical causation opinion. His opinions are most consistent with the testimony from the witnesses and the other lay evidence. The claimant worked long hours in an extremely noisy environment and was subjected regularly to loud noise. This is the most likely cause of her tinnitus.

The next issue is the extent of claimant's industrial disability.

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).

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.

I conclude the claimant has suffered a 5 percent loss of earning capacity as a result of her tinnitus. This is a minimal award. The condition of tinnitus is undoubtedly annoying and extremely unpleasant. It has, however, had a very limited impact on her ability to earn wages in the competitive job market at this point. She has not taken herself out of the noisy environment. She continues to work overtime. Her wages have not been impacted at all. While there are many good reasons for this, and Ms. Funk's decisions are logical, these factors are strong evidence that this condition has had a negligible impact on her employability.

An award of 5 percent of the body as a whole entitles the claimant to 25 weeks of benefits commencing on October 7, 2015.[3]

File No. 5054701

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

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[3] It is noted that defendants have submitted the following issue in the Hearing Report: "Application of successive disabilities statute, Iowa Code § 85.34(7)". The defendants contend they are entitled to a credit for 100 weeks as it relates to File No. 5018157. As I read section 85.34(7), this is probably technically correct. My finding herein is that claimant's condition of tinnitus has caused an additional 5 percent industrial disability. Therefore, strictly applying section 85.34(7), results in a finding of a total industrial disability of 25 percent with a credit for the previous 20 percent.

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.

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 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).

I conclude that the claimant has failed to meet her burden of proof that she has suffered anything other than a temporary aggravation or flare-up of the bursitis in her hips. For the reasons set forth in the findings of fact, the greater weight of evidence supports the position of the employer.

ORDER

THEREFORE IT IS ORDERED:

For File No. 5018157

Claimant shall take nothing further.

For File Nos. 5054697, 5054698, 5054699

Claimant shall take nothing further.

For File No. 5054700

Defendants shall pay the claimant twenty-five (25) weeks of permanent partial disability benefits at the rate of nine hundred sixty-eight and 86/100 dollars ($968.86) per week from October 7, 2015.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall be given credit for weeks previously paid.

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

For File No. 5054701

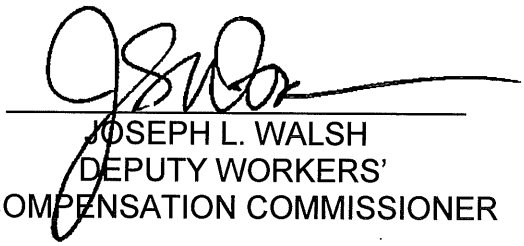
Claimant takes nothing.

For all files:

Claimant is entitled to the lost wages and transportation expenses for her section 85.39 evaluations as set forth in Claimant's Exhibits 9-10.

Costs are taxed to defendants.

Signed and filed this 24th day of April, 2018.



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