BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PAMELA PHILLIPS,

Claimant,

vs.

MENARDS,

Employer,

and

XL INSURANCE AMERICA, INC.,

Insurance Carrier,
Defendants.

File Nos. 5053532
5053533

ARBITRATION

DECISION

Head Note Nos.: 1100; 1402.30; 1803

STATEMENT OF THE CASE

Pamela Phillips, claimant, filed petitions in arbitration seeking workers' compensation benefits from defendants, Menards, the employer, and their workers' compensation insurance carrier, XL Insurance America, Inc. The files were combined for hearing, which was held on August 12, 2016, in Des Moines, Iowa.

Claimant testified at the hearing. The evidentiary record also includes Claimant's Exhibits 1 through 8, and Defendants' Exhibits A through P.

Some of the exhibits are duplicative. Therefore, when exhibits are cited in this decision, the citation may refer to only one exhibit, although a copy of the same exhibit may be found in another location. The pages in defendants' exhibits O and P will be referred to by exhibit and page number, with the page number referring to the appropriate sequential page number within the exhibit regardless of the exhibit letter or page number on the individual page.

The parties submitted a hearing report for each file, which contain numerous stipulations. The parties' stipulations are accepted and no factual findings or conclusions of law will be made in this decision regarding the parties' stipulations. The parties are now bound by those stipulations.

Counsel for the parties submitted post-hearing briefs on September 14, 2016, and the matter was considered fully submitted on that date.

ISSUES

The parties submitted the following disputed issues for resolution concerning File No. 5053532:

1. Entitlement to permanency benefits if any and the extent thereof.

2. Assessment of costs.

The parties submitted the following disputed issues for resolution concerning File No. 5053533:

1. Whether claimant sustained injury to her neck and upper back, arising out of, and in the course of, her employment on April 10, 2015.

2. Extent of entitlement to permanent partial disability benefits, if any.

3. Whether claimant is entitled to Iowa Code section 85.27 medical benefits.

4. Whether claimant is entitled to penalty benefits.

FINDINGS OF FACT

At the time of the hearing, claimant, Pamela Phillips, was 57 years old. (Tr. p. 11) She was living in Ft. Dodge, Iowa and had completed the ninth grade. (Tr. pp. 11-12) Claimant did not obtain a GED or obtain any other formal education. (Tr. p. 12)

Claimant began working part-time at Menards in November 1998. (Tr. p. 13) She worked in the hardware department for six months. She then obtained full-time employment in the electrical department and worked there for a few years before taking a job in receiving. (Id.) Claimant worked in the receiving department for almost 14 years, and was working there in 2015 at the time of the alleged injuries. (Id.)

File Number 5053532, (Date of injury March 11, 2015):

Claimant testified that on March 11, 2015, she obtained approval to check her cellular phone from time to time during her work shift because she was expecting a call. (Tr. p. 17) While checking her phone, the assistant general manager was behind her and threw a 25 foot tape measure at her, which struck her on the side of her right lower leg. (Tr. pp. 17-18; Ex. C, p. 2; Ex. A, p. 10) The individual that threw the tape measure stated at some point after the incident, that he only meant to hit a door near claimant to scare her. (Ex. 2, p. 5) Claimant testified that after the tape measure struck her leg, she had a burning sensation in her leg. (Tr. p. 19) She reported the incident to her employer that same day and worked the remainder of her shift. (Id.)

