BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KELLY MITCHELL, Claimant, vs. PERKINS & MARIE CALLENDER'S LLC, Employer, and ACE FIRE UNDERWRITERS INSURANCE CO., Insurance Carrier, Defendants.	FILED MAR 23 2015 WORKERS COMPENSATION	File No. 5041461 ARBITRATION DECISION Head Note No.: 1803

STATEMENT OF THE CASE

Kelly Mitchell, claimant, filed a petition in arbitration seeking workers' compensation benefits from Perkins and Marie Callender's LLC (hereinafter Perkins), and its insurer, Ace Fire Underwriters Insurance Company, as a result of an alleged cumulative injury she sustained on March 10, 2011 that allegedly arose out of and in the course of her employment. This case was heard in Des Moines, Iowa, and fully submitted on September 30, 2014. The evidence in this case consists of the testimony of claimant and Rick Frazier and claimant's exhibits 1 through 16 and defendants' exhibits A through J. Defendants were given permission to provide post-hearing additional exhibits. Defendants submitted Exhibits K and L. Exhibits K and L were admitted as part of the record. Both parties submitted briefs.

ISSUES

Whether claimant sustained an injury on March 10, 2011, which arose out of and in the course of employment;

Whether the alleged injury is a cause of temporary disability and, if so, the extent;

Whether claimant is entitled to a running award of temporary benefits;

Whether the alleged injury is a cause of permanent disability and, if so;

The extent of claimant's disability;

The commencement date for any permanent benefits;

Whether claimant provide notice of the injury to the defendants;

Whether the claimant filed a claim with in the statute of limitations; and

Assessment of costs.

The stipulations contained in the hearing report are accepted and incorporated into this decision as if fully set forth. The stipulated weekly rate of $186.37 is accepted.

FINDINGS OF FACT

The deputy workers' compensation commissioner, having heard the testimony and considered the evidence in the record, finds that:

Kelly Mitchell, claimant, was 44 years old at the time of the hearing. She graduated from high school. Claimant started her work for Perkins in 1994. After 3 months working as a baker she became a server/waitress. Claimant worked as a server from 1994 through March 2012. She started as a part time worker for about a year and then worked full time (36 - 40 hours) until 2010. (Exhibit 14, page 3) In addition to serving customers at their tables, claimant said she would do some other tasks like clean machines, help with the cash registers, and other tasks. (Transcript, p. 24) For about 8 years claimant worked the bar shift, which required her to bus tables as well as serve. Claimant described that work as more physical work than that of a server. (Ex. 14, p. 3) Claimant described the majority of her work as serving customers at their tables and carrying trays of food to the customers. When carrying trays of food, claimant would generally use her right dominant hand to carry trays. Claimant said she used 3 different types of trays, weighing, 5, 3 and 1 pound respectively. Claimant said the plates weighed 4.2 pounds; she had weighed a plate on a scale in the bakery section. (Tr. p. 26) Claimant said the average weight of the trays with plates she carried was around 30 pounds. (Tr. p. 26) She said on average she would wait on 60 – 80 people per shift during weekdays and on the weekend 100 – 125 customers. (Tr. p. 27) Claimant said she started having physical problems at work in September 2010.

(Tr. p. 28) Claimant said she did not miss any work due to wrist or shoulder problems from September 2010 through March 2011. (Tr. p. 31) Claimant said that her supervisor suggested she go to the hospital after dropping a plate, having her hands go numb. (Tr. p. 29) Claimant said she told her boss that the night before she could not sleep--that her hands would go numb and she could barely move her arms. She said her boss recommended she go the emergency room. (Ex. 14, p. 5) She went to the hospital on March 10, 2011. Claimant said while her shoulder was hurting at that time, she went to the hospital due to her wrists. (Tr. p. 30) Claimant said before March 2011

she was taking no medication for her wrists and shoulder. (Tr. p. 35) Claimant did not go to the hospital or the InstaCare clinic for her wrist or shoulder in the months before the March 2011 emergency room visit. (Ex. 14, p. 6)

In her deposition, claimant said that she went to the emergency room in September 2010 for her arms and wrists. (Ex. 14, p. 5) In her testimony, she said she was mistaken about the date. She said she went to the emergency room only once and that was on March 10, 2011. There is no record of any September 2010 emergency room visit. Claimant was merely mixed up about her dates. I find that the time that claimant went to the emergency room for her wrists was March 10, 2011.

