BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHELLE JONES, Claimant, vs. RAINING ROSE, INC., Employer, and SFM MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	FILED FEB 13 2018 WORKERS' COMPENSATION File No. 5048297 APPEAL DECISION Head Notes: 1402.30, 2502, 2907

STATEMENT OF THE CASE

Defendants, Raining Rose, Inc. (Raining Rose), employer and SFM Mutual Insurance Company, insurer, both as defendants, appealed from an arbitration decision filed December 29, 2015. That decision found, in part, that claimant was due permanent and total disability benefits, that defendants were liable for a penalty, and the defendants were ordered to pay costs, including costs associated with an independent medical evaluation (IME).

The detailed arguments of the parties have been considered, and the record of the evidence has been reviewed de novo. Upon written delegation of authority by the workers' compensation commissioner under Iowa Code section 86.3, I render this decision a final agency decision on the behalf of the Iowa Workers' Compensation Commissioner.

ISSUES

1. Whether claimant sustained an injury that arose out of and in the course of employment on July 16, 2013.

2. Whether claimant's claim is barred by application of Iowa Code section 86.23.

3. Whether defendants are liable for a penalty under Iowa Code section 86.13.

4. Whether defendants are liable for costs.

FINDING OF FACTS

Claimant was 43 years old at the time of the hearing. Claimant has a Bachelor of Science degree in psychology.

Claimant has worked as an income maintenance worker for the state of Iowa. She worked as a social worker at the University of Iowa Hospitals and Clinics (UIHC). Claimant also worked for a temporary staffing agency.

Claimant began with Raining Rose in 2013. (Exhibit 5, pages 3-4; Ex. 8, pp. 16-18) Raining Rose produces and packages lip balm and lotion. Claimant worked as a line person at Raining Rose. Claimant worked on a shrink wrap machine. She was responsible for fixing the machine, loading product, and supervising coworkers. (Transcript pp. 7, 9, 11-12) Claimant testified she usually worked for two hours at a time and then walked around monitoring machines. (Tr. pp. 17, 89)

Claimant's prior medical history is relevant. In 1992 claimant attempted suicide. (Ex. D, p. 11) Claimant treated for neck and back pain in 2003. (Ex. D, pp. 1-5)

In April of 2004 claimant was assessed as having bipolar disorder, impulse control disorder, fibromyalgia, migraine headaches and osteoarthritis. (Ex. D, pp. 12-13)

Claimant had mental health counseling from April of 2004 through May of 2005, and from April of 2006 through October of 2008. (Ex. D, pp, 33, 40, 141)

In July of 2007 claimant had surgery for a C6-7 disc herniation. (Ex. D, pp. 95-96)

In October of 2008 claimant was assessed as having bipolar disorder, impulse control disease, posttraumatic stress disorder (PTSD), attention deficit disorder, osteoarthritis, fibromyalgia and migraines. Claimant was taking Lamictal, Zoloft, and Concerta. (Ex. D, pp. 140-141)

Claimant testified she was not on any medications from 2008 until the date of injury for mental health issues. (Tr. p. 30)

In November of 2008 claimant had treatment for bilateral trochanteric bursitis. (Ex. D, p. 142)

In January of 2013 claimant was diagnosed positive for hepatitis C and depression. Claimant indicated at that time she had felt depressed. (Ex. D, pp. 148, 151)

In May of 2013 claimant was assessed as having fatigue, muscle and joint pain, fibromyalgia, weight loss, tinnitus, vertigo, headaches, depression issues and stress. (Ex. D, p. 155) Claimant was assessed as being depressed. (Ex. D, p. 158) Records indicate claimant took medication for migraines. (Ex. D, p. 160)

On July 11, 2013 claimant was assessed as having weight loss, fatigue, and difficulty with sleeping. Claimant was assessed as having severe fibromyalgia, depression and hepatitis C. Claimant was taking medication for migraines. (Ex. D, pp. 162-166)

Claimant testified at hearing she had headaches in May of 2013, but did not have migraines. (Tr. 71)

Claimant testified Raining Rose gave her a specific ergonomic chair that allowed her to work the shrink wrap line. Claimant testified that due to her height, noted in the records as being 6 foot 7 inches, and her history of neck problems, the ergonomic chair allowed claimant to do her job without difficulty. (Tr. pp. 13-14; Ex. A, p. 3)

Claimant testified she came to work on Monday, June 15, 2013 and found her chair missing. (Tr. pp. 14-15) Claimant said she looked for the chair. After not finding the chair, claimant used another chair. She said using the new chair did not hurt at first, but as the day went on her neck began to hurt. (Tr. pp. 16-17) Claimant testified that when she woke up the next morning she had pain in her neck and arms. Claimant returned to work the next day, and again unsuccessfully searched for the ergonomic chair. Claimant said that by lunch on July 16, 2013, she was not able to continue working at the front of the line. Claimant said she felt pain in her neck, head and right arm with numbness into her fingers. (Tr. pp. 18-19)

Claimant said she told her supervisor her neck was too painful to continue to work. Claimant was put on light duty at the end of the line. Claimant called human resources at Raining Rose the next day. She said she was in too much pain to continue to work. Claimant did not return to Raining Rose after July 16, 2013. (Tr. pp. 21-22)

On July 19, 2013 claimant was evaluated by Rebecca Davis, M.D. Claimant had an acute onset of neck pain and generalized body aches. Dr. Davis suspected a C8 radiculopathy and a re-injure of claimant's prior cervical/discectomy repair. (Ex. 4, pp. 1-8)

In a July 23, 2013 letter claimant was informed the blood test showed she had an acute Epstein-Barr virus infection. (Ex. A, p. 4)

On July 24, 2013 claimant completed an application for short-term disability (STD) benefits. The application indicated the disability did not occur as a result of employment. (Ex. G, p. 2)

Claimant began physical therapy on August 1, 2013. Physical therapy notes indicate neck pain with radiculopathy beginning when claimant could not find her chair at work. (Ex. 4, p. 10)

On August 27, 2013 claimant was evaluated by Loren Mouw, M.D. Claimant noted neck pain began after the ergonomic chair was missing. MRI of the spine showed degenerative changes at C6-7 with no evidence of new disc herniation. Dr. Mouw recommended against surgery. (Ex. 4, p. 18)

On August 28, 2013 claimant returned to Dr. Davis. Claimant was treated with medication. (Ex. 4, pp. 19-22)

On September 19, 2013 claimant had a cervical epidural injection. Records indicate the injection did not help with symptoms. (Ex. A, p. 6)

In an October 31, 2013 letter, written by defendants' counsel, Dr. Mouw indicated claimant's work activities on July 15 and July 16, 2013, without use of the ergonomic chair, was a substantial contributing factor in claimant's report of symptoms. (Ex. 4, pp. 36-37)

Sometime in October of 2013 claimant stepped off a curb and fell face first. (Ex. A, p. 6)

Claimant was evaluated by Elahi Foad, M.D. on November 21, 2013. Claimant attributed her original pain to poor ergonomics as a secretary. Claimant had full resolution of pain following surgery. In July claimant began working as a mechanic. Claimant was unable to find an ergonomic chair at work and two days later neck pain returned. Claimant was assessed as having neck and shoulder pain with no radiculopathy. An EMG, physical therapy and aqua therapy were recommended. (Ex. 4, pp. 40-45)

On January 17, 2014 claimant underwent EMGs and nerve conduction studies. The tests found no evidence of cervical radiculopathy on the right upper extremity. (Ex. D, pp. 171-172)

In a May 21, 2014 letter, written by claimant's counsel, Dr. Davis opined claimant's work activities on July 15 and July 16, 2013 without use of an ergonomic chair was a substantially contributing factor to claimant's report of symptoms. (Ex. 4, pp. 63-64)

On June 20, 2014 claimant was evaluated by Stanley Mathew, M.D. Claimant was assessed as having severe migraines, chronic neck pain and cervical radiculopathy. Medications were prescribed. (Ex. A, pp. 7-8)

On June 30, 2014 claimant was evaluated by Megan Raddatz, ARNP. Claimant had problems with word finding and balance. Claimant indicated difficulty with balance

and was falling easily. Claimant indicated cramping and tingling in both legs. Claimant indicated these problems began three years prior. (Ex. D, p. 184)

In a June 30, 2014 letter, written by claimant's attorney, Dr. Mathew indicated claimant's work activities performed on June 15 and June 16, 2013, without the ergonomic chair, were a substantially contributing factor to claimant's reports of symptoms. (Ex. 4, p. 70)

On February 11, 2015 claimant was seen by Donald MacFarlane, M.D. Claimant was complaining of lower back pain shooting down to the right leg and increased fatigue. She was assessed as having fatigue, right-sided back pain with sciatica, hepatitis C with early cirrhosis, and pain secondary to cervicalgia with fibromyalgia. Claimant's symptoms were compatible with hepatitis C virus (HCV), compounded by fibromyalgia, bipolar disorder and PTSD. (Ex. D, pp. 204-211)

In a May 29, 2015 report, Marc Hines, M.D., gave his opinions of claimant's condition following an independent medical evaluation (IME). Claimant had difficulty looking down, raising her arm, writing and typing. Claimant indicated no antidepressants or counseling since 2008, but since July of 2013, has significant anxiety and depression. (Ex. 1, pp. 1-6) Claimant complained of headaches every day. (Ex. 1, pp. 1-6)

Dr. Hines believed claimant's severe neck pain was caused by two days of work when she did not have an ergonomic chair. He found work-related activities substantially aggravated claimant's neck pain, use of right arm, increase in migraines, and difficulty with falling. (Ex. 1, p. 9)

Dr. Hines found claimant had a 15 percent permanent impairment due to anxiety and depression. He found claimant had an 8 percent permanent impairment due to her neck using Table 15-5 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Dr. Hines found claimant had a 20 percent permanent impairment due to migraines using Table 13-11 of the Guides. He found claimant had permanent impairment in her sacroiliac and trochanteric dysfunction. Claimant had a combined 45 percent permanent impairment to the body as a whole. Dr. Hines did not believe claimant could return to work. Dr. Hines recommended Botox treatments for claimant. He also recommended a repeat EMG study. (Ex. 1, pp. 9-11)

In a July 29, 2015 report, John Kuhnlein, D.O., gave his opinions of claimant's condition following an IME. Claimant had constant neck pain that sent burning pain into her hands, down her right arm and down her back. Claimant had multiple migraine headaches every week. Claimant developed ringing in her ear. Claimant said she could not raise her arm without increased symptoms. (Ex. A, pp. 1-9)

Claimant had a history of hepatitis C, arthritis, depression, fatigue, migraine headaches, PTSD, fibromyalgia and bipolar disorder. (Ex. A, p. 10)

On exam claimant complained of neck and back pain with light touch to the head. Claimant had complaints of lower back pain with light touch to the lumbar area. (Ex. A, pp. 11-12) A pain diagram made by claimant indicated she had right-sided head and neck pain, right shoulder pain, right arm pain, right upper and mid-back pain, right low back pain, and numbness in the right buttock and right leg. (Ex. A, p. 18)

Dr. Kuhnlein opined there was no objective evidence that the force claimant was subjected to at work, without her ergonomic chair, was sufficient enough to cause any tissue damage. Dr. Kuhnlein found lack of evidence of physical injury causing claimant's neck pain. Claimant's lack of response to treatment modalities that should have produced some benefit, with true tissue damage, also supported a finding of no tissue damage. Dr. Kuhnlein suggested claimant's increased symptoms were more likely related to psychological issues, rather than physical issues. (Ex. A, p. 13)

Dr. Kuhnlein found claimant had no evidence of lower back pain that was related to her injury. He found no causal connection in the claims of claimant's headaches due to a work injury. (Ex. A, p. 13) Dr. Kuhnlein found claimant had no permanent impairment. (Ex. A, p. 14)

Dr. Kuhnlein found it was inappropriate for Dr. Hines to assess values, under the Guides, for depression and anxiety. He believed Dr. Hines should have used the range of motion method, and not the DRE method, to rate claimant's cervical impairment. This was because claimant had a preexisting radiculopathy. Dr. Kuhnlein said he had never seen before the method Dr. Hines used to rate claimant's headaches, and noted Dr. Hines' finding that claimant had a 20 percent permanent impairment for headaches was improper. (Ex. A, p. 15)

In an August 26, 2015 report, Mark Mittauer, M.D., gave his opinions of claimant's condition following an independent psychological evaluation. Claimant indicated depression since childhood. Claimant indicated diminished concentration and forgetfulness since her injury. Claimant indicated suicidal thoughts in 2014. (Ex. 2, pp. 1-12)

