BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOSHUA RICHARDSON, Claimant, vs. VERMEER MANUFACTURING, Employer, and EMC RISK SERVICES, Insurance Carrier, and SECOND INJURY FUND OF IOWA, Defendants.	File Nos. 5057918, 5057919 A P P E A L D E C I S I O N Head Note Nos: 1108, 1402.50, 2401, 2800, 2802, 4000

On March 9, 2018, defendants filed an appeal of the proposed arbitration decision issued on February 22, 2018. On July 23, 2019, this matter was delegated to the undersigned for final agency action. Therefore, this appeal decision is entered as final agency action pursuant to Iowa Code section 17A.15(3) and Iowa Code section 86.24.

Defendants argue the arbitration decision was wrongly decided on three counts:

- Adversely deciding the proper notice issue;
- Finding claimant sustained his burden of proof regarding causation and impairment; and
- Wrongful award of penalty.

The undersigned has reviewed the record of evidence de novo. