BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

GEORGE TYLER,	:	
	:	File Nos. 20010491.01
Claimant,	:	20010492.01
	:	
vs.	:	ARBITRATION DECISION
	:	
TYSON FRESH MEATS, INC.,	:	
	:	
Employer,	:	
Self-Insured,	:	Head Note Nos.: 1402.30, 1403.30,
Defendant.	:	2209, 2401, 2907

STATEMENT OF THE CASE

George Tyler, claimant, filed two petitions for arbitration against Tyson Fresh Meats, Inc., as the self-insured employer. File No. 2001049.01 asserts a traumatic injury occurred on September 10, 2018. File No. 20010492.01 asserts that claimant sustained a cumulative trauma injury on October 31, 2018. These files were consolidated for hearing and came before the undersigned for an arbitration hearing on July 27, 2021.

Pursuant to an order from the Iowa Workers' Compensation Commissioner, this case was heard via videoconference using CourtCall. All participants appeared remotely via CourtCall.

The parties filed a hearing report prior to the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 13, Claimant's Exhibits 1 through 14, as well as Defendant's Exhibits A through G. All exhibits were received without objection.

Claimant testified on his own behalf. Defendant called its nurse manager, Mary Jones, to testify. No other witnesses testified live at the hearing. The evidentiary record closed at the conclusion of the arbitration hearing.

However, counsel for the parties requested an opportunity to file post-hearing briefs. This request was granted and both parties filed briefs prior to the September 3, 2021 deadline established by the undersigned. The case was considered fully submitted to the undersigned on that date.

ISSUES

The parties submitted the following disputed issues for resolution in File No. 20010491.01 (9/10/18 Alleged Date of Injury):

1. Whether claimant sustained an injury, which arose out of and in the course of his employment on September 10, 2018.

2. Whether defendant proved claimant failed to give timely notice of the alleged injury, including an assertion that the discovery rule tolled any time for providing notice.

3. Whether defendant proved claimant's asserted claim is barred by the statute of limitations.

4. Whether the alleged injury caused a period of temporary disability entitling claimant to an award of temporary total disability, or healing period, benefits from September 10, 2018 through September 3, 2020.

5. Whether the work injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent disability benefits, including an assertion that claimant is permanently and totally disabled as a result of the alleged injury.

6. Whether claimant is an odd-lot employee as a result of the alleged injury.

7. The proper commencement date for permanent partial disability benefits.

8. Whether claimant is entitled to payment or reimbursement for past medical expenses.

9. Whether claimant is entitled to reimbursement of his independent medical evaluation fees.

10. Whether costs should be assessed against either party and, if so, in what amount.

In File No. 20010492.01 (10/31/18 Alleged Date of Injury), the parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury, which arose out of and in the course of his employment on October 31, 2018.

2. Whether defendant proved claimant failed to give timely notice of the alleged injury, including an assertion that the discovery rule tolled any time for providing notice.

3. Whether defendant proved claimant's asserted claim is barred by the statute of limitations.

4. Whether the alleged injury caused a period of temporary disability entitling claimant to an award of temporary total disability, or healing period, benefits from October 31, 2018 through September 3, 2020.

5. Whether the work injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent disability benefits, including an assertion that claimant is permanently and totally disabled as a result of the alleged injury.

6. Whether claimant is an odd-lot employee as a result of the alleged injury.

7. The proper commencement date for permanent partial disability benefits.

8. Whether claimant is entitled to payment or reimbursement for past medical expenses.

9. Whether claimant is entitled to reimbursement of his independent medical evaluation fees.

10. Whether costs should be assessed against either party and, if so, in what amount.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

George Tyler, claimant, is a 65-year old gentleman, who worked 25 years for the employer, Tyson Fresh Meats, Inc. (hereinafter "Tyson") in Waterloo before retiring on October 31, 2018. At the end of his career with Tyson, Mr. Tyler worked as a Waste Water Operator. He alleges that he slipped and fell while performing his work duties on September 10, 2018. As a result of that fall, he asserts that he sustained a low back injury.

