BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TERRIE McDOUGAL, Claimant, vs. MENARD, INC., Employer, and XL INSURANCE AMERICA, INC., Insurance Carrier, Defendants.	File No. 5066644 ARBITRATION DECISION Head Note Nos.: 1402.30; 2502

STATEMENT OF THE CASE

Terrie McDougal, claimant, filed a petition for arbitration against Menard, Inc. (Menards), as the employer and XL Insurance America, Inc. as the insurance carrier. This case came before the undersigned for an arbitration hearing on January 8, 2020, in Des Moines.

The parties filed a hearing report at the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 5. Joint Exhibits 1 through 4 were received at the time of hearing. Pursuant to a verbal order at the commencement of the hearing, defendants were allowed to introduce Joint Exhibit 5, which is received and admitted into the record.

Claimant offered Claimant's Exhibits 1 through 6. Defendants objected to Claimant's Exhibit 1, pages 16 and 17 as an untimely expert report that was prejudicial. Defendants' objection was sustained. Defendants also objected to Claimant's Exhibit 6, which was also sustained at the time of trial. Therefore, Claimant's Exhibit 1, pages 1 through 15, as well as Claimant's Exhibits 2 through 5 were received into the evidentiary record.

Defendants' Exhibits A through J were received into the record at the time of hearing. Defendants requested the opportunity to introduce additional deposition pages referenced during the hearing. Defendants' request was granted, and defendants subsequently filed Defendants' Exhibit K. Defendants Exhibits A through K are all admitted into the evidentiary record without objection.

Claimant testified on her own behalf. Defendants called Chris Ruff, a front-end manager for the employer, to testify. The evidentiary record closed upon the defendants' filing of Joint Exhibit 5 and Defendants' Exhibit K.

However, counsel for the parties requested the opportunity to file post-hearing briefs. Their request was granted, and both parties filed briefs simultaneously on February 10, 2020. The case was considered fully submitted to the undersigned on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury that arose out of and in the course of her employment with Menard, Inc., on April 7, 2018.

2. Whether the alleged injury caused temporary disability and, if so, the extent of claimant's entitlement to temporary disability or healing period benefits.

3. Whether the alleged injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent disability benefits.

4. If permanent disability is owed, the proper commencement date for permanent disability benefits.

5. The number of exemptions to which claimant is entitled and the applicable weekly worker's compensation rate.

6. Whether claimant is entitled to an award of past medical expenses, including direct payment of expenses, reimbursement of a third-party payer, or reimbursement to claimant.

7. Whether claimant is entitled to reimbursement of her independent medical evaluation fees pursuant to Iowa Code section 85.39.

8. Whether claimant is entitled to a reimbursement of her independent medical evaluation fees as a cost in this case.

FINDINGS OF FACT

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

Claimant, Terri McDougal, is a 51-year-old woman, who is employed at Menards in Marion, Iowa. Ms. McDougal began her employment at Menards as a cashier and customer service representative in January 2017. As part of this job, Ms. McDougal was required to lift up to 50 pounds, bend, stoop, climb, and pivot. She performed customer checkouts, requiring her to lift and manipulate large items. She made change for customers and performed customer service duties, including returning carts of items to the appropriate departments within the Menards store.

Ms. McDougal worked on April 7, 2018. Her shift started between noon and 2:00 p.m. At the beginning of her shift, claimant was assigned to the customer service department. Her initial duties were to return items to the appropriate departments within the store. At trial, Ms. McDougal testified that she returned four carts full of bags of cement, lumber, blocks, and tile. She had no physical complaints while performing these duties. (Transcript, pages 29-30)

Claimant was then reassigned to a cashier line. She checked out her initial customer without incident. However, she complained of immediate onset of symptoms while helping her second customer. Specifically, Ms. McDougal testified that she bent down to retrieve cash from the cash drawer. She estimated the cash drawer is about mid-thigh height. As she straightened up after retrieving change for the customer, Ms. McDougal testified she experienced immediate onset of symptoms in her low back and down the left leg. She testified the symptoms took her breath away. (Tr., pp. 31-32)