After the visit to the hospital, claimant said she continued to work for Perkins until March 2012. Claimant said that between March 2011 and March 2012 she had restrictions of working no more than four hours per day and a lifting limitation of five pounds for each arm. Claimant would carry a plate in each hand rather than a tray at work. (Tr. p. 32) Claimant said that Perkins allowed her to work within her restrictions. Claimant said she decided to stop working for Perkins in March 2012 because her work was causing pain in her arms, shoulders, and neck. Claimant did not believe she could keep up with her job as she had to carry a plate in each hand and could not use the trays due to her weight restrictions. (Ex. 14, p. 9)

At the time of the hearing, claimant said she had constant pain in her wrists. Everyday activities like cooking, combing her hair, and using a phone would cause pain. (Tr. pp. 36, 39) She said both of her shoulders hurt, with the right hurting greater than the left. She said she is not able to lift above her head. (Tr. p. 20)

Claimant requested healing period benefits in March 2012. She stated that she did not believe she could work after that time due to her pain. (Tr. p. 43)

Claimant admitted in cross-examination that she told her supervisor in March of 2011 that she began to have problems in September 2010. (Tr. p. 47) She also told David Segal, M.D., when he performed his independent medical examination (IME), her medical problems began in September 2010. (Tr. p. 48) Claimant said that while she was having problems in September 2010, she was still able to do her job. (Tr. p. 52)

Claimant said that she learned in David Tearse, M.D.'s deposition that he had removed any weight or hour restrictions. (Tr. p. 63) Dr. Tearse's restrictions concerned claimant's shoulders and he did not consider claimant's wrist and carpal tunnel limitations. (Tr. p. 78) Claimant agreed that the information contained in her answers to interrogatories about her work would have been the way she described her work to Dr. Segal. (Tr. p. 114)

Claimant testified in her deposition that her shoulder, neck, and wrists have all gotten worse, since March of 2012. (Ex. 14, p. 10) At the hearing, claimant's testimony was similar, but she noted that she has not been on medication for a while. (Tr. p. 57)

Claimant testified that her right side, wrist, arm, and shoulder hurts more than her left. (Ex. 14, p. 12)

Rick Frazier, associate manager of the Perkins restaurant in Cedar Rapids, testified. He has worked with and supervised claimant for a number of years. He said that a server would average servicing about 12 customers per hour. (Tr. p. 95) Mr. Frazier said that he estimated claimant would carry around 80 to 100 trays per week and serve about 240 meals. He testified that the average, not the heaviest, plates weighed 3.1 pounds and that for safety and breakage reasons, no more than 5 plates were to be put on a tray. (Tr. pp. 98, 99) Mr. Frazier testified that the estimates of amount of weight and number of customers listed in claimant's answer to interrogatories, Exhibit 12, page 4, was significantly high. (Tr. pp. 101, 102) Mr. Frazier said Perkins honored the restrictions that claimant was given and that he and other staff would, on occasion, help her in carrying items. He said that claimant stopped coming to work. He said Perkins was willing to work with claimant's restrictions. (Tr. p. 105)

On March 10, 2011, claimant went to the Mercy Medical Center Emergency Department. She was complaining of upper extremity pain and altered sensation. Claimant reported she had similar symptoms for the last six months. (Ex. 2, p. 1) The clinical impression was upper extremity pain involving the left shoulder and hypertension. She was referred to a family medicine physician for follow-up care. Claimant was seen by Bradley Beer, M.D., on March 23, 2011, where she reported radicular arm pain, pain in the left shoulder joint, that was worse at night and with overhead activity. Dr. Beer noted claimant reported onset six months ago and that it had been getting worse the last month. There was no specific injury associated with her symptoms. (Ex. D, p. 1) Dr. Beer's assessment was neck pain and he suspected cervical radiculopathy and recommended an MRI. (Ex. D. p. 3)

