BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
JAN 02 2019
WORKERS COMPENSATION

SAMANTHA OLSEN, Claimant, vs. DFS, INC., Employer, and NATIONWIDE INSURANCE COMPANY, Insurance Carrier, Defendants.	File Nos. 5066025, 5066026 ARBITRATION DECISION Head Note Nos.: 1100, 1801, 1803

STATEMENT OF THE CASE

Samantha Olsen, claimant, filed petitions in arbitration seeking workers' compensation benefits from DFS, Inc., the employer, and Nationwide Insurance Company, the workers' compensation insurance carrier.

The matter proceeded to hearing on May 7, 2018. Following an extension, the parties submitted post-hearing briefs on or about June 25, 2018, and the matter was considered fully submitted at that time.

The evidentiary record includes: Joint Exhibits JE1 through JE9; Claimant's Exhibits 1 through 9; and Defendants' Exhibits A through F. At hearing, claimant provided testimony.

The parties filed separate hearing reports for each file, at the commencement of the arbitration hearing. On the hearing reports, 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.

ISSUES

File No. 5066025:

1. Whether claimant sustained an injury to her neck on or about May 12, 2016, arising out of and in the course of her employment with defendant employer.

2. Extent of temporary benefits, if any, concerning the neck.

3. Extent of permanent partial disability benefits, if any, concerning the neck and the commencement date of said benefits.

4. Medical and mileage reimbursement, Exhibits 5 and 7.

5. Reimbursement of independent medical evaluation (IME) expense, Iowa Code section 85.39, Exhibit 1, page 24.

6. Alternate medical care, Iowa Code section 85.27.

File No. 5066026:

1. Whether claimant sustained an injury to her low back that arose out of and in the course of her employment on July 31, 2016.

2. Extent of temporary benefits, if any. Claimant asserts entitlement to temporary benefits from August 1, 2016 through July 17, 2017.

3. Extent of permanent partial disability benefits, if any, and the appropriate commencement date of said benefits.

4. Medical and mileage reimbursement, Exhibits 5 and 7.

5. Reimbursement of IME expense, Iowa Code section 85.39, Exhibit 1, page 24.

6. Alternate medical care, Iowa Code section 85.27.

FINDINGS OF FACT

After a review of the evidence presented, I find as follows:

In File No. 5066025, the parties stipulate that claimant sustained a cumulative injury that arose out of and in the course of employment on May 12, 2016 concerning her left elbow. However, claimant also asserts that the injury involved her neck, which is denied by defendants. The parties stipulate that the appropriate maximum medical

improvement (MMI) date for the left arm only, is August 4, 2016. (Exhibit JE1, page 30; Ex. 1, p. 19)

In File No. 5066026, claimant asserts that she sustained a cumulative injury to her low back that arose out of and in the course of her employment on July 31, 2016. Defendants deny the claim.

Claimant seeks payment of medical expenses in both files. Exhibit 5 in claimant's exhibits is a summary of medical expenses paid by Amerigroup Iowa, Inc., which does not identify which part of the body is associated with individual payments. However, the parties stipulated and requested at hearing that if defendants are found liable for either the neck or the low back, that the undersigned should simply order medical bills to be paid by defendants for the compensable body part and the parties will sort out which bills are associated with that particular part of the body. If such an order is made, the undersigned will do the same for the mileage contained in Exhibit 7.

Background

At the time of the hearing, claimant was 42 years old. (Transcript, p. 14) She graduated from high school and took courses at two different community colleges over a period of years. Her last college course was in 2005. She took classes in the areas of legal administration and office work. She did not obtain a degree or certificate. (Ex. 3, p. 2)

Claimant's work history is long and varied, including about 18 different employers before she began in 2012 working for DFS, Inc., the defendant employer. Prior to working for the defendant employer, claimant worked: in fast food; at a grocery store; as a waitress and bartender; in factories on assembly lines; in customer service and sales; as a house cleaner; as a security guard; at a medical center involving health information/medical records; and, as an office manager for a pallet company. (Ex. 3, pp. 3-5) It appears that claimant most frequently held jobs in the area of sales and customer service. Claimant testified that she is comfortable working with Microsoft Office programs such as Word, Excel, and PowerPoint. (Tr. p. 110)

