BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LAURA L. JOHNSON,	:	
Claimant,	:	
vs.	:	
	:	File No. 5065802
CITY OF CLINTON,	:	
	:	A R B I T R A T I O N
Employer,	:	
	:	D E C I S I O N
and	:	
IMWCA,	:	
Insurance Carrier,	:	
Defendants.	:	Head Note No.: 1108

STATEMENT OF THE CASE

Claimant, Laura Johnson, filed a petition for arbitration seeking workers' compensation benefits from City of Clinton, the employer and Iowa Municipalities Workers' Compensation Association, the insurance carrier.

The matter came on for hearing on August 27, 2018, before Deputy Workers' Compensation Commissioner Joseph L. Walsh in Davenport, Iowa. The record in the case consists of joint exhibits 1 through 1-11, claimant's exhibits 1 through 12, and defense exhibits A through W, as well the sworn testimony of the following witnesses: Laura Johnson, Kathleen Lawrence, Carol Hyde, Anita Dalton and Dennis Hart. Heidi Kraftka was appointed as the court reporter for the proceedings.

The parties briefed this case and the matter was fully submitted on October 12, 2018.

ISSUES AND STIPULATIONS

The following issues and stipulations were submitted. All of the stipulations have been accepted by the agency and are deemed binding at this time.

It is stipulated that there was an employer-employee relationship at the time of

the alleged injury. The claimant alleged she suffered an injury which arose out of and in the course of employment on May 1, 2015. The defendants dispute this and further dispute that, even if there is found to be an injury on May 1, 2015, that it is a cause of any temporary or permanent disability. Claimant seeks temporary disability benefits from June 10, 2015, through February 4, 2016. Defendants dispute that claimant is entitled to any benefits during this period of time. Defendants stipulate that the claimant was off work during this period of time.

Claimant is also seeking industrial disability benefits. Defendants dispute that claimant has suffered any industrial disability. The parties stipulate that, if the defendants are liable for the alleged injury, the disability is industrial. The parties further stipulate the commencement date for any permanent disability benefits is February 5, 2016.

The parties stipulate to all of the elements which comprise the rate of compensation. Affirmative defenses have been waived. Claimant is seeking medical expenses as set forth in an attachment to the hearing report. Defendants dispute these expenses as not causally connected to any work injury.

FINDINGS OF FACT

Laura Johnson is a pleasant, 68-year-old woman who resides in Clinton, Iowa. She testified live and under oath at hearing. Her sworn testimony is found to be credible. It is consistent with the remainder of the record. There was nothing about her demeanor which causes the undersigned any concern regarding her truthfulness.

Ms. Johnson has a GED, as well as a CNA certificate. She worked as a receptionist for International Paper from 1992 to 2000. She spent time as a stay home mother from 2000 to 2004. She held another receptionist position for about three years before starting with the City of Clinton.

Ms. Johnson began employment with the City of Clinton as a part-time paratransit driver in 2007. A year and a half later, she switched into a job as a fixed route driver, which paid significantly more. She alleges she suffered a cumulative injury which arose out of and in the course of her employment for the City. She contends the injury manifested on or about May 1, 2015. Prior to her employment with the City of Clinton, Ms. Johnson had never had low back problems. At hearing, Ms. Johnson described her position prior to her alleged injury, as follows:

> We would get our manifest in the morning that had all – we started out on paper manifests, and eventually when I was leaving, it ended up we were going to iPads, but when I was working, it was on paper manifests. We had a list of people that we were supposed to pick up in the time, so we would get or manifest. We would go out and get our busses ready to go, drive to the first pickup, go inside, get them, and bring them out, put them

> on the lift, and take them to their destination, sometimes more than one person.

(Transcript, page 39)

Ms. Johnson's former co-workers, Kathleen Lawrence and Carol Hyde, both testified regarding the job duties of a transit driver. They both testified that many of the busses were not in good condition, particularly the seats and that some of the work assisting passengers was fairly heavy. (Tr., pp. 13-15; 25-30) Ms. Johnson testified that the work was strenuous, in particular, pushing people in wheelchairs. (Tr., p. 40)

Ms. Johnson further described her work to her expert physician as follows:

> This was physical work, getting in and out of the bus to help handicap [sic] individuals, many in wheelchairs that she had to push and some of these weighing 200 to 300 pounds to go to their appointments and then to return to their home. This included putting them on the lift in order to get into the bus and then secure them into their seats while in transit. She was in and out of the bus 20 to 25 times a day, at least according to history.

(Cl. Ex. 2, p. 4) Ms. Johnson's job description is in the record as well. (Def. Ex. E, p. 1)

The City disputed Ms. Johnson's description of her work and presented data kept for compliance and payment records regarding the number of wheelchair assists claimant was involved with. (Def. Ex. O2) The City alleged Ms. Johnson averaged about three wheelchair assists per day. (Def. Ex. O2, paragraph 8) Dennis Hart, Director of Fleet and Transit for the City, testified that the job was not as strenuous as Ms. Johnson alleged and contested the allegations that the busses, particularly the seats, were poorly maintained. (Tr., p. 116-118)

Ms. Johnson has a number of personal health problems, including Parkinson's disease, arthritis/joint pain, type 2 diabetes, hypertension, hyperlipidemia, and GERD. (Jt. Ex. 1, p. 1; Jt. Ex. 2, p. 1; Jt. Ex. 4, p. 1) On a regular visit to her personal physician for her Parkinson's condition in April 2015, there is nothing documented about back problems. (Jt. Ex. 2, p. 1) On June 1, 2015, Ms. Johnson was evaluated by a chiropractor. At that visit, Ms. Johnson recorded the following history of her injury: "4 weeks driving bus with bad seats". (Jt. Ex. 3, p. 1) She described the pain as constant. The chiropractor documented that the "mechanism of injury described by the patient involved prolonged driving in a vehicle." (Jt. Ex. 3, p. 3) He developed a treatment plan for Ms. Johnson, including home exercises. (Jt. Ex. 3, p. 4)

On June 2, 2015, Ms. Johnson was evaluated by her primary care physician, Wade Lenz, M.D. He documented the following: "She has some pain that goes down her right leg for about the last month. She has been sitting in a poor seat when she drives. She is taking some Ibuprofen and Tylenol without much relief." (Jt. Ex. 4, p. 2) He diagnosed right sciatic pain and referred her to physical therapy. (Jt. Ex. 4, p. 2)

Ms. Johnson testified that on June 2, 2015, she told the City that she had severe pain and she did not think she could do the job. (Tr., p. 48) In her injury report she stated that the seat on the bus she drives "is not straight and leans to the side. She noticed pain to her right waist area 'SI' that radiates down her side and her leg past the calf." (Def. Ex. H, pp. 1, 2) She made a similar report to the insurance carrier. (Cl. Ex. 5, p. 26) Two days later, Ms. Johnson called the insurance carrier and reported that she wanted to withdraw the claim. (Def. Ex. M, p. 2) On June 10, 2015, Dr. Lenz took her off work. (Jt. Ex. 4, p. 4) On June 11, 2015, she signed a statement for the City indicating that she had decided not to pursue workers' compensation. (Def. Ex. V, p. 1) Dr. Lenz recommended an MRI which was performed on June 29, 2015, which showed degenerative changes as well as stenosis at L4-L5. (Jt. Ex. 6, p. 1)

On July 8, 2015, Ms. Johnson was evaluated at Genesis Neurosurgical Associates by Todd Ridenour, M.D. (Jt. Ex. 7, p. 1) The cause or onset of her injury is not documented in these notes. (Jt. Ex. 7, pp. 1-3) Ms. Johnson testified that she had dropped her claim for workers' compensation so she did not mention anything. Dr. Ridenour diagnosed degenerative disc disease, herniated disc, degenerative lumbar spondylosis and early degenerative scoliosis. (Jt. Ex. 7, p. 3) He noted that she had "pain suggestive for an L5 and or L5-S1 radiculopathy" and he recommended surgery. (Jt. Ex. 7, p. 3) He noted that "patient does have a number of very real traits of Parkinson's disease and is quite rigid." (Jt. Ex. 7, p. 3) She was provided an injection on July 15, 2015. (Jt. Ex. 8, p. 1)

Dr. Ridenour performed surgery on August 7, 2015. (Jt. Ex. 9, p. 1) Ms. Johnson continued to be off work. After a period of recovery and follow up care, permanent restrictions were placed on Ms. Johnson. The following is documented from November 9, 2015.

> Laura has been under the care of Dr. Todd Ridenour and myself after under going [sic] a Right lumbar four-five diskectomy August 7, 2015 at Genesis Medical Center. She continues to have difficulties that include right low back pain that is worsened with prolonged sitting as well as weakness in her right foot (dorsiflexion and EHL). The weakness in her right foot is essentially unchanged and likely to remain this way given she is now 3 months out from her surgical procedure. . . . On exam today I feel it is most consistent with sacroiliitis and have recommended she return back to the pain clinic to have a Sacroiliac injection. I have written a new order for physical therapy and she would like to attend therapy at Comprehensive Rehab in Clinton, IA. Currently, given the weakness as well as the use of prescription opioid pain medications I would not advise her to return to driving a commercial vehicle. If there is a light duty, office type position available I would certainly consider this for her. I will see her back for follow up in 1 month. Please feel free to contact me with questions.

(Jt. Ex. 7, p. 21)

In November 2015, the City terminated Ms. Johnson indicating the City had no positions available for her. (Cl. Ex. 9, p. 36) Shortly after this, Ms. Johnson chose to retire. She receives Social Security retirement, a small pension from the City of Clinton and another small pension from International Paper. She has not sought work and she has no other income.

The primary fighting issue in this case is whether the claimant suffered a cumulative work injury from working as a paratransit driver for the City of Clinton which caused permanent damage to her low back. The claimant relies upon the medical opinions of her family physician, Dr. Lenz, and a hired expert, Dr. Kreiter. The defendants rely upon the expert medical opinions of the treating surgeon, Dr. Ridenour and their hired expert, Dr. Igram.

In February 2017, Dr. Lenz provided a "check box" opinion on claimant's attorney's letterhead. (Cl. Ex. 1) He confirmed he was her primary physician for five years. After confirming the history of his visits with Ms. Johnson in June 2015, he opined that "Ms. Johnson's low back and right sciatic condition is causally related to her work activities of sitting in a seat as a bus driver for the City of Clinton." (Cl. Ex. 1, p. 3)

In July 2017, Cassim Igram, M.D., performed an independent medical evaluation (IME) on the claimant on behalf of the City. Dr. Igram took a history and examined Ms. Johnson. He opined there was "no evidence of a work-related injury." (Def. Ex. C, p. 7) "In other words, there is no causal connection between her work activities and the need for surgery." (Def. Ex. C, p. 7) He indicated there was no permanent impairment or restrictions associated with any work injury. (Def. Ex. C, p. 7)

In September 2017, Dr. Ridenour corresponded with defense counsel. He stated that when he saw Ms. Johnson she "did not offer any history of a work injury. She did not make mention of prolonged driving and/or prolonged driving of a paratransit bus with a bad seat." (Def. Ex. A, p. 3) He further opined that the "back condition for which I treated her surgically was not caused by any injury including, but not limited to, any activity of driving a paratransit bus with a bad seat." (Def. Ex. A, p. 3) He noted that her diagnosis of Parkinson's includes "rigidity which would have contributed to her back pain." (Def. Ex. A, p. 3)

In November 2017, Richard Kreiter evaluated Ms. Johnson for an IME. (Jt. Ex. 2) While Dr. Kreiter agreed with Dr. Lenz that the claimant's condition was caused by her work, he specifically opined that it was "more related to the loading and unloading activities rather than the actual driving." (Cl. Ex. 2, p. 4)

> This was physical work, getting in and out of the bus to help handicap [sic] individuals, many in wheelchairs that she had to push and some of these weighing 200 to 300 pounds to go to their appointments and then return to their home. This included putting them on the lift in order to get into the bus and then secure them into their seats while in transit. She was in and out of the bus 20 to 25 times per day, at least according to history. This

> was to load and unload and not just driving. The physical activity caused permanent aggravation and acceleration of underlying pre-existing lumbar pathology leading to sciatica and surgery performed by Dr. Ridenour which relieved the sciatica.

