BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JANET CRAIG, Claimant, vs. NESTLE PURINA PETCARE, Employer, and INDEMNITY INSURANCE CO. OF NORTH AMERICA, Insurance Carrier, Defendants.	:	File No. 5042182.01 ARBITRATION DECISION Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Janet Craig, filed a petition for arbitration seeking workers' compensation benefits against Nestle Purina Petcare, employer, and Indemnity Insurance Company of North America, insurer, both as defendants.

In accordance with agency scheduling procedures and pursuant to the Order of the Commissioner in the matter of the Coronavirus/COVID-19 Impact on Hearings, the hearing was held on September 9, 2021, via Court Call, and considered fully submitted on the same.

The record consists of Joint Exhibits 1-8 and Defendants Exhibits A-C and the testimony of claimant.

ISSUES

1. The extent of permanent disability, if any;

2. Costs.

STIPULATIONS

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The parties stipulate claimant sustained an injury on December 27, 2007 which arose out of and in course of her employment. They further agree that the injury was the cause of temporary and permanent disability. Claimant seeks no recovery for temporary benefits.

Parties agree the claimant sustained a permanent disability that was industrial in nature and that the commencement date for permanent partial disability benefits is May 11, 2019.

At the time of the injury, claimant's gross earnings were $808.85 per week. She was married and entitled to two exemptions. Based on the foregoing the parties believe the weekly benefit rate to be $519.21.

There are no medical benefits in dispute. Defendants waive all affirmative defenses. There are no credits sought.

FINDINGS OF FACT

Claimant was a 67-year-old person at the time of the hearing. Her past medical history includes a thyroid condition, broken right toe, shoulder pain, reflux problem, cataract removal, tendinitis, burning feeling in the feet, headaches and dizziness, and the removal of a lump in the right breast. (DE B:8)

Claimant retired from employment with defendant employer on May 1, 2019. Shortly after she and her husband moved to Texas in September of 2019 where she has family. She began receiving Social Security benefits in May 2020. (DE B:10)

Claimant completed high school in 1972 and later obtained a degree from community college in 1990 and a business administration degree from Iowa State University in 1993. She has also received some specialized training in payroll, taxes, purchasing orders, and tracking of maintenance and inventory. (DE B:4)

Her work history includes positions as a secretary, bookkeeper, sales clerk, office assistant in a retail setting, computer security monitor, receiving and sales clerk, office manager and purchasing agent. (DE B:6)

She began work for the defendant employer, the producer of cat and dog food packaged in a 5 ounce can, in 1993 as an administrative assistant. She answered the phone, planned trips for the managers, assisted in letter writing for plant managers, and learned everyone's job so she could fill in for them. After two years as an administrative assistant, she then moved into the accounts payable department. While in that department, she reviewed the billing process and was able to save the company $110,303.00. (JE 2:3)

When her position was eliminated, she transferred to the maintenance department where she served as a parts clerk. As part of her duties, she would need to lift parts that weighed approximately 20-50 pounds. She testified she would need to lift over her head frequently. Her job description limited the carrying to 20 pounds and pushing and pulling to 50 pounds. (JE 1)

She regularly received reviews or even award bonuses for exemplary work. (JE 2:4-6)

In late December 2007, claimant reported an injury to her right elbow. She consulted with Ze-Hui Han, M.D., who went on to recommend surgery. She underwent debridement of the right lateral wrist epicondylitis. (JE 3:7) She was released from his care on June 29, 2009, without work restrictions. (JE 3:9) Dr. Han assessed a 3 percent impairment to the right upper extremity. (JE 3:10)

She developed shoulder pain and Dr. Han suggested claimant seek out another physician. (JE 3:9)

On or about July 18, 2012, claimant was seen by Phuong D. Nguyen, M.D., for right elbow pain which she said she suffered from on and off for approximately five years. (JE 4:12) During the examination she had palpable tenderness present along the upper trapezius muscle with normal range of motion. (JE 4:13) Her neck range of motion was also normal but with forced lateral neck flexion there was tightness and pain of the right trapezius muscle. (JE 4:13) She was slightly tender on palpation of the lateral elbow slightly proximal to the lateral epicondyle at the location of the extensor carpi radialis longus muscle. Resisted wrist extension and resisted supination did not cause pain and she had good grip strength bilaterally. Her medial elbow was normal, and her elbow range of motion was normal except with pain on lateral elbow at the end of flexion. (JE 4:13)