Claimant was hired in August 2012 at DFS, Inc., as a labtech/scale operator. She also worked in the retention lab. (Tr. pp. 17, 20) She was terminated from her employment in August 2016, for insubordination. Claimant was denied unemployment benefits following her application and appeal. (Tr. pp. 67, 69, 124)

After being terminated, claimant held other jobs including seasonal farming work operating a grain cart and a tractor. (Tr. pp. 79-81) She also cleaned houses on a part-time basis for a couple of months. Claimant described it as "light house cleaning." (Tr. p. 82)

Pre-injury Medical Treatment

In September 2006, claimant was involved in a motor vehicle accident (MVA). (Ex. JE1, p. 1; Tr. pp. 48-49) She had a thoracic spine strain and was referred to physical therapy and given Naprosyn and Trazodone for pain. (Ex. JE1, p. 1) On January 12, 2007, claimant was noted to have slow improvement following the MVA and reported some flare up pain in the back of her neck. Her assessment at that time was a neck sprain with some irritation at the T1 region. (Id.) On March 17, 2007, claimant underwent a cervical spine MRI, which indicated that she had "[m]ild central disc bulge C4-5 without evidence of neural sequela." (Ex. JE2, p. 1)

On or about May 1, 2009, claimant was seen at Kueny Chiropractic complaining of right-sided low back pain and tenderness. (Ex. JE3, p. 1) She continued to receive care for low back and neck complaints. (Ex. JE3, pp. 2-4, 8-13, 15-17) On October 26, 2009, claimant was seen at Kueny Chiropractic with complaints of neck pain and her arms falling asleep. (Ex. JE3, pp. 5-7)

On July 26, 2010, claimant reported being a victim of domestic abuse assault on or about July 23, 2010, which prompted her to seek care at Kueny Chiropractic. (Ex. JE3, p. 18) She described neck pain and reduced cervical rotation. (Ex. JE3, p. 19)

On August 10, 2010, claimant reported low back pain following a slip and fall. (Ex. JE3, p. 24) Although she reported some improvement in her neck pain, it was initially better, but about a week later on August 16, 2010, she reported that her neck was really aching. (Ex. JE3, p. 25)

On May 18, 2015, claimant was seen by her primary care physician, Bernadette Gyano, M.D. and complained of back pain that started a few weeks prior with no known injuries. (Ex. JE4, p. 1) She returned to her family physician on August 1, 2015 and again complained of back pain in the sacral area that she related to constipation. She again denied any back injury. (Ex. JE4, p. 6) There were no sciatica symptoms associated with her back pain at that time.

On or about August 10, 2015, claimant reported a variety of complaints. (Ex. JE1, p. 3) She was assessed with, among other things, low back pain without sciatica, and unspecified back pain laterally. (Ex. JE1, pp. 4-5)

The Alleged Injuries

In File No. 5066025, the parties agree that claimant sustained a cumulative injury to her left elbow arising out of and in the course of her employment with DFS, Inc., on May 12, 2016. Claimant asserts an additional injury to her neck on the same date, which defendants deny.

In File No. 5066026, claimant asserts a cumulative low back injury that arose out of and in the course of her employment on July 31, 2016, which defendants deny.

Claimant's job as a Scale Operator/Lab Assistant for the defendant employer involved constant standing and walking, and handling/fingering, occasional sitting, squatting/kneeling, lifting and carrying, and pushing and pulling. (Ex. 4, p. 2) Claimant described the job as requiring handling 40 gallon totes and may require pushing up to 100 pounds. (Tr. p. 38) She described some of the totes weighing 30 pounds and others up to 50 pounds. She also described the job to medical providers as "heavy physical labor." (Tr. pp. 119-120)

In opposition to claimant's testimony, Andrea Vanderhoff, stated that before she became the safety and training specialist for the defendant employer, she worked in the same job held by claimant and worked with claimant for about 15 months in that job. (Tr. pp. 144-145) She stated that the totes used were 16 and 18 gallon totes, not 40 gallon totes. (Tr. p. 146) Ms. Vanderhoff actually weighed the totes with the product and found that they ranged from 16 to 18 pounds, with one tote at the end of the shift that held accumulated waste material, weighing "maybe 30 pounds." (Tr. pp. 146-147) Ms. Vanderhoff also testified that the particle testing claimant performed involved stacks of pans or trays weighing less than 10 pounds total. Ms. Vanderhoff described the job that claimant performed as being a position that was utilized to accommodate employees on light duty and that the job was not at all a heavy, physical job. (Tr. p. 157)

In view of the fact that Ms. Vanderhoff actually weighed the totes and claimant did not, I accept Ms. Vanderhoff's testimony as more persuasive concerning the weight of the totes and pans/trays.