Tyson denies that claimant sustained an injury on September 10, 2018. The employer points out that claimant often reported to the plant's medical center to report injuries and incidents. However, there is no documentation of a September 10, 2018 slip and fall within the plant's medical records for Mr. Tyler. (Joint Exhibit 1)

Mr. Tyler continued working full-duty after September 10, 2018. However, he asserts that his symptoms were continuous after September 10, 2018. By October 31, 2018, claimant testified that he realized he could not continue working as a Waste Water Operator and decided to retire from Tyson. Retirement documentation documents the retirement and inquires about the reason for retirement. However,

claimant included no mention of his injury or symptoms as reasons for his retirement on his written exit interview.

Claimant asserts he sustained a cumulative low back injury as a result of his work duties at Tyson, which included some heavy work duties. Claimant contends his retirement date, October 31, 2018, is an appropriate cumulative injury date. Tyson disputes whether claimant has proven a cumulative injury and whether October 31, 2018 is an appropriate legal cumulative injury date.

Mr. Tyler testified that he experienced numerous slip and falls while working at Tyson throughout his career. He also acknowledged numerous other injuries while working at Tyson, including hitting his head on pipes. His medical records from Tyson's on-site medical facility document numerous prior medical complaints and injuries. In fact, the parties introduced over 100 pages of medical records for claimant at its on-site clinic. (Joint Ex. 1)

Claimant's injury and treatment history at Tyson's clinic begins long before 2018. Low back complaints were documented by at least 2006 with a fall on snow. (Joint Ex. 1, p. 69) Those same records document various injuries and complaints from Mr. Tyler. Among the most significant and relevant to this case was a 2017 injury resulting in umbilical and inguinal hernias. Claimant required surgical intervention for those hernias, filed a workers' compensation claim, and ultimately settled that claim. Mr. Tyler testified that he had ongoing symptoms after the 2017 hernias in spite of surgical intervention and in spite of settling the claim. He testified that his symptoms after the hernias included symptoms into his back, groin, and thigh. In fact, he testified that his hernia symptoms continued through the date of his alleged September 10, 2018 incident.

On September 10, 2018, Mr. Tyler testified that he slipped and fell while working at Tyson. He also testified that he immediately reported the fall to his supervisor and that his supervisor took him to the on-site clinic. Tyson's nurse manager, Mary Jones, testified as to the business practices and procedures at Tyson's on-site health department. Specifically, Ms. Jones testified that a nurse's note should be entered into the health records any time someone comes to the nurse's office. Certainly, the voluminous prior entries contained in claimant's medical records at Tyson suggest that this is a regular business practice at this facility and that Mr. Tyler was not afraid, or reluctant, to report his work injuries. Yet, there is no documentation of claimant visiting the nurse at the on-site facility on September 10, 2018.

In his post-hearing brief, claimant points out that he reported the incident to his supervisor and that the employer could have called the supervisor to testify. Indeed, the supervisor did not testify in this proceeding and it could be inferred that the employer failed to call the supervisor because he would not support their defense, or would confirm that claimant reported an injury on September 10, 2018.

On the other hand, Ms. Jones testified that the employee completes a statement of injury when a work injury is reported to the on-site nurse. I note claimant's

experience with the workers' compensation system. Claimant should be aware that an injury report is filled out when an injury is reported. In fact, claimant had experience at Tyson completing such forms when he reported a work injury.

Claimant reported another work injury to the same nurse's station on September 24, 2018. Just as Ms. Jones testified would happen, a medical record was completed documenting the visit. On that date, claimant sustained burns to his left chest and neck. (Joint Ex. 1, pp. 92-93) Though he was just over two weeks removed from his fall on September 10, 2018 with purported ongoing and continuous symptoms from his low back injury, claimant reported no ongoing symptoms for his low back, left hip, or left thigh, when he reported his burn.

Certainly, the undersigned can understand why someone would focus on an acute injury, especially a burn, when being evaluated. Yet, claimant returned to the on-site medical facility for follow-up on his burn. Once again, there is no mention of his low back, hip, thigh, or similar symptoms when returning. At this evaluation, claimant's burn was resolving so that condition was not as acute or urgent. Claimant offers no explanation why he would report to the on-site facility a little more than two weeks after his fall and not report his ongoing and significant symptoms from that fall. Given his proclivity to seek care and report injuries to the on-site medical facility, I find it highly unlikely that claimant would not report his low back injury and symptoms two weeks after his fall if he had significant and ongoing symptoms since that fall.