On March 16, 2015, claimant was seen by Tricia Widlund, ARNP. (Ex. C, p. 2) At that time, claimant reported her pain level as 4 out of 10. She also described moderate tingling in her right ankle, which she felt was getting worse. (Id.) She was diagnosed with an acute contusion of the right lower leg, but was deemed medically fit to work and she was maintained on regular duty. (Ex. C, pp. 3-4)

Claimant testified that she was never taken off work for this injury. (Tr. p. 41)

On March 26, 2015, Ms. Widlund recorded that there was a knot and slight bruise at the injury site. (Ex. C, p. 5) On May 29, 2015, when claimant's symptoms had not subsided, Ms. Widlund requested an MRI to rule out a bone bruise or hairline fracture. (Ex. C, p. 12)

On June 25, 2015, claimant reported that her pain was zero out of 10 and the MRI, which was reviewed at that time, showed only slight residual edema and no fractures. (Ex. C, p. 15)

Claimant returned to Ms. Widlund on January 18, 2016, at which time her pain was recorded as being intermittent and at a level of 1 out of 10. (Ex. C, p. 18; Ex. 2, p. 5) Ms. Widlund opined that claimant had reached maximum medical improvement and had no physical impairment. It was also noted that claimant had been working full-time at Marian Home, a nursing home, as a housekeeper since August 2015. (Ex. C, p. 19) Claimant testified that she did not have any additional treatment thereafter. (Tr. p. 19)

On May 25, 2016, claimant was seen by John Kuhnlein, D.O., at the request of claimant's counsel for the purpose of an independent medical examination (IME) regarding, among other things, the right leg injury. (Ex. 6) This evaluation occurred concurrently with an evaluation for the alleged injury in File No. 5053533. At that time, Dr. Kuhnlein reviewed the medical history related to the right leg. (Ex. 6, p. 45-46) He noted that claimant stated that the knot she had in the right leg, had resolved. (Ex. 6, p. 46) Claimant related that the right leg ached at the location where she was struck, but only with prolonged driving and sometimes when she walks. She also indicated that she sometimes has a warm sensation in the right leg. (Ex. 6, p. 48) Claimant advised that she did not have any pain in her leg at the time of the exam and she advised that her leg is more often pain-free than painful. (Id.) She rated her pain as ranging from zero to 2 out of 10. (Id.) She further denied any swelling, numbness or tingling at the time of the exam. (Id.) Dr. Kuhnlein noted that claimant was working without restrictions. (Ex. 6, p. 45) He then opined that claimant sustained a right lateral ankle contusion causally related to the March 11, 2015 incident. (Id.) He assigned an MMI date of January 18, 2016. (Ex. 6, p. 53) Dr. Kuhnlein, noting claimant's intermittent pain with activity, stated concerning permanent impairment that, "[t]he tissue rating methodologies are not adequate to address this, and so, using Chapter 18, I would assign 2% right lower extremity impairment for the discomfort she experiences on an intermittent basis." (Id.) Dr. Kuhnlein did not reference any particular portion of chapter

18 of the AMA Guides that he relied upon or discuss how he arrived at a conclusion of 2 percent impairment.

Concerning permanent restrictions, Dr. Kuhnlein stated that claimant should be allowed to change positions from seated, to standing, to walking on an as needed basis and that she may need to take breaks from time to time. (Ex. 6, p. 54) He also suggested that she wear compression stockings, not just because of this injury, but also due to her peripheral edema. (Id.) Dr. Kuhnlein noted in his report that claimant "is a fair historian at best." (Ex. 6, p. 52)

Claimant then underwent an IME of the right leg at defendants' request by Charles Mooney, M.D., on or about July 5, 2016, which occurred concurrently with an exam regarding the alleged injury in File No. 5053533. (Ex. B, pp. 1-9; Ex. 4, pp. 30-38) Dr. Mooney reviewed relevant records concerning the leg injury at the time of the evaluation and reviewed the medical history with claimant. (Ex. B, p. 4) Dr. Mooney noted that claimant was a "moderately poor historian." (Ex. B, p. 4, 6) Claimant reported that she had pain in her right leg, which she described as aching over the area where she was struck but that it occurred due to prolonged standing, walking and driving. (Ex. 4, p. 5) She reported no pain in her leg at rest. (Id.) She was not taking any medication and was not undergoing any medical treatment for the injury. (Id.) Following the examination, Dr. Mooney's diagnosis was "a soft tissue injury or bruise to the right lower extremity related to injury date of 03/11/15," but "without evidence of specific physical findings of residual deficits." (Ex. 4, p. 8) He opined that claimant reached maximum medical improvement (MMI) as of June 22, 2015 and assigned no permanent partial impairment and no permanent restrictions. (Id.)

