BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CATALINA AGUILAR, Claimant, vs. FOUNTAIN WEST HEALTH CENTER, Employer, and UNITED HEARTLAND INSURANCE COMPANY, Insurance Carriers, Defendants.	FILED MAR 18 2016 WORKERS COMPENSATION File No. 5047732 ARBITRATION DECISION Head Note Nos.: 1704; 1802; 1803; 2500

STATEMENT OF THE CASE

Catalina Aguilar, claimant, filed a petition in arbitration seeking workers' compensation benefits from Fountain West Health Center (Fountain West) and its insurer, United Heartland, as a result of an alleged injury she sustained on December 3, 2013 that allegedly arose out of and in the course of her employment. This case was heard in Des Moines, Iowa and fully submitted on September 28, 2016. The evidence in this case consists of the testimony of claimant and Christian Anderson and claimant's exhibits 1 through 15 and defendants' exhibits A through K. The hearing was interpreted.

ISSUES

Whether claimant sustained an injury on December 3, 2013 which arose out of and in the course of employment;

Whether claimant has a cumulative injury;

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

The extent of claimant's disability;

Whether claimant is entitled to payment of medical expenses;

Whether defendants are entitled to a credit under Iowa Code section 85.34(7); and

Assessment of costs.

The stipulations contained in the Hearing Report are accepted and incorporated into this decision as if fully set forth. I accept the parties' stipulation as to the claimant's weekly workers' compensation rate.

FINDINGS OF FACT

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

Catalina Aguilar Higareda (a/k/a Catalina Aguilar), claimant, was 53 years old at the time of the hearing. Her education consists of 6 years in Mexico. Claimant can speak some English. She can read some English, but cannot write English.

Claimant's understanding of the restrictions she has from John Kuhnlein, D.O., due her December 3, 2013 fall, are no lifting more than 20 to 30 pounds and limited bending. (Transcript page 13) She testified that she believes the restrictions are more severe than her restriction for her 2007 injury.

Claimant has worked in restaurants, meat packing plants, cleaning offices, and for a temporary agency. (Exhibit 10, pp. 128, 129) Claimant testified that she could not perform her prior work due to lifting or standing restrictions. (Tr. pp. 15 – 23)

Fountain West is a nursing home. Claimant has worked for Fountain West on two occasions. She worked between 2000 and 2004. She returned to Fountain West in 2006. When she returned she worked in housekeeping until March 2014. On April 1, 2014, claimant chose to transfer to the dietary department at Fountain West. She was working in the dietary department at the time of the hearing.

Claimant had a work related injury at Fountain West on December 7, 2007. Her injury was found to be to her neck and back. (Ex. A. p. 3) The claimant's case went to an arbitration hearing and she was found to have a 20 percent industrial disability on February 3, 2010. (Ex. A, p. 6)

Claimant testified during the August 2015 hearing that she modified how she worked for Fountain West after her 2007 injury. She said she would make the garbage bags smaller, sit down once in a while and ask co-workers for help. (Tr. p. 30)

On April 30, 2012, claimant fell at work. She stepped on a balloon to pop it and fell backwards. Claimant reported her injury and Fountain West sent claimant to Michael Jackson, M.D. for treatment. (Tr. p. 32) Claimant was provided prescriptions

and physical therapy. Dr. Jackson released claimant to return in June 2012 to her housekeeping job. (Tr. p. 33)

Claimant fell on the ice twice on January 30, 2013 while working for Fountain West. Claimant went to the emergency room. Claimant was sent to Von Miller C-PA and then to Dr. Jackson. Dr. Jackson recommended light duty, provided prescriptions, and an injection in her knee. Claimant worked in laundry for a time when she was on restrictions. (Tr. pp. 37, 38) In May 2013, claimant was returned to regular duties in housekeeping.

On December 3, 2013, claimant was mopping a resident's room when she fell backwards. Claimant hit her head, back, and left arm in her fall. Claimant testified the floor was wet. (Tr. p. 40) She said that she was not feeling lightheaded when she fell. That she fell due to the wet floor. (Tr. p. 43)

An ambulance was called and claimant was taken to the emergency room. She was released the same day from the hospital. Fountain West sent her for treatment with Jon Yankey, M.D. Dr. Yankey put claimant on light work. (Tr. p. 45) Dr. Yankey released claimant to return to regular work in February 2014. Claimant said that her return to work was painful and that she complained to her supervisor about her pain. (Tr. p. 48) Claimant requested to work in the kitchen and was allowed transfer effective April 1, 2014. (Tr. pp. 49, 66) Claimant said that in the kitchen work she uses a cart instead of using trays to carry plates. Claimant said she took short breaks every hour and a half. (Tr. p. 50) Claimant believes she can continue to work in the kitchen with the restriction that Dr. Kuhnlein provided her in June 2014. (Tr. p. 50)