Although she continued to experience symptoms for the remainder of her evening shift, Ms. McDougal testified that she was able to complete her shift. Claimant testified she finished her shift in tears as a result of her low back and left leg symptoms. Ms. McDougal reported the incident to her supervisor, Chris Ruff. She notified Mr. Ruff that she intended to seek medical care at the emergency room after her shift. (Tr., pp. 33-35)

Indeed, after her shift, Ms. McDougal did go to the emergency room. That medical record indicates that claimant reported sudden onset of left-sided low back pain and symptoms radiating into her left leg after standing back up after bending to get cash out of a drawer at work. (Joint Exhibit 2, pp. 1-5) During the emergency room visit, Ms. McDougal reported a history of low back pain but indicated to the emergency room staff that it “never radiated into the left leg.” (Joint Ex. 2, p. 2)

Defendants take issue with this statement and point out that claimant had significant pre-existing low back treatment and symptoms. Medical records in evidence clearly demonstrate prior low back injuries, symptoms and treatment. On August 19,

2010, claimant's medical records document positive bilateral straight leg raises, detailing radicular symptoms from her low back. (Joint Ex. 1, p. 3) A medical record dated March 11, 2013 clearly documents a history of lower back pain with radicular pain in the backs of claimant's legs. (Joint Ex. 1, p. 1)

A neurosurgeon, David H. Segal, M.D., evaluated claimant and recorded a sudden injury in 2003 with continually worsening symptoms over the past decade. Dr. Segal noted bilateral leg pain, as well as numbness in claimant's toes. In fact, she reported intractable pain that was affecting her ability to work. (Joint Ex. 1, p. 8) At trial, claimant acknowledged being the victim of a prior domestic assault and undergoing an L5-S1 fusion by Dr. Segal in 2013. (Tr., p. 38)

Ms. McDougal testified that she had no ongoing low back or leg symptoms after recovering from the 2013 surgery. However, defendants note that claimant sought treatment on March 12, 2018, reporting lower back pain on the left. The pertinent medical record indicates that claimant reported severe pain, but thought maybe it felt like a prior kidney stone she had experienced. Defendants also point out that claimant sought medical care again on April 3, 2018. At that medical appointment four days prior to her alleged work injury, claimant reportedly told her physician that she had been taking gabapentin since her low back surgery but that it was no longer working for pain control. (Joint Ex. 1, p. 30)

Claimant asserts that the symptoms reported on March 12, 2018 and April 3, 2018 were not similar to the symptoms she experienced on April 7, 2018. Instead, claimant asserts that the symptoms she reported on those dates were related to her menstrual cycle and resolved shortly after her period began. At trial, claimant also testified that she has been diagnosed with fibromyalgia and shortly before trial with Ehlers-Danlos syndrome. (Tr., p. 43) Claimant did not disclose the name of the medical provider diagnosing her with Ehlers-Danlos syndrome prior to the time of trial and no records from this medical provider are in evidence.

Unfortunately, I have difficulties accepting some of Ms. McDougal's testimony. She offered some testimony at the time of trial that was not credible. For instance, Ms. McDougal testified during her deposition that she was not under the influence of medications. (Defendants' Exhibit A, page 3) However, at trial, claimant testified that she was under influence at the time of her deposition. (Tr., pp. 89-90)

While I could potentially overlook the contradictory testimony with some convincing or credible explanation, claimant's explanation of the reason she provided inaccurate testimony at the time of her deposition was not believable. Specifically, Ms. McDougal testified that she was intimidated by the defense attorney at her deposition and was not telling him everything because she was intimidated. (Tr., p. 90)

I have two difficulties with claimant's testimony in this regard. First, it suggests that she intentionally withheld information under oath in reaction to the questioning style of defense counsel. This suggests that claimant is willing to modify her testimony, limit

her testimony, or provide inaccurate testimony under oath if she feels it appropriate under her subjective standards. This does not lend confidence in the accuracy of the remainder of her testimony. When a person "picks and chooses" when to tell the truth under oath, it is very difficult for the undersigned to accept any of the testimony offered.

