BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

GALE HENRY-PETE,

Claimant,

vs.

MEDICAL ASSOCIATES OF CLINTON IOWA, P.L.C.,

Employer,

and

ARGENT,

Insurance Carrier,
Defendants.

File No. 5055779

ARBITRATION

DECISION

Head Note Nos.: 1108; 1803; 1804; 2502

STATEMENT OF THE CASE

Gale Henry-Pete, claimant, filed a petition in arbitration seeking workers' compensation benefits against Medical Associates of Clinton Iowa, PLC, employer, and Argent, insurer, for an alleged work injury date of July 14, 2015.

This case was heard on April 27, 2017, in Davenport, Iowa. The case was considered fully submitted on May 18, 2017, upon the simultaneous filing briefs.

The record consists of claimant's exhibits 1-11, JE 1-6, defendants exhibits A-G, claimant's testimony, and that of Steve Pete.

ISSUES

1. Whether the claimant sustained an injury on July 14, 2015 which arose out of and in the course of her employment;

2. Whether the alleged injury is the cause of some temporary disability during intermittent periods identified in Exhibit 4;

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

4. The extent of such disability;

5. Whether claimant is entitled to reimbursement or repayment of medical expenses;

6. Whether claimant is entitled to the reimbursement of an independent medical examination under Iowa Code section 85.39;

7. And whether costs should be assessed.

STIPULATIONS

The parties agree that at the time of the alleged injury the claimant was an employee of the defendant employer. They further stipulate that his gross earnings were $478.66 per week. He was married and entitled to two exemptions. Based upon the foregoing, the parties believe the weekly benefit rate to be $328.76.

The commencement date for permanent partial disability would be July 1, 2016.

If it is found that claimant's current condition in her shoulder, neck, and back are caused by a work injury, the defendants agree that claimant is entitled to the temporary disability benefits identified in Exhibit 4.

FINDINGS OF FACT

Claimant was a 59-year-old person at the time of the hearing. Her educational background includes high school diploma awarded in 1976. Following high school, claimant attended two years of pre-nursing school at Clinton Community College from 1976 to 1978. Claimant then became a nurse's aide and worked at a nursing home. She left the workforce to be a stay-at-home mom and reentered the workforce in approximately 1995 to 1996 wherein she took a part-time job at the Comanche post office for six months. In this position, claimant was required to carry mail which could weigh up to 50 pounds. She testified at hearing that she would no longer be able to do that type of work following her injury.

In 1996, claimant earned her CNA license at Clinton Community College and worked for Mercy Medical Center in Clinton, Iowa from 1996 to 2006 as a CNA.

In 2006, claimant began to work for defendant employer serving as a cardio tech and nuclear medicine technologist assistant which were essentially the same duties under different titles. Her job duties required her to prepare a patient to go under the camera, position them on the bed, and help them rise from a seated or prone position.

To perform tests, claimant would be required to assist the patient's on-and-off an adjustable platform. The claimant would then lower the bed to about knee level. Patients would often hold onto her arm or shoulder as they descended to the bed. After the patient's body was on the bed, claimant would pick up the patient's legs and lift them onto the bed. The claimant would then push the bed underneath the camera, positioning it for the necessary tests. Claimant would assist the patients in getting off the bed as well. Claimant would typically see seven to eight patients per day, approximately two days per week.

Both the Cardio Tech and the Nuclear Medicine Technologist Assistant position require the employee to occasionally lift and/or move up to 35 pounds. (Ex. E)

Sue Tomich performed an ergonomics study on behalf of the defendants. (Ex. F) Claimant takes issue with this test because no videotape was provided, although Ms. Tomich indicates one was taken. Claimant also argues that the focus of the ergonomic study was wrong. According to claimant, Ms. Tomich focused on the shoulder and the impact the job duties had on the shoulder rather than the impact the job duties had on the neck. (See pp. 18-19, claimant's brief; Ex. F:2)