Post-Injury Medical Treatment

Claimant was seen by David R. Archer, M.D. on May 17, 2016 concerning left arm pain, which was "suggestive of lateral epicondylitis." (Ex. JE1, p. 6) Dr. Archer stated that based on the mechanism of injury, which was understood to be an RSI (repetitive strain injury) from working as a lab tech, that "this is a work related injury." (Id.) Claimant had been working for DFS, Inc. for about four years in the position of Scale Operator/Lab Assistant since being hired. (Id.)

Claimant continued to treat with Dr. Archer and was returned to light duty work and prescribed physical therapy/occupational therapy. (Ex. JE1, p. 10)

On July 11, 2016, claimant reported left elbow pain and "nonphysiologic sx [symptoms] radiating into her index finger as well as vague pain in the entire right arm as well." (Ex. JE1, p. 16) Claimant was referred to Seth W. Harrer, M.D. (Ex. JE1, p. 18)

On or about July 21, 2016, claimant described pain spreading to her entire left arm and also generalized pain in her right arm. (Ex. JE1, p. 24) Dr. Archer obtained an MRI of claimant's cervical spine, which showed a "[s]mall broad-based midline disc protrusion at C4-C5 causing mild central spinal stenosis as outlined above;" and, a very small disc bulge "at C5-C6 causing mild central spinal stenosis, moderate to severe right exiting C6 nerve compromise and only mild such changes involving the left exiting C6 nerve root." (Ex. JE1, p. 25)

Dr. Archer recommended claimant do physical therapy and specifically, the "McKenzie Neck Program." (Ex. JE1, p. 27) He stated that "[b]ased on the description of the mechanism of injury, this is probably a work related aggravation, altho [*sic*] the cervical degenerative disease is a pre-existing condition that probably dates back to 2 episodes of whiplash type injury that she described to me, one episode of MVA and another of domestic abuse." (Ex. JE1, pp. 25, 26) This statement is not altogether clear. Dr. Archer describes both the left arm and cervical spine as being pre-existing conditions, but only clearly identifies the left arm as work related.

On July 28, 2016, Dr. Archer clarified his causation opinion and stated that based on the mechanism of injury, he "could perhaps explain the lateral epicondylitis as being r/t [related to] her work activity but her cervical disc findings and anxiety sx are not work related." (Ex. JE1, p. 29)

On or about July 29, 2016, claimant underwent EMG testing for her left ulnar nerve, which was negative, with no abnormalities. (Ex. JE6, p. 1; Ex. JE5, p. 9)

On August 4, 2016, Dr. Archer further stated concerning causation that the medical studies claimant had undergone did not reveal any pathology beyond the lateral epicondylitis. Dr. Archer stated "[b]ased on the description of the mechanism of injury, this lateral epicondylitis was initially a work related injury. I have no explanation for her other sx [symptoms], which have apparently remitted." (Ex. JE1, p. 30) She was returned to work, full-duty and placed at MMI for the left lateral epicondylitis. (Id.) Dr. Archer explained to claimant that he was unable to determine the cause of her symptoms and he supported a second opinion with Dr. Harrer to see if there was something he missed. (Id.)

On August 8, 2016, claimant was seen by Dr. Harrer for evaluation of her left elbow, hand pain and follow-up of her EMG testing. Dr. Harrer stated that claimant was "having resolution of her symptoms" and that they were "resolved." (Ex. JE5, p. 4) He advised claimant that an EMG may not identify radial tunnel syndrome, and that if this becomes problematic again that he would recommend a diagnostic injection. (Id.) She was to return to see Dr. Harrer on an as needed basis.

