BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOAN VOSHELL, Claimant, vs. COMPASS GROUP, USA, INC./CHARTWELLS, d/b/a AU BON PAIN CAFÉ, Employer, and NEW HAMPSHIRE INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5056857 ARBITRATION DECISION Head Note Nos.: 1100; 1801; 1803 2701

FILED
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WORKERS' COMPENSATION

STATEMENT OF THE CASE

Joan Voshell, claimant, filed a petition in arbitration seeking workers' compensation benefits from defendant employer, Compass Group, USA, Inc./ Chartwells, d/b/a Au Bon Pain Café and New Hampshire Insurance Company, the workers' compensation insurance carrier. The arbitration hearing was held on September 14, 2017. The parties submitted post-hearing briefs on October 27, 2017, and the matter was considered fully submitted on that date.

The evidentiary record includes: Joint Exhibits JE1 through JE14, Claimant's Exhibits 1 through 10 and Defendants' Exhibits A through E.

At hearing, Claimant Joan Voshell, along with her husband Robert "Terry" Voshell and Paul King, of Compass Group, provided testimony.

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

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained a cumulative or acute injury that arose out of and in the course of her employment on or about January 21, 2016.

2. Whether defendant received timely notice of the injury per Iowa Code section 85.23.

3. Whether the alleged injury was the cause of temporary total disability.

4. Whether the alleged injury was the cause of permanent partial disability.

5. Whether claimant is entitled to payment of medical expenses.

6. Whether claimant is entitled to reimbursement of mileage related to claimant's attendance at defendants' IME.

7. Whether claimant is entitled to alternate medical care under Iowa Code section 85.27, of ongoing medical care with Sarah Olsasky, D.O.

8. Whether claimant is entitled to penalty benefits.

9. Costs.

FINDINGS OF FACT

After a review of the evidence presented, I find as follows:

Claimant was 71 years old at the time of the hearing. (Transcript page 16) The employer, Compass Group, is a management company that provides staff for the Au Bon Pain restaurant, which is located on the Simpson College Campus in Indianola, Iowa. (Tr. p. 31; Ex. 5, p. 4)

In school, claimant repeated the second grade and dropped out during her 10th grade year to assist with caring for her father. (Tr. pp. 16-17) Claimant has not obtained a GED, however, she graduated from the Paris Academy of Beauty in Cedar Rapids in 1963. (Tr. p. 17; Ex. 5, p. 2)

WORK HISTORY

Claimant's work history includes a significant period of time working as a beautician from 1964 through 1991 or 1992. (Ex. 5, pp. 2-4) She also worked for a few years in industrial jobs, which included tasks such as buffing armrests and assembling electrical parts. (Ex. 5, pp. 3-4) Claimant worked at Burger King from 1993 until about 1994 or 1995, and she worked for about 18 years at the Iowa Machine Shed as a hostess from 1995 to 2012. (Ex. 5, p. 4; Tr. p. 22) At the Iowa Machine Shed, claimant filled water glasses, received to-go orders from customers, and moved chairs and tables for guests along with other tasks. (Ex. 5, p. 4)

Claimant began working for the defendant employer at Au Bon Pain Café on October 17, 2012, and continued there until her surgery on April 25, 2016. (Ex. 5, p. 4; Tr. pp. 30, 56) Her job duties included: operating the cash register; stocking product; sweeping and mopping; cleaning dishes and carrying out the garbage, among other things. (Ex. 5, p. 4; Ex. 9, p. 10)

While working for the defendant, claimant also worked part-time for Casey's General Store from December 7, 2012 until May 10, 2013, although, she only worked one day per week. She eventually moved to working just one day every other week. (Ex. 5, pp. 4-5) At Casey's, claimant operated a cash register, stocked product, made coffee, and cleaned counters. Claimant reported that this job did not require significant lifting, and only rarely up to 10 pounds. (Id.)

Claimant has never worked in an office and has never done computer work, keyboarding or data entry beyond operating a cash register. (Tr. p. 21; Ex. 5, pp. 2-5)

At the time of the hearing, claimant was not employed. She stated that she has not "been out really looking for a job" because there are "a lot of things [she] is not able to do." (Tr. p. 75) She also stated that she has "been extra tired, and [her] arm gets very tired," and the Tramadol that she takes for pain makes her sleepy. (Id.) Claimant stated she would not be very interested in taking a job that required working nights or working "a lot of hours." (Id.) However, claimant testified that, but for this shoulder injury, she would still be working and that she had no plans to retire prior to the occurrence of the alleged work injury. (Tr. p. 74)

PRIOR MEDICAL CONDITION/INJURY

On December 25, 1994, while working at Burger King, claimant slipped and fell on ice. (Ex. JE1, p. 3) She injured her head, neck and right shoulder. (Ex. JE1, p. 2) Claimant underwent surgery on her right shoulder with Dr. Galles in 1998. (Tr. p. 18) The surgery was a right shoulder arthroscopic acromioplasty to address impingement syndrome. (Ex. JE1, pp. 16-17) She testified that the surgery resolved her issues and that "[i]t totally took care of it." (Tr. pp. 18-19) She does not recall receiving any permanent work restrictions following that surgery. (Tr. p. 19)

On September 5, 2009, while working at The Iowa Machine Shed, claimant slipped and fell and injured her right wrist/arm. (Tr. p. 23; Ex. JE5, p. 1) She was treated by Michael Gainer, M.D., of Iowa Ortho and was diagnosed with a distal radius fracture and was placed in a splint. (Ex. JE5, pp. 1-2) On a follow-up visit, Dr. Gainer diagnosed right carpal tunnel, which he found to be related to the fall. (Ex. JE5, p. 3) A right carpal tunnel release was performed. (Ex. JE5, pp. 3-4) Claimant also saw James Sykes, D.O., of Metro Anesthesia & Pain Management. (Ex. JE3) Dr. Sykes's impression of claimant's condition was "[c]hronic neck pain with right shoulder referral pain," along with right carpal tunnel syndrome. (Ex. JE3, pp. 1, 2, 4) She was treated with a cervical epidural. (Ex, JE3, pp. 3-4) On May 10, 2011, Dr. Sassman (f/k/a Epp)

issued a report and diagnosed claimant with: right distal radius fracture; right carpal tunnel syndrome status post-release; and, neck pain with radicular symptoms. (Ex. JE2, p. 3) Claimant testified that she did not injure her shoulder as a result of this incident. (Tr. p. 25)