According to Ms. Tomich's review, claimant would spend approximately 60 percent of her time performing treadmill stress tests and 40 percent performing chemical stress tests with an average of four to seven patients per day in the chemical stress test rooms. (Ex. F:1) Each patient would undergo two tests. The claimant would position the patient on the table and then push the table from the head using "hip and bodyweight to engage and lock the table." (Ex. F:2) The claimant was then supposed to use an electronic control to slide the table into the testing machine. Ms. Tomich described this as "common practice and has recently been enforced as the correct way to perform the tests." (Ex. F:2) However, prior to the claimant's injury, claimant and others were manually pushing and pulling the table to speed up the process.

Patients in Tomich's review weighed 171 pounds and 304 pounds. Ms. Tomich measured the initial push/pull force as 32.33 pounds to 35 pounds and a sustained push/pull force at around 9.75 pounds. (Ex. F:3) This is consistent with the job descriptions. (Ex. E) Ms. Tomich concluded there was no work involving the shoulder with greater than 45 degrees flexion, or 30 degrees abduction, and that the work was not repetitive nor did the job exceed recommended vertical or horizontal reach limits. (Ex. F:4)

In sum, Ms. Tomich declared the job ergonomically sound. She did not opine whether claimant could have been injured by her job duties, only that shoulder injuries were most often sustained when there were job duties that required repeated and or sustained shoulder postures with greater than 60 degrees flexion or abduction along with high repetition and forceful work. (Ex. F:4)

In the weeks leading up to her injury, claimant testified she was performing these duties approximately four days per week because a coworker was off work. Defendants assert that the coworker was only gone for one week.

As a result of these increased physical duties, claimant believes that she suffered a strain in her neck, upper back and thoracic areas. On or about July 14, 2015 claimant began experiencing sharp stabbing pains in her spine after pushing, pulling and lifting patients. (JE 1:5)

Initially, claimant treated with a chiropractor but did not see any improvement. On July 15, 2015, claimant sought care from Dr. Wade Lenz, M.D. (Joint Exhibit 1:1) She presented with low back pain, more in the right side along with right-sided rib pain. (Ex. JE 1:2) She reported consistently working for a few weeks alone, moving heavy patients on and off the table for cardiac imaging.

On examination, she had incongruent movement of the neck with decreased range of motion. She was tender in the upper right side of the back, lower thoracic, lumbar area and right sacroiliac. She had some localized pain, muscle spasm and tightening. She also had an area in the upper thoracic region on the left that was involved. Range of motion was restricted with rotation, forward flexion, and extension. (JE 1:2) Dr. Lenz's plan was to follow the claimant with therapy. He believed her pain was probably related to her job. He added some medication and ordered her to follow-up. (JE 1:2) Claimant continued to work her full duty job and attend chiropractic care.

She returned to Dr. Lenz on September 9, 2015. (JE 1:26) During the September 2015 visit, she reported that she had neck and back pain with the neck pain bothering her the most. She had difficulty sleeping, and increased pain with moving her patients back and forth on the cardiac table. (JE 1:3) Dr. Lenz diagnosed her with cervical back pain from overuse. He continued her current treatment and recommended she continue with therapy for rehabilitation. He also noted that he would like to document how much arthritis she has in her neck with a series of cervical spine studies. (JE 1:4)

Claimant reported her symptoms to the defendant employer who sent her to see Donald Flory, M.D. (JE 1:5) She saw Dr. Flory on September 14, 2015 during which time Dr. Flory recommended claimant undergo physical therapy. (JE 1:5) Claimant was returned to full duty.