On September 7, 2016, claimant returned to Dr. Harrer who stated that at the August 8, 2016 visit, claimant "was not having any issues at that time" but, after shucking corn, she had some pain. (Ex. JE5, p. 5) She was diagnosed with left upper

extremity pain and likely aggravation of radial tunnel syndrome. (Id.) Claimant wanted another opinion, which Dr. Harrer thought would be reasonable. He also noted that she had significant back and neck issues that were being worked up by a different physician. (Id.) She was to return on an as needed basis.

On September 20, 2016, claimant was seen by her primary care physician, Dr. Gyano, and described back pain that started a few weeks earlier. She had no numbness or weakness in her legs but did have pain down both legs. (Ex. JE4, p. 19) A lumbar MRI was recommended. (Id.)

On September 22, 2016, a lumbar MRI was obtained and revealed an L5-S1 broad-based right paracentral and foraminal disc protrusion slightly posteriorly displacing the descending right S1 nerve root and mild bilateral foraminal stenosis at L5-S1 and on the left at L4-5.

On October 10, 2016, claimant was seen by Sarah Stamm, PA-C, of Nebraska Spine and Pain Center on a referral from Dr. Gyano. (Ex. JE8, p. 2) Claimant described low back and leg pain, which Ms. Stamm stated was not related to the cervical spine. She recommended bilateral lower extremity EMG/NCV testing.

On October 18, 2016, Dr. Harrer responded to questions concerning causation and the left arm injury of May 12, 2016. He stated regarding the May 12, 2016 work injury that "[s]he likely had an exacerbation of an underlying condition or created a radial tunnel syndrome." (Ex. JE5, p. 7) Dr. Harrer was asked whether the injury was temporary or permanent and stated: "this could be a possible problem in the future. However, at this time she is having no other issues and she was having no impairment at that visit." (Id.)

I find that Dr. Harrer's statement that the claimant's injury "could be a possible problem in the future" (emphasis added) does not indicate that it is probable, or more likely than not, that the injury resulted in permanent impairment.

On November 30, 2016, claimant had bilateral lower extremity EMG/NCV testing, which was abnormal and suggestive of, but not conclusive for, a mild chronic right S1 radiculopathy without active or ongoing denervation; and, it also revealed abnormal left peroneal motor nerve conduction. (Ex. JE8, p. 9)

Claimant was seen by John McClellan, M.D. of Nebraska Spine & Pain Center and was diagnosed with: lumbago; lumbosacral disc degeneration; bilateral leg pain, right greater than left; right S1 radiculopathy with ongoing denervation; and retrolisthesis L5/S1 Grade 1. (Ex. JE8, p. 15) Dr. McClellan recommended that if her symptoms persist that she undergo L5-S1 decompression and fusion surgery.

On January 18, 2017, claimant returned to see Dr. Harrer, who stated that he was unable to determine the cause of claimant's continued upper extremity pain. He

recommended another opinion, "possibly with the same caregiver who is providing care for her low back . . . Dr. McCullen [*sic*]" to evaluate her cervical issues, which were "so very minimal" at that time. (Ex. JE5, p. 11)

Claimant was seen by Dr. McClellan, who stated that her bilateral leg EMG test showed right S1 radiculopathy and questionable left L5 radiculopathy. This, along with claimant's minimal improvement, led to Dr. McClellan's recommendation for L5-S1 decompression and fusion surgery. (Ex. JE8, pp. 19, 24)

On February 15, 2017, Dr. McClellan noted that "W/C is still evaluating the cervical injury. That includes the arm pain. There is central cervical stenosis. In the future she may benefit from TDR [total disc replacement] versus acdf [anterior cervical disc fusion];" and that "[f]urther evaluation [would be needed] before surgical determination [is] made." (Ex. JE8, p. 19)

Dr. McClellan was apparently never asked or at least he never offered an opinion concerning whether the neck or low back conditions were caused or aggravated by claimant's work.

On April 10, 2017, claimant was seen for an IME with Trevor Schmitz, M.D. of Iowa Ortho, at defendants' request. (Ex. E) Dr. Schmitz reviewed claimant's medical history beginning with records from May 17, 2016. (Ex. E, p. 38) Dr. Schmitz noted claimant's current condition and conducted a physical examination. Dr. Schmitz opined that although claimant has "a diagnosis of cervical disk degeneration" from the imaging she presented clinically "with left lateral epicondylitis, as well as possibly left carpal tunnel syndrome." (Ex. E, p. 45) Dr. Schmitz also stated that claimant has a diagnosis of "lumbar disk degeneration and spondylotic changes on imaging," but that she presents with "findings more consistent with a lower extremity peripheral neuropathy." (Id.) Dr. Schmitz opined that claimant's left lateral epicondylitis was related to her work. (Ex. E, pp. 46) This causation conclusion is based on "continuous and repetitive motion, primarily of taking the lids off of sample cups," which could cause or aggravate a lateral epicondylitis. (Id.) Dr. Schmitz could not causally relate any cervical degenerative changes or the low back condition to claimant's work. (Id.) Dr. Schmitz noted that claimant said concerning the low back condition that "this was not a work related injury which was documented by Breanna Hoffer on September 22, 2016 and by Sarah Stamm on October 10, 2016." (Id.)

In his report, Dr. Schmitz seemed unaware of the prior MVA or domestic abuse and related complaints of neck and back pain. This is not fatal to Dr. Schmitz's opinion, because if anything, knowledge of the prior complaints would likely provide more support for his conclusion rather than cut against it.

Dr. Schmitz opined that claimant reached MMI for the low back complaints, although he does not identify a specific date of MMI. Concerning the May 12, 2016 injury, he assigned MMI as of "June 14, 2016 as outlined by Dr. Archer. She was

released to full duty at that time and was essentially pain free." (Ex. E, p. 47) He opined that this was merely a temporary injury and that her subsequent symptoms were different from those she initially exhibited. (Id.)

On April 13, 2017, Dr. McClellan performed the L5-S1 decompression and fusion surgery. (Ex. JE9, p. 1)

On May 15, 2017, claimant was returned to work as tolerated with her reported pain of 0/10.

On June 8, 2017, Dr. Archer's office confirmed that the workers' compensation insurance carrier refused to authorize the recommended FCE and referral to Dr. McClellan. (Ex. JE1, p. 34)

On June 21, 2017, claimant returned to Dr. McClellan with constant throbbing leg pain and it was noted that she was "[n]ot able to return to work yet." (Ex. JE8, p. 41)

However, by July 17, 2017, claimant's pain was noted to be 0/10 and she had returned to work cleaning houses. Sarah Stamm, PA-C, stated that due to financial obligations patient may return to work as tolerated and she was to be allowed to change positions for comfort. (Ex. JE8, p. 52)

On December 11, 2017, claimant had a CT scan of her lumbar spine per Dr. McClellan. (Ex. JE8, p. 58) He stated that the fusion was well healed and "[r]eally looks good." (Ex. JE8, p. 60)

On January 18, 2018, Dr. Archer noted that claimant's complaints of left arm and neck pain, now include her right arm and the pain has persisted although she no longer works at DFS. Dr. Archer is critical of claimant alternately stating "that her work, which she had done w/o incident for about 4 years until May 2016, was the cause of her elbow pain and other c/o [complaints]," but then she "denies that the work was too hard." (Ex. JE1, p. 36) Claimant was upset that workers' compensation was not covering all of her complaints, but Dr. Archer explained that "her studies so far have failed to reveal any serious pathology beyond lateral epicondylitis, including a [*sic*] MRI of her neck and EMG study of her left arm." (Ex. JE1, p. 36)

On February 14, 2018, claimant was seen by Dr. McClellan, complaining of neck pain and bilateral arm pain with numbness and tingling. Dr. McClellan requested a cervical MRI, and suggested that a bilateral upper extremity EMG be considered depending upon the cervical MRI results.

On April 3, 2018, Dr. Archer authored a letter to defense counsel in response to a phone call and a letter. (Ex. F, p. 49) Dr. Archer appears to have retyped significant portions of the same letter he received from defense counsel setting forth his opinions, with some minor changes. (Ex. 9, pp. 1-2; Ex. F, p. 49) Dr. Archer stated that after providing initial care to claimant, she later returned to Dr. Archer with "non-physiologic

symptoms radiating into her left index finger and vague pain in her right arm for which we had no work related injury." (Id.) He advised that the referral for a cervical MRI and referral to Dr. Harrer "were not related to her lateral epicondylitis." (Id.) Dr. Archer agreed with Dr. Harrer that claimant's neck condition "is not related to her original work injury which involved left elbow pain," and she has no permanent impairment. (Id.)