On July 29, 2012, claimant had a second injury while working at the Iowa Machine Shed. (Tr. p. 25) She fell and landed with her arms stretched out in front of her and hit her chin on the floor. (Id.) Claimant stated that she injured her elbow and her neck. (Id.) Claimant treated with Steven Aviles, M.D., at Iowa Ortho who diagnosed right medial epicondylitis. (Tr. p. 25; Ex. JE5, pp. 10, 12) Claimant received an injection. (Tr. pp. 26-27; Ex. JE5, pp. 16, 18) On May 21, 2013, a functional capacity evaluation (FCE) report was issued indicating that claimant should be restricted to: lifting 20 pounds from floor to waist; 10-15 pounds from waist to crown; and, carrying 15 pounds. (Ex. JE6, pp. 1-2) Dr. Aviles assigned restrictions based on the FCE on July 8, 2013. (Ex. JE5, p. 26) On November 4, 2014, Dr. Aviles modified the restriction to no lifting over 20 pounds. This was the last day that claimant saw Dr. Aviles for this injury. (Tr. p. 29; Ex. JE5, p. 30) Claimant had treatment for her neck with Dr. Sykes. (Tr. p. 27; Ex. JE3, p. 5) On January 22, 2014, Dr. Sykes noted that claimant had received injections into her neck that were helpful. His assessment was: cervical pain, cephalgia, cervical spondylosis, and degenerative disk disease of the cervical spine. (Ex. JE3, pp. 8-9) On March 13, 2014, claimant was seen by Mercy Neurosurgery where the assessment of claimant's condition was neck pain and cervical radiculopathy. (Ex. JE7, p. 3) Claimant indicated that this was the last time she saw Dr. Sykes for this neck injury. (Tr. p. 28) Claimant stated that this incident did not cause any injury to her shoulder and was resolved with the insurance carrier, Liberty Mutual, who provided for continued medical care for her elbow. (Tr. pp. 28-30)

Claimant testified that when she began working for the defendant employer her arm, shoulder and biceps tendon were not bothering her. (Tr. p. 36) She said after about two years of working for the defendant employer, her right arm became painful, beginning in about the winter or spring of 2015. (Tr. p. 32) She testified that she eventually became reliant on her left hand for simple tasks like running a credit card through the credit card reader, which required her to raise her arm to about eye level (Tr. p. 37)

On May 26, 2015, claimant sought medical attention for her right shoulder with her primary care provider, Sarah Olsasky, D.O. (Tr. pp. 32-33; Ex. JE8, p. 5) She had not had any medical care specifically for her right shoulder for a number of years prior. (Tr. p. 33; Ex. JE8, p. 5) On May 26, 2015, she reported having pain for about one week with no particular injury. (Ex. JE8, p. 5) She described her pain a "burning sensation" in her right shoulder. (Id.) Dr. Olsasky's assessment was right rotator cuff tendonitis. She was given an injection. (Tr. p. 33; Ex. JE8, p. 5)

Claimant testified that she continued to see Dr. Olsasky between May, 2015 and January, 2016 for right shoulder pain. (Tr. p. 33) Dr. Olsasky had been claimant's primary care provider since about 2012. Claimant stated that Dr. Olsasky was aware of

claimant's prior medical history, including her prior injuries at Burger King and the Iowa Machine Shed. (Id.)

On August 10, 2015, claimant's right shoulder was "starting to hurt again," and she inquired with Dr. Olsasky about another injection and was told it was too soon and that she could return in one month for another injection. (Ex. JE8, pp. 6, 7) Claimant was concerned that she "will be starting back to work in a couple of weeks," and "that it will flare up again with increased activity." (Ex. JE8, p. 6)

On September 23, 2015, claimant returned for the second injection, and at that time, she described "having pain in the shoulder for over a year." (Ex. JE8, p. 8) She noted that she had "returned to work and her pain has been exacerbated." (Ex. JE8, pp. 8-9)

On January 8, 2016, claimant returned to see Dr. Olsasky for a recheck concerning her continuing shoulder pain and noted that "if surgery would fix the problem then she would like to start working through that process." (Ex. JE8, p. 14) Another injection was administered and an MRI was recommended to determine the underlying cause. It was noted that claimant would like to be referred for surgery if the MRI showed that "surgical intervention would be beneficial." (Ex. JE8, p. 18) Dr. Olsasky suspected a "rotator cuff tear, however could be secondary to lible or arthritic issue and very remote possibility for biceps tendon tear." (Ex. JE8, p. 18) Claimant was given a "work note to restrict her to 20 pounds lifting and to avoid mopping until she is seen by the orthopedic surgeon," because "these are exacerbating her pain significantly at work." (Ex. JE8, p. 18)

January 21, 2016 – Date of Alleged Injury

Claimant testified that on January 21, 2016, she was at work, her shift ended and when she was leaving, she "punched" the door to push it open with her right arm and had pain in her right shoulder that "felt like rubber bands snapping in my arm." (Tr. pp. 41-42) The door she pushed open was the exterior door on the north side of the building and she stated that there was a lot of "wind suction" affecting the door, indicating that it was hard to push open, and she described the door as a "big, heavy . . . industrial door." (Tr. pp. 42-44) Claimant's supervisor, Paul King described the door as "just like any other office-type building door. I mean you just push it open. It's already unlocked so . . . [y]ou don't have to push a bar . . . just push the door open." (Tr. p. 126) Claimant stated that this incident occurred on a Thursday and she could not get into see Dr. Olsasky any earlier than Monday January 25, 2016. (Tr. p.45)

Claimant testified that her husband took pictures of bruising that appeared on her arm within a few days after the January 21, 2016 incident. (Tr. pp. 83-84; Ex. 1)

On January 25, 2016, claimant was seen by Dr. Olsasky, and it was noted that claimant had severe pain "over the last two days . . . in the upper arm when she turns a doorknob." (Ex. JE8, p. 20) There is no specific mention of the January 21, 2016 work

incident of pushing on the door. There is also no mention of any bruising as depicted in the photos contained in claimant's Exhibit 1. Claimant was referred to orthopedics for evaluation and treatment of her right shoulder pain. (Ex. pp. 20, 22) Dr. Olsasky suspected an exacerbation of epicondylitis, which she did not think was related to her "primary shoulder issue." (Ex. 8, pp. 22) Claimant was referred to orthopedics for "both of these issues." (Id.) Dr. Olsasky referred claimant to Dr. Aviles of Iowa Ortho, who was the physician that saw claimant regarding the July 29, 2012 injury at the Iowa Machine Shed, described above. (Ex. JE8, p. 23; Ex. JE5, pp. 10, 12; Tr. p. 25) Claimant had not seen Dr. Aviles since November 4, 2013. (Tr. pp 29-30; Ex. JE5, p. 30)

Claimant testified that she was taken off work by Dr. Olsasky on January 25, 2016, until she was seen by orthopedics. She testified that the handwritten date on the doctor note of "1/25/15" taking her off work is incorrect and the year should be 2016, not 2015. (Tr. p. 41; Ex. JE8, p. 19) I find that it is more likely than not that the record should have been dated 2016, which is consistent with claimant's testimony and the accompanying January 25, 2016 medical record.