Dr. Mittauer assessed claimant as having a major depressive disorder, anxiety and PTSD. He also found claimant had an attention deficit disorder. He opined claimant's injury at work was a substantial contributing factor in exacerbating her preexisting major depressive disorder and anxiety. He opined that as long as claimant had neck pain she would have associated psychosocial stressors. He recommended claimant be treated with antidepressants. He also found claimant's psychiatric condition interfered with her ability to work full time. (Ex. 2, pp. 14-16)

In a September 28, 2015 report, Kent Jayne, M.A., M.B.A., C.R.C., gave his opinions of claimant's vocational opportunities. He opined that "given the confluence of her multiple limitations at this time, Ms. Jones would not be competitively employable in any reasonably stable branch of the labor market." (Ex. 3, p. 15)

On September 30, 2015 claimant underwent an EMG. Claimant's range of motion in the neck and upper extremities was within functional limitations. EMGs suggested neuropathy at the wrist compatible to carpal tunnel syndrome. Claimant was undergoing treatment for hepatitis C. (Ex. D, pp. 230-231)

In an October 5, 2015 report, James Carroll, M.Ed., C.R.C., gave his opinions of claimant's vocational opportunities. Mr. Carroll noted claimant had a degree in psychology and 15 years' experience in social work related to her occupation. He noted that even using the restrictions as detailed in Dr. Hines' IME, claimant was employable in a number of occupations. (Ex. C)

In an October 15, 2015 report, Philip Ascheman, Ph.D., gave his opinion of claimant's condition following an independent psychological evaluation. Dr. Ascheman found claimant had a long history of preexisting depression. Claimant was given mental status testing that suggested claimant was amplifying symptoms and memory problems. Claimant was given the Minnesota Multiphasic Inventory-2 (MMPI-2). Claimant's response to the MMPI-2 resulted in an invalid profile. Claimant's results in the MMPI-2 suggested symptom amplification. Based on his exam and testing, Dr. Ascheman did not find evidence that claimant's mental health disorder was caused or exacerbated by a physical injury related to employment. (Ex. B)

Claimant testified she has pain in both arms. Claimant has constant headaches. Claimant has pain in the lower back and hips. Claimant attributed her lower back pain and hips to her fall in October 2013. (Tr. pp. 26-29)

Claimant testified she has not looked for work since leaving Raining Rose. She said she could not return to work to any of her prior jobs. (Tr. pp. 34-37)

Kyle Hach testified he is the vice president in charge of operations at Raining Rose. Mr. Hach is familiar with claimant. (Tr. p. 86) Mr. Hach testified claimant received STD benefits. He testified claimant would not be receiving STD benefits if she had a work-related injury. (Tr. p. 98)

Claimant testified in deposition she was receiving long-term disability benefits. (Ex. 8, p. 6; Depo. p. 14) Mr. Hach testified claimant would not be receiving long-term disability benefits for a work-related injury. (Tr. p. 100)

Mr. Hach testified he believed claimant was terminated from Raining Rose sometime in December of 2013. (Tr. p. 100)

CONCLUSIONS OF LAW

The first issue to be determined is if claimant sustained an injury that arose out of and in the course of employment.

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 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).

Claimant contends she sustained a physical and mental injury that arose out of and in the course of employment with Raining Rose. Claimant argues the two days she worked without an ergonomic chair resulted in claimant being entitled to permanent and total disability benefits.

Dr. Mouw, Dr. Davis and Dr. Mathew have all signed letters, which claimant suggests, indicate she has a work-related injury. There are several problems with these letters.

First, all three letters indicate, ". . . work activities Ms. Jones performed on July 15 and 16, of 2013, without the benefit of her ergonomic chair, to be a substantial contributing factor to her report of her symptomology." (Ex. 4, pp. 37, 64, 70) None of the three doctors opined claimant had a work injury or that her symptoms were caused by work. The letter only opines claimant's work, without the ergonomic chair, caused claimant to report her symptoms. In brief, the "opinions" only corroborate that claimant reported symptoms after lacking her ergonomic chair for two days.