Second, claimant's explanation of being intimidated by defense counsel at the time she provided inaccurate testimony about whether she was on medication is not credible. Counsel asked claimant on page three of the deposition whether she was under oath. (Tr., pp. 90-91; Defendants' Ex. A, p. 3) It is not realistic to believe that claimant was so overwhelmed and intimidated by page three of her deposition to have made a conscious decision to alter or limit her testimony.

Prior to this point in her testimony, defense counsel had asked claimant her name, where she lived and when she had moved to that residence. (Defendants' Ex. A, p. 3) I simply do not believe that the five questions asked of claimant prior to the question about being under the influence of medications were sufficiently intimidating to make claimant's explanation credible. I do not believe that claimant provided inaccurate testimony about being under the influence of medication at her deposition because she was intimidated. Therefore, I question the authenticity and accuracy of her testimony at trial. This hurts her overall credibility.

Some of claimant's other trial testimony gives me pause and concern as well. For instance, claimant testified on direct examination that she has not looked for work since going on a leave of absence from Menards. In fact, she testified that she understood she would be fired if she worked elsewhere. (Tr., p. 72) Then, on cross-examination, Ms. McDougal conceded that she did work for two weeks for Kwik Star after going on her leave of absence. (Tr., p. 104)

Defendants questioned claimant about a medical record dated May 25, 2018. In that record, claimant reported low back pain radiating to her left buttock. She reported this was "a new problem" that "started in the past 7 days." (Joint Ex. 4, p. 1) Obviously, if this was a new problem with symptoms for only seven days, this would not necessarily be attributed to events at Menards on April 7, 2018, a month and a half earlier. In response, Ms. McDougal testified at trial that she did not want to submit her claim as a worker's compensation claim because he believed it would reduce the store's profit-sharing bonuses. She testified that she took a management advancement class through Menards and that the company discouraged reporting of worker's compensation claims in that training. (Tr., pp. 48, 92-96)

At trial, claimant testified that she heard her immediate supervisor verbally discourage filing of worker's compensation claims. When challenged about this claim and shown her contrary deposition testimony, claimant proclaimed she had not heard her supervisor say that worker's compensation claims should not be filed until after her deposition. (Tr., p. 96) However, this contradicts claimant's prior testimony that she avoided filing the claim or telling physicians about the work injury immediately after the

injury because she was concerned about reporting it as a work injury. Claimant's testimony is internally inconsistent and is difficult to believe.

Claimant's supervisor, Chris Ruff, testified at trial that the training materials and course claimant referenced do not refer to discouraging the filing of worker's compensation claims. I accept Mr. Ruff's testimony over claimant's testimony on this issue. Frankly, I doubt the veracity of Ms. McDougal's testimony in this regard.

It is very unlikely that a large corporation like Menards would put something in writing for a management training course that explicitly discouraged the reporting of worker's compensation claims. Such irresponsible behavior likely would create significant exposure for such a company and is highly unlikely. Therefore, I again find Ms. McDougal's testimony suspect and incredible.

Claimant also testified at trial that she had no back symptoms and was losing weight prior to the alleged date of injury. (Tr., p. 32) Claimant's medical record four days before the injury date document low back symptoms and weight gain with a discussion of the need for weight loss. (Joint Ex. 1, p. 30)

To a lesser extent, I note some discrepancies, omissions, or inconsistencies between claimant's recorded statement, deposition testimony, and trial testimony. For instance, in her recorded statement, Ms. McDougal made no reference to returning carts or any heavy work at Menards prior to the increase in back symptoms. At her deposition, claimant testified that she did return some items to departments within the store prior to the injury. However, she also testified in her deposition that she did not pick up anything. At trial, she testified to having to lift heavy bags of items during these returns. (Tr., pp. 86-88)

Again, I could potentially overlook and understand some of these omissions or inconsistencies. Claimant was not specifically asked about the job duties she performed prior to the alleged injury during her recorded statement. Therefore, the omission can be understood. However, as the version of events were discussed during the deposition and subsequently at trial, the version of events changed. Claimant's explanation for the change in her description of events ultimately was that she was on medications at the time of her deposition. For the reasons outlined above, this explanation is not credible.