On January 28, 2016, claimant's counsel wrote a letter to Liberty Mutual Insurance Company requesting that claimant be authorized to see Dr. Aviles due to a potential biceps tendon tear under the belief that it was related to the July 29, 2012 injury at the Iowa Machine Shed and would be covered by the open medical resolution of the previous workers' compensation claim. (Ex. 3, pp. 1, 2)

On February 10, 2016, claimant was seen by Dr. Aviles. (Ex. JE5, pp. 19, 34) Dr. Aviles referred to claimant's prior workers' compensation injury from years earlier and described this visit initially as a reevaluation of the right epicondylitis, noting that claimant saw him "under the impression that this was the same injury." (Ex. JE5, p. 34) However, Dr. Aviles noted that "[h]er exam is clearly extremely different than it was the last time I saw her," stating that his evaluation suggests a partial biceps rupture. (Ex. JE 5, p. 35) Dr. Aviles stated "I do believe that this is a new injury and not related to her old injury and I made it very clear to her that I felt that way." (Id.) His assessment was "traumatic partial tear of right biceps tendon" and "right elbow pain." (Ex. JE 5, p. 35) Dr. Aviles assigned temporary restrictions of no lifting over 10 pounds. (Ex. JE5, p. 37)

On February 12, 2016, Liberty Mutual Insurance, the insurance carrier for the prior Iowa Machine Shed injury, denied any further medical care based on the opinion of Dr. Aviles that the current biceps tendon tear was a new injury and was not related to the July 29, 2012 incident. (Ex. JE5, p. 38)

On February 15, 2016, claimant returned to her primary care physician, Dr. Olsasky, who assessed her with a biceps tendon tear and right shoulder pain. (Ex. JE8, p. 25) She described claimant's "sudden exacerbation of pain at the elbow with a 'snapping sensation.'" (Ex. JE8, p. 24) This is consistent with claimant's description of a feeling of "rubber bands snapping in my arm" when she pushed open the door at work

on January 21, 2016. (Tr. pp. 41-42) Dr. Olsasky described claimant as having an "acute elbow issue and chronic shoulder pain." (Id.)

On March 8, 2016, claimant was seen by Jason Sullivan, M.D., at Des Moines Orthopedic Surgeons, P.C. (Ex. JE9, pp. 4-5) At that time, claimant reported that her current symptoms included joint pain and soft tissue swelling at times. (Ex. JE9, p. 2) Concerning the history of the injury, she stated in part that "[w]hen my arm snapped inside, it felt like a big rubber band snapped . . . I have chronic pain in my right arm," which is "so bad I have to lift my arm with my left hand." (Ex. JE9, pp. 2-3) She also described "shoulder pain – burning & some pain into chest. On January 21, 16, as pushing the door leaving my work felt terrible pain in right arm," and that her right arm gave her "a lot of trouble at work." (Id.) Dr. Sullivan recommended an MRI of the right shoulder. (Ex. JE9, p. 7) Dr. Sullivan returned claimant to work with the restriction of no lifting exceeding 10 pounds with the right arm. (Ex. JE9, p. 8)

On March 18, 2016, the MRI was obtained and the impression included: supraspinatus tendinopathy with a small full-thickness tear; subscapularis tendinopathy with a partial tear; a proximal long head biceps tendon rupture; and an irregular tear of the superior portion of the labrum. (Ex. JE9, pp. 9-10)

On March 31, 2016, claimant returned to see Dr. Sullivan who recommended right arthroscopic rotator cuff repair and debridement of the biceps stump. (Ex. JE9, p. 11)

On April 6, 2016, claimant reported her injury to her employer, which I find is less than 90 days from January 21, 2016. (Ex. 2, pp. 1-3) Claimant advised she had been having pain in her right arm for the past two and half years, but on January 21, 2016, she pushed open to door to leave work and her "arm snapped" or "popped" and felt like rubber bands snapping. (Ex. 2, pp. 1-3)

On April 25, 2016, Dr. Sullivan performed right arthroscopic debridement of a biceps stump and arthroscopic rotator cuff repair. (Ex. JE9, P. 12)

On May 3, 2016, claimant was noted to be doing well after surgery, and she was to start physical therapy in three weeks. (Ex. JE9, p. 14)

On May 12, 2016, Dr. Olsasky, her family physician, authored a letter setting forth her opinions concerning causation. (Ex. JE8, pp. 37-38) She stated that it was probable that "the repetitive nature of patient's employment contributed to the rotator cuff tear." (Ex. JE8, p. 37) The particulars of the "repetitive nature" of claimant's job are not detailed. (Id.) She also stated that concerning the biceps tendon rupture it "would be probable the patient's injury that she sustained on 1/21/16 while pushing the heavy door at work ultimately caused the rupture to occur," and that "while the patient had previous injury to the elbow after this incident, she had acute pain, swelling, and bruising consistent with an acute rupture." (Id.) Dr. Olsasky acknowledged claimant's bruising as related to the bicep rupture. Dr. Olsasky stated that concerning the labral

tear, she did not feel comfortable concerning the mechanism and causation and would defer to the orthopedic surgeon. (Id.)

On May 31, 2016, claimant returned to see Dr. Sullivan following surgery and indicated that she had no pain in her shoulder and was progressing with physical therapy. (Ex. JE, p. 17)

On June 2, 2016, Dr. Sullivan issued a letter stating that the "mechanism of opening a heavy door in a 70-year-old lady could account for her rotator cuff tear, biceps tendon tear, and superior labrum tear assuming she had no symptoms prior to that incident." (Ex. JE9, p. 18) He also opined that "I do not believe her right shoulder injury is at all related to her prior right elbow injury." (Id.) She was continued on her 10 pound lifting restriction. (Id.)

On July 26, 2016, claimant was seen by Dr. Sullivan who stated that she "has an occasional ache after working with therapy, otherwise no pain in her right shoulder," and "[s]he is very happy with the results." (Ex. JE9, p. 20) She was noted to be "doing great" and "[s]he can now begin strengthening at physical therapy." (Id.) Claimant was again released to return to work with the restriction of no lifting more than 10 pounds. (Ex. JE9, p. 21)

On September 21, 2016, claimant was discharged from physical therapy "due to all goals being met and patient is independent with home exercise program and other instructions." (Ex. JE10, p. 64)

On October 20, 2016, claimant returned to Dr. Sullivan who noted that claimant had "done very well," and she had "minimal complaints" and "is able to achieve overhead motion." (Ex. JE9, p. 22) Claimant indicated that "[s]he wants to return back to work." (Id.) Dr. Sullivan stated that claimant was at maximum medical improvement (MMI) and placed her on "a permanent overhead lifting restriction of 10 pounds. Other than that, she can return to work full duty." (Id.) There is a separate patient status report that limits claimant to lifting 10 pounds generally, not just overhead. (Ex. JE9, p. 23)

On January 12, 2017 (report dated May 8, 2017) claimant was seen by Robin Sassman, M.D., for the purpose of an independent medical evaluation (IME) at the request of claimant's counsel. Dr. Sassman reviewed claimant's job duties, her medical history, her current complaints, and conducted a physical examination. (Ex. JE11, p. 6-14) The physical exam included recording measurements of range of motion, strength, and sensation. Dr. Sassman diagnosed claimant with "[r]ight shoulder rotator cuff tear and bicep tendon tear status post right shoulder arthroscopic debridement of a biceps stump and arthroscopic transosseous double-row rotator cuff repair on April 25, 2016, by Jason Sullivan, M.D." (Ex. JE11, p. 15) Dr. Sassman stated that claimant's right shoulder symptoms started "in approximately September of 2015" after beginning her job with defendant employer and her job involved "a lot of repetitive upper extremity activities," and "there were no outside incidents or activities that could have caused

this." (Id.) Dr. Sassman does not explain the particular upper extremity activities that claimant was repetitively doing that were problematic. Dr. Sassman concluded that,

> [I]t is my opinion that her right shoulder symptoms are directly and causally related to work activities. I also believe the right shoulder worsened with the incident that occurred on January 21, 2016, when she pushed the large, heavy door open and noted worsening pain in her shoulder and the pain in her right bicep. I believe this is when the tear in her bicep occurred.

(Ex. JE11, p. 15) Dr. Sassman projected a date of maximum medical improvement (MMI) of April 25, 2017, based upon the idea that this would be one year from her surgery. (Ex. JE11, p. 16) I note that April 25, 2017, was three months after her evaluation of claimant. Dr. Sassman then, based on loss of range of motion, referred to specific pages and figures from the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, (AMA Guides), and assigned a permanent impairment rating of 8 percent to the whole person. (Id.)

On February 6, 2017, Dr. Aviles signed a letter written by defense counsel, which indicated his opinion that claimant's biceps tendon "tear(s) and related conditions, as presented to [Dr. Aviles] in February, 2016, as presented by her MRI in March, 2016 and any treatment or surgery concerning such, were/are NOT causally related to her alleged work incident of January 21, 2016 and/or her cumulative work at the Au Bon Pain Café." (Ex. JE5, p. 41) On February 10, 2016, Dr. Aviles had previously stated that claimant had likely suffered a traumatic biceps rupture, which was a new injury. It is not clear what prompted this apparent change of opinion.

On April 8, 2017, Philip Davis issued a vocational report concerning claimant. (Ex. 8) Mr. Davis interviewed claimant and reviewed medical records, claimant's answers to interrogatories, and claimant's handwritten job description and journal. (Ex. 8, p. 1) Mr. Davis's report discussed claimant's social history, education, work history and medical history. In his report, Mr. Davis relied upon the restrictions assigned by Dr. Sassman. (Ex. 8, p. 5) He stated that these restrictions would place claimant in the sedentary physical demand level and that her job at Au Bon Pain based on the description provided by claimant was in the light category, with some aspects of a medium classification. (Ex. JE pp. 6-7) Mr. Davis stated that a vocational analysis requires consideration of an individual's transferable work skills. However, Mr. Davis does not clearly discuss claimant's transferable work skills and the impact of those skills on his analysis, although he mentions in passing, her poor keyboarding and computer skills. (Ex. 8, p. 7) He opined that claimant is not capable under her restrictions of performing any of her past occupations and that it is highly unlikely that claimant would be employable by any employer, with or without additional education. (Ex. JE8, pp. 7-8) Mr. Davis concluded that claimant is "100% precluded in her ability to obtain or maintain competitive employment." (Ex. 8, p. 9) Mr. Davis did not discuss the relationship and level of employability when considering claimant's work restrictions that were in place prior to this work injury compared to those restrictions in effect after the work injury.

In response to Dr. Sullivan's statement that claimant's shoulder injuries were caused from the incident of pushing open the door at work, "assuming she had no symptoms prior to that incident," defendants sought to inform Dr. Sullivan of claimant's prior symptoms. (Ex. JE9, p. 18) Defendants sent two undated letters to Dr. Sullivan. The first letter set forth a medical summary that included claimant's medical history dating back to 1995 and discussed claimant's symptoms prior to January 21, 2016 and her medical treatment thereafter. (Ex. JE9, pp. 24-26) The second letter referenced a conversation between Dr. Sullivan and defense counsel and sets forth Dr. Sullivan's opinion as understood by defense counsel, which is that the surgery he performed and claimant's shoulder condition at that time are related to the traumatic injury of January 21, 2016 and are not due to claimant's work "in general" at Au Bon Pain Café, "either directly or as a substantial aggravation of a preexisting condition." (Ex. JE9, p. 27) Defendant's requested a follow-up responsive letter. (Id.)

On July 27, 2017, Dr. Sullivan responded in a short letter to defense counsel and stated: "Ms. Voshell is a patient of mine who I believe, based upon a reasonable degree of medical certainty, had a traumatic injury to her shoulder on January 21, 2016." (Ex. JE9, p. 28) He further stated: "I do not believe that this is an attritional injury as a result of working, in general, for Au Bon Pain Café." (Id.) He then discusses factors that may influence restrictions for a rotator cuff repair, but does not assign any specific restrictions. (Id.) In essence, Dr. Sullivan reaffirmed his prior opinion that opening the door caused the rotator cuff tear, biceps tendon tear, and superior labrum tear, after having been advised of claimant's medical history.

On August 14, 2017, Connie Oppedal issued a vocational evaluation report. (Ex. E) Ms. Oppedal did not interview claimant, but she did review medical records and claimant's answers to interrogatories. (Ex. E; Tr. p. 67) Ms. Oppedal gleaned information concerning claimant's job duties, hobbies and other information and described claimant's social history, education and work history. (Ex. E, pp. 7-8) Ms. Oppedal noted that claimant's restrictions prior to the January 21, 2016 incident were set by Dr. Aviles of limiting lifting from floor to waist of 20 pounds, waist to crown and carrying of 15 pounds. (Ex. E, p. 9) Regarding claimant's current physical ability, Ms. Oppedal relied upon the restrictions assigned by Dr. Sullivan, which was no lifting over 10 pounds and the additional restrictions assigned by Dr. Sassman. (Id.) Ms. Oppedal noted claimant's transferable skills included: customer service; cashiering; knowledge of the restaurant field; critical thinking; verbal communication; and, reading. (Ex. E, p. 10) She opined that based on claimant's physical capabilities, prior work history, skills and education, that claimant would be able to "continue to work as a cashier in a restaurant setting, receptionist in a beauty salon/spa, a greeter, sales associate beauty counter retail, and donor recruitment specialist." (Ex. E, p. 10)

On September 5, 2017, claimant was seen by Scott Neff, D.O., for the purpose of an independent medical examination at the direction of defendants. (Ex. JE12, p. 7) Dr. Neff noted that claimant began having shoulder problems in 1995 and had arthroscopic impingement decompression surgery done several years ago, and "[s]hortly before the alleged date of injury, she was having enough symptoms in her

shoulder to ask to be referred to a surgeon because of these symptoms." (Ex. JE12, p. 14) Dr. Neff concluded that the "rotator cuff degenerative bursal surface tear of the rotator cuff and her proximal biceps tendon rupture were not causally related to, contributed to, or aggravated by her alleged work injury." (Ex. JE 12, p. 15)) Dr. Neff stated that "the push on the door was not really an injury, but simply a coincidence of location which worsened the symptoms which had already been progressing." (Id.) Dr. Neff stated that he was not asked to give an opinion concerning whether claimant's injuries may have resulted from overuse and were cumulative in nature. Rather, he stated "[t]he issue as I understood it, was did the work injury, the pushing on the door, cause all this problem?" (Ex. 14, p. 8) Dr. Neff reviewed medical records related to claimant, but did not have Dr. Olsasky's records prior to August 10, 2015. (Ex. JE14, p. 13) Nor did he review Dr. Sullivan's July 27, 2017 letter concerning causation. (Ex. JE14, p 14) In his deposition, Dr. Neff described Dr. Sullivan as "an expert orthopedic surgeon who is fellowship trained in sports medicine and who is exceptionally competent." (Id.)

Dr. Neff agreed in his deposition that from 1999 through 2015 the medical records he reviewed may describe shoulder pain, loss of motion, and difficulty with use of the shoulder, but that there was no diagnosis of shoulder impingement syndrome or rotator cuff pain. (Ex. 14, p. 4) He further agreed that the pain claimant complained of from 1999 through 2015 had some contribution from her neck. (Id.) Dr. Neff agreed that he was provided no information beyond claimant's verbal description of the door that she pushed open on January 21, 2016, nor was he provided with a job description for claimant concerning her work for defendant or the April 6, 2016 injury report that claimant filled out for her employer. (Ex. 14, p. 6)

Causation

Despite claimant's prior complaints and request to proceed to surgery, on January 8, 2016, she testified credibly that on January 21, 2016, while pushing open a heavy exterior door at work on a windy day, she felt a sensation like "rubber bands snapping" in her right arm and she had immediate pain in her shoulder. (Tr. pp. 41-42)

On February 10, 2016, Dr. Aviles referred to claimant's prior injury from 2012 and stated concerning the recent increase in pain, that "this is a new injury and not related to her old injury." (Ex. JE5, p. 35) Dr. Aviles stated his assessment was a "traumatic partial tear of right biceps tendon" and "right elbow pain." (Ex. JE 5, p. 35) However, on February 6, 2017, Dr. Aviles later appears to change his opinion when he signed a letter written by defense counsel, indicating that claimant's biceps tendon tear and related conditions are neither acute nor cumulative work injuries. (Ex. JE5, p. 41) There is no specific rational provided by Dr. Aviles for this change of opinion. I give little weight to this change in opinion of Dr. Aviles.

On March 8, 2016, claimant described the trauma from pushing open the door to Dr. Sullivan, saying that "[w]hen my arm snapped inside, it felt like a big rubber band snapped." (Ex. JE9, pp. 2-3) She described the same mechanism of injury and sensation in her report of injury to her employer on April 6, 2016. (Ex. 2, pp. 1-3)

Before the door pushing incident, Dr. Olsasky stated on January 8, 2016 that it was very unlikely that claimant's shoulder pain came from a bicep tendon rupture. (Ex. JE8, p. 18) After the incident of pushing open the door, she stated that it "would be probable the patient's injury that she sustained on 1/21/16 while pushing a heavy door at work ultimately caused the rupture to occur." (Ex. JE8, pp. 37-38) Dr. Sassman, stated in reference to the act of pushing open the door on January 21, 2016, "I believe this is when the tear in her bicep occurred." (Ex. JE11, p. 15) On July 27, 2017, Dr. Sullivan stated that claimant had "a traumatic injury to her shoulder on January 21, 2016," and her shoulder condition did not happen "as a result of working, in general, for Au Bon Pain Café." (Ex. JE9, p. 28) Although Dr. Neff concluded that claimant's "rotator cuff degenerative bursal surface tear of the rotator cuff and her proximal biceps tendon rupture were not causally related to, contributed to, or aggravated by her alleged work injury," he nevertheless stated that "the push on the door . . . worsened the symptoms which had already been progressing." (Id.) (Ex. JE12, p. 15)

The greater weight of the evidence supports a finding that claimant sustained a right bicep tendon rupture on January 21, 2016 while pushing open a door at work, which arose out of and in the course of her employment with defendant employer.

Concerning the additional conditions of claimant's shoulder, claimant testified that she began experiencing right shoulder pain in the winter or spring of 2015, after she had been working for the defendant employer for a few years. (Tr. p. 32)

On May 26, 2015, claimant sought medical attention for her right shoulder with Dr. Olsasky. (Tr. pp. 32-33; Ex. JE8, p. 5) At that time, claimant reported having shoulder pain for about one week, with no particular injury. (Ex. JE8, p. 5) On January 8, 2016, about two weeks before claimant pushed on the door at work, her pain was significant enough that she inquired about surgery. (Ex. JE8, p. 14) Dr. Olsasky responded to this request by recommending an MRI and referral to another physician if the MRI showed that surgery would be beneficial. (Ex. JE8, p. 18) At that time, Dr. Olsasky suspected the problem was a rotator cuff tear. (Id.) She later opined on May 12, 2016, that it was probable "that the repetitive nature of patient's employment contributed to the rotator cuff tear." (Ex. JE8, p. 37) However, the particulars of claimant's "repetitive" employment and the extent to which it "contributed" to the rotator cuff tear was not specified.

On June 2, 2016, Dr. Sullivan, the treating orthopedic surgeon, stated that the "mechanism of opening a heavy door in a 70-year-old lady could account for her rotator cuff tear, biceps tendon tear, and superior labrum tear *assuming she had no symptoms prior to that incident*." (Ex. JE9, p. 18)(emphasis added) However, it is obvious from

the medical history that claimant had significant symptoms prior to the January 21, 2016 incident. However, Dr. Sullivan was provided a medical history which included a description of claimant's prior symptoms, and thereafter he stated that "based upon a reasonable degree of medical certainty, [claimant] had a traumatic injury to her shoulder on January 21, 2016." (Ex. JE9, p. 28) He also stated that claimant did not have "an attritional injury as a result of working in general for Au Bon Pain Café." (Ex. JE9, p. 28) Therefore, Dr. Sullivan confirmed his prior opinion that it was the January 21, 2016 incident of pushing open the door that caused the rotator cuff tear, biceps tendon tear and superior labrum tear.

Dr. Aviles stated that the biceps tendon "tear(s) and related conditions" of claimant's shoulder were not causally related to the January 21, 2016 work incident or a cumulative work injury at the Au Bon Pain Café. (Ex. JE5, p. 41) However, this opinion has been given little weight as stated above.

On May 8, 2017, Dr. Sassman opined in her report that claimant's "right shoulder symptoms are directly and causally related to work activities" and that the "right shoulder worsened with the incident that occurred on January 21, 2016." (Ex. JE11, p. 15) Dr. Sassman further stated that pushing a heavy door may "cause a bicep tendon tear, a rotator cuff tear, and/or a labral tear in a 70-year old woman," and "I do believe this is what caused these injuries." (Ex. JE11, p. 16)

Dr. Neff offered an opinion on causation as it related to the January 21, 2016 incident and relied heavily on claimant's prior shoulder complaints, in his determination that there was no causation. (Ex. JE12, p. 14) Dr. Neff concluded that the "rotator cuff degenerative bursal surface tear of the rotator cuff and her proximal biceps tendon rupture were not causally related to, contributed to, or aggravated by her alleged work injury." (Ex JE12, p. 15) However, Dr. Neff did state that pushing the door open "worsened the symptoms which had already been progressing." (Id.)