Claimant was not receiving active medical treatment from when she last saw Dr. Yankey on February 18, 2014 until she saw Dr. Kuhnlein on June 4, 2014. (Tr. p. 56) Claimant admitted under cross-examination that during her hearing in 2010 she testified she was having difficulty walking and standing, that she had to take breaks every 1 1/2 to 2 hours and that she had difficulty with large bags of garbage. (Tr. pp. 58, 59; Ex. B, p. 8) Claimant also said she had not lost any pay as a result of her December 2013 injury. (Tr. p. 69) Claimant admitted at the hearing she was able to drive herself from the Mexican border to Iowa. (Tr. p. 71)

Christian Anderson is the interim administer at Fountain West. Ms. Anderson said the claimant and another employee approached her about switching position from housekeeping to dietary and dietary to housekeeping. Ms. Anderson said that claimant wanted to move to the dietary position as it was lighter. (Tr. p. 76) Ms. Anderson testified she was not told by claimant that the December 2013 injury has resulted in any different restrictions that the claimant had as a result of her 2007 injury. (Tr. p. 83)

The claimant's injury in 2007 is relevant to her 2013 claimed injury. In the arbitration decision of February 3, 2010, the deputy commissioner found that Dr. Kuhnlein provided the following opinion;

> With respect to permanent impairment, he assigns a 5 percent whole person impairment for the lumbar spine and no impairment for the back, ankle, or knees. With respect to restrictions, he recommended that the claimant lift 20 pounds occasionally from floor to waist and over the shoulder and 30 pounds occasionally from waist to the shoulder. Further, he recommends that the claimant stand, walk, or kneel on an occasional basis and work above shoulder height on an occasional basis.

(Ex. A, p. 3) In assessing claimant's impairment, the deputy commissioner found:

> The claimant has very little permanent impairment. She has some work restrictions but they are not substantial. The claimant's potential for retraining is very limited, however, given her level of education. It is concluded considering these and all factors of industrial disability that the claimant is [*sic*] sustained a 20 percent industrial disability entitling her to 100 weeks of permanent partial disability benefits pursuant to Iowa Code section 85.34(2)(u).

(Ex. A, p. 5)

On April 20, 2012, claimant was seen by Michael Jackson, M.D. for complaints of neck, low back, left ankle and right ankle pain. (Ex. 7, p. 87) Claimant fell while trying to pop a balloon at work. Dr. Jackson's impression was mild cervical strain and mild left ankle sprain. On June 6, 2012, claimant told Dr. Jackson that she was continuing to improve and that her hours were being cut so she wanted to be taken off workers' compensation. Dr. Jackson retuned claimant to work full duty on that day and encouraged claimant to be careful with respect to lifting, twisting, and bending at work. (Ex. 7, p. 94)

On January 30, 2013, claimant fell in the parking lot at work. Claimant went to the emergency room at Iowa Methodist hospital in Des Moines, Iowa. The assessment was:

1. Strain of right elbow
2. Right wrist sprain
3. Contusion of left knee
4. Lumbosacral strain.

(Ex. 8, p. 114) Claimant was discharged. Claimant was then seen at Mercy Occupational Health and Wellness by Von Miller, PA-C on February 6, 2013. PA-C Miller provided restrictions, a Depo-Medrol injection and a short course of physical therapy. (Ex. 9, p. 23) On March 6, 2013, Dr. Jackson was providing care for her January 30, 2013 injury. His impression was:

1. Cervical strain/sprain.
2. Bilateral sacroiliac dysfunction, left worse than right.
3. Lumbosacral strain/sprain.
4. Gastrocnemius and Achilles strain.
5. Plantar fasciitis.