Claimant testified at hearing that concerning her lower right leg, "it just aches now and then if I've twisted it or if I take a long drive and have my foot back, but that's it. As far as pain, no." (Tr. p. 20)

Considering the medical opinions in the matter, I note that Tricia Widlund, ARNP, the authorized medical provider, had an opportunity to see claimant over a period of time and throughout the healing process. She found claimant had no impairment as a result of the right leg injury. (Ex. C, p. 1, 19)

Although both of the IME physicians in this file are well qualified to render opinions in this matter, they arrive at different conclusions.

Dr. Mooney agreed with Ms. Widlund that there was no permanent impairment from the incident, relying on the fact that he found no physical findings of any residual deficits. (Ex. B, p. 8) Dr. Mooney found no loss of range of motion, no neurologic deficits and no musculoskeletal injury. (Id.) However, Dr. Kuhnlein opined claimant sustained a 2 percent permanent impairment to the right lower extremity based on "the discomfort she experiences on an intermittent basis." (Ex. 6, p. 53) In other words, they both appear to agree that the claimant does not have a ratable impairment to her right lower extremity when considering quantifiable physical deficits. However, unlike

Dr. Mooney, Dr. Kuhnlein, looks to chapter 18 of the AMA Guides, to find a 2 percent impairment based on claimant's reports of intermittent aching with certain activities. As stated above, Dr. Kuhnlein did not reference the particular portions of chapter 18 that he relied upon or provide significant discussion of the process he relied upon to arrive at the 2 percent rating.

I find that although the incident was caused by the careless and even offensive action of a supervisor that the physical injury claimant sustained did not result in any permanent impairment. This is supported by the fact that she was not taken off work at any time by any medical provider for this injury. Also, she reported minimal or no pain in her last visits with Ms. Widlund, the authorized provider. (Ex. C, p. 15, 18) When she was seen by Dr. Kuhnlein, claimant advised that the knot in her leg had gone away. (Ex. 6, p. 46) Further, Dr. Kuhnlein noted that she did not have any pain, swelling, numbness or tingling in her leg at the time of the exam and she was working without any restrictions. (Ex. 6, p. 45) The only arguable basis for permanency is claimant's report of occasional symptoms which she herself did not describe as pain per se. Rather she described it as, "it just aches now and then . . . [a]s far as pain, no." (Tr. p. 20)

I find the combined opinions of Ms. Widlund and Dr. Mooney to be the most persuasive concerning assessment of permanency and I therefore find that claimant has not carried her burden of proof and has failed to establish a permanent impairment as a result of the March 11, 2015 work injury.

File Number 5053533, (Date of injury April 10, 2015):

Concerning claimant's neck and back injury, she asserts that she sustained a work injury that arose out of and in the course of her employment on April 10, 2015, her last day of work. Defendants disagree.

The records do not indicate any particular incident that occurred on April 10, 2015, and the claim is understood to be a cumulative injury.

Claimant asserted at the time of her deposition that her job at Menards, which involved daily handling of freight and pulling pallets caused her to injure her neck and back. (Ex. A, pp. 15-16) When asked to be more specific concerning the involved part of her back, claimant described it as her "lower back." (Ex. A, p. 16) She then described it as above the belt line and "up to the middle part of my back." (Ex. A, p. 17) Claimant also advised that her hips bother her, but that she did not have pain in her buttocks, but does sometimes have a warm feeling in her right leg and "a little bit of tingling in her feet, but not bad." (Tr. p. 18) However, at hearing, claimant testified that her pain was in the middle to upper back and denied that the problem was in the low back. (Tr. pp. 31, 34) She declared that the pain has always been in her mid-back, not the low back. (Tr. p. 47) This is plainly contrary to the medical records, which describe low back pain.