On April 4, 2018, claimant was seen by Sunil Bansal, M.D. of the Iowa Injury Institute, at the request of claimant's counsel for the purpose of an IME. (Ex. 1) Dr. Bansal noted the prior MVA and domestic abuse injuries and he reviewed claimant's medical history, and discussed her current complaints and her job duties. (Ex. 1, pp. 12-14) Dr. Bansal opined after an examination concerning the neck and low back claims that claimant "aggravated her cervical and lumbar spondylosis from her cumulative work at DFS, including lifting, bending, and twisting." (Ex. 1, p. 19) He further stated that claimant has not yet had proper treatment for her neck and he agreed with Dr. McClellan that claimant would be a candidate for total disc replacement versus cervical fusion. (Ex. 1, p. 19; Ex. JE8, p. 19) However, I note that Dr. McClellan stated that further evaluation would be required before any surgical recommendations could be made. (Ex. JE8, p. 19) Dr. Bansal went on to assign 8 percent whole person impairment for the cervical condition based on Table 15-5 and placement in DRE Category II, from the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides); and, 20 percent whole person for the low back condition based on Table 15-3 and placement in DRE Category IV. (Ex. 1, p. 22)

Concerning the neck, Dr. Bansal stated that claimant should not lift over 30 pounds, 10 pounds overhead and no frequent overhead lifting. She should avoid repeated neck motion or holding her neck in a "posturally flexed position for any appreciable duration of time (greater than 15 minutes)." (Ex. 1, p. 23) Regarding the back condition, Dr. Bansal recommended restrictions "based on a myriad of factors, including her future propensity towards adjacent segment disease," and assigned restrictions of: no lifting over 30 pounds, no frequent lifting over 15 pounds; no frequent bending or twisting; and no standing or walking greater than 60 minutes. (Ex. 1, p. 23)

Dr. Bansal based his opinions, in part, upon his understanding of claimant's job duties. Dr. Bansal understood that the totes claimant handled weighed between 30 and 40 pounds and that she also had to move about 20 to 40 or more totes every day weighing between 20 and 40 pounds. (Ex. 1, pp. 14-16) However, Andrea Vanderhoff, the safety and training specialist for defendants testified that she weighed the totes in question as described above. She testified that claimant would likely need to move about three totes in the morning weighing between 16 and 18 pounds and then one tote at the end of the day weighing about 30 pounds. (Tr. pp. 145-147) Ms. Vanderhoff also testified that the job claimant was performing is actually a light duty job in the facility that is used to accommodate restrictions because of the light nature of the work involved. (Tr. p. 157) Ms. Vanderhoff further testified that the restrictions assigned by Dr. Bansal would not prevent claimant from working in her former position and that the only special accommodation would be eliminating lifting 10 pounds overhead. (Tr. p. 159)

Having accepted above the testimony of Ms. Vanderhoff as more persuasive, I find that Dr. Bansal relied upon incorrect information concerning claimant's job duties regarding the weight and frequency of lifting that claimant engaged in to perform her job.

Dr. Bansal did not assign any impairment or restrictions for the left arm injury.

Claimant reported back pain in May and August 2015, prior to the alleged dates of injury herein. (Ex. JE4, pp. 1, 6; Ex. JE1, pp. 3-5)

Claimant has been treated by Dr. Archer, Dr. Harrer, Sarah Stamm, PA-C, Dr. McClellan, and Dr. Gyano and evaluated by Dr. Schmitz and Dr. Bansal.

Claimant testified that Dr. Archer told her the cervical spine was aggravated by her work for the defendant employer. (Tr. p. 63) However, the records indicate that Dr. Archer does not believe the cervical spine to be work related. (Ex. F, p. 49) Dr. Harrer, Sarah Stamm, PA-C, and Dr. McClellan did not offer an opinion whether the neck or low back conditions were work related. Claimant testified that she was told by her primary care physician, Dr. Gyano, that the work she was doing for the defendant employer aggravated her back condition. (Tr. p. 77) That opinion is not included in the medical records. I rely more heavily on the records presented to ascertain the causation opinions of the physicians.