Second, even if these letters can be considered causation opinions, they fail to address diagnostic testing that did not support claimant's complaints of pain. As noted in the finding of facts, claimant had an MRI of the cervical spine in August of 2013. It only showed degenerative changes. The MRI does not show a new herniation. The MRI does not show a nerve root impingement. (Ex. 4, p. 18)

In January 2014 claimant underwent nerve conduction and EMGs. They show no evidence of radiculopathy in the right arm. (Ex. D, pp. 171-172)

The record indicates claimant complains of neck pain, pain in both arms, and pain down her right back. (Tr. pp. 26-28; Ex. A, p. 10) There is no explanation from Drs. Mouw, Davis or Mathew why claimant's symptoms are caused by work, yet diagnostic testing fails to support her complaints of radiculopathy.

The letters from Drs. Mouw, Davis and Mathew are not opinions regarding causation. They fail to address the lack of diagnostic findings supporting claimant's complaints. For these reasons, the letters from Drs. Mouw, Davis and Mathew are not convincing regarding causation of claimant's alleged injury to her work.

Dr. Hines opined claimant's headache, neck pain, and mental health condition were caused by the two days claimant failed to have an ergonomic chair. He found claimant has a 45 percent permanent impairment to the body as a whole for injury. Dr. Hines' opinions are suspect for several reasons.

First, as noted above, diagnostic testing does not support claimant's complaints of radiculopathy. Dr. Hines offers no explanation for the lack of findings in the MRI and the EMGs.

Second, the record indicates Dr. Hines was not provided with claimant's recent mental health treatment records in the months before her alleged work injury.

Third, it appears Dr. Hines made numerous errors regarding rating. For example, Dr. Hines gave values of permanent impairment for claimant's anxiety and depression, relying on Table 14-1 of the Guides. Table 14-1 lacks numerical values. Dr. Kuhnlein indicates it is inappropriate under the Guides to give values for depression and anxiety using the Guides. (Ex. A, pp. 14-15) Dr. Hines uses the DRE method for rating claimant's neck condition. Dr. Hines should have used the range of motion method, as claimant had a prior radiculopathy. (Guides, pp. 379-380) Dr. Hines also found claimant had a 20 percent permanent impairment for headaches. However, the Guides suggested at most a 3 percent rating is appropriate for headaches. (Ex. A, p. 15; Guides, pp. 571, 573)

It is recognized that discrepancies found regarding Dr. Hines' ratings are not causation opinions. However, major discrepancy in the way Dr. Hines rates claimant's permanent impairment question his overall opinion regarding causation.

Prior agency decisions also question Dr. Hines' methodologies for finding causation and rating of claimants. See Perez v. West Liberty Foods, File No. 5033695 (Arb. September 15, 2011); Brown v. Menards, Inc., File No. 5040961 (Arb. November 5, 2013); Olson v. Brooks Park Resorts, File No. 5043565 (Appeal September 9, 2015); Olhausen v. 1st Step Chiropractic, File No. 5045054 (Arb. October 31, 2016); Kovach v.

Titan Machinery, Inc., File No. 5053492 (Arb. September 13, 2016); Grouette v. Gilbane Building Co., File No. 5044473 (Appeal September 18, 2017).

Dr. Hines did not have mental health or medical records made in the year prior to claimant's work injury. He offers no rationale for diagnostic testing that questions claimant's complaints of pain. His methods of rating and causation are questionable. Given this record, the opinions of Dr. Hines regarding causation are found not convincing.

Dr. Kuhnlein evaluated claimant once for an IME. He noted claimant alleged neck, arm pain, back pain, leg pain and mental health issues all caused by working without an ergonomic chair for approximately two days. Dr. Kuhnlein found there was insufficient evidence to find claimant had an acute or cumulative work-related injury. He noted claimant's lack of response to treatment modalities also suggested an increase in symptoms due to psychosocial issues. Dr. Kuhnlein also referred to the MRI and EMG studies that did not explain claimant's complaint of bilateral upper extremity pain.

Dr. Kuhnlein had claimant's pre and post-injury records. Dr. Kuhnlein found no evidence claimant sustained an acute or cumulative injury. His opinions regarding causation are supported, in part, by diagnostic testing showing no objective rationale for claimant's alleged bilateral arm pain. His opinions are also based on claimant's lack of response to modalities for treatment. As Dr. Kuhnlein's opinions regarding causation are based on more objective evidence in this case, it is found his opinion regarding causation is more convincing.