I note that Dr. Sullivan as the treating surgeon was in a superior position to see, treat and evaluate claimant's medical condition and is the only physician who saw first-hand the condition of claimant's shoulder during surgery. Dr. Sullivan is highly qualified, as confirmed by the testimony of defendant's expert, Dr. Neff. Although this is a closer call than the bicep tendon rupture, I rely most significantly on the opinion of Dr. Sullivan, and I find that claimant's rotator cuff injury and labrum injury either occurred or was substantially aggravated by the January 21, 2016 work injury, which arose out of and in the course of her employment. This finding is also supported by the opinion of Dr. Sassman who stated that pushing a heavy door could "cause a bicep tendon tear, a rotator cuff tear, and/or a labral tear in a 70-year old woman," and "I do believe this is what caused these injuries." (Ex. JE11, p. 16) It is further supported in part by the statement of Dr. Neff that pushing the open the door "worsened the symptoms which had already been progressing." (Ex JE12, p. 15)

Temporary Total/Healing Period

The incident occurred on Thursday, January 21, 2016 at the end of claimant's shift as she was leaving work. (Tr. p. 45) Claimant saw Dr. Olsasky on Monday, January 25, 2016 and was taken off work. (Tr. p. 41; Ex. JE8, p. 19) Claimant testified that after the door pushing incident, she was off work for about three weeks. (Tr. p. 50) Claimant's payroll records confirm that following the pay period ending January 29, 2016, she was not paid again until the pay period ending February 26, 2016. (Ex. 2, p. 6) On February 10, 2016, claimant was seen by Dr. Aviles, who returned claimant to work with the work restriction of no lifting over 10 pounds. (Ex. JE5, p. 37) The payroll records indicate that claimant then worked until the time of her surgery with Dr. Sullivan on April 25, 2016. (Ex. 2, p. 6; Ex. JE9, P. 12) Claimant testified that she never returned to work after the surgery. (Tr. p. 56) She was placed at MMI by the treating surgeon, Dr. Sullivan on October 20, 2016. (Ex. JE9, p. 22)

I find, based on the above, that claimant was off work from January 22, 2016 through February 10, 2016, and from April 25, 2016 until October 20, 2016.

Permanent Partial Disability

Prior to this injury, claimant had a permanent work restriction of no lifting over 20 pounds, assigned by Dr. Aviles on November 4, 2014. (Tr. p. 29; Ex. JE5, p. 30) After this injury, claimant was assigned work restrictions by Dr. Sullivan of no lifting over 10 pounds with the right arm. (Ex. JE9, p. 23) I accept the restriction as assigned by Dr. Sullivan and note that he was in the best position to see claimant over multiple visits and observe claimant's healing.

Dr. Sassman provided an opinion concerning the extent of permanent partial disability. She assigned 8 percent to the whole person based on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, based on claimant's loss of range of motion. (Ex. JE11, p. 16) I accept Dr. Sassman's opinion of the applicable impairment rating. It does not appear that another physician has assigned a rating.

Claimant receives Social Security retirement benefits and has been receiving them since age 62 or 63. (Ex. 8, p. 5; Tr. p. 110) She was not employed at the time of the hearing. She had not been looking for work and she indicated that any work that she might be willing to do could not involve nights or too many hours. (Tr. pp. 74-75) I find that claimant is not particularly motivated to obtain employment.

Defendant's vocational expert concluded that claimant could continue in similar positions that she has had in the past, such as a cashier in a restaurant setting, along with other jobs identified in her report. (Ex. E, p. 10) Claimant's vocational expert concluded that claimant is now 100 percent precluded from obtaining and maintaining employment. (Ex. 8, p. 9) Claimant has not put either of these experts to the test as

she has made little to no effort to find employment. I put greater weight on the report of Ms. Oppedal who more clearly considered claimant's transferable skills.

I note that on October 20, 2016, when she was placed at MMI, she was noted to have "done very well," and she had "minimal complaints" and "is able to achieve overhead motion." (Ex. JE9, p. 22) Claimant testified that she has continued to see Dr. Olsasky to receive pain medication. (Tr. p. 58) However, the records indicate that she has had no particular treatment for her shoulder since being placed at MMI by Dr. Sullivan on October 20, 2016. (Ex. JE 9, p. 22) Claimant has been seen for other concerns such as a rash. (Ex. JE8, pp. 39-48)

Considering the above and claimant's age, limited education, her work restrictions, impairment rating, the situs of the injury, the length of the healing period, and all other appropriate considerations for industrial disability, I find that claimant has sustained 40 percent industrial disability.

Additional Findings

Claimant incurred medical expenses associated with the above described treatment. I find that the records indicate that the treatment, including surgery was helpful and improved claimant's physical condition.

I find that defendants are not presently providing authorized medical care for the work injury. I find that the failure to provide medical care is unreasonable.

I find that on April 14, 2016, the defendants communicated their denial to claimant by letter. (Ex. 4, p. 1) This denial came a little over a week after the injury was reported to the employer on April 6, 2016. (Ex. 2, p. 1) The letter advised of the basis for the denial of the claim. I find based upon the medical history including claimant's request to pursue shoulder surgery a few weeks prior to the January 21, 2016 date of injury and the medical opinions of Dr. Aviles and Dr. Neff that defendants had a reasonable basis to deny benefits in this claim and that penalty is therefore not appropriate.

CONCLUSIONS OF LAW

1. Causation

The first issue is whether claimant sustained a cumulative or acute injury that arose out of and in the course of her employment on or about January 21, 2016.

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

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the

employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler 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.

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).

When an expert 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. Dunlavey v. Economy Fire & Casualty Co., 526 N.W.2d 845 (Iowa 1995).

I have found above that based upon the greater weight of the medical evidence and expert medical opinions, supported by claimant's testimony that claimant sustained injury to her right shoulder on or about January 21, 2016, as a result of pushing open the door at work. Defendants argue that claimant is not credible, and there should be no finding of causation. For example, defendants argue that claimant stated at hearing

that when she hit the door with her right hand to open it, she may have hit the door below shoulder level, because the handle/bar on the door is below shoulder level, and she had previously testified to pushing the door open with her right arm stretched straight out. (Tr. pp. 110-111) However, this ignores the testimony of claimant's supervisor, Paul King, who testified that "[y]ou don't have to push a bar . . . just push the door open." (Tr. p. 126) The fact that claimant agreed that the handle/bar on the door in question was below shoulder level, does not negate her prior testimony of her arm position when the door was pushed. Nor does it negate the expert medical opinions finding claimant was injured when she pushed the door open on January 21, 2016.

In reaching a conclusion that claimant's bicep rupture, rotator cuff injury, and labrum injury either occurred or was substantially aggravated by the January 21, 2016 work injury, I relied significantly on the opinion of Dr. Sullivan, who was the only orthopedic physician who saw claimant on more than one occasion and saw first-hand the specific condition of claimant's shoulder during surgery. He was also advised of claimant's prior medical conditions. (Ex. JE9, pp. 18, 24-28) This conclusion is also supported by the opinions of Dr. Sassman, claimant's IME physician and in part by the statement of Dr. Neff that pushing open the door "worsened the symptoms which had already been progressing." (Ex JE12, p. 15) Specifically, concerning the bicep rupture, causation is also supported by Dr. Olsasky and initially by Dr. Aviles, who later changed his mind.

2. Notice

The Hearing Report indicates that the defendants assert a notice defense only if the injury is found to be a cumulative injury. That is not the case as I have found the injury is acute, therefore, there is no notice defense asserted.

However, to the extent that a notice defense was intended even if the injury was found to be acute, I note that Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

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

I have found above that claimant sustained her work injury on January 21, 2016 and provided notice to the employer on April 6, 2016. (Ex. 2, p. 1) I therefore conclude that, to the extent a notice defense is asserted, claimant provided notice to the employer within 90 days of the date of injury in compliance with Iowa Code section 85.23 and that defendant has failed to carry their burden of proof concerning a failure to give proper notice.