Claimant continued to work full duty after the alleged September 10, 2018 low back injury until claimant retired from Tyson on October 31, 2018. His written retirement exit interview offers no explanation of injury or ongoing symptoms as the reason for his retirement. Instead, claimant's explanation for the reason he retired was, "retiring because I've worked 43 years 25 here at Tyson." (Defendant's Ex. F, p. 3) Though he had prior experience working light-duty with prior injuries, claimant sought no accommodations, no light duty, no change in his job duties, nor a different position to permit him to continue working at Tyson. Instead, Mr. Tyler continued working full-duty until his retirement and retired without mention of his September 10, 2018 injuries. Given his experience with the workers' compensation system and prior light duty stints, I find this to be curious if he had a serious injury with ongoing symptoms that were forcing him to retire.

Claimant offers the opinions of David H. Segal, M.D. to support his claim of a traumatic injury on September 10, 2018. Dr. Segal opines that claimant sustained a traumatic injury, which is causally related to his work activities on September 10, 2018. Of course, Dr. Segal's opinions are reliant upon the accuracy of the history relayed by claimant. He makes no mention of the fact that claimant did not discuss his purported ongoing and continuous back symptoms when he returned to the Tyson on-site clinic approximately two weeks after the injury.

Defendant produced the opinions of Charles D. Mooney, M.D., who challenges the claim of a September 10, 2018 work injury. Dr. Mooney notes that claimant did not mention the September 10, 2018 injuries or ongoing symptoms when evaluated two

weeks later at the Tyson medical clinic. Dr. Mooney also accurately notes that claimant did not seek medical care for his September 10, 2018 injuries and ongoing symptoms until April 2019. Dr. Mooney opines that he cannot temporally relate claimant's low back condition treated in and after April 2019 to an alleged fall at Tyson on September 10, 2018.

Ultimately, the September 10, 2018 injury claim requires a factual determination of whether the alleged fall occurred. While claimant presented as a pleasant witness, I find significant discrepancies with his testimony and other evidence. I did not find Mr. Tyler's testimony about the September 10, 2018 fall and resulting injury to be credible. The lack of a medical record for the purported injury, coupled with no mention of symptoms two weeks later at the Tyson clinic, as well as a six-month delay in seeking medical treatment simply contradicts claimant's testimony of a traumatic injury. Instead, I find that claimant failed to prove that he sustained a fall and low back injury on September 10, 2018.

However, this does not end the analysis in this case. Mr. Tyler also asserts a cumulative injury claim, asserting that his work duties over time caused or materially aggravated his low back condition causing a cumulative injury. Claimant asserts that his low back condition worsened over time with work and eventually resulted in him determining he could not continue working due to the symptoms. Claimant asserts he retired on October 31, 2018 as a result of the low back injury and symptoms.

Mr. Tyler again relies upon the medical opinions of Dr. Segal to support his cumulative trauma injury theory. Dr. Segal provides an extensive explanation and opines:

> The mechanism of injury to Mr. Tyler's joints involves the performance of repetitive and/or forceful tasks that may include tissue injury or compression and tissue reorganization. Continued exposure to the work-related musculoskeletal disorders initiates chronic inflammation and then to a chronic fibrotic state. Fibrotic changes within tissues may subsequently increase the susceptibility of those tissues to further injury with continued exposure, even to decreased levels of repetition and force. Once degradation of Mr. Tyler's synovial lining and osteophytes began in the facet joints and disc spaces, the repetitive motion and forceful maneuvers caused and sped up the arthritic changes.
>
> Therefore, when applying the legal and medical standards of causation to Mr. Tyler and his 25-year history of repeated heavy manual labor, within a reasonable degree of medical certainty, Mr. Tyler's work activities were a material factor causing Mr. Tyler's lumbar condition of cumulative work injury. Mr. Tyler's history and work activities more than meet the standards set forth for cumulative work injury causation as well as aggravation of preexisting conditions.