It is undisputed that claimant has a history of neck and back pain prior to April 10, 2015. The records presented discuss a cervical fusion at C5-6, which occurred around 1990. (Ex. 6, p. 46) Claimant reported to Dr. Kuhnlein that she had several years with no problems following the fusion. (Id.) However, the records then describe the return of her neck pain. On May 8, 2002, it is noted that claimant had "persistent neck pain, most likely DJD." (Ex. D, p. 1) The same record also discusses a disk herniation at C4, which is described as having occurred three years prior. (Id.) Claimant underwent three cervical MRIs on February 24, 2004, October 20, 2004 and May 10, 2010. (Ex. E, pp. 2, 6; Ex. G, p. 3) The records indicate multiple complaints of neck pain and treatment related thereto prior to the alleged work injury of April 10, 2015. The most recent record of claimant's neck pain was about eight and a half months prior to the alleged work injury. It occurred with John Birkett, M.D., on July 25, 2014. (Ex. G, p. 5)

Concerning claimant's back, the records indicate that claimant reported having back surgery in about 2006. (Ex. B, p. 6) Dr. Kuhnlein, notes more specifically, that claimant had surgery on her lumbar spine, performed by Dr. Sam Kaspar on October 29, 2007.

On June 15, 2011, claimant reported pain in her neck and back to Sherman Jew, D.O., after pulling a box off of a pallet at work. Her neck and low back remained symptomatic at that time, but the pain in her thoracic region had resolved. (Ex. H, pp. 1-2)

In the few years prior to the alleged date of injury, claimant had been receiving treatment at the Huseman Chiropractic Clinic. She complained of low back pain in July, 2013, May, June, July, and September, 2014. (Ex. 3, pp. 15, 19, 21, 23, 25)

On March 5, 2015, about one month before the alleged date of injury, claimant was seen by Dr. Birkett with particular complaints, but there was no discussion of neck or back pain. (Ex. O, pp. 1 -2)

On March 11, 2015, the above described tape measure incident occurred. Claimant finished her shift on that day and returned the next day, but stated that "I ended up quitting. I walked out." (Ex. A, p. 25) Claimant stated that her employer asked her to return to work and she enjoyed her job, so she agreed to return. (Ex. A, p. 31-32) Claimant stated that upon her return, the employer offered to apply her accrued vacation to some of the days that she had missed. However, she wanted to save her vacation time and did not want it used at that time, but the employer submitted it anyway. Claimant said that she felt harassed by these events and quit again, this time for good, on April 10, 2015. (Ex. A, p. 31-32) Claimant was under no physical restrictions when she left her employment. (Tr. pp. 37-38)

Regarding the above described events leading to claimant's final quit from her employment at Menards, the following exchange occurred at claimant's deposition:

> Q: So you didn't quit because of any physical issue at that time. It was because you thought you were being harassed?

A: Harassed, right.

Q: Because physically at that time you felt like you were able to continue doing your job?

A: Right.

Q: And that was with whatever was going on with your neck at that time and whatever was going on with your back at that time as well?

A: Right.

(Ex. A. p. 33) Claimant went on to state in her deposition that near the end of her employment at Menards, she asked to be transferred "inside the store, where I wasn't doing all this lifting," but was advised the only available jobs inside the store were part-time. (Ex. A, p. 33) However, upon further questioning, it was revealed that this request to move inside the store occurred in 2012, or about two years before her separation from employment with Menards. (Ex. A, p. 34) Claimant had been doing her regular work duties prior to her quitting. (Ex. A, p. 29) During the month or so prior to quitting her employment, she had not asked her employer to see a doctor for her neck or back. (Tr. p. 57) Neither had she specifically reported neck or back pain to any supervisor at Menards in the weeks prior to her separation from her employment. (Id.) Although she believed that "everybody knew." (Id.)

Claimant was asked at hearing about why she no longer worked for the defendant employer. She responded that it was a hostile work environment and that "[a]fter I got hit with the tape measure, I just didn't want to work there no more." (Tr. p. 23) I find that this is certainly a reasonable and rational position. However, it is clear from claimant's testimony that she did not leave her employment due to her alleged work injury.

Prior to the work injury, claimant had a cervical fusion of the C5-6 and was noted to have degenerative disc disease. (Ex, p. 2) She also was found to have protrusion of disc material in 2004 at the C4-5 level. (Ex. E, p. 2) Also, she had osteophyte formation with minimal neuroforaminal and central canal stenosis in October 2004 and disc space narrowing in April 2010, along with posterior disk spur complex with mild impingement of the ventral cord and variable narrowing of the neural foramen bilaterally in May 2010 at the C4-5 and C6-7 levels. (Ex. E, pp. 2, 6; Ex. G, pp. 1-3)

Following her separation from employment at Menards, she received treatment with Tricia Widlund, ARNP, only for her leg as described above, not for her neck or back.

On April 29, 2015, claimant was seen by her primary care physician, Dr. Birkett, for headaches. (Ex. O, pp 3-5) Dr. Birkett's assessment included "frequent headaches" and "stress." (Ex. O, p. 5) The record contains no mention of neck or back pain. When questioned about why the record did not contain anything about neck or back pain, claimant responded with an explanation that it was the neck pain that was causing the

stress diagnosed by Dr. Birkett. (Ex. A, 36) I find this explanation difficult to accept in view of a reading of the medical record.

Claimant returned to see Dr. Birkett again in July, 2015 for a bump on her scalp. At that time, it is noted that she needed a "refill on norco for leg injury and back pain." (Ex. O, p. 6) The record indicates under, "Review of Systems" that claimant is "[p]ositive for back pain, right lower leg pain." (Ex. O, p. 7) Further, under "Assessment/Orders:" it is recorded that claimant has "[b]ack pain." (Ex. O, p. 8) This is the first mention of back pain in the records following the alleged date of injury, but there is no significant discussion in the record regarding the same, including whether this pain relates to the low back or something else. Given the context of the entirety of the medical records it is more likely than not, referring to low back pain.

On September 2, 2015, claimant was seen by Dr. Birkett and noted to have worsening low back pain and right cervical neuropathy pain in the right 4th and 5th fingers. (Ex. O, p. 10)

Thereafter, claimant had additional complaints of low back pain and neck pain and received treatment with Huseman Chiropractic Clinic and Dr. Birkett. Her final visit prior to the hearing was with Dr. Birkett on August 5, 2016. (Ex. O, p. 15) Dr. Birkett noted bilateral lumbar radiculopathy and recommended a referral to a pain clinic and a repeat lumbar MRI. (Id.) Although claimant alleged an upper back injury in the petition, the medical records relate to complaints of low back pain.

During claimant's IME with Dr. Kuhnlein, she advised that her back and neck symptoms became constant at some point, but she was not sure when that happened. (Ex. 6, p. 46) Dr. Kuhnlein noted that claimant had neck and back pain since at least 2005. (Id.) Claimant reported taking Hydrocodone for pain in her neck and upper back pain daily since September, 2015. (Ex. 6, p. 48) However, the undersigned finds that the medical treatment records concerning her complaints of back pain after the alleged work injury relate primarily, if not exclusively, to her low back rather than her upper back.