(Ex. 7, p. 98) On May 15, 2013, Dr. Jackson discharged claimant from his care and had her return to work full duty. (Ex. 7, p. 109)

The claimant fell at work on December 3, 2013. She was taken to a hospital emergency room by ambulance. She complained to the emergency medical technician (EMT) and hospital personnel of neck, low back, left hip and left arm pain. (Ex. 1, p. 4; Ex. 2, p. 5) She was discharged that day with a diagnosis of contusion of the right elbow, simple bruising, strain of the neck muscle and lumbosacral strain. (Ex. 2, p. 24) Claimant was seen by Dr. Yankey on December 10, 2013. Claimant described that she fell on wet floor at Fountain West and landed on her back and head. (Ex. 3. p. 29) Dr. Yankey's analysis was "Head contusion. Cervical strain. Thoracic and lumbar strain. Left elbow contusion. Left knee strain." (Ex. 3, p. 30; Ex. G, p. 2) He recommended conservative care and modified work duties. (Ex. 3, p. 31) On December 13, 2013, Dr. Yankey recommended physical therapy. On February 18, 2014, Dr. Yankey stated claimant had plateaued in her improvement and has remained stable. He found that given her past medical history, claimant had returned to her baseline and that she should follow the permanent restrictions that were provided to her for her 2007 injury. (Ex. 3, p. 44; Ex. G, p.14) Dr. Yankey discharged claimant form treatment and advised claimant to go to her personal physician.[1] Dr. Yankey was a physician retained by the defendants. In his report of February 18, 2014 medical note, he found claimant back to baseline and that the restrictions from her prior injury should be used. This is equivalent to a zero impairment rating.

Peter Matos, D.O., performed an independent medical examination (IME) of the claimant on July 27, 2015 at the request of the defendants. Dr. Matos wrote that it was reasonable to believe that claimant fell due to a personal health condition due to undiagnosed diabetes and hyperglycemia on that day. (Ex. K, p. 3) Dr. Matos noted that claimant has had a number of falls over the years and that there was no evidence of a wet floor as support for his conclusion. Dr. Matos found that claimant suffered no permanent injuries due to her December 3, 2013 fall and that she had returned to baseline as of February 8, 2014. (Ex .K, p. 27)

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[1] Claimant's prior injury was found to be work related, it is uncertain why Dr. Yankey would send claimant to her personal physician for treatment. (Ex. A, p. 6)

Dr. Kuhnlein has performed two IMEs on the claimant. One IME was performed in May 2009 for the 2007 injury. (Ex. 6, pp. 74 – 85) He performed an IME for this case on June 16, 2014. (Ex. 6, pp. 50 – 62) It is important in this case to compare the results of these two IMEs by Dr. Kuhnlein as it provides a potential benchmark as to whether the claimant has any additional impairment or a permanent impairment as a result of her falls in 2012 and 2013.

In the June 2014 IME, Dr. Kuhnlein made the following diagnoses,

Diagnoses by Date of Injury

April 20, 2012, Injury

1. Cervical strain.
2. Lumbosacral strain.
3. Left ankle strain.

January 30, 3013 [*sic*], Injury

1. Cervical strain.
2. Lumbar strain.
3. Right elbow strain – resolved.
4. Right wrist strain – resolved.
5. Left knee strain.

December 3, 2013, Injury

1. Head contusion – resolved.
2. Cervical strain.
3. Lumbosacral strain.
4. Left elbow contusion – resolved.
5. Left knee strain.

(Ex. 6, pp. 58, 59) Dr. Kuhnlein wrote, "Her current symptoms would be related to the cumulative effect of these various injuries." (Ex. 6, p. 60) As far as claimant's prognosis, he wrote,

> The prognosis for complete symptom resolution is nil. The prognosis for unrestricted return to work is nil. The prognosis for return to work with appropriate accommodations is fair.

(Ex. 6, p. 60) The prognosis is the same as his May 2009 report, except he wrote in 2009 that the claimant's prospect of returning to work with appropriate accommodations was excellent. (Ex. 6, p. 83)

Dr. Kuhnlein provided a three percent whole person impairment rating for the claimant's cervical spine in his 2014 IME. (Ex. 6, p. 60) In his 2009 IME, he provided a zero percent rating. (Ex. 6, p. 68) In his 2014 IME, he provided a six percent whole body rating for the lumbar spine. (Ex. 6, p. 60) In his 2009 IME he provided a five percent whole body decision. (Ex. 6, p. 84) As far as restrictions he made in the 2014 IME, he specifically made a precaution concerning falls, which were not made in his 2009 IME. (Ex. 6, pp. 61, 84, 85) Dr. Kuhnlein also provided more restrictive lifting limitations in his 2014 IME than his 2009 IME. (Ex. 6, pp. 61, 84)

In the 2014 report he recommended lifting of 10 pounds floor to waist occasionally, 20 pounds waist to shoulder occasionally, and 10 pounds over the shoulder occasionally. (Ex, 6, p. 61) In 2009, his lifting restrictions were 20 pounds occasionally, floor to waist and 30 pounds waist to shoulder, occasionally. (Ex. 6, p. 84)

On August 4, 2015, Dr. Kuhnlein reviewed Dr. Matos's report and opinions. Dr. Kuhnlein concluded that Dr. Matos speculated as to whether diabetes produced the fall. Dr. Kuhnlein felt that it was more likely than not that the wet floor caused the fall. (Ex. 6, p. 64A)

I find that the claimant's fall on December 3, 2013 was as a result of her work activities at Fountain West. She was actively engaged in mopping when she fell and injured herself. Her injuries on April 2, 2012; January 30, 2013; and December 3, 2013 happened when she was engaged in work activities. I agree with Dr. Kuhnlein that Dr. Matos's opinion the claimant's fall due to diabetes was just speculation.