Dr. Nguyen noted that the work activities had aggravated an underlying, pre-existing condition and prescribed PT and nortriptyline and Voltaren gel. (JE 4:14)

On August 28, 2012, she was seen again for the elbow and shoulder. (JE 4:17) Both areas of complaint were improving, and she rated both one on a ten scale. (JE 4:17) She had palpable tenderness along the upper trapezius muscle with normal range of motion. Forced lateral neck flexion caused tightness and pain in the right trapezius muscle. There was slight tenderness on palpation at the lateral elbow, good grip strength, resisted wrist extension and resisted supination did not cause pain, but there was pain on the lateral elbow at the end of flexion. (JE 4:18) The plan was to continue claimant's physical therapy. (JE 4:18)

On October 15, 2012, Emile C. Li, M.D., saw claimant for impingement of the right shoulder. (JE 6:38) He provided her with a home exercise regimen and if symptoms persisted, he could perform a subacromial injection. (JE 6:38)

Claimant returned for the subacromial injection on October 27, 2014. (JE 6:40)

On December 10, 2013, claimant underwent an independent medical examination with Mark Taylor, M.D. (JE 5) Dr. Taylor concluded It was more likely than not the right lateral epicondylitis developed as a result of her use of a scanner over a two-week period of time at work. The symptoms occurred within a day or two of initiating those tasks and there were no other changes in her work or home environments. (JE 5:32) As a part of the treatment process, she attended physical therapy and noted the onset of right shoulder pain as well as pain in the upper trapezius. Her pain levels were minimal, but symptomatology increased with work activities particularly use of the numeric keyboard and overhead reaching tasks. (JE 5:32) He found claimant to be at maximum medical improvement for the elbow and that her prognosis for return to unrestricted

work for her right elbow was excellent. As for her shoulder, he felt that her prognosis was unclear and that she needed further testing. (JE 5:32-33)

Dr. Taylor assigned a 3 percent right upper extremity impairment rating regarding the right elbow lateral epicondylitis and recommended no lifting greater than 20 pounds above shoulder level and no repetitive overhead tasks. (JE 5:35)

On February 5, 2015, claimant underwent an MRI of the left shoulder which showed degenerative changes in the acromioclavicular joint, rotator cuff tendinosis/tendinopathy and a small bursal effusion but not a full-thickness rotator cuff tear. (JE 7:74)

On September 9, 2016, Dr. Li replied to an inquiry from the third-party administrator of the defendant insurer and wrote, "I appreciate the approval of 12 physical therapy visits for Janet. I do feel that her right shoulder is a case of rotator cuff tendinitis related to her work injury. As you know tendinitis can have a waxing and waning course and it is possible that an individual would not seek active treatment in a period of a year or year and a half." (JE 6:44)

Claimant saw Dr. Li again for right shoulder pain on October 7, 2016, and the medical records document that Dr. Li recommended claimant to undergo a right shoulder diagnostic glenohumeral arthroscopy to see if there was a tear. (JE 6:46) He planned to do a biceps tenodesis and arthroscopic subacromial decompression on the right shoulder. (JE 6:46) He also informed claimant that the base of the neck pain was a separate issue from the shoulder. (JE 6:46)

Claimant went for a consult with the Mayo Clinic for her headaches and neck pain. (JE 8:75) The history states "Additionally, since last April, she has had the onset of daily headaches that involve a band-like distribution of pain the entire way around the head. This is present early in the morning and gets worse throughout the day. Over the time period since April, her symptoms are also quite progressive. Pain essentially ranges from 3 to 10 out of 10. She feels her headache/head pain is worse than the neck pain. It can be associated with ringing in the ears and imbalance as well." (JE 8:75) Brian E. Grogg, M.D. did not see any structural issues and believed that the pain was myofascial in nature. He recommended she be seen in the Headache Clinic and consider a higher dose of Botox injections. (JE 8:77) In February she was seen again by Dr. Grogg for the headaches. (JE 8:78) She stated that she did not know the cause but admitted to significant workplace stress. (JE 8:78) Dr. Grogg had difficulty finding an explanation for all symptoms and recommended a brain MRI and to follow up with her local neurologist. (JE 8:79) The MRI of the brain was negative, and she was referred back to her local physicians for pain management strategies. (JE 8:81)

She returned to Dr. Li on April 7, 2017, for another impingement test. (JE 6:48) He placed her on work restrictions of no lifting over 15 pounds with the right arm. (JE 6:50) Claimant did not want to proceed with surgery which Dr. Li conveyed via letter to the defendant employer. (JE 6:51) Part of the problem for claimant was the lengthy recovery of approximately six months. Claimant worried that her work would suffer due to her absence.

