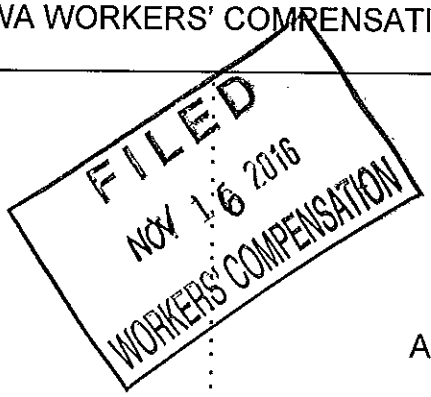
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



DEBORAH HALLADAY,

Claimant,

vs.

MENARDS,

Employer,

and

ZURICH NORTH AMERICAN INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 5051327

ARBITRATION

DECISION

DEBORAH HALLADAY,

Claimant,

vs.

MENARDS,

Employer,

And

PRAETORIAN INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File Nos. 5051329, 5051330

ARBITRATION

DECISION

Head Note Nos. 1803, 1108

STATEMENT OF THE CASE

Deborah Halladay filed a petition for arbitration seeking workers' compensation benefits from Menards, Praetorian Insurance Company, and Zurich North American Insurance Company.

The matter came on for hearing on December 14, 2015, before Deputy Workers' Compensation Commissioner Joseph L. Walsh in Des Moines, Iowa. The record in the case consists of claimant's Exhibits 1 through 15; defense Exhibits A through Z; as well the sworn testimony of claimant, Deborah Halladay and the defendants' expert

vocational witness, Lana Sellner. The parties briefed this case and the matter was fully submitted on January 19, 2016.

ISSUES AND STIPULATIONS

For File No. 5051327:

Claimant alleges a cumulative work injury to her right shoulder which manifested on or about August 31, 2011. The defendants dispute that the claimant sustained an injury which arose out of and in the course of employment. The defendants further assert that, even if there was an injury, it did not cause any temporary or permanent disability. The claimant is not alleging entitlement to any temporary disability benefits. If it is determined the alleged injury is a cause of permanent disability, it is stipulated that the commencement date for any PPD benefits is March 8, 2013. The elements comprising the rate of compensation are stipulated and the parties assert the correct rate is $397.41. Affirmative defenses are waived and there is no claim for medical expenses. The parties stipulate that 25 weeks of PPD benefits have been paid at the rate of $428.27. The claimant asserts that the defendants are entitled to a credit for the weeks paid. Defendants seek a credit for the gross payments. Costs are disputed.

With regard to File No. 5051329:

Claimant alleges she sustained an injury to her neck which manifested on or about August 22, 2013. The defendants dispute that the claimant sustained an injury which arose out of and in the course of employment. The defendants further assert that, even if there was an injury, it did not cause any temporary or permanent disability. The claimant is not alleging entitlement to any temporary disability benefits. If it is determined the alleged injury is a cause of permanent disability, it is stipulated that the commencement date for any PPD benefits is November 7, 2013. The elements comprising the rate of compensation are stipulated and the parties assert the correct rate is $370.94. Affirmative defenses are waived and there is no claim for medical expenses. No benefits have been paid prior to hearing for this file. The defendants assert a credit under Section 85.34(7) for claimant's prior industrial disability. Costs are disputed.

For File No. 5051330:

Claimant alleges she developed eczema as a result of her exposures at work which manifested on or about March 5, 2014. The defendants dispute that the claimant sustained an injury which arose out of and in the course of employment. The defendants further assert that, even if there was an injury, it did not cause any temporary or permanent disability. The claimant is not alleging entitlement to any temporary disability benefits. The claimant contends the permanent disability, if any, is industrial, while defendants assert that it would be limited to the schedule. If it is determined the alleged injury is a cause of permanent disability, it is stipulated that the commencement date for any PPD benefits is October 28, 2014. The elements

comprising the rate of compensation are stipulated and the parties assert the correct rate is $351.36. Affirmative defenses are waived. The claimant alleges entitlement to medical expenses as outlined in Claimant's Exhibit 8. The defendants deny that these expenses are causally connected to any work injury and are not reasonable and necessary. The defendants assert a credit under Section 85.34(7) for claimant's prior industrial disability. Costs are disputed.