When some of these inconsistencies were called to claimant's attention during cross-examination at trial, she appeared flustered and agitated. Her voiced raised and she spoke more swiftly, while her face appeared flushed and she sat forward in a more aggressive posture toward defense counsel. Claimant's body language at trial, particularly on cross-examination, did not leave the undersigned with the impression she was being completely honest or forthcoming.

Defense counsel also questioned claimant about a medical record that seems to question the veracity of her pain complaints with respect to her requests for work leave medical notes. Specifically, on August 26, 2019, claimant's personal health care provider noted claimant would be required to be examined before any future work excuse notes were granted. (Tr., p. 113) When asked questions about this specific issue, claimant fidgeted nervously in her chair and her responses were not perceived as authentic or credible by the undersigned.

On redirect examination, claimant testified that none of the inconsistencies highlighted during her testimony were intentional. She testified that she was not trying to mislead anyone. Rather, she testified that the situation is overwhelming and that her medications make her hazy, groggy, and tired. (Tr., p. 121)

Interestingly, then on re-cross examination, claimant testified that her responses are likely more accurate when she is clear-headed and not on medications. She testified that she did take her medications on the date of trial and conceded on re-cross that her deposition testimony was more reliable than her trial testimony, which makes little to no sense after spending much of her testimony detailing why her deposition testimony was erroneous. (Tr., p. 122) Ultimately, I do not find Ms. McDougal's trial testimony to be credible.

That being said, an individual can offer incredible testimony and still have sustained a work injury. It is conceivable that medications can fog a person's memory and render their testimony unworthy of reliance while still having sustained a compensable work injury. Therefore, I must analyze the case to determine causation for Ms. McDougal's injuries and back condition.

Three physicians have offered causation opinions in this case. Claimant offers and relies upon the causation opinion of her independent medical evaluator, Jacqueline M. Stoken, D.O. Dr. Stoken evaluated claimant on October 15, 2019. (Claimant's Ex. 1)

Dr. Stoken opines, "The injury of April 7, 2018, caused the condition(s) set forth in my answer to question No. 2 above." (Claimant's Ex. 1, p. 11) Claimant's counsel then asked Dr. Stoken, "what facts support your conclusion that the condition(s) identified … is (are) related to Ms. McDougal's work at Menard's, Inc.?" (Claimant's Ex. 1, p. 11) Dr. Stoken's analysis of this issue is, "Prior to this time, she was able to work full duty without restrictions and without low back pain and left lower extremity radiculopathy." (Claimant's Ex 1, p. 12)

Defendants appropriately point out that Dr. Stoken does not refer to and apparently did not review the medical record from April 3, 2018. Dr. Stoken does not mention the Ehlers-Danlos syndrome claimant testified she has been diagnosed with at the time of trial. Defendants also point out that Dr. Stoken offers no analysis of the biomechanics of how claimant's injury could have been injured on April 7, 2018. Rather, Dr. Stoken appears to adopt and rely upon more of a temporal relationship to

causally connect claimant's low back and left leg symptoms to her work activities at Menards. At least partially, Dr. Stoken's analysis relies upon the accuracy of Ms. McDougal's statements that she had no back or leg symptoms prior to the incident on April 7, 2018. For the reasons outlined above, Ms. McDougal's testimony and statements are not relied upon or found credible. Reliance on those statements by Dr. Stoken, without other definitive explanation of the cause of claimant's low back and left leg symptoms damages Dr. Stoken's credibility in this situation.

Defendants rely upon two medical opinions. Nicholas O. Bingham, M.D., offered the first opinion on August 24, 2018. Defendants sent claimant to Dr. Bingham to investigate this claim. Dr. Bingham opined:

> I have serious questions about the work relatedness of the patient's current complaints. Patient's account and all prior notes reflect that she had merely bent down slightly to access the cash drawer and turned slightly toward the customer when her pain began. I am quite familiar with the store where the patient works. She stands at a counter with [a] moving belt on it. This counter is somewhat lower than one would encounter in a grocery store, for example. The level of the counter would be about at the level of mid thigh on myself and probably a little higher for her, given the patient's shorter stature. The cash drawer is just below the surface of this counter. Patient seems to have not been carrying any load except for a small amount of cash when she raised up from accessing this drawer and turned toward the patient, when her pain began. It is incalculable how often the average human would perform this motion in the course of a normal day. It certainly appears that she was at no more risk for this sort of event at work than she would've been anywhere else. Such minor bending under no load is a normal activity of life. I think the patient's current complaints are the result of her pre-existing degenerative disease of the lumbar spine, body habitus and other comorbidities.