3. Temporary Total Disability

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

The Hearing Report provides the disputed issue of temporary disability is in dispute. Claimant seeks payment of temporary total or healing period benefits from January 22, 2016, the day after the injury occurred, through October 20, 2016, the date claimant was placed at MMI by the treating surgeon, Dr. Sullivan. The parties also stipulated that the proper commencement date for permanent partial disability benefits is October 20, 2016. Therefore, it appears that claimant seeks temporary benefits from and including January 22, 2016 through and including October 19, 2016, with October 20, 2016, being the first date of permanency benefits.

Defendants disputed that claimant would be entitled to said temporary benefits if defendants were found liable for the injury and further disputed that claimant was off work during the above period of time.

I have found above for the reasons there stated that claimant was off work from January 22, 2016 until she was returned to work with restrictions by Dr. Aviles on February 10, 2016. She continued to work until her surgery on April 25, 2016 and never returned to work thereafter, and was placed at MMI by the treating surgeon on October 20, 2016.

The parties stipulated that claimant would be entitled to a credit for wages paid after the date of injury, if claimant was found to be permanently and totally disabled. That did not occur and therefore, this stipulation does not apply. Further, based upon my finding that claimant was off work for the periods I have identified above and therefore would not have earned wages during that time, there would not be any applicable credit. In short, there is no credit to be applied.

I conclude that claimant is entitled to healing period benefits from January 22, 2016 until she was returned to work on February 10, 2016, and again from April 25, 2016, the date of her surgery to, but not including, October 20, 2016, the date that Dr. Sullivan placed her at MMI. I use the MMI date as the termination of the second healing period because claimant had not returned to work nor was she deemed medically capable of returning to work prior to being placed at MMI. Therefore, MMI was the first triggering event ending the second healing period under Iowa Code section 85.34(1).

4. Permanent Partial Disability

The parties stipulated in the Hearing Report that any disability awarded would be industrial disability. The parties further stipulated that if claimant was not found to be permanently and totally disabled that the commencement date for permanency benefits would be October 20, 2016.

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, 593; 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. However, consideration must also be given to the injured worker's medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured workers' qualifications intellectually, emotionally and physically; the worker's earning before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted. Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616 (Iowa 1995); 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).

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 654 (App. February 28, 1985).

Assessments of industrial disability involve a viewing of loss of earning capacity in terms of the injured workers' present ability to earn in the competitive labor market without regard to any accommodation furnished by one's present employer. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 158 (Iowa 1996); Thilges v. Snap-On Tools Corp., 528 N.W.2d 614 (Iowa 1995).

I have found above for the reasons there stated that claimant is entitled to 40 percent industrial disability, which is 200 weeks.

Defendants argue for apportionment.

Apportionment of disability between a preexisting condition and an injury is proper only when some ascertainable portion of the ultimate industrial disability existed independently before an employment-related aggravation of disability occurred. Bearce v. FMC Corp., 465 N.W.2d 531 (Iowa 1991); Varied Enterprises, Inc. v. Sumner, 353 N.W.2d 407 (Iowa 1984). Hence, where employment is maintained and earnings are not reduced on account of a preexisting condition, that condition may not have produced any apportionable loss of earning capacity. Bearce, 465 N.W.2d at 531. Likewise, to be apportionable, the preexisting disability must not be the result of another injury with the same employer for which compensation was not paid. Tussing v. George A. Hormel & Co., 461 N.W.2d 450 (Iowa 1990).

The burden of showing that disability is attributable to a preexisting condition is placed upon the defendant. Where evidence to establish a proper apportionment is absent, the defendant is responsible for the entire disability that exists. Bearce, 465 N.W.2d at 536-537; Sumner, 353 N.W.2d at 410-411.

In this case there was no evidence of an ascertainable portion of the ultimate industrial disability existed independently before this work injury, nor was there evidence of a previous disability with this employer for which claimant was paid.

Further, pursuant to Iowa Code section 85.34(2)(u), Iowa has adopted the so-called "fresh start rule." Industrial loss now is no longer a measure of claimant's disability from all causes after which we then apportion out non-work causes and leave in work related causes under the full responsibility rule. The percentage of industrial loss now is the loss of earning capacity from what existed immediately prior to the work injury. This means that an already severely disabled person before a work injury can have a high industrial loss because the loss is calculated in all cases from whatever his earning capacity was just before the injury and what it was after the injury, not the loss as compared to a healthy non-disabled person. In other words, all persons, start with a 100 percent earning capacity regardless of any prior health or disability conditions. The rationale for this approach is that an employer's liability for workers' compensation benefits is dependent upon that person's wages or salary. Consequently, the impact, if any, of any prior mental or physical disability upon earning capacity is automatically factored into a person's wages or salary by operation of the competitive labor market and there is no need to further apportion out that impact from any workers' compensation award. Roberts Dairy v. Billick, 861 N.W.2d 814 (Iowa 2015); Steffan v. Hawkeye Truck & Trailer, File No. 5022821 (App. September 9, 2009).

Apportionment is not applicable in this case.

5. Medical

Claimant seeks payment of medical expenses identified in Tab D attached to the Hearing Report for: Indianola Family Medicine; Orthopaedic Outpatient Surgery Center; Iowa Ortho; Des Moines Orthopedic Surgeons (DMOS); Mercy Indianola Physical Therapy; Walmart Pharmacy; and, Walgreens Pharmacy.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 16, 1975).

Prudent persons customarily rely upon their physician's recommendation for medical care without expressly asking the physician if that care is reasonable. Proof of reasonableness and necessity of the treatment can be based on the injured person's testimony. Sister M. Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963).

It is said that "actions speak louder than words." When a licensed physician prescribes and actually provides a course of treatment, doing so manifests the physician's opinion that the treatment being provided is reasonable. A physician practices medicine under standards of professional competence and ethics. Knowingly providing unreasonable care would likely violate those standards. Actually providing care is a nonverbal manifestation that the physician considers the care actually provided to be reasonable. A verbal expression of that professional opinion is not legally mandated in a workers' compensation proceeding to support a finding that the care provided was reasonable. The success, or lack thereof, of the care provided is evidence that can be considered when deciding the issue of reasonableness of the care. A treating physician's conduct in actually providing care is a manifestation of the physician's opinion that the care provided is reasonable and creates an inference that can support a finding of reasonableness. Jones v. United Gypsum, File No. 1254118 (App. May 2002); Kleinman v. BMS Contract Services, Ltd., File No. 1019099 (App. September 1995); McClellon v. Iowa Southern Utilities, File No. 894090 (App. January 1992). This inference also applies to the reasonableness of the fees actually charged for that treatment.

Claimant is entitled to an order of reimbursement only if he has paid treatment costs; otherwise, to an order directing the responsible defendants to make payments directly to the provider. See, Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Defendants should also pay any lawful late payment fees imposed by providers. Laughlin v. IBP, Inc., File No. 1020226 (App., February 27, 1995)

The Court in Bell Bros. stated:

> We do not believe the statute can be narrowly construed to foreclose all claims by an employee for unauthorized alternative medical care solely because the care was unauthorized. Instead, the duty of the employer to furnish reasonable medical care supports all claims for care by an employee that are reasonable under the totality of the circumstances, even when the employee obtains unauthorized care, upon proof by a preponderance of the evidence that such care was reasonable and beneficial. In this context, unauthorized medical care is beneficial if it provides a more favorable medical outcome than would likely have been achieved by the care authorized by the employer.

Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010).

Defendants denied medical care per their letter of April 14, 2016. (Ex. 4, p. 1) I have found above that claimant sustained a work-related injury to her shoulder on January 21, 2016, that required medical treatment including surgery, I conclude that it was reasonable for claimant to proceed with the medical treatment as recommended by the treating physicians and that the records indicate that claimant's surgery and treatment were successful and helpful to her condition. I conclude that the medical treatment claimant received as referenced by the bills set forth in Tab D attached to the Hearing Report were reasonable and beneficial and the defendants are obligated to pay the same. I further conclude that defendants are likewise obligated to pay the accompanying medical mileage identified in Tab C attached to the Hearing Report.

The second part of the medical issue is the fact that this has been a denied claim and defendants have not identified any authorized treater going forward.

Under Iowa law, the employer is required to provide care to an injured employee and is permitted to choose the care. Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997).

> [T]he employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See Iowa R. App. P. 14(f)(5); Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what care is reasonable under the statute is a question of fact. Id. The employer's obligation turns on the question of reasonable necessity, not desirability. Id.; Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983). In Pirelli-Armstrong Tire Co., 562 N.W.2d at 433, the court approvingly quoted Bowles v. Los Lunas Schools, 109 N.M. 100, 781 P.2d 1178 (App. 1989):

> [T]he words "reasonable" and "adequate" appear to describe the same standard.
>
> [The New Mexico rule] requires the employer to provide a certain standard of care and excuses the employer from any obligation to provide other services only if that standard is met. We construe the terms "reasonable" and "adequate" as describing care that is both appropriate to the injury and sufficient to bring the worker to maximum recovery.

The commissioner is justified in ordering alternate care when employer-authorized care has not been effective and evidence shows that such care is "inferior or less extensive" care than other available care requested by the employee. Long, 528 N.W.2d at 124; Pirelli-Armstrong Tire Co., 562 N.W.2d at 437.

I conclude that the failure to provide medical care is unreasonable. Defendants shall identify an appropriate physician to provide care as needed for claimant's work injury.

6. Mileage Reimbursement for claimant's attendance at Defendants' IME

Claimant requests payment of mileage for her attendance at an IME with Dr. Neff on September 5, 2017, which was scheduled by defendants. The amount claimed is $36.38 and is set forth in Tab A attached to the Hearing Report.

Iowa Code section 85.39 provides that after an injury has occurred, the employee is to submit for an examination at a reasonable place and time as may be requested by the employer to a physician authorized to practice medicine, "without cost to the employee . . . and the employee shall be furnished transportation to and from the place of examination, or the employer may elect to pay the employee the reasonable cost of transportation."

Claimant is entitled to reimbursement of the mileage expense. It is unknown why this was not paid prior to hearing.

7. Penalty

Iowa Code section 86.13(4) provides that:

(a) If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, of chapter 85, 84A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed or terminated without reasonable or probable cause or excuse.

(b) The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:

(1) The employee has demonstrated a denial, delay in payment, or termination of benefits.

(2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

(c) In order to be considered a reasonable or probable cause or excuse under paragraph "b", an excuse shall satisfy all the following criteria:

(1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.

(2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.

(3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Weekly compensation payments are due at the end of the compensation week. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229, 235 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if

viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

I have found above that defendants provided written notice to claimant about one week after claimant advised the employer of the injury. The notice included defendants' basis for the denial, which was supported by claimant's medical history. The second opinion of Dr. Aviles and the opinion of Dr. Neff could be understood to support claimant's denial. I conclude that no penalty benefits are appropriate and that defendants had a reasonable basis for the denial.

8. Costs

Claimant seeks reimbursement of costs as described in Tab B attached to the Hearing Report.

All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010) The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

Tab B attached to the Hearing Report sets out cost for the filing fee of $100.00, the service fee of $20.01, the cost of the transcript of the depositions of Paul King and Dr. Neff, in the amount of $183.75 and $526.74 respectively, both of which are included in the joint exhibits. I conclude that the above are appropriate for reimbursement to claimant.

I now consider the three remaining costs of $3,640.00 for Dr. Sassman's IME, $1,000.00 for Dr. Neff's deposition and $1,671.45 for Mr. Davis's vocational report.

Concerning Dr. Sassman's IME, the attached invoice indicates the following breakdown of the fee: $700.00 for the first hour of the IME exam; $787.50 for the IME exam time exceeding one hour; $700 for the first hour of the report preparation and $1,452.50 for the report preparation exceeding the first hour. Therefore, $1,487.50 is attributable to the exam and $2,152.50 is attributable to the report. The Iowa Supreme Court in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, at 846-847 (Iowa 2015) has made it clear that the examination that may be associated with a report is not properly taxable as a cost. I therefore award $2,152.50 in costs for Dr. Sassman's IME report and nothing for the examination.

I award Dr. Neff's deposition fee of $1,000.00.

Regarding Mr. Davis's vocation report prepared at the cost of $1,671.45, I award $150.00.

I therefore award costs to claimant of: $100.00 – filing fee; $20.01 – service fee; $183. 75 – Paul King deposition transcript; $526.74 – Dr. Neff deposition transcript; $1,000.00 – Dr. Neff deposition fee; $2,152.50 - Dr. Sassman's IME report (nothing for the examination); and, $150.00 for Dr. Davis's vocational report, for a total cost amount of $4,133.00.

ORDER

IT IS THEREFORE ORDERED:

Defendants shall pay healing period benefits to claimant for the periods of January 21, 2016 to February 10, 2016 and from April 25, 2016 to, but not including October 20, 2016.

Defendants shall pay claimant two hundred (200) weeks of permanent partial disability benefits commencing on October 20, 2016.

All weekly benefits shall be paid at the stipulated rate of two hundred seven and 98/100 dollars ($207.98) per week.

Defendant shall pay all accrued weekly benefits in a lump sum.

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

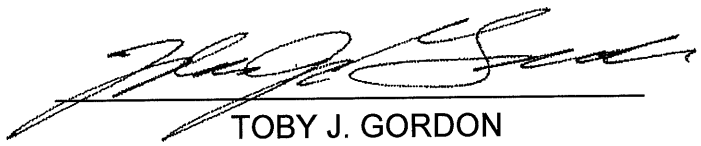
Defendants shall reimburse claimant for his out-of-pocket medical expenses, including mileage, as set forth in Tabs A, C and D attached to the Hearing Report and shall pay, reimburse, and or otherwise satisfy all remaining medical expenses contained therein.

Defendants shall promptly identify and authorize an appropriate board certified physician to provide medical care to evaluate and treat claimant's work injury.

Defendants shall pay costs as set forth above in the amount of four thousand one hundred thirty-three and no/100 dollars ($4,133.00).

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

Signed and filed this 22nd day of February, 2018.



TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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TJG/kjw

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.