(Claimant's Ex. 12, pp. 172-173)

Defendant disputes whether claimant proved a cumulative injury as a result of his work duties. Tyson produced the medical opinions of Dr. Mooney to refute this claim. Dr. Mooney opines, "the medical literature does not support that 'cumulative trauma' (i.e., work activities) consistently cause degenerative disc or degenerative facet disease of the lumbar spine. It is my opinion that no dose response effect is supported in the medical literature and as such a causal relationship cannot be established." (Defendant's Ex. B, p. 3)

Dr. Mooney furthered his opinion asserting:

> It is my opinion that a causation analysis using Bradford Hill Causality Criteria including Temporality, Specificity and Strength of Association are unmet as it relates to "cumulative trauma' (i.e. work activities) and degenerative changes of the lumbar spine. Further, it is my opinion that any assumption of "cumulative trauma" causing degenerative conditions, specifically disregards known causal factors including aging and genetic influences.

(Defendant's Ex. B, p. 3)

It is a bit odd that claimant did not seek any medical care for his low back injuries and resulting symptoms before he retired. In fact, he did not even identify his low back injury or resulting symptoms as a reason for his retirement on the documentation he completed for Tyson. Yet, claimant's job duties were heavy and physically demanding at Tyson.

This agency has recognized and compensated cumulative injuries for quite some time. When I ponder Dr. Mooney's medical opinions, I find them to be inconsistent with the practice of this agency and contrary to long-standing legal practices in the state of Iowa. Dr. Mooney appears to reject any reasonable medical basis for a cumulative injury resulting in degenerative changes in the spine. He also appears to misunderstand, or not accept, that a compensable cumulative injury can occur through a material aggravation of an underlying condition that may be partially caused by other factors such as aging or genetic influences. Yet, it is well established in numerous cases before this agency that work activities can materially aggravate, or worsen, underlying personal health conditions. Dr. Mooney's opinions appear to contradict this and are found not credible or convincing.

Dr. Segal's opinions also have some weaknesses. Dr. Segal's opinions rely upon the subjective history reported by claimant, which was not found to be accurate at least with respect to the September 10, 2018 injury date. Nevertheless, Dr. Segal's explanation of how claimant's work duties caused material aggravation of his low back condition and ultimately a cumulative injury to his low back are the most credible and convincing medical opinion in this record. Therefore, I accept Dr. Segal's opinion and find that claimant proved he sustained a cumulative injury to his low back as a result of his work duties at Tyson.

I find that claimant was plainly aware of the ongoing and worsening symptoms and aware that the injury and symptoms were related to his employment by the time he retired, October 31, 2018. Claimant may not have yet understood his diagnosis of a low back condition or the specific cause of his symptoms, but he believed the injury and symptoms to be related to work and clearly knew the symptoms were present. Therefore, I find by October 31, 2018, claimant knew the nature and work-relatedness of his injury and symptoms.

Defendant contends that claimant failed to give timely notice of his cumulative injury. In this respect, I again note that claimant did not reference or mention his cumulative injury in his retirement documents. He did not request accommodation, light duty, or a change in his position with Tyson prior to retirement. Claimant provided no notice to the employer prior to his retirement that he believed he sustained a cumulative injury causing symptoms in his low back, hip, and left thigh.

Yet, claimant knew by October 31, 2018 that his injury and symptoms were serious enough that he could not continue working as a Waste Water Operator at Tyson. Claimant testified that he retired because of the ongoing and worsening symptoms resulting from his low back injury. Claimant's testimony is accepted that the reason he retired was because of these ongoing and worsening symptoms, even though he did not report them to the employer. Therefore, I find that by the date of his retirement, October 31, 2018, claimant knew or should have known that his injury and resulting symptoms were serious and were affecting his ability to work.

Despite this knowledge, claimant did not report his cumulative injury to the employer within 90 days of his retirement. Instead, claimant continued to experience symptoms and testified that the symptoms continued to worsen even after retirement. In April 2019, claimant sought medical treatment for these ongoing and worsening symptoms. Certainly, no later than April 2019, claimant knew or should have known that his injury and symptoms were causing significant and worsening symptoms that required medical attention. Claimant knew these symptoms caused him to retire and that they were not improving by April 2019. The passage of six months after his retirement with ongoing and worsening symptoms did or should have alerted claimant to the seriousness of his injury.

In spite of his knowledge that he had an injury and worsening symptoms that required him to retire and eventually seek medical care, claimant did not notify the employer of his injury within 90 days of either his October 31, 2018 retirement or within 90 days of receipt of medical care in April 2019. I find that the employer did not have actual knowledge of claimant's injuries within 90 days of either the retirement or the April 2019 medical care. Instead, claimant did not provide notice of potential injury to Tyson until October 2019.