Dr. Schmitz, an orthopedic surgeon, opined only that the left lateral epicondylitis was related to her work, consistent with Dr. Archer's opinion. (Ex. E, p. 46) Dr. Schmitz did not find the cervical spine or low back condition to be work related.

Concerning the neck and low back claims, the records indicate that only Dr. Bansal has made a clear causal connection between the claimant's alleged work injuries and her neck and low back conditions. Also, Dr. Bansal is the only physician who has assigned any permanent restrictions or permanent impairment to the neck and back claims.

Claimant agreed that Dr. McClellan, the orthopedic surgeon who performed claimant's lumbar fusion, never stated that either her neck or low back conditions were related to her work for the defendant employer. (Tr. p. 122)

Claimant agreed that Dr. Bansal is the only physician that assigned permanent work restrictions. (Tr. p. 124)

Claimant's job description indicated that her job required constant standing, walking and handling/fingering and only occasional reaching, lifting, carrying, pushing and pulling. (Ex. 4, p. 2) Claimant testified that she believed the job required frequent or constant reaching out and above shoulder, climbing, crawling, squatting, kneeling and bending. (Tr. p. 46) I rely on the more persuasive testimony of Ms. Vanderhoff and the written job description.

Andrea Vanderhoff, safety and training specialist for defendant employer, testified that claimant never reported a low back injury while she was employed by the defendant employer.

Based on the weight of the evidence and considering the expert medical opinions, I find Dr. Bansal's opinion less persuasive than the combined opinions of Dr. Archer and Dr. Schmitz that the neck and back conditions are not causally related to claimant's employment with the defendant employer.

I note that Dr. Harrer also opined that claimant sustained a radial tunnel injury or aggravated that condition on May 12, 2016 with no mention of a cervical diagnosis related to the work injury. I also found above that he opined the condition was not permanent.

I also note that no physician has assigned any permanent impairment concerning claimant's stipulated left arm injury.

CONCLUSIONS OF LAW

I combine the first issues from both files concerning whether claimant carried her burden of proof that she sustained injuries to her neck and back that arose out of and in the course of her employment.

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, 379 N.W.2d 368 (Iowa 1985).

I have accepted above the opinions of Dr. Archer and Dr. Schmitz, which are arguably supported in part by Dr. Harrer that claimant's neck and low back condition are not causally related to claimant's employment. It is significant to the undersigned that of the myriad of physicians who have treated and evaluated claimant, only Dr. Bansal, claimant's IME physician, found a causal relationship. I have found above that Dr. Bansal's understanding of claimant's job duties were overstated concerning the weight and frequency of the lifting claimant had to do in her job.

I conclude that claimant has failed to carry her burden of proof that she sustained an injury to her neck or low back arising out of and in the course of her employment on May 12, 2016.

The next relevant issue is whether claimant is entitled to reimbursement of her independent medical examination (IME) with Dr. Bansal.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

On April 10, 2017, claimant was directed to Dr. Schmitz by defendants for the purpose of an IME. Dr. Schmitz authored a report setting forth his opinions that the neck and back claims were not related to claimant's work, which is understood by the undersigned to be equivalent to a zero percent rating.

In response thereto, on April 4, 2018, claimant was seen by Dr. Bansal at the request of claimant's counsel for an IME pursuant to Iowa Code section 85.39 regarding the neck and back claims.

I conclude that claimant is entitled to reimbursement of the reasonable expense of $3,380.00 covering both files and two dates of injury in response to Dr. Schmitz's IME report and in compliance with Iowa Code section 85.39.

The remaining issues raised are moot.

ORDER

IT IS THEREFORE ORDERED:

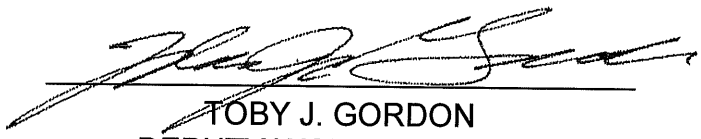
Defendants shall pay the cost of Dr. Bansal's IME in the sum of three thousand three hundred eighty and 00/100 dollars ($3,380.00).

Claimant shall take no additional benefits.

Each party shall pay their own costs.

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

Signed and filed this 2nd day of January, 2019.



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TJG/srs

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.