I find that the injury of December 3, 2013 caused permanent impairment and her impairment is greater than the impairment caused by her 2007 injury.

The claimant continues to work at Fountain West. Claimant, at her own request, transferred from housekeeping to the kitchen (dietician). I find that she has the restrictions that Dr. Kuhnlein provided her in his June 16, 2014 report.

I find the claimant has a suffered a 45 percent loss in earning capacity.

Claimant has requested costs in the total amount of $2,518.38. Of these costs, claimant is requesting $2,405.00 for Dr. Kuhnlein's IME report, $100.00 for the filing fee and $13.38 in service fees. (Ex. 15, p. 168)

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 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 find that claimant has proven by a preponderance of the evidence that she suffered a permanent injury to her cervical and lumbar spine as a result of the December 3, 2013 fall. Claimant has an industrial disability under Iowa Code section 85.34(2)(u). The fall arose out of and in the course of her employment. The fall was caused by her work activity, mopping the floor. I find the opinions of Dr. Kuhnlein to be the most convincing as to the increased restrictions and impairment after the December 3, 2013 fall. Dr. Kuhnlein had the opportunity to conduct two thorough examinations. His examination is more thorough than Dr. Matos's. I find the testimony

of the claimant that she is not able to perform the housekeeping duties without increased pain to be credible.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

The claimant was 53 years old at the time of the hearing. She can understand some basic English and has limited ability to read and cannot write English. She has a grade school education. Claimant has shown motivation to stay engaged in the workforce. Claimant has not had surgery and has been treated conservatively. Her age and education are not a positive factor. The limitations that she has limit the scope of her employment opportunities very significantly. Claimant is currently working full time for Fountain West, earning the same wages as before her injury. Considering all of the factors of industrial disability, I find that she has a 45 percent industrial disability. This entitles claimant to 225 weeks of permanent partial disability benefits.

Claimant has requested payment of a certain medical expenses of $516.00. (Ex. 14, p. 166) While neither party briefed the issue, the costs are related to claimant's work injury of December 3, 2012 and are reimbursable to the claimant under Iowa Code section 85.27.

The parties stipulated that claimant received an award of 20 percent industrial disability for a prior injury with the same employer. The defendants have shown that they are entitled to a credit for their prior payments. Iowa Code section 85.34(7)(b)(1) states,

> *b.* (1) If an injured employee has a preexisting disability that was caused by a prior injury arising out of and in the course of employment with the same employer, and the preexisting disability was compensable

> under the same paragraph of subsection 2 as the employee's present injury, the employer is liable for the combined disability that is caused by the injuries, measured in relation to the employee's condition immediately prior to the first injury. In this instance, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer.

Defendants are entitled to a credit of a 20 percent disability awarded for the 2007 injury. The defendants, with the credit, will owe claimant one hundred twenty-five (125) weeks of industrial disability after they receive the credit. [45% – 20% = 25%. 500 weeks x 25% = 125 weeks]

I find that claimant is entitled to payment of Dr. Kuhnlein's IME expenses under Iowa Code section 85.39 and order defendants to pay the IME costs of $2,405.00.

In my discretion, pursuant to 876 IAC 4.33, I award the cost of the filing fee and service costs in the amount of $113.38 to claimant.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant one hundred twenty-five (125) weeks of permanent partial disability benefits at the rate of three hundred eleven and 62/100 dollars ($311.62) per week commencing on February 11. 2014.

The defendants shall pay claimant costs of one hundred thirteen and 38/100 dollars ($113.38).

The defendants shall pay the medical expense of five hundred sixteen dollars and 00/100 dollars ($516.00).

The defendants shall pay claimant the IME cost of two thousand four hundred five and 00/100 dollars ($2,405.00).

Defendants shall pay any past due amounts in a lump sum with interest as provided by law.

Defendants shall file any subsequent reports (SROI) as required by this agency.

Signed and filed this 18th day of March, 2016.

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JFE/srs

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.