CONCLUSIONS OF LAW

Mr. Tyler's initial claim is for a traumatic injury occurring on September 10, 2018. 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" refer 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).

In this case, I weighed the claimant's testimony, competing evidence, as well as the medical causation opinions of Drs. Segal and Mooney. Ultimately, I found that claimant failed to prove the alleged September 10, 2018 injury occurred. Claimant's testimony on the fall and subsequent events is rebutted and not confirmed by the lack of any medical evidence of his injury. Claimant was no stranger to the occupational health clinic at Tyson. He should have known that injury reports were completed because they had been done for his injuries in the past. Yet, there is no record or report of his injury in the voluminous medical records kept by the Tyson clinic for claimant noting a September 10, 2018 fall or injury. I simply found claimant's testimony not credible on the issue, when compared with competing evidence. Accordingly, I conclude that

claimant failed to carry his burden of proof to establish that he sustained an injury arising out of and in the course of his employment at Tyson on September 10, 2018. This conclusion renders all other disputed issues moot for the September 10, 2018 injury date.

Claimant also asserts a cumulative injury claim, asserting an injury date of October 31, 2018. October 31, 2018 represents claimant's date of retirement. While disputing whether claimant proved a cumulative work injury, defendant contends claimant's symptoms existed long before October 31, 2018 and that any cumulative injury date should be found long before October 31, 2018.

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).

Having considered claimant's testimony and competing medical evidence on the issue of a cumulative injury, I found the opinions of Dr. Mooney inconsistent with existing and long-standing Iowa law. Dr. Mooney essentially opines that a cumulative

back degenerative claim is not medically supportable. Dr. Mooney also appears to either ignore or reject the premise that work activities can materially aggravate an injury that may be at least partially caused by other factors, even personal factors. However, this agency has long found such claims compensable. Therefore, I rejected Dr. Mooney's causation opinions pertaining to the cumulative trauma injury claim.

Claimant put forth the medical opinion of Dr. Segal in support of his cumulative injury claim. Dr. Segal's opinion has some concerning issues as well. First, his opinion pertaining to the cumulative injury assumes the September 10, 2018 injury occurred. Having found that injury was not proven to have occurred, the history and assumptions offered by Dr. Segal are not necessarily accurate. Nevertheless, having rejected Dr. Mooney's opinion, Dr. Segal offers the only other opinion. Dr. Segal provides a comprehensive explanation of how a cumulative injury can occur.

Ultimately, I found the opinion of Dr. Segal pertaining to a cumulative injury to be the most credible and convincing opinion in this evidentiary record. Therefore, I conclude claimant proved he sustained a cumulative injury as a result of his work at Tyson. Nevertheless, Tyson challenges the proper date of injury for the cumulative injury.

In a cumulative injury claim, the proper date of injury is the date that the cumulative injury manifests. A cumulative injury manifests when the claimant, as a reasonable person, realizes or should realize that an injury has occurred and that the injury is causally related to the 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). In other words, a cumulative injury manifests when it is plainly apparent to a reasonable person that an injury has occurred and that the injury is related to the claimant's work.

Defendant contends that claimant knew or should have known of the nature of his injury and the work-related nature of his condition by at least 2017 because he had similar symptoms ongoing at that time after a prior hernia injury. For reasons that will become obvious, I find the issue of the date of injury not to be significant in this case and that October 31, 2018 is a reasonable and legally permissible manifestation and injury date for claimant's cumulative injury.

Cumulative injuries often take years to develop and manifest. Claimant was not missing work as a result of his alleged October 31, 2018 cumulative injury until the date of his retirement. October 31, 2018 represents the last date claimant worked at the Tyson plant, is the date when claimant testified he could no longer perform his job duties with his injury, and is a potential cumulative injury date recognized by the Iowa appellate courts. Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992). I conclude claimant proved he sustained a cumulative injury to his low back, which manifested on October 31, 2018, as a result of his work duties at Tyson.