FINDINGS OF FACT

Deborah Halladay is a pleasant, married 61-year-old woman who lives in Cedar Rapids, Iowa. She has two grown children and six grandchildren. She testified under oath at hearing. I find her testimony to be credible. Her hearing testimony is consistent with her deposition. (Defendants' Exhibit A) It is consistent with the other discovery responses in the record. It is consistent with the medical records in the record. There was nothing about her testimony which gave the undersigned any concern at all about whether she was being truthful.

Ms. Halladay left high school in approximately 10th grade. She did eventually receive her high school diploma from Kirkwood Community College in the early 1990's. She went on to receive an associate degree from Kirkwood in 1996. By her testimony, she learned administrative or clerical duties. Her work history included work in a hospital laundry room and as an assistant at a dry cleaning business. After she graduated from Kirkwood in 1996, she worked for a brief time as a receptionist at a law firm. She also worked for a title company working on abstracts prior to a brief stint at the phone company.

She began working for Menards in 2000. She initially worked as a cashier. Her duties included running the cash register, assisting customers with "carryout" and collecting and pushing carts in the parking lot. Some of the carryout duties involved fairly significant lifting, including items weighing 30 to 50 pounds. (Transcript, pages 20-22)

In August 2011, Ms. Halladay developed pain in her right shoulder. She attributed the pain to her work activities. According to her testimony, Ms. Halladay had never had previous issues with her right shoulder. On September 3, 2011, she sought treatment with Jana Marlett, M.D., at an urgent care clinic. "Deborah is a 57 yo female here today reporting Rt shoulder pain that radiates into her neck and back." (Claimant's Exhibit 9a, page 55) "She does do a lot of lifting at work, but cannot identify a specific injury." (Cl. Ex. 9a, p. 55) Dr. Marlett diagnosed tendonitis of shoulder, prescribed some medications and recommended an MRI. (Cl. Ex. 9a, p. 56) She had the MRI on September 12, 2011, which showed a couple tears and some other damage in the right shoulder. (Cl. Ex. 9b, p. 71)

Thereafter, Ms. Halladay reported her condition to her employer as a work injury and was immediately directed to see a company physician, Stephen Runde, M.D. Dr. Runde evaluated Ms. Halladay on September 13, 2011. He recorded her history of

lifting at work and collecting carts in the parking lot. (Cl. Ex. 9c, pp. 72-73) Dr. Runde referred claimant to an orthopedic shoulder specialist. On September 26, 2011, Ms. Halladay was evaluated by Lisa Coester, M.D. Dr. Coester placed restrictions on her and recommended an injection. (Cl. Ex. 9d, p. 96) The injection was performed a few weeks later. (Cl. Ex. 9d, p. 99)

Ms. Halladay returned to Dr. Coester in late October 2011. Dr. Coester recommended physical therapy. (Cl. Ex. 9d, p. 104) Physical therapy did help with the symptoms for a while; however, eventually surgical repair was required. On January 25, 2012, Dr. Coester performed arthroscopic surgery on Ms. Halladay's right shoulder. (Cl. Ex. 9e, p. 123) Following the surgery, she had more physical therapy and remained on light duty. She continued to follow up with Dr. Coester until she was released in May 2012. The physical therapist noted at that time that Ms. Halladay was still not able to lift in excess of 10 pounds. (Cl. Ex. 9f, p. 124) On May 4, 2012, Dr. Coester placed medical restrictions of no lifting more than 20 pounds and, no repetitive movement and no above shoulder reaching. She set the restrictions to expire on August 1, 2012. Dr. Coester officially placed Ms. Halladay at maximum medical improvement on March 8, 2013, and released her from care. "The patient continues with intermittent pain aggravated by work and is at MMI." (Cl. Ex. 9d, p. 121) She provided a 5 percent permanent whole person impairment rating. (Cl. Ex. 7, p. 51)

Ms. Halladay testified that, as a result of her shoulder condition, she switched jobs from cashier to greeter until eventually taking employment in the electrical department. (Tr., pp. 29-32) She testified that she believed she could have performed the cashiering work, so long as she did not have to perform heavy lifting. I find it is unlikely that she could perform the cashiering position without some type of accommodations for the lifting. She never returned to cashiering after the shoulder surgery.