She returned to Dr. Flory on October 5, 2015 reporting that she was not improving. She reported some gains with the use of Percocet and the TENS unit. (JE 1:6) During this visit, Dr. Flory noted that her right hand grip was a trace weaker than the left. He ordered her to continue full-time duties but undergo an MRI of the C-spine. He also ordered a TENS unit for home use since it seemed to be beneficial. (JE 1:6)

The MRI was completed on October 8, 2015. The results revealed degenerative disc disease from C4 through T-1 with it being most severe at C6 to C7 with moderate to severe left neural foraminal stenosis and a superimposed left foraminal protrusion. (JE 1:7 – 8)

She returned to Dr. Flory on October 13, 2015 (JE 1:9) Dr. Flory prescribed her a soft C-collar to wear as needed. She was to continue with her full work duties and see Dr. Dolphin about her cervical root impingement. (JE 1:9) Dr. Flory also extended her physical therapy three times a week for eight weeks. She was to follow up with him in four weeks. (JE1:9)

On November 5, 2015 she consulted with Nicholas Bingham, M.D., who determined that claimant was suffering upper lumbar pain along with right neck and trapezius pain. He returned her to work under "severe restrictions". (JE 1:15) Claimant's restrictions were to be allowed to vary sit stand and walk as needed. She was not to participate in any patient transfers. She is not to lift push, or pull greater than 5 pounds and no work above the chest level. (JE 1:16)

She was then seen by Michael Dolphin, D.O., on November 10, 2015 (JE 3:1) Dr. Dolphin felt that she demonstrated more shoulder irritability than cervical symptoms. He wrote, "Her MRI of the cervical spine does not correlate well with her complaints. I believe her symptoms may be more in line with RTC irritation or irritability. I recommended she be evaluated by a shoulder specialist". (JE 3:3)

On November 25, 2015, claimant consulted with Tuvi Mendel, M.D., a shoulder specialist. (JE 3:7) Dr. Mendel noted that the claimant's right shoulder was lower than her left, and he was able to elicit some clicking which he believed suggested some labral type injury. He also felt that she might have some mild bilateral carpal tunnel. (JE 3:8) Dr. Mendel performed an injection to see what kind of relief that she might get with anti-inflammatories and physical therapy. (JE 3:8) In a follow-up appointment on December 16, 2015 claimant reported approximately 75 percent relief with the injection but that she still had burning pain up to the neck. (JE 3:11)

On December 16, 2015, Dr. Mendel modified her restrictions allowing her to go back to normal duties with no patient lifting and ordered a new MRI of the shoulder. (JE 3:14)

Upon Dr. Mendel's recommendation, claimant underwent an MRI of the shoulder on December 21, 2015 which revealed mild supraspinatus tendinopathy without any tears. (JE 1:18) Dr. Mendel read this MRI as essentially negative and ruled out the shoulder as the genesis of claimant symptoms. (JE 3:11)

He wrote:

> She does clearly have some clicking with range of motion of her shoulder and does have some involvement of the shoulder with mild impingement. Although clearly the some [sic] symptoms related to the shoulder the MRI was essentially negative and most of his symptoms are related to the musculoskeletal type trigger point pain on the trap and medial border of the scapula.

(JE 3:18) Dr. Mendel did not believe that she was a surgical candidate as it was unlikely surgery would make her symptoms resolve. He believed she should continue with conservative protocol and referred her to a pain clinic. (JE 3:19)

Claimant was then seen by Timothy Miller, M.D., at the pain clinic on January 19, 2016. He wrote. "I am really uncertain what is happening here. One would assess it might be from the neck, however, she has not responded terribly well to steroids. I would initiate desensitization with therapy." (JE 2:1) He proceeded to modify her prescriptions and directed her to follow-up.

Claimant was then sent back to Dr. Bingham who would follow claimant while the claimant was under the care of Dr. Miller. (JE 1:21) Claimant was returned to work with restrictions.