(Joint Ex. 4, p. 8)

Dr. Bingham's analysis certainly contains greater analysis of the biomechanical nature of claimant's alleged injury. On the other hand, Dr. Bingham's analysis also seems to focus upon whether the work activities claimant performed before the alleged injury create any increased risk of injury above and beyond other typical human activities outside the workplace. For the reasons explained in the conclusions of law, I do not find Dr. Bingham's analysis and opinions to be based upon an accurate understanding of the law in Iowa. Iowa does not require claimant to prove or demonstrate that work activities cause an increased risk of injury beyond other typical human activities. Rather, as explained below, Iowa law requires claimant prove that there was an actual risk of injury from the activities performed.

Dr. Bingham's opinion could be read to suggest that the act of bending and/or twisting poses an actual risk of injury, just not an increased risk of injury. On the other hand, Dr. Bingham also notes that Ms. McDougal's "current complaints are the result of her pre-existing degenerative disease of the lumbar spine, body habitus and other comorbidities." This would suggest that Dr. Bingham does not believe claimant's low back and left leg symptoms and conditions were causally related to work activities. Ultimately, I find the opinions of Dr. Bingham not terribly helpful in my factual and legal analysis. I give the causation opinions of Dr. Bingham little to no weight in my analysis.

Finally, defendants offer a causation opinion from John D. Kuhnlein, D.O. Dr. Kuhnlein performed an independent medical evaluation of claimant on August 21, 2019 and authored a report dated December 9, 2019. (Defendants' Ex. C) Dr. Kuhnlein appears to have taken a thorough history of claimant, noting her prior medical history and referencing both the Ehlers-Danlos syndrome claimant testified about at trial and the medical records immediately preceding the alleged date of injury. Dr. Kuhnlein offered a very thorough causation opinion, stating:

> I am not able to state with a reasonable degree of medical certainty that Ms. McDougal sustained a low back or lumbar spine injury as a result of her work activities for Menards on April 7, 2018. Even though Ms. McDougal was at work when she states that she developed the immediate onset of low back pain, she attributed the onset of back pain not to the more physical activities she performed before her back pain started (if she had sustained an injury as a result of those activities, she would have developed back pain before she did), she attributed her back pain to basically bending to retrieve cash for a customer.
>
> For an injury to occur, the stress to the anatomic structure must exceed that structure's ability to resist such stress. Simply bending without a load as she did would not preset such stress to the lumbar spine, even with her pre-existing low back condition with the L5-S1 fusion performed by Dr. Segal in October 2013. In this case, even with 51% probability, there is no convincing evidence that the stressors applied to Ms. McDougal's low back when bending minimally sideways to retrieve cash would produce stressors in the lumbar spine that would produce such radiculopathy that she alleges that she experienced.
>
> In her deposition, Ms. McDougal indicated that she did not have any pain leading up to the time of this sudden onset of pain. This would not be a 'straw that broke the camel's back' kind of condition with cumulative stressors producing the sudden onset of low back pain, as there was no evidence of any ongoing stressors with the gradual worsening of symptoms.
>
> There are issues with differences in Ms. McDougal's statements and in deposition as opposed to the records. Ms. McDougal states that it was

determined that her back pain was related to her menstrual cycles that she now believes is related to a diagnosis of Ehlers-Danlos syndrome producing back pain approximately four days per month. That would not seem to be consistent with Dr. Spiva's April 3, 2018 note indicating that gabapentin was no longer effective. If Ms. McDougal had low back pain only four days a month, the gabapentin issues would have been irrelevant, as gabapentin is used to address pain related to nerve issues, and the back pain she experienced would have not been related to such issues if her statements regarding back pain about the time of her menstrual cycles is accurate. In her deposition at page 32, she stated that she felt wonderful before going on to discuss the relationship of her back pain to her menstrual cycle. Also in deposition at pages 73-74, Ms. McDougal indicated that she was untruthful when at an urgent care describing the onset of her back pain, stating that she did not want her condition to be noted as a Worker's Compensation claim, as she had gone through management training (pages 56-57) where she alleged that managers were told specifically to not send anything through Workmen's Comp. because it comes out of their bottom line. The end result is that she was untruthful to providers about the source of her pain, and she acknowledged that in her deposition.

At times, we see people who bend and develop pain, but usually there are other factors involved that support the development of such pain. In this case, there are other factors that confuse the issues enough that I am not able to state that her back pain is related to her work for Menards.

As a result, even though Ms. McDougal may have been at work at the time of the onset of these symptoms, there was no physical stressor associated with the activities that she alleged produced her back pain that would be great enough to produce physical damage in her back. Because there is no evidence of any stressor great enough to produce physical injury related to her work activities for Menards, I am not able to state that she sustained any acute work related injury as a result of her employment for Menards on April 7, 2018.

For the same reasons, there is no evidence that the work activities on April 7, 2018, temporarily exacerbated her pre-existing lumbar condition. There is no evidence that bending to pick up cash from a cash drawer would produce enough stress to injure her back, regardless of her pre-existing, based on her statements in deposition regarding the relationship of her back pain to her menstrual periods, and not to physical activities. One might postulate that Dr. Mathew's EMG/NCV study reportedly showing a left L5 radiculopathy proves the relationship, but it still does not address how an activity that would not present sufficient stress to cause such an injury would produce the radiculopathy he states he found on the EMG/NCV study.

> There is no evidence of a permanent injury to her low back as a result of the April 7, 2018, work activities as a result of 'permanently lighting up' this previously latent or dormant pre-existing back condition. She saw Dr. Spiriva [sic] on April 3, 2018, indicating the gabapentin was no longer effective for chronic back pain care, four days before the alleged injury. Therefore, this would not have been a dormant condition. The mechanism of injury would not materially accelerate the progression of this pre-existing condition, as there would be no stressor significant enough to produce injury by the physical activities she states she performed at the time of the acute onset of the low back condition.

(Defendants' Ex. C, pp. 27-28)

Dr. Kuhnlein clearly put significant biomechanical thought and analysis into his medical opinion. Dr. Kuhnlein's opinion appears to accurately apply Iowa law to the facts of this case. He assesses whether the stressors on claimant's low back were sufficient to cause this type of injury and also considers whether the work activities may have either temporarily or permanently aggravated or lit up claimant's condition.

Interestingly, Dr. Kuhnlein notes some of the inconsistencies that also trouble me in his analysis. Dr. Kuhnlein's analysis certainly is more in-depth than that offered by Dr. Stoken. Moreover, Dr. Kuhnlein's analysis contemplates the temporal relationship relied upon by Dr. Stoken and explains why that temporal relationship alone is not sufficient to establish a causal connection. Ultimately, I find Dr. Kuhnlein's medical opinion to be the most thorough, medically and biomechanically based, and credible medical opinion in this evidentiary record. I accept Dr. Kuhnlein's causation opinion as accurate.

Having found Dr. Kuhnlein's medical causation opinion most accurate and convincing and having found claimant's testimony not credible, I find that claimant failed to prove she sustained a low back or left leg injury that arose out of and in the course of her employment at Menards on April 7, 2018. Similarly, I find that claimant failed to prove she sustained either a temporary or permanent aggravation of her low back and/or left leg condition as a result of her work activities at Menards on April 7, 2018 or on a cumulative basis leading up to April 7, 2018.

CONCLUSIONS OF LAW

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational

consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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

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

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

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

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

The workers' compensation statute is not a general health insurance policy that extends to all injuries that happen to occur while on the job. Miedema, 551 N.W.2d at 312. Rather, an employee must "prove by a preponderance of the evidence that a causal connection exists between the conditions of his [or her] employment and the injury." Miedema, 551 N.W.2d at 311. "In other words, the injury must not have coincidentally occurred while at work, but must in some way be caused by or related to the working environment or the conditions of his [or her] employment." Id.