On April 8, 2011, claimant was referred to St. Luke's Work Well Solutions and saw Shirley Pospisil, M.D. Dr. Pospisil's records showed the date of claimant's injury as September 25, 2010. (Ex. 1, pp. 19, 21, 25) Dr. Pospisil's assessment was, "Left shoulder, neck, elbow and hand pain." (Ex. 1, p. 25) Claimant was sent to physical therapy and given a wrist splint. (Ex. 1, p. 25) The wrist splint and physical therapy appeared to help for a time. (Ex. F, p. 1) Claimant was given restrictions of lifting no more than five pounds with her left arm. (Ex. 1, p. 24) Claimant returned on April 22, 2011. Claimant told Dr. Pospisil that she mainly had pain when she overdid it at work. (Ex.1, p. 21) On May 6, 2011, Dr. Pospisil's assessment was "Left Shoulder pain with left hand tingling and also neck pain." (Ex. 1, p. 19) On May 20, 2011, an MRI of claimant's cervical spine without contrast was performed. The impression was described as,

> At C5-C5 there is disc degeneration. There is a slight diffuse disc bulge without compromise of the cord or overall spinal stenosis, however, there is significant disc or disc-osteophyte complex projecting into the right neural foramen and causing significant right-sided neural foraminal stenosis. There is mild right-sided neural foraminal stenosis at C4-C5.

(Ex. 4, p. 3)

On June 20, 2011, Mary Hlavin, M.D., examined claimant. Dr. Hlavin noted claimant had been having aching in her shoulder blades, shoulders, and down both arms since September 2010. She wrote, "I think the patient may very well be having some cervical radiculopathy. I cannot entirely rule out some shoulder involvement as well." (Ex. 3, p. 5)

On June 22, 2011, claimant had an MRI of the right shoulder. The Impression was,

> There is spurring off the AC joint that projects against the myotendinous junction of the supraspinatus and probably narrows the shoulder outlet. It could support a diagnosis of impingement. There is some heterogeneous signal in the proximal supraspinatus tendon suggesting tendinopathy. A discrete tear is not noted however. The remainder of the rotator cuff appears intact. There is a possible SLAP Type II tear of the superior glenoid labrum. This might be better evaluated by MR shoulder arthrography. Long head of the biceps tendon is intact.

(Ex. 4, p. 1)

Dr. Hlavin referred claimant to a pain clinic. On August 4, 2011, Frank Hawkins, M.D., examined claimant. His impression was, "Cervicalgia. Degenerative cervical disk disease." (Ex. G, p. 1) Claimant described to him that she had been having pain since September 2010 and that her neck started hurting while lifting plates at work. Dr. Hawkins performed a cervical epidural injection. (Ex. G, pp. 1, 2) At that same visit, Alison McFadden, ARNP, noted that claimant was not aware of any specific injury or activity that led to her pain, but said that it started at work when she was carrying and lifting trays. (Ex. G, p. 3)

On June 22, 2011, Ivo Bekavac, M.D., Ph.D., performed an EMG. The results of the EMG were,

> 1. Bilateral median neuropathy, at or distal to the wrist, consistent with carpal tunnel syndrome, mild in degree electrically.
>
> 2. There is also EMG evidence of bilateral ulnar neuropathy, probably distal to the elbow, mild in degree electrically.

(Ex. 5, p. 1)

Claimant returned to Dr. Hlavin on August 25, 2011. Dr. Hlavin noted claimant was carrying 17 pounds with her right arm and 5 pounds with her left at work and was in a lot of pain. She thought that claimant's pain was probably multifactorial and that she had a lot of myofascial neck pain. (Ex. 3, p. 4)

On September 21, 2011, Dr. Pospisil noted that claimant was not provided the prescription for gabapentin and a TENS unit recommend by Dr. Hlavin and agreed with Dr. Hlavin that claimant should be referred to an orthopedist. (Ex. 1, pp. 11, 12) On September 10, 2011, Dr. Pospisil noted the claimant had a TENS unit for two weeks, but the insurance company wanted the unit back. Dr. Pospisil continued to recommend an orthopedic evaluation. She continued claimant's restrictions on ten pounds, no reaching with the right and left arm, and working a four-hour day. (Ex. 1, p. 9)