Having reached that conclusion, I must turn to the defendant's notice defense. Tyson contends that claimant failed to give timely notice of the cumulative injury and that his claim should be barred. Iowa Code section 85.23 requires an employee to give

notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Iowa State Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

The time period both for giving notice and filing a claim does not begin to run until the claimant as a reasonable person, should recognize the nature, seriousness, and probable compensable character of the injury. The reasonableness of claimant's conduct is to be judged in light of claimant's education and intelligence. Claimant must know enough about the condition or incident to realize that it is work connected and serious. Claimant's realization that the injurious condition will have a permanent adverse impact on employability is sufficient to meet the serious requirement. Positive medical information is unnecessary if information from any source gives notice of the condition's probable compensability. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Orr v. Lewis Cent. Sch. Dist., 298 N.W.2d 256 (Iowa 1980); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

In this instance, claimant did not give Tyson notice of his alleged cumulative injury claim until October 2019. In October 2019, claimant's counsel sent correspondence giving notice of an injury, but did not specify if it was a traumatic or cumulative injury. The substance of the letter suggests it was a traumatic injury being reported. Regardless, for purposes of this analysis, the undersigned will assume the October 2019 notice was sufficient to put the employer on notice of the potential cumulative injury claim.

Assuming the sufficiency of the report of injury, claimant's report of an injury occurred in October 2019. This is well beyond the 90-day period for giving notice. However, this does not end the legal analysis. Mr. Tyler contends that the period for giving notice was tolled under the discovery rule.

Indeed, as noted above, Iowa recognized the discovery rule. Under the discovery rule, the time period for giving notice of an injury is tolled and does not begin to run under Iowa Code section 85.23 until the claimant knows or should know the seriousness of the work injury. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001).

In this case, I found that Mr. Tyler knew or should have known the seriousness of his injury by October 31, 2018 and certainly no later than April 2019. Claimant testified

at trial that his symptoms were the reason he retired. If, in fact, claimant's symptoms were serious enough that he knew he could not carry on in his job and he knew he needed to retire by October 31, 2018, the discovery rule would not toll his notice period beyond his retirement date. In fact, this is what I found in this case. Clamant knew or should have known on his date of retirement that his symptoms were serious enough that he could not continue working and needed to retire. Claimant was required to give notice within 90-days of this occurrence. Iowa Code section 85.23. He did not give notice of the cumulative injury within the required 90-day period, and his claim for the October 31, 2018 cumulative injury is barred. Iowa Code section 85.23.

Moreover, claimant testified that his symptoms continued to worsen after his retirement. Therefore, claimant knew that his symptoms were sufficient to cause him to retire. He knew that his symptoms continued to worsen for months after his retirement. He then sought medical treatment for these symptoms in April 2019. Certainly, by April 2019, claimant knew the work injury and symptoms caused his retirement, continued to worsen, and required medical attention. While I actually conclude claimant knew or should have known by October 31, 2018 that his condition was serious, he certainly should have recognized that fact by the time he was seeking medical attention for his symptoms in April 2019.

Having found that claimant did not give notice of his injury until October 2019, I conclude that claimant gave notice of injury to the employer well beyond this 90-day period using either the October 31, 2018 date or claimant's medical treatment in April 2019 as the date claimant discovered the seriousness of his injury. Accordingly, I conclude that the employer has proven its notice defense and that claimant's October 31, 2018 cumulative trauma injury claim is statutorily barred. Iowa Code section 85.23. Once again, this renders all other issues moot for the alleged October 31, 2018 injury date.

The only remaining disputed issue is whether costs should be assessed against either party. Costs are assessed at the discretion of the agency. Iowa Code section 86.40. In this case, claimant fails to recover any benefits in either file. Therefore, exercising the agency's discretion, I conclude that neither party's costs should be assessed in this case. Rather, all parties should bear their own costs.

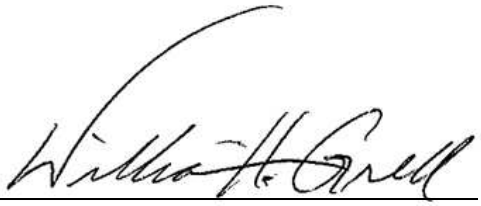
ORDER

THEREFORE, IT IS ORDERED:

Claimant takes nothing in either file.

All parties shall pay their own costs.

Signed and filed this _____21st_____ day of January, 2022.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Charles Showalter (via WCES)

Gregory Racette (via WCES)

Jason Wiltfang (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.