On August 24, 2018, claimant decided to undergo surgery which was performed on October 18, 2018. (JE 6:56) On November 16, 2018, claimant was seen in follow up and reported minimal pain of 2 on a 10 scale. (JE 6:59) Dr. Li recommended physical therapy and the return to work with no use of the right arm. (JE 6:60) During the December 14, 2018, visit, she described her pain as varying from 2/10 to 8/10. (JE 6:61) Dr. Li prescribed more physical therapy and added home exercises. (JE 6:62) By March 8, 2019, claimant had progressed to the point of minimal to no pain. (JE 6:67)

Dr. Li placed claimant at MMI on May 10 2019. (JE 6:71) Claimant had minimal pain which she rated 2 on a 10 scale. (JE 6:70) On July 17 2019, Dr. Li reported releasing the claimant to full duty without restrictions and assigned a 7 percent upper extremity impairment rating. (JE 6:73) Since her release, claimant has not received any medical treatment for her work injury however she has been to a few wellness visits and prescription medication management for her thyroid condition and reflux condition.

Claimant retired on May 1, 2019. She testified at hearing that physically and mentally she could no longer manage the work. She was frustrated with the lack of support from the company in terms of additional hires as well as being physically worn out by the end of the workday.

For her physical condition, she continues to have pain in her right shoulder and right arm. She takes over-the-counter medication and gives self-massage. She did do some home exercises but after she added resistance at her doctor's recommendation, her shoulders began to hurt, and she opted to refrain from those exercises.

Current limitations include the inability to pick up heavy things, playing games with her grandchildren, overhead reaching. She self-limits her use of the shoulder, picks her grandchildren up with the left arm, avoids overhead activities.

She developed soreness and pain packing for the move to Texas. She also has a ruptured disc and two slipped vertebrae in her back. She testified that she is concerned that there is something wrong with her shoulder but has not been able to pursue medical treatment as a result of reduced medical availability due to Covid.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3).

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).

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 Ry. Co. of Iowa, 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 terms of percentages of the total physical and mental ability of a normal man."

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

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

Claimant's initial injury to the right wrist resulted in a 3% impairment rating from Dr. Han and a release to work without restrictions. She was then diagnosed with right elbow lateral epicondylitis by Dr. Taylor who assigned a 3% upper extremity impairment rating with restrictions of no lifting greater than 20 pounds above the shoulder and no repetitive overhead tasks.

In 2015, claimant began experiencing an increase in right shoulder and neck pain. She sought out care with Dr. Li who opined the shoulder issues were an exacerbation of her pre-existing condition due to claimant's work. He placed claimant at MMI on May 10, 2019. At that time, claimant had minimal pain of 2 on a 10 scale. Dr. Li assessed a 7 percent upper extremity impairment rating.

Claimant has not seen any additional medical providers since her release by Dr Li in part due to the pandemic.

Claimant is an older worker. She retired voluntarily on May 1, 2019. She testified that both physically and mentally she could no longer do the work. She also testified that she had been promised office aid but that defendants did not follow through.

Following her retirement, claimant moved to Texas with her husband. She remains retired and has not looked for work. Her educational background consists of a community college degree and a business administration degree from Iowa State University obtained in 1993. She has had some specialized training in payroll and purchasing orders processes and tracking of maintenance and inventory. In the relevant past, she has worked as a shipping and receiving clerk but testified that she had trained to do every job in her plant to help fill in for absent workers.

She was not motivated to continue working, although she was well within her rights to retire. She testified that retirement was in part due to her physical status but also because of work stress and lack of help, two issues that while work related were not part of her injury.

Based on the foregoing, it is found claimant has sustained a 15 percent industrial loss due to the work restrictions of no lifting greater than 20 pounds over the shoulder, no repetitive overhead tasks, impairment ratings of 3 percent for the wrist, 3 percent for the elbow and 7 percent for the right shoulder, and ongoing pain of 2 on a 10 scale.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant seventy-five (75) weeks of permanent partial disability benefits at the rate of five hundred nineteen and 21/100 dollars ($519.21) per week from May 11, 2019.

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

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

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

That defendant shall pay the costs of this matter pursuant to rule 876 IAC 4.33.

Signed and filed this ____12th____ day of November, 2021.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Janece Valentine (via WCES)

Timothy Wegman (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.