On May 1, 2016, claimant was seen by Kristina Colbenson, M.D., at the Mayo Clinic for a second opinion. (JE 5:1) Dr. Colbenson diagnosed claimant with acute neck pain consistent with degenerative disc disease and acute multiple level central disc bulge. She encouraged the claimant to follow up with an orthopedic spine specialist. (JE 5:1) Claimant then saw Marshall Holland, M.D., and Dr. Hiroto Kawasaki, M.D., at the University of Iowa Hospital Clinics on May 27, 2016. (JE 6:1)

Claimant reported severe stabbing pain in her posterior neck radiating to bilateral paraspinal neck muscles. She believed that this was due to her job of repeatedly pushing and pulling patients in and out of the nuclear scanner. She did feel the original stabbing pain improved but that the skin and muscle around the posterior neck remained tender to the touch and very sensitive. Recently, she had noted some tingling in the outer part of the right arm to her elbow and dizziness and instability while walking. (JE 6:1) The MRI of the cervical spine showed mild degenerative changes in the cervical spine as well as an osteophyte formation causing neural foraminal stenosis on the left and C6 to C7. (JE 6:2) The assessment was a 58-year-old female with posterior neck pain and right upper extremity tingling with benign imaging findings and normal physical examination. (JE 6:2) Dr. Kawasaki and Dr. Holland recommended a series of tests to confirm or rule out particular injuries or causes. (JE 6:3)

The MRI was conducted on June 24, 2016 which showed no dynamic instability in the range of motion and mild multilevel degenerative changes of the cervical spine most pronounced at C6 to C7. (JE 6:8)

After review of the patient's history, physical examination and the new imaging findings, Dr. Holland and Dr. Kawasaki did not recommend surgical intervention. They determined that while the claimant did have mild neural foraminal stenosis they did not believe that it significantly accounted for her symptoms, particularly her posterior neck pain which they believe to be more musculoskeletal in nature. (JE 6:10) They recommended she continue with conservative management and deferred to chronic pain management at claimant's local primary care provider. (JE 6:10)

Before, during, and after the University of Iowa Hospitals and Clinics visit, claimant continued to seek care from Medical Associates where she was seen by Dr. Lentz or Dr. Johnson for osteopathic manipulative treatment along with medication therapy and management. (JE 1:32-44)

On March 8, 2016, claimant underwent an IME with Abdul Foad, M.D., an orthopaedic surgeon specializing in sports medicine. (Ex C) Claimant testified that her examination time with Dr. Foad was very brief. She is also critical of the notation in the report that says, "I have thoroughly reviewed your detailed" synopsis as said synopsis was not provided at hearing. Nonetheless, Dr. Foad indicates that he has reviewed the "summary report" along with all the medical records and imaging studies relating to claimant's back and neck. (Ex. C:1-2)

Claimant's description of the origin of the pain was the same as she had always related. To wit: one staff member was on a leave of absence which required claimant to engage in more lifting and moving of patients on and off the testing bed as well as pushing and pulling the bed under the camera. (Ex. C: 2)

Dr. Foad's examination noted that she displayed mild pain behaviors, no spasm around the trapezius or cervical muscles, full passive range of motion on all planes, and normal strength. She was most tender to palpation over the right trapezial muscle and cervical spine as well as tenderness over the infraspinatus fossa and right levator scapulae. Her pectorialis minor and short head of the biceps tendon felt tight. (Ex. C:2, C:4)

He found that her MRIs showed moderate to severe neural foraminal stenosis on the left side but that the MRI of the right shoulder "actually looked quite good for a person in her 50s." (Ex. C:5) He ruled out the shoulder as being a "significant contributing factor to her current condition." (Ex. C:5)

Ultimately, he found that she "may have chronic myofascial pain and or neuropathic pain as a significant cause of her pain." (Ex. C:5) He recommended she be treated with aerobic conditioning and stabilization exercises for the right shoulder listing and to continue with the use of the TENS unit to help her wean off gabapentin. (Ex. C:6)

He would not assign an impairment rating because she did not, in his opinion, meet any of the following:

A) Symptoms and physical findings that match her shoulder injury.

B) A typical presentation of rotator cuff pathology/injury.

C) Condition and complaints should be one that is widely accepted by orthopaedic surgeons as having a well-defined biologic or pathophysiologic basis.

(Ex. C: 6) He went on to conclude, "I believe her current complaints of right shoulder extremity pain are idiopathic. Her work injury of 7/14/15 should not be a substantial contributing factor to her current complaints of right arm/shoulder pain." (Ex. C:7) He then quoted from an article in The Journal of Bone and Joint Surgery from 2004:

> The prevalence of unexplained pain in the upper limb is well recognized. The situation is similar to headaches and back pain, both of which are extremely common and are poorly understood but not typically reflective of a pathological process that is a cause for concern. Uncertainty regarding the source of upper-limb pain implies the absence of findings that cause concern and the recognition that arm pain does not always indicate an underlying injury or problem that is not being treated...in other words, the indiscriminate use of diagnostic tests in the setting of vague, diffuse idiopathic pain is unlikely to yield useful information and may lead to inaccurate diagnoses and unnecessary treatments.
>
> ...the substantial dysfunction in the absence of objective findings may reflect the strong influence of psychological or sociological factors.

(Ex. C:7) Dr. Foad speculated as to what different psychological or sociological factors may be contributing to claimant's pain such as anxiety and/or depression.

> In my opinion, people with these conditions tend to suffer more when they experience mundane or traumatic injury because it is more difficult for them to emotionally cope with pain and disability than those of us that do not suffer from such disorders. This is not the patient's fault, but is a result of conditions they cannot control.

(Ex. C:7)

After Dr. Foad's opinion was issued, the defendants ceased providing care for the claimant.

On August 24, 2016, Dr. Mendel signed a letter drafted by defendants' counsel agreeing that claimant did not experience any injury to her shoulder or scapular area as a result of her job activities as described in the ergonomic assessment. (Ex. A:2)

Dr. Dolphin's checkmark opinion letter agreed that based on the ergonomic evaluation, it was not likely that claimant sustained a cumulative trauma/repetitive injury to her cervical spine. (Ex. A:4-5) The same questions were asked of Dr. Binghman who provided the same opinion as Dr. Dolphin. (Ex. B:2)

Dr. Mendel, Dr. Dolphin, and Dr. Bingham were also unable to identify a specific etiology for her symptoms. (Ex. A:2, A:4, B:2)

Contrarily, in a November 2, 2015 letter, drafted by claimant's counsel, Dr. Flory indicated that the mechanism of injury of pushing and pulling patients in and out of a table in the cardiac area could cause cervical impingement and did so for the claimant. (Exhibit 8:2) Further he identified no pre-existing conditions that would have been aggravated or contributed to the current condition of the claimant. (Ex. 8:2)

In a separate letter dated September 26, 2016, Dr. Flory stated "in my opinion the right-sided neck pain and right upper extremity numbness for which I initially saw Gail Pete Henry on September 14, 2015 was work-related." (Ex. 8:3)

On September 28, 2016, Dr. Lenz opined that claimant's work contributed to her neck and upper back problems. (Ex. 9:1) In a subsequent letter, he agreed that it was more likely than not that claimant would continue to experience pain in her neck, upper back, and thoracic symptoms.

On October 11, 2016, Dr. Lenz confirmed that he held the opinion claimant's work duties as a certified cardiology tech, namely the lifting and moving of patients back and forth on the table for scanning, represented a substantial aggravating factor in the development of her neck, upper back, thoracic symptoms for which he had been treating her. (Ex. 9:2) He further believed that given it was over a year since the development of her symptoms and she had shown no significant relief, that she would continue to experience her symptoms and that he questioned her ability to work as a certified cardiology tech without experiencing repeated flareups of her symptoms. (Ex. 9:2)