On the day of the IME with Dr. Kuhnlein, claimant reported her pain as 6/10 and that it ranged from 4/10 to 8/10. (Ex. 6, p. 49) She reported intermittent burning pain between her shoulders and in her neck and occasional mild tingling in both ring and small fingers that occurs about once per week, but she could not say how long the sensation lasted. (Id.) Dr. Kuhnlein diagnosed claimant with "Chronic cervical myofascial and upper back pain." (Ex. 6, p. 52)

Dr. Kuhnlein opined that "[g]iven the work that she performed at Menards, the work for Menards would have been a substantial more than minor factor in developing her musculoskeletal neck and upper back pain." (Ex. 6, p. 53) Dr. Kuhnlein then determined that maximum medical improvement occurred "on or about May 25, 2015, a year before this evaluation." (Ex. 6, p. 53) Dr. Kuhnlein's assessment places claimant's MMI date just over six weeks from the alleged date of injury. The only medical evidence

provided during this small window of time, is a note from Huseman Chiropractic dated May 20, 2015, which states that claimant had "[p]ain in the LB and stiff neck *for the past few days*." (Ex. 3, p. 27)(Emphasis added) This does not fit with claimant's testimony that "it was getting really bad towards the end," at the time that she quit her employment on April 10, 2015. (Ex. A, p. 33)

Dr. Kuhnlein assigned a seven (7) percent whole person impairment based on the DRE method, and relying on Table 15-5, page 392 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Ex. 6, p. 54) Dr. Kuhnlein also assigned permanent restrictions of lifting 20 pounds occasionally from floor to waist; 30 pounds occasionally from waist to shoulder with weights kept close to the body, if more than an elbows distance away from the body, then limit to 20 pounds occasionally, and no overhead work or above shoulder height with tools.

By the time claimant was evaluated by Dr. Kuhnlein, she had not worked for Menards for nearly 17 months. However, she had been working at her new employer, Marian Home for more than a year, having started that employment on August 27, 2015. (Ex. P, p. 11) Significantly, claimant testified in her deposition that her work at Marian Home, bothers her neck and back, when she engages in bending, dusting and lifting heavy garbage. (Ex. A, pp. 18-19)

Dr. Kuhnlein did not discuss the impact of claimant's current employment on her condition and his findings at the time of his IME.

Claimant underwent an IME with Dr. Mooney on July 5, 2016, concerning her neck and upper back claim. Claimant reported ongoing neck pain for many years, but stated that her pain has significantly increased over the last year. (Ex. B, p. 5) It is significant to note that claimant had not worked for the defendant employer for over one year prior to this IME. Therefore, the period of claimant's self-reported increase in neck pain occurred at a time that she was not employed by defendant.

Claimant reported during her IME with Dr. Mooney that she had a burning pain in the midline of her neck between the shoulder blades and loss of motion and pain with movement. (Id.) In addition, she noted tingling in all her fingers, but more in the index and middle fingers, which occurred only when she twisted her neck in certain positions. She also reported pain in the low back, radiating into both hips and some tingling in her legs when she uses stairs or walks on uneven surfaces. (Ex. 6, p. 5-6) She reported her lumbar pain level at 3-4/10, increasing to 6-7/10 with activity. (Ex. 6, p. 6) Following examination, Dr. Mooney was asked the question of whether or not claimant's work in 2015, up to April 10, 2015, caused injury to claimant's neck or back, or materially aggravated, accelerated, or lighted up a preexisting condition. (Ex. B, p. 8) Dr. Mooney responded that claimant had a long-standing degenerative condition and disc disease of the cervical spine requiring multiple treatments prior to April 10, 2015. (Ex. B, 8) He further stated that, "it is my opinion that Mrs. Phillips' work activities are not a causal factor in her diagnosis and would not be considered a material aggravator

as interpreted by an activity that would promote or advance this pathologic process." (Ex. B, p. 9)

Claimant testified at hearing that she currently has a burning sensation in her upper back and neck brought on or aggravated by prolonged standing, sitting and/or movement. (Tr. p. 22) She reported that the pain creates problems with her sleep. (Id.) Claimant further testified that driving a car in reverse requires her to turn her whole body to avoid pain. (Id.)

I find that claimant has a long standing history of neck and low back issues that is well documented in the medical records and that was noted by Dr. Kuhnlein and Dr. Mooney.