On July 17, 2012, Dr. Pospisil saw and assessed claimant with, "Neck and bilateral shoulder pain with bilateral hand numbness and tingling." (Ex. 1, p. 2) Dr. Pospisil last saw claimant on October 15, 2012. She continued her restrictions and assessed claimant with, "Neck and bilateral shoulder pain, bilateral hand numbness and tingling." (Ex. 1, p. 1)

Dr. Hlavin responded to a letter prepared by defendants' counsel dated April 17, 2013. In her check box responses, Dr. Hlavin stated she did not see claimant enough to have a clear picture of her conditions or arrive at a concrete diagnosis. Dr. Hlavin was not able to state with a reasonable degree of medical certainty that the pains and conditions claimant described were caused by or aggravated by her work at Perkins. (Ex. 3, p. 1)

David Tearse, M.D., examined claimant on December 20, 2011. He noted that claimant had been waitressing for 17 years and had no specific injury. (Ex. H, p. 1) His impression was, "Bilateral shoulder impingement with point of myofascial pain and bilateral carpal tunnel syndrome by history." (Ex. 6, p. 3) He provided an injection to the right shoulder on that date and provided work restrictions of light duty, lifting no more than 10 pounds, no lifting above shoulder and working no more than 4 hours per day. (Ex. 6, p. 3) Dr. Tearse provided an injection to the left shoulder on February 9, 2012. (Ex. 6, p. 3) On April 2, 2012, he saw claimant for a follow-up for the bilateral shoulder impingement with myofascial pain. (Ex. 6, p. 4) On May 10, 2013, Dr. Tearse's impression was, "Bilateral shoulder myofascial pain with left AC arthrosis." (Ex. 6, p. 2) He provided an injection in the left shoulder on that date and provided a restriction of no overhead lifting. On June 25, 2013 Dr. Tearse provided an opinion letter to defendant's counsel. In this letter Dr. Tease stated,

> I do not find any evidence for a specific injury or particular action, which in my opinion would make her current condition directly related to her activities at work at Perkins. In other words, more likely than not, she would have developed this condition regardless of her job. There are degenerative changes at her AC joint and she may require further injections or possibly surgery, should conservative treatment not be helpful in improving her symptoms. This surgery would most likely consist of a shoulder arthroscopy with distal clavicle excision.

(Ex. 6, p. 1)

Dr. Tearse was deposed on April 2, 2014. (Ex. 11, pp. 1 – 14) Dr. Tearse is board certified in orthopedic surgery.

He saw claimant for her bilateral shoulder pain beginning in December 2011. (Ex. 11, p. 1) He said his diagnosis at that time was,

> A. My diagnosis at that time was bilateral shoulder impingement with myofascial pain, and by history she related some bilateral carpal tunnel symptoms.

(Ex. 11, p. 2) When Dr. Tearse saw claimant on May, 14, 2013, he said claimant had less signs of impingement and more prominent signs of myofascial pain and her left acromioclavicular (AC) joint was tender. (Ex. 11, p. 3) Dr. Tearse stated that based on his examinations of claimant in May 10, 2013, he felt claimant had ". . . bilateral shoulder myofascial pain and left shoulder AC arthrosis." (Ex. 11, p. 4) When asked of the cause of the left AC joint pain he said that it was typically caused by wear and tear. (Ex. 11, p. 4) Dr. Tearse testified that claimant's work at Perkins could have aggravated her shoulders. He did not consider the work any different than other activities such as raking leaves, painting walls at home, sweeping. In Dr. Tearse's opinion ". . . her work at Perkins is not much different than her activities of daily living." (Ex. 11, p. 4) He further stated,

> A. My understanding of those activities are that they are not terribly much more aggravating for this kind of condition than home activities could, fishing, recreational activities. I don't know of any specific injury that caused it, and I don't know of anything specific or unique to her activities at Perkins that would be highly likely or more likely than not to cause her condition.