Dr. Johnson also wrote on October 12, 2016 that the claimant had suffered from chronic cervalgia and lumbar back pain. Dr. Johnson had been treating her since May 19, 2016 and the claimant continued to suffer chronic pain even after physical therapy, chiropractic treatments, osteopathic manipulation, and medical medication therapy. (Exhibit 10:1) Dr. Johnson believed that the pain was related to the work injuries sustained on July 14, 2015. (Exhibit 10:1)

On February 15, 2017, Mark Taylor, M.D., issued an independent medical evaluation based on an examination he had performed on January 18, 2017 along with a review of the medical records. (Exhibit 11) Dr. Taylor noted that on examination all of the neck motions were painful and that claimant's shoulder range of motion was impacted due to her neck pain, especially flexion. (Exhibit 11:10) Her shoulder joints could be moved without pain and she had symmetric range of motion in both elbows. She was tender along the base of the occiput bilaterally and had palpable tenderness extended down along the paracervical muscles and down toward the right levator scapulae over the superomedial aspect of the upper trapezius. She also had some degree of tenderness near the superiomedial border of the scapula. Her findings were more generally pronounced on the right compared to the left. (Exhibit 11:10)

She walked with a minimal limp, generally protecting the right leg. She had tenderness over the mid to lower lumbar spine greater on the right. She had limited side bending along with pain upon lumbar flexion and extension. (Ex. 11:11)

Dr. Taylor concluded that the claimant suffered a permanent functional impairment associated with her cervical spine with pain that radiated into the upper back and scapular areas as well as into the right upper extremity. He assigned her 8 percent whole person impairment rating based upon non-verifiable radicular complaints and asymmetric loss of motion. (Ex. 11:11)

Moreover given that the claimant had no complaints of prior neck pain or symptomology extending into the upper back or into the right extremity, Dr. Taylor attributed claimant's current condition to her work related injury.

> Ms. Henry Pete's presentation is a mixed picture as far as a direct and causal relationship (such as those associated with an acute traumatic event) and a cumulative trauma – type injury. Ms. Henry-Pete's co-worker was out for a period of time due to an ill relative. As such, Ms. Henry-Pete spent multiple weeks in a row working in the camera room. The process associated with the camera room was described in some detail above. I understand that an ergonomic evaluation was completed on or about July 1, 2016. Ms. Henry-Pete recalled that the therapist that performed the evaluation apparently commented regarding a 'safety concern' as far as how they were moving the beds into and out of the camera. During the evaluation, they apparently realized that there was a button that could be depressed which allowed the table to move without having to move it manually. However, Ms. Henry-Pete was apparently not trained as far as the button and was therefore manually moving the patients back and forth under the camera while standing at the side of the bed and reaching up to the head of the bed.

(Ex. 11:12)

As for restrictions, Dr. Taylor recommended the following:

> At waist level, or between knee and chest level, Ms. Henry Pete may be able to handle a bit more weight, perhaps up to 20 pounds in a rare to occasional basis. Above chest level, I would presently recommend she stick to around 10-15 pounds. Above chest/shoulder level, her right upper extremity and neck pain will likely worsen. She should avoid forceful pushing and pulling movements with the arms and she should have the ability to alter and/or change positions as needed for comfort. She finds that if she remains in one spot for too long, her symptoms worsen. She should avoid sustained head positioning or extreme head movements. She has decreased range of motion of the cervical spine and she will not likely tolerate activities that require sustained neck extension or full neck

> flexion. Turning to the left and to the right also aggravates her pain. I would recommend only rare crawling because crawling requires the neck to be in an extended position. She can kneel occasionally. I would recommend that she generally avoid ladders other than a stepladder for a couple of steps or so if needed. She can climb stairs occasionally. She can travel occasionally but her chronic neck pain and decreased range of motion could impact her ability to safely and effectively operate certain types of vehicles or equipment.

(Ex. 11:13)

Claimant testified that her examination with Dr. Taylor was far more thorough and lengthy than the one with Dr. Foad.