Claimant has asserted a claim concerning a neck and upper back injury. Concerning her back complaints, claimant's medical records relate primarily to a low back condition. Claimant agreed in her deposition that her problem was with her low back, but changed her position at hearing and asserted that she had a mid-back problem. A mid-back or upper back condition, is not supported by the medical records.

I find that claimant did not make specific neck or back complaints to the employer concerning this alleged injury until the employer received the May 28, 2015 letter from claimant's counsel. (Ex. M, p. 1)

I find that the medical records do not indicate that there were complaints of neck or back pain at the time of her separation from employment. Rather the first record after she quit her job reports headaches and stress, with no mention of neck of back pain. (Ex. O, pp. 3-5) I have found above, that claimant's explanation that she was having neck pain, which in turn caused the stress, and the doctor simply failed to record the neck pain as the source of the stress, difficult to accept. The more logical explanation is that the stress claimant complained of related to her job separation and life circumstances at that time. Be that as it may, it is clear that this medical record simply does not contain any complaint of neck or back pain. The next chronological medical record is May 20, 2015, which records low back pain and a stiff neck. However, the symptoms had only been present for the "past few days." (Ex. 3, p. 27) This contradicts claimants testimony noted above that she was having worsening neck and back pain at the time of her separation from employment on April 10, 2015.

I find that although claimant was in a position that required material handling at Menards, the medical treatment records, excluding the IME reports, do not indicate any relationship between claimant's work at Menards and her alleged work injury to her neck and back.

Claimant reported to Dr. Mooney that her neck pain significantly increased in the year or so prior to his examination in July, 2016. During that year, claimant worked for her new employer, Marian Home, but did not work for the defendant employer herein.

Further, claimant testified that her work at her new employer, which began in August, 2015, aggravates her neck and back conditions.

Dr. Kuhnlein, in his evaluation, was apparently unaware that claimant's current job at Marian Home affected her neck and back conditions and therefore, did not discuss the impact this may have on his conclusions re: causal connection and impairment. I find that this information was contained within claimant's deposition, which occurred after Dr. Kuhnlein's examination of claimant, and through no fault of his own, Dr. Kuhnlein lacked this relevant information.

Further, it is not apparent from the medical records that there was any change in claimant's treatment plan following her alleged work injury, to support a conclusion that her condition was aggravated or lighted up.

For all of these reasons, I find the causal connection opinion of Dr. Mooney most persuasive and I therefore find that claimant has failed to carry her burden of proof that she sustained an injury to her neck and upper back that arose out of an in the course of her employment with Menards on April 10, 2015.

CONCLUSIONS OF LAW

The disputed issue in File No. 5053532 is claimant's entitlement to permanency benefits if any and the extent thereof.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss, or loss of use, of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

In this file, I have found above that claimant has not sustained a permanent impairment to her lower extremity and therefore is not entitled to any additional permanency benefits regarding this injury at this time.

The parties also identified as an issue, the assessment of costs, which is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. I conclude that claimant was not successful in this claim and therefore exercise my discretion and order that each party shall pay their own costs.

The primary disputed issue in File No. 5053533 is whether claimant sustained an injury that arose out of and in the course of her employment with the defendant employer on April 10, 2015.

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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

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

When an expert opinion is based upon an incomplete history, the opinion is not necessarily binding upon the commissioner. The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence, together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire & Casualty Co., 526 N.W.2d 845 (Iowa 1995).

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).

I have found above that claimant has failed to carry her burden of proof that she sustained an injury arising out of and in the course of her employment with the defendant employer on April 10, 2015 for the reasons there stated. Therefore, the remaining issues are moot.

ORDER

IT IS THEREFORE ORDERED:

Concerning File No. 5053532, claimant shall take nothing further.

Concerning File No. 5053533, claimant shall take nothing.

Each party shall pay their own costs in both files.

Defendants shall file any subsequent reports of injury (SROI) that may be required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 10th day of February, 2017.

TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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TJG/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.