While I performed a de novo review, I gave considerable deference to the finding of facts that are impacted by the credibility findings, made by the deputy who presided at the hearing. The deputy who presided at the hearing had the best opportunity to evaluate the demeanor of claimant who testified at the hearing. However, it should be noted there are several inconsistencies between the medical records and claimant's testimony and deposition at hearing. Claimant testified in hearing that she had not had any migraines in 2013, and the migraines she was experiencing were due to the alleged 2013 injury. (Tr. p. 71) Records indicate claimant was taking medication for migraines in May of 2013 and on July 11, 2013, a few days before the alleged date of injury. (Ex. D, pp. 160, 162-166)

Claimant testified at hearing she was not taking any medication for mental health issues from 2008 until the date of injury. Records indicate that in October of 2008 claimant was taking three medications for mental health problems. (Ex. D, pp. 140-141)

Claimant testified she did not have lack of balance or memory issues until after the alleged date of injury. Records from June 2014 suggest claimant had issues with balance and word finding sometime in 2011. (Ex. D, p. 184)

The opinions of Drs. Mouw, Davis and Mathew are not causation opinions. Assuming the letter signed by Drs. Mouw, Davis and Mathew are causation opinions,

they are found not convincing for the reasons detailed above. The opinions of Dr. Hines regarding causation are found not convincing. The opinions of Dr. Kuhnlein regarding causation are found convincing. Claimant's testimony regarding prior health issues is inconsistent. Given this record, claimant has failed to carry her burden her proof she sustained an injury that arose out of and in the course of employment.

As claimant has failed to carry her burden of proof she sustained an injury that arose out of and in the course of employment, the issues regarding notice and penalty are moot.

The final issue to be determined is that of costs. The arbitration decision indicates costs were to be taxed to defendants. (Arbitration decision, p. 18) The arbitration decision gave no detail of what those costs are.

Exhibit 10 details claimant's costs. Claimant seeks $3,241.60 for Dr. Hines' IME. The record indicates Dr. Hines, the employer-retained expert, issued his IME opinion on May 29, 2015. The employer-retained expert did not issue his opinion until a report dated July 29, 2015.

Regarding the IME, the Iowa Supreme Court provided a literal interpretation of the plain-language of Iowa Code section 85.39, stating that section 85.39 only allows the employee to obtain an independent evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 847 (Iowa 2015).

The Court also noted:

> If the injured worker wants to be reimbursed for the expenses associated with a disability evaluation by a physician selected by the worker, the process established by the legislature must be followed. This process permits the employer, who must pay the benefits, to make the initial arrangements for the evaluation and only allows the employee to obtain an independent evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. Iowa Code § 85.39.

Young at 847

Under the Young decision, an employee can only obtain an IME at the employer's expense if an evaluation of permanent disability has been made by an employer-retained physician.

The Supreme Court, in Young noted that in cases where Iowa Code section 85.39 is not triggered to allow for reimbursement of an independent medical exam (IME), a claimant can still be reimbursed at hearing the costs associated with the preparation of the written report as a cost under rule 876 IAC 4.33 Young at 846-847.

Based upon the chronology of the IMEs, claimant is not due reimbursement for an IME under Iowa Code section 85.39.

Iowa Code section 86.40 provides that all costs incurred in a hearing shall be taxed at the discretion of the commissioner or the deputy workers' compensation commissioner. As claimant failed to prevail in this case, each party shall bear their own costs. This includes the costs of preparation of Dr. Hines' IME, and the costs associated with Mr. Jayne's report.

ORDER

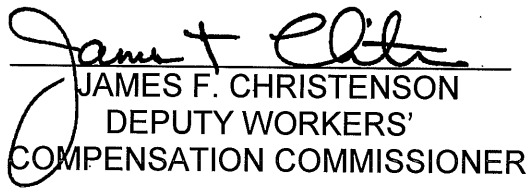
Therefore it is ordered:

That the arbitration decision of December 29, 2015 is reversed.

That claimant shall take nothing in the way of benefits from this proceeding.

That both parties shall pay their own costs.

Signed and filed this 13th day of February, 2018.



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