In 2016, intraoffice emails indicated that the workplace was running out of "necessary work" due to her light duty status. (Ex. 3:5)

There is indication that some of the light duty that was assigned to the claimant was difficult for her due to her injury. "She didn't work out in triage because she said it hurt her to sit in one place. She didn't work out in scanning because the constant looking down hurt her neck. She liked it in Fulton because she was moving around distributing paperwork and felt that helped her to move around." (Ex. 3:7)

On December 19, 2016, claimant was found to be disabled under the Social Security Administration beginning on July 14, 2015. (Ex. 5:1)

Claimant's current condition is characterized by constant back pain which is increased with activity. Housework, going on a boat, riding quads, riding in the car, and intimate activity all increase her pain.

Claimant has not made attempt to find new work. (Ex. D:2) She did return to work various light duty jobs with the defendant employer. She had to be removed from two of them because scanning aggravated her neck pain and another position aggravated her symptoms due to the fact that the desk was low. Defendants had difficulty finding a position for her, but did offer her one in medical records which paid her less and offered her fewer hours. She ultimately resigned. (Ex. E:1)

CONCLUSIONS OF LAW

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

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

circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler 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 also 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).

There are a variety of expert witness opinions. Dr. Foad took the stance that claimant's pain was idiopathic and that claimant's work injury "should not be a substantial contributing factor to her current" condition. While he noted that claimant has some mild pain behaviors, he did not accuse her of malingering or making up her pain. Instead, he concluded that claimant's mental status worsened the pain condition.

> In my opinion, people with these conditions tend to suffer more when they experience mundane or traumatic injury because it is more difficult for them to emotionally cope with pain and disability than those of us that do not suffer from such disorders. This is not the patient's fault, but is a result of conditions they cannot control.

(Ex. C:7)

Dr. Foad did not find that the claimant had no pain, but rather she was not processing her pain complaints as other individuals would. This is essentially the same diagnosis made by the doctors at the UIHC. Drs. Holland and Kawasaki found her posterior neck pain to be more musculoskeletal in nature.

Drs. Tuvi, Bingham, and Dolphin could not identify the etiology of claimant's pain as it did not correlate with the MRIs or other objective signs. These three doctors also viewed the report of the ergonomics expert and concluded based on the report of how the job should be performed, it was not likely claimant sustained a cumulative or repetitive work injury.

Sue Tomich did not dispute that the claimant conducted her job tasks using her shoulder, back and neck to push and pull the patient. Ms. Tomich described the force used (averaging around 35 pounds as was described in the job description) and the optimal way to conduct the job by using the electronic slide. Ms. Tomich acknowledged that prior to the claimant's injury, techs like the claimant were pushing and pulling the table instead of using the electronic slide.

Claimant had few complaints of pain in her neck and shoulder region prior to her report of pain and discomfort in that area on July 15, 2015. When she began treating, her treating physicians immediately ascribed the pain to her work.

Drs. Johnson and Lenz continued to affirm that the claimant's condition arose out of her work. I give more weight to Drs. Johnson and Lenz as well as Dr. Taylor. Dr. Foad's opinions acknowledge that claimant has pain but chalks it up to her anxious and depressive state. Drs. Dolphin, Mendel, and Bingham rely on Ms. Tomich's description of the optimal job execution which she acknowledged was not followed prior to the claimant's injury.

Therefore it is found that claimant sustained an injury to her neck and shoulder arising out of and in the course of her employment.

The next issue is the extent of claimant's disability.

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.

Claimant maintains that she has lost all access to the workplace. Claimant has not looked for work since leaving the employ of the defendants. However, she did return to work various light duty jobs although she testified she could not continue to do

some positions such as scanning because it caused her pain because she had to look down and a desk job that aggravated her symptoms due to the fact that the desk was low. Defendants had difficulty finding a position for her, but did offer her one in medical records which paid her less and offered her fewer hours. She resigned instead.