(Ex. 11, p. 5) Dr. Tearse said that claimant may need further injections, or possible surgery that would consist of shoulder arthroscopy and distal clavicle excision. (Ex. 11, p. 5) Dr. Tearse testified that if claimant was not working between December 11, 2011 and May 2013, that her arthritis was progressing because of her genetics and age and just general lifetime activities. (Ex. 11, p. 10) From March 2011 through March 2012, claimant was working four hour shifts. She stopped work after March 2012. Dr. Tearse believed claimant would have developed her conditions in her shoulder regardless of if she worked as a waitress for Perkins. (Ex. 11, p. 11) He did not believe that her waitress job was any more aggravating than activities of daily living. (Ex. 11, p. 11) In May 2014, Dr. Tearse provided restrictions of no lifting over 20 pounds or above shoulder reaching. (Ex. 11, p. 11) He did not restrict the number of hours she was to work.

On September 14, 2012, Cassim Igram, M.D., performed an independent medical examination (IME). Dr. Igram stated that there was no documented injury for her neck condition. (Ex. A, p. 2) He did not see any need for surgical or other

treatment for claimant's neck and that if any surgery was to be performed, it should be for her carpal tunnel syndrome. (Ex. A, p. 2)

On September 30, 2013, Dr. Segal, provided an IME. His diagnosis was,

> 1) Cervical radiculopathy bilateral, right worse than left at this time;
>
> 2) Degenerative shoulder changes, shoulder impingement with osteophyte formation; 3) Bilateral ulnar neuropathy; 4) bilateral carpal tunnel.

(Ex. 7, p. 3) Regarding causation, he stated in part,

> The causation is likely not from her work, or it cannot be said with a high degree of medical probability, because all of her diagnoses happened with degenerative changes, even at Ms. Mitchell's age. However, her history as was given to me (which I have no reason to doubt and see no evidence to doubt—in fact, it is confirmed by all of the medical documentation) is that her symptoms started in September 2010 and progressed over the next year and a half to the point where she could no longer work and were worsened and aggravated by her work daily. This information tells me that although work was not a causal factor, it did provide a permanent aggravation, and it is clearly a common situation in regards to all of these diagnoses that repeatedly aggravating an area can cause a permanent aggravation. I would also like to point out that there were work restrictions put in place of minimal to no lifting (5-10 pounds) and no lifting hands over shoulders, and that was put in place by Work Well and confirmed by all of her providers including Dr. Igram. I think it is important to think *why would she have these restrictions in place if doing these repetitive actions would not be an aggravating factor.* Generally restrictions are put in place to promote healing and prevent aggravation. So by giving her these restrictions, it is implied that doing the actions which are restricted would cause permanent aggravation and prevent healing. Permanent aggravations are such that they do not necessarily dissipate with cessation of the activity. There are situations where repetitive actions can cause permanent hypertrophy of various ligaments and permanent swelling of neural structures within already narrowed spaces. And these symptoms that are worsened by the repetitive action do not necessarily stop with stopping the activity but would progress if that activity or work was continued. So therefore, based on what I have just said above, I believe that potentially all of these diagnoses are a permanent aggravation as a result of Ms. Mitchell's continuation at work between the onset of the symptoms on September 10, 2010, and the next year and a half. (Emphasis in original.)

(Ex. 7, p. 3) Dr. Segal provided a 23 percent whole body rating. He did not believe claimant was at MMI. Without further treatment, he recommended claimant have a 10 pound weight restriction, no lifting her hands above her head and no repetitive motions. (Ex. 7, p. 4)

On January 27, 2014, Benjamin Paulson, M.D., performed an IME of the claimant concerning her upper extremities. His impression was,

> A 44-year-old lady with right worse than left carpal tunnel syndrome, mild cubital tunnel syndrome, and right de Quervain tenosynovitis.

(Ex. B, p.2) Dr. Paulson stated that he did not believe the work at Perkins would have caused or significantly aggravated her carpel tunnel syndrome. As for the right de Quervain's syndrome, he stated as it was recently diagnosed he could not attribute it to her work. He stated that claimant's carpal and cubital syndromes were idiopathic in nature and therefore should not be considered covered by workers' compensation. (Ex. B, pp. 2, 3)

Lana Sellner, MS, CRC, provided a vocational report on May 1, 2014. Utilizing the restrictions of various physicians, she concluded there were a number of part and full time jobs in the Waterloo area that were within claimant's restrictions. (Ex. C, pp. 1 - 8)

Claimant needs additional medical care for her bilateral arms, shoulders and neck conditions. Claimant is not a MMI for these conditions.