On August 22, 2013, Ms. Halladay picked up a ceiling fan to place it on a shelf when she felt pain in her neck. She seemed to hope the injury was not serious and would go away on its own, however, she did report it immediately. (Tr., pp. 32-33) She was again referred to Dr. Runde. Dr. Runde prescribed some muscle relaxers and provided some temporary lifting restrictions. (Cl. Ex. 9c, pp. 77-78) Thereafter, Ms. Halladay had some physical therapy and experienced some improvement in her neck symptoms. By November, Dr. Runde released her to full-duty, stating "she will try to let her coworkers do some of the heavier lifting at work when there is a need for that." (Cl. Ex. 9c, p. 88)

Ms. Halladay continued to work in the electrical department after her work injury. Her co-workers continued to assist her with lifting items over 20 pounds, such as larger ceiling fans and other heavy boxes. (Tr., p. 37)

On March 5, 2014, Ms. Halladay reported a rash on her hands. Ms. Halladay had been experiencing symptoms of contact dermatitis since around the time she moved to the electrical department. Her first medical visit associated with contact

dermatitis was on June 25, 2012. (Cl. Ex. 9a, p. 57) She reported an itchy rash on her arms, neck and torso. The physician attributed this primarily to stress and prescribed medications. (Cl. Ex. 9a, p. 58) She continued to follow up in 2012 and 2013. By December 27, 2013, her hands were dry, bleeding, flaking and cracked. (Cl. Ex. 9a, p. 62) After seeing an allergist and dermatologist on her own, Ms. Halladay concluded she needed to report this as a work injury, which she did on or about March 5, 2014.

She was sent to see Dr. Runde on March 6, 2014. Dr. Runde diagnosed contact dermatitis. (Cl. Ex. 9c, p. 89)

> This 59-year-old comes in with a rash on her hands that she has been battling for [sic] least several weeks. She has been to her family doctor, dermatologist, and an allergist [sic] nobody can figure out exactly what is causing the rash. The allergist had her get some special strong over-the-counter her [sic] hand lotion and that seemed to start to work and then she just by coincidence had several days off from work back to back while she was off work [sici] the rash pretty much went away. Then she returned to work a couple of days ago and within a few hours at work she had a [sic] red, raised rashy areas on both hands again, even though she is trying to wear white count [sic] gloves when she is at work at the Menards store where she works. . . .

(Cl. Ex. 9c, pp. 89-90) Dr. Runde prescribed a lotion and set forth the goals of getting the rash under control and then, secondarily, attempting to determine whether something specific at the workplace was causing it. (Cl. Ex. 9c, p. 90)

After following up with Dr. Runde, she was referred to a dermatologist, Robert Barry, M.D. Dr. Barry confirmed the diagnosis of eczema and performed a thorough evaluation. (Cl. Ex. 9h, pp. 132-33) He provided an ointment and advised her to avoid irritants and over-the-counter lotions. (Cl. Ex. 9h, p. 133) Dr. Barry continued to follow up with Ms. Halladay. He eventually took her off work from May 9, 2014, through May 23, 2014. When he saw her on May 23, 2014, he noted that her hands were 95 percent clear. (Cl. Ex. 9h, p. 141) He kept her off work for another week and her hands were entirely clear. (Cl. Ex. 9h, pp. 142-43) On June 3, 2014, Dr. Barry provided the following opinion. "It is my professional opinion that she suffers from work related hand eczema as mentioned above, she will not be able to return to her previous job. Whether or not she could tolerate some sort of office work remains to be seen, but is an option for you to explore with her." (Cl. Ex. 9h, p. 145)

Ms. Halladay contacted Menards shortly after this visit and she was told that they had no work for her. (Tr., p. 52) Once she was no longer working for Menards, her hands cleared up. In January 2015, the defendants sent Ms. Halladay for an evaluation with Jay Brown, M.D. (Def. Ex. E) Dr. Brown reviewed Ms. Halladay's work history and determined that her exposure at work likely exacerbated her dermatitis, but did not result in any permanency. (Def. Ex. E, p. 2)

She did not obtain new employment until May 2015, when she started working part-time at Arby's. She began working as a cashier and also wiping down tables. Over time, when she sought more hours, she was asked to do food preparation as well. (Tr., pp. 58-60) Eventually, her eczema flared up. She returned to Dr. Barry who advised her not to wash her hands as much as she was. (Cl. Ex. 9h, pp. 150-51) Ms. Halladay quit because she felt she was not able to perform the work per company policy. (Tr., p. 60)

Two medical experts have provided expert medical opinions regarding the three alleged injuries. Robin Sassman, M.D., provided a report dated January 22, 2015. (Cl. Ex. 2) She provided opinions supporting all three of the claimant's alleged injuries (right shoulder, cervical pain and bilateral hand eczema, as well as other conditions which were dismissed at the time of hearing. Dr. Sassman opined that claimant suffered permanent functional impairment as a result of each of her work injuries. She opined the right shoulder condition resulted in a 5 percent whole body impairment as related to her work injury. (Cl. Ex. 2, p. 17) She opined the neck injury resulted in an additional 5 percent whole body rating. (Cl. Ex. 2, p. 17) She concluded the claimant also suffered an impairment of her skin of 5 percent of the whole body. (Cl. Ex. 2, p. 17)

Robert L. Broghammer, M.D., provided expert medical opinions for the defendants. (Def. Ex. C) Dr. Broghammer reached the conclusion that none of her work injuries resulted in any permanent functional impairment or loss of use. Regarding the shoulder injury, he opined that no particular event occurred. (Def. Ex. C, p. 11) He felt the primary cause was aging. (Def. Ex. C, p. 11) He did not address the correct legal standard for causation in his report. Regarding the neck injury, he opined claimant suffered from a muscle strain which fully healed. (Def. Ex. C, p. 15) Regarding the skin condition (eczema), he opined that he did not have enough information to offer an opinion. (Def. Ex. C, pp. 15-17) It appears the defendants primarily chose to rely on the opinion of Dr. Brown for their defense.

In addition, the record contains an expert vocational opinion. The defendants retained Lana Sellner, MS, CRC, a vocational case manager at Encore Unlimited. Ms. Sellner opined that Ms. Halladay is employable and identified a number of positions which are likely within her restrictions which she should try. (Def. Ex. M)

CONCLUSIONS OF LAW

File No. 5051327:

The first question for this file is whether the claimant suffered a cumulative right shoulder injury which arose out of and in the course of her employment and manifested on or about August 31, 2011. The claimant claims she had no specific incident but that she developed right shoulder pain after performing work duties. The defendants contend that the claimant has not met her burden of proof that such an injury occurred.

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).

The finding of an injury is a minimal standard. There is no question in this case that Ms. Halladay began feeling pain in her right shoulder as a result of some of her work duties as a cashier. I find that the greater weight of the evidence supports a finding that the claimant suffered a cumulative injury to her right shoulder which arose out of and in the course of her employment for the employer. August 31, 2011, is a reasonable manifestation date. The real question presented is causal connection.

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 question here is whether the claimant's work activities, which were causing her right shoulder pain and symptoms, materially caused, substantially aggravated, or lit up the conditions in her right shoulder such that she needed treatment, as well as any temporary and/or permanent disability. I find, by a preponderance of evidence that the claimant's repetitive work activities did substantially contribute to the development of the medical conditions in her right shoulder. The expert medical opinions in this case are conflicted; however, I find that the report of Dr. Sassman is more closely aligned with the lay evidence in the case, as well as the other medical records.

Dr. Sassman echoed the diagnosis of the treating surgeon, Dr. Coester. "Right shoulder pain status post right shoulder arthroscopy with limited debridement of the labrum and subscapularis tear, bursectomy and subacromial decompression on January 5, 2012, by Lisa Coester, M.D." (Cl. Ex. 2, p. 14) Regarding causation, she stated her opinion as follows:

> It is my opinion that the right shoulder impingement and the abnormalities noted on the MRI were aggravated by the heavy lifting and pushing of the carts at Menards. This opinion is supported by the fact that she denies having any right shoulder symptoms prior to this occurring and there is no evidence in the currently available record that she sought care for right shoulder symptoms prior to this injury occurring. Additionally, the mechanism of injury is consistent with her complaints.

(Cl. Ex. 2, p. 15) This opinion makes sense particularly in light of Ms. Halladay's credible testimony. I read the opinions of Dr. Runde and Dr. Coester to generally support the conclusions of Dr. Sassman.

Dr. Broghammer's opinion is less compelling. He focused heavily upon the fact that there was no specific incident. "First, and foremost as noted, the worker has no event or injury to correspond with the onset of symptoms." (Def. Ex. C, p. 11) He further opined that the "primary cause" of the rotator cuff degeneration "is aging." (Def. Ex. C, p. 11) This is undoubtedly true and it is noted that Ms. Halladay was 57 years old when she first sought medical treatment for the right shoulder pain. Her age undoubtedly made her more susceptible to this type of right shoulder injury. When read in conjunction with the entire record of evidence, the opinions of Dr. Broghammer are rejected. The only remaining issue related to the claimant's right shoulder injury is the extent of her permanent 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.

The claimant was 61 years old as of the date of hearing. She is a good worker, however, her work skills are fairly limited, which limits her universe of job possibilities. She has a significant right shoulder impairment which causes her difficulty with heavy

lifting or any type of overhead work. This is a significant loss when seeking work in the competitive job market. Considering all of the factors of industrial disability, I find the claimant has suffered a 25 percent loss of earning capacity. This entitles the claimant to 125 weeks of compensation at the stipulated rate commencing on the stipulated date of March 8, 2013.

File No. 5051329:

The first question for this file is whether the claimant suffered an injury to her neck which arose out of and in the course of her employment on August 22, 2013. The claimant asserts she suffered a specific incident of injury causing pain in her neck on that date and defendants deny this.

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.

Again, the finding of an injury is a minimal standard. There is no question in this record that Ms. Halladay was working on August 22, 2013. She experienced pain in her

neck on that date while performing a work function of lifting a boxed ceiling fan. She reported this injury immediately and it is well-documented. Once again, the real question is 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 greater weight of the evidence supports a finding that the claimant's work injury caused her to need treatment and temporary medical restrictions. The claimant, however, has not met her burden of proof that the work injury caused any permanent disability which is distinguishable or independent of her right shoulder disability.

Again the medical experts are divided. Dr. Sassman, hired by the claimant, opined that her August 22, 2013, work injury, aggravated underlying degenerative changes in her neck. (Cl. Ex. 2, p. 15) Dr. Sassman, however, acknowledged that there is no MRI to confirm this diagnosis. The evidence in the record is that claimant suffered this work injury, she was treated conservatively for several months and then she was released from treatment with no medical restrictions. She was already avoiding any heavy lifting over 20 pounds at this time. When viewed as a whole, the evidence does not support a finding that this injury resulted in any permanent disability. I find the opinion of Dr. Broghammer more compelling that Ms. Halladay likely suffered a muscular strain to the upper back region which resulted in no permanency. (Cl. Ex. C, p. 15)

The claimant has stipulated that she is not seeking temporary disability or medical benefits for this file. As a consequence, the claimant takes nothing as it relates to File No. 5051329.

File No. 5051330:

The first question for this file is whether the claimant suffered a cumulative injury which arose out of and in the course of her employment to her skin. In particular, did the claimant develop the condition of eczema or contact dermatitis, primarily upon her hands and arms as a result of her work activities? The claimant alleges she did and her condition manifested on or about March 5, 2014. The defendants argue strenuously that the claimant has failed to prove that any work activity or exposure led to her development of any such work-related condition.

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).

By a preponderance of evidence, I find that the claimant suffered an injury which arose out of and in the course of her employment which manifested on or about March 5, 2014, the date she reported her condition to her employer to seek treatment. This finding is based primarily upon the expert medical opinion of Dr. Barry. It is supported by the testimony of the claimant, as well as the other medical documentation in this record.

I have thoroughly reviewed the medical notes of Dr. Barry. (Cl. Ex. 9h) I have reviewed and analyzed the written medical opinions of Dr. Barry. (Cl. Ex. 4) I have also thoroughly reviewed the sworn testimony of Dr. Barry taken December 7, 2015. (Cl. Ex. 6) Dr. Barry was the claimant's authorized treating physician, and he has the greatest expertise of any physician in this case. (Cl. Ex. 3) His opinion appears to be completely free of bias in that he was not retained for litigation purposes. He was a treating physician who simply sought to help claimant get better.

Dr. Barry opined that the claimant developed "contact eczema which historically were [sic] related to exposure to substances at Menards." (Cl. Ex. 4, p. 22) The evidence is overwhelmingly convincing in that when she was not working, her condition cleared up almost immediately. The defendants' own expert, Dr. Brown, agreed with this. (Def. Ex. E, p. 2)

Once again, the real fighting dispute revolves around the issue of medical causation. The claimant argues that, as a result of her work-related exposure, the claimant has developed a permanent allergy. The defendants argue she suffered a temporary flare-up of her condition that has fully resolved.

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).

By a preponderance of evidence, I find the opinion of Dr. Barry to be the most compelling and credible medical opinion in the record.

> 2. The patient historically has allergies of allergic contact type prior to her employment at Menard's. Her history and physical finding of her current condition are not indicative that the previous allergies are related to her current episodes. People who are eczema prone, however, are frequently worsened by nonspecific contactants. I have been unable in my examinations of Ms. Halladay to ascertain specifically what is causing her problem. If the nature of this exposure is allergic in nature she would have that sensitivity on a permanent basis.
>
> 3. Deb cannot work at Menards or in any other job environment where she would be exposed to similar products. This restriction is permanent. . . .

(Cl. Ex. 4, p. 22) Dr. Barry credibly maintained these opinions throughout his testimony and upon extensive, thorough cross-examination.

His opinion is supported, to some degree, by the opinion of Dr. Sassman, although her opinion, by itself, would not have carried claimant's burden of proof.

Alternatively, I would simply note that even if the claimant's allergy did not result in a permanent physical impairment, the permanent restrictions alone may be a basis for a finding of industrial disability. Again, the greater weight of evidence supports the finding of both impairment and disability.

The next issue is the nature and extent of the 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.

Iowa Code section 85.34(7) requires that I assess the claimant's disability in its totality, in connection with her other work-connected disabilities. Given her age, education and work experience, I find that the claimant has suffered a 60 percent loss of earning capacity as a result of her eczema combined with her right shoulder condition. Her eczema caused her separation from employment with Menards and has already interfered with her efforts to maintain employment in the fast food industry. I cannot find that claimant is permanently and totally disabled. It is hard to pinpoint what exposures may trigger her eczema in the future, but I believe it would be speculative to conclude that there is no job in the employment universe that she could perform without causing flare-ups.

The defendants are entitled to a credit for her right shoulder disability in the amount of 125 weeks for her right shoulder disability. Consequently, the claimant is entitled to 175 weeks of benefits at the stipulated rate commencing on October 28, 2014.

ORDER

THEREFORE IT IS ORDERED:

File No. 5051327

Defendants shall pay the claimant one hundred twenty-five (125) weeks of permanent partial disability benefits at the rate of three hundred ninety-seven and 41/100 dollars ($397.41) per week commencing March 8, 2013.

Defendants shall pay accrued weekly benefits in a lump sum.

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

Defendants shall be given credit for the weeks previously paid.

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

For File No. 5051329

Claimant shall take nothing.

For File No. 5051330

Defendants shall pay the claimant one hundred seventy-five (175) weeks of permanent partial disability benefits at the rate of three hundred fifty-one and 36/100 dollars ($351.36) per week commencing October 28, 2014.

Defendants shall pay accrued weekly benefits in a lump sum.

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

Defendant shall be given credit for the weeks previously paid.

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

For all files:

Costs are taxed to defendants.

Signed and filed this 16th day of November, 2016.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JLW/sam

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.