Generally, injuries that result from risks personal to the employee are not compensable. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000). However, claimant does not have to prove that the activities performed at work constitute an increased risk of injury over and above activities typically experienced outside the work place. Rather, claimant need only prove that the activities performed at work constitute an actual risk of injury. Lakeside Casino v. Blue, 743 N.W.2d 169, 174 (Iowa 2007).

In reviewing the competing medical causation opinions, I rejected the opinions of Dr. Bingham. In formulating his causation opinion, it appears to the undersigned that Dr. Bingham believes that the work activities must cause an increased risk of injury above and beyond the risks individuals are exposed to outside of the employment setting. For the reasons set forth above, this is an erroneous understanding of the

applicable legal standard. I disregarded Dr. Bingham's causation opinion for this reason.

Nevertheless, considering the other two competing medical opinions, I found Dr. Kuhnlein's causation analysis and opinion to be the most thorough and convincing in this record. I also rejected claimant's testimony as lacking credibility. Therefore, I found that claimant failed to prove she sustained an injury arising out of and in the course of her employment at Menards. I similarly found that claimant failed to prove she sustained a temporary or permanent aggravation of an underlying condition as a result of her work activities at Menards on April 7, 2018.

Having found that Ms. McDougal failed to prove by a preponderance of the evidence that she sustained an injury arising out of and in the course of her employment, I conclude that claimant failed to prove a compensable work injury occurred. Similarly, having found that claimant failed to prove a material aggravation of an underlying condition; I conclude that claimant failed to prove entitlement to weekly worker's compensation benefits.

Ms. McDougal also seeks an award of past medical expenses. Defendants challenge whether the past medical expenses sought are causally related to claimant's work at Menards. The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening, October 1975).

Having found that claimant failed to prove she sustained an injury that arose out of and in the course of her employment, I conclude that claimant failed to establish entitlement to payment or reimbursement of her past claimed medical expenses.

Claimant also seeks an award of her independent medical evaluation expenses pursuant to Iowa Code section 85.39. Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify

for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

However, Iowa Code section 85.39 establishes pre-requisites that claimant must meet before reimbursement of an independent medical evaluation is required of the defendants. First and foremost, an evaluation of permanent disability must be made by a physician chosen by the defendants before claimant obtains his independent medical evaluation.

In this case, defendants obtained an independent medical evaluation performed by Dr. Kuhnlein on August 21, 2019. However, Dr. Kuhnlein did not issue his formal report until December 9, 2019. Claimant obtained an independent medical evaluation with Dr. Stoken on October 15, 2019. It is not possible that claimant could have been dissatisfied with Dr. Kuhnlein's impairment rating before seeking the evaluation with Dr. Stoken because Dr. Stoken's evaluation occurred before Dr. Kuhnlein issued a report. I conclude that claimant failed to establish the pre-requisites of Iowa Code section 85.39 to qualify for reimbursement of her independent medical evaluation with Dr. Stoken. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 843-844 (Iowa 2015).

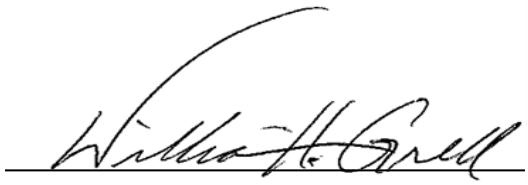
Finally, claimant seeks the award of the cost of her independent medical evaluation as a cost pursuant to 876 IAC 4.33(6). Costs are assessed at the discretion of the agency. Iowa Code section 86.40. In this instance, claimant failed to carry her burden of proof to establish a compensable work injury. Therefore, exercising discretion, I conclude that it would not be appropriate to assess any of claimant's costs, including the cost of her independent medical evaluation.

ORDER

THEREFORE, IT IS ORDERED:

Claimant takes nothing.

Signed and filed this __15th___ day of April, 2020.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Jeffrey Schultz (via WCES)

Charles Blades (via WCES)

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