(Cl. Ex. 2, p. 4) He assigned a 10 percent whole person impairment rating. He did not provide an opinion about permanent restrictions specifically, noting that Ms. Johnson has other health conditions and that she is retired now. (Cl. Ex. 2, p. 5)

Having reviewed all of the evidence, it is my assessment that claimant has failed to meet her burden of proof that her work activities are a cause of any permanent disability in her low back. While this is a close case, I do not find the opinions of Dr. Lenz and Dr. Kreiter convincing. These physicians, while reaching the same conclusion, have very different rationales for their causation theories. Dr. Lenz opined it was from "sitting in a seat as a bus driver" while Dr. Kreiter specifically downplayed that theory and focused on the "very strenuous, repetitive job duties" of a paratransit bus driver. The claimant did prove that some of the work she performed, particularly assisting passengers with disabilities, was strenuous. While she did not perform this work constantly, she did perform it regularly. The claimant herself, believed that her condition developed primarily from riding in a crooked, uncomfortable seat. This is what she reported in her initial medical visits where there is no record that she told her physicians her condition developed as a result of helping individuals in wheelchairs or other heavy labor.

Dr. Ridenour was the claimant's treating surgeon. He was not a hired expert. His opinion is flawed in that he primarily based his opinion on the fact that Ms. Johnson never relayed a history of the injury to him. Of course, Ms. Johnson did not relay such a history because, at the time, she was not planning to pursue the claim. She had told her employer she wished to drop it. She signed a statement which indicated that her condition may not be work related. I believe the claimant that this is the reason she did not tell Dr. Ridenour the history of her injury. Nevertheless, Dr. Ridenour and Dr. Igram are both highly qualified experts who provided adverse causation opinions regarding Ms. Johnson's low back condition. While it is quite possible that her condition may have developed or been lit up by her work activities, I cannot find that she proved this by a preponderance of medical evidence.

CONCLUSIONS OF LAW

The first question is whether the claimant suffered a cumulative injury which manifested on or about May 1, 2015, which arose out of and in the course of her employment.

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or

source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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

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

Proof in a cumulative injury case is highly intertwined with evidence of medical causation.

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

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

The expert opinions as to the medical impairment in this case are conflicted. For the reasons set forth in the findings of fact, I find that the claimant has failed to prove medical causation by a preponderance of evidence. While this is a close case, the claimant has failed to meet her burden of proof.

The claimant seeks payment of an IME under 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).

I find that the defendants obtained a medical opinion from Dr. Igram which opined there was no disability associated with claimant's work activities. (Def. Ex. C, p.

7) At that point, claimant was entitled to receive a second opinion IME under section 85.39.

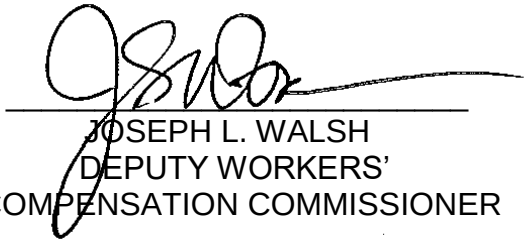
ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay Dr. Kreiter's IME expense under section 85.39 in the amount of one thousand and 00/100 dollars ($1,000.00).

Costs are taxed to defendants in the amount of six hundred sixty-five and 39/100 dollars ($665.39).

Signed and filed this 28th day of January, 2020.



JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Jean Dickson (via WCES)
Matthew Leddin (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.