I find that claimant is limited to not lifting above the shoulders and is limited to lifting no more than ten pounds.

Claimant began experiencing pain in her upper extremities, shoulders and back in September 2010. She did not inform her employer until March 10, 2011, when her supervisor recommended that she go to the emergency room for her conditions. Claimant missed no work and received no medical treatment for these conditions from September 2010 through March 2011. Claimant was given no restrictions concerning her work until March 2011.

I found claimant's testimony that she could not keep up with her work at Perkins to be credible after March 2012. Not being able to carry trays and limited in the number of plates she could carry is certainly going to impact how she does her job. Claimant was making $4.35 per hour plus tips. Slowing her service ability would impact the amount of money she could make. I also find that claimant's pain in her upper extremities and shoulders made it impracticable for her to continue her work at Perkins. The work at Perkins was not suitable work at the time claimant left her employment.

REASONING AND CONCLUSIONS OF LAW

Defendants have asserted a notice defense pursuant to Iowa Code section 85.23. Claimant did not suffer a traumatic injury so that she would have known that she had a work injury on a specific date. Defendants do not assert claimant had a traumatic injury. Rather claimant alleged a cumulative trauma injury.

In Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2011) the court stated,

> To summarize, a cumulative injury is manifested when the claimant, as a reasonable person, would be plainly aware (1) that he or she suffers from a condition or injury, and (2) that this condition or injury was caused by the claimant's employment. Upon the occurrence of these two circumstances, the injury is deemed to have occurred. Nonetheless, by virtue of the discovery rule, the statute of limitations will not begin to run until the employee also knows that the physical condition is serious enough to have a permanent adverse impact on the claimant's employment or employability, i.e., the claimant knows or should know the "nature, seriousness, and probable compensable character" of his injury or condition. (Citation omitted.)

Herrera, Id. p. 288

The claimant did not know the nature, seriousness, and probable compensable character of her injuries until March, 10, 2011, the day she received medical treatment and had restrictions. Perkins had notice as of that date. Defendants have failed to prove a notice defense under Iowa Code section 85.23.

The defendants also asserted a statute of limitations defense pursuant to Iowa Code section 85.26. This law requires the commencement of a claim for benefits within two years, if no indemnity benefits have been paid. Claimant filed her claim within two years of when she knew or should have known she had a work related injury that could result in permanency and be compensable.

For both the notice and statute of limitations defenses, defendants point out that claimant reported to health care providers and Perkins that she started to experience symptoms in September 2010. Claimant testified to that fact and the medical records support that fact. However, claimant did not discover her injury was work related and could lead to permanent disability until March 2011.

In order to qualify for workers' compensation benefits under chapter 85, the employee must demonstrate "(1) the claimant suffered a 'personal injury,' (2) the claimant and the respondent had an employer-employee relationship, (3) the injury arose out of the employment, and (4) the injury arose in the course of the employment." Meyer v. IBP, Inc., 710 N.W.2d 213, 220 (Iowa 2006).

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 Elec. 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.

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 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).

"When an expert's opinion is based upon an incomplete history, the opinion is not necessarily binding upon the commissioner. The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence, together with the other disclosed facts and circumstances, and then to accept or reject the opinion." (Citations omitted.) Dunlavey v. Economy Fire & Casualty Co., 526 N.W.2d 845 (Iowa 1995).

Defendants have argued that Dr. Segal's opinion should be discounted as it relied upon incorrect history or information from the claimant. While claimant testified she would have told Dr. Segal that her work was similar to what see set forth in her interrogatories, (Tr. p. 114), it does not appear that Dr. Segal referred to the specific weight and frequency of her lifting in his reports. More importantly, Dr. Segal noted the aggravation of the claimant's symptoms over the last year and one-half time period. He did not find that her work at Perkins caused her conditions, but did opine that they permanently aggravated her conditions. Dr. Segal noted that claimant was working with significant restriction when her condition was aggravated. He concluded claimant's conditions were work related.