However, the job restrictions of Dr. Taylor do not place claimant in the fully unemployable category. Per Dr. Taylor, claimant can still lift 10 to 15 pounds on an occasional basis and even up to 20 pounds at waist level or below. She is to avoid forceful pushing and pulling with her arms and the ability to alter and/or change positions as needed.

While claimant has worked as a CNA and cardiology tech for most of her working life, claimant has many transferable skills. She has specialized knowledge in her work field. She can read medical records. She is capable of clerical work if allowed to move around. She was able to do most of the cardiology tech position so long as it did not require patient movement.

Therefore, based on the foregoing, giving particular reliance on the restrictions of claimant's own independent medical examiner, it is found that claimant has sustained a 75 percent industrial loss.

Defendants stipulated that if the injury arose out of and in the course of employment, the claimant would be entitled to the temporary benefits asserted in exhibit 4, pages 6-22. Additionally, claimant seeks reimbursement for medical bills associated with pain and discomfort in her neck, shoulder, and upper back.

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).

The lower back claim is not causally related and any medical bills associated with low back pain are not the responsibility of the defendants. However, any and all charges related to claimant's neck, shoulder, and upper back are related to work injuries and therefore those charges should be paid and/or reimbursed by the defendants.

Claimant seeks reimbursement of the charges of Dr. Taylor under Iowa Code section 85.39. Iowa Code section 85.39 allows for an evaluation of an employee when an "evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low." Dr. Foad's report of March 8, 2016, refused to provide an impairment and based on the report, the

defendants ceased to provide care arguing that Dr. Foad's position was that the claimant's shoulder and neck condition were not caused by claimant's work.

Claimant was thus entitled to an evaluation of her own. The 2015 case of DART v. Young proscribed the boundaries of Iowa Code section 85.39. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, (Iowa 2015). Therein the Iowa Supreme Court determined that the report is a separate concept from the examination.

> Thus, the concept of obtaining a report for a hearing is separate from the concept of a physical examination. A "physical examination" is "[a]n examination of a person's body by a medical professional to determine whether the person is healthy, ill, or disabled." Id. at 680. The concept of "obtaining" a report is separate from the process of "obtaining" an examination.

Id. at 845. The court went on to say, "We conclude section 85.39 is the sole method for reimbursement of an examination by a physician of the employee's choosing and that the expense of the examination is not included in the cost of a report." Id at 846-47.

Therefore, only the costs of Dr. Taylor's examination is reimbursable under Iowa Code 85.39. The IME report of from Mark Taylor, M.D., was broken down: $2,005.00 for the examination and $2,220.00 for the report. (Prayer for costs) Claimant is entitled to a reimbursement of $2,005.00.

Claimant further seeks recovery of the reports of Dr. Lenz in the amount of $450.00 Reports are covered in IAC rule 876 4.33 wherein the claimant can request that costs be taxed by the deputy to a prevailing party.

Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested.

Rule 876 IAC 4.33. Under Young, 876 N.W.2d at 847, rule 4.33 reports are allowed in lieu of testimony. Therefore, claimant is entitled to all costs claimed but for the IME charges previously addressed.

ORDER

THEREFORE IT IS ORDERED:

That defendants are to pay unto claimant three hundred seventy-five (375) weeks of permanent partial disability benefits at the rate of three hundred twenty-eight and 76/100 dollars ($328.76) per week from July 1, 2016.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants are to be given credit for benefits previously paid.

That defendants shall pay temporary and/or healing period benefits as identified in Exhibit 4.

That defendants shall reimburse and/or pay medical expenses associated with claimant's neck and shoulder injury.

That defendants shall pay two thousand and five and no/100 dollars ($2,005.00) of the examination costs of Dr. Taylor pursuant to Iowa Code section 85.39.

That defendants shall pay the costs of this matter pursuant to rule 876 IAC 4.33 other than the IME fee of Dr. Taylor which is addressed above.

Signed and filed this 19th day of October, 2017.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JGL/kjw

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.