Dr. Igram's IME stresses the fact that there was no report of an injury on September 2010. He does not address the possibility of a cumulative injury or whether claimant's work temporarily or permanently aggravated her neck and bilateral carpal tunnel syndrome. As such, I do not give it much weight as to causation.

In Meyer v. IBP, Inc., 710 N.W.2d 213 (Iowa 2006), the court examined the legal criteria to determine whether employee had proven his work at IBP had caused his carpal tunnel syndrome. The court stated:

> This statutory coverage formula gives rise to four basic requirements: (1) the claimant suffered a "personal injury," (2) the claimant and the respondent had an employer-employee relationship, (3) the injury arose out of the employment, and (4) the injury arose in the course of the employment. See Freeman v. Luppes Transp. Co., 227 N.W.2d 143, 148 (Iowa 1975). (Footnote omitted.) The failure of any one requirement results in a denial of a claim for benefits.

Meyer, at 220.

In analyzing the facts of the Meyer case the court held:

> Thus, although Meyer only worked a short time on the job, the type of injury he sustained was nevertheless a "rational consequence" of a hazard of the work he performed with IBP. The type of work he performed placed him at a greater risk of carpal tunnel syndrome, which meets the arising-out-of employment standard regardless of the number of days worked. (Citations omitted.)

Meyer, at 224.

I find that claimant suffered personal injuries at her work for Perkins that arose out of and in the course of her employment. I find the conditions identified by Dr. Segal of cervical radiculopathy bilateral, right worse than left, degenerative shoulder changes, shoulder impingement with osteophyte formation, bilateral ulnar neuropathy and

bilateral carpal tunnel arose out of and in the course of her employment with Perkins. Defendants shall provide medical care for these conditions.

Dr. Tearse stated he did not find that the work claimant performed as a waitress any different than the activities of daily living. Based upon the evidence, I do not find that statement accurate. Even using the numbers provided by Mr. Frazier about the weight and frequency of claimant lifting, claimant's work in carrying trays for 18 years is more than activities of daily living. Additional, claimant bussed in the bar area for many years before she was solely a server, which was heavier work than just her serving activities.

Dr. Paulson found that claimant's carpal tunnel and cubital tunnel syndrome to be idiopathic in nature and therefore not covered by workers' compensation. I do not find Dr. Paulson's report as convincing as Dr. Segal's report. Dr. Segal noted that claimant continued to work after her symptoms appeared and her symptoms got worse as she worked. (Ex. 3, p. 7) Dr. Paulson did not attribute any of the claimant's work to a permanent aggravation or lighting-up of her symptoms.

The next issue to be determined is the extent of claimant's entitlement to temporary benefits regarding the March 10, 2011 injury.

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 (1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

Claimant has not returned to work and is not capable of similar work. Claimant has not achieved maximum medical improvement. Claimant is entitled to healing period benefits from March 15, 2012, the date she stopped working and continuing until she meets the criteria under Iowa Code 85.34(1). Claimant is entitled to a running award of healing period benefits.

As claimant is not at maximum medical improvement, no finding of permanency is made at this time. Either party may file a review-reopening petition when the time is right to stop the temporary benefits and determine permanent disability.

Both parties requested assessment of costs. As the claimant generally prevailed in this claim, I award her costs. No costs are awarded to defendants.

Assessment of costs is a discretionary function of the agency. Iowa Code section 86.40.

Claimant is awarded the cost of the filing fee of $100.00, the deposition costs for the deposition of Dr. Tearse of $232.20 and the claimant's deposition costs of $120.00.

The claimant has requested reimbursement of $937.50 for payment to Dr. Tearse for his deposition. This costs is limited to $150.00 pursuant to rule 876 IAC 4.33(5). I award claimant $150.00 for the payment to Dr. Tearse.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant running healing period benefits from March 15, 2012, at the rate of one hundred eighty-six and 37/100 dollars ($186.37) per week and continuing until the requirements for termination of healing period are met.

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 pay the claimant's prior medical expenses submitted by claimant at the hearing.

Defendants shall pay the future medical expenses of the claimant necessitated by the work injury.

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

Costs are taxed to defendants as set forth in the decision.

Signed and filed this 23rd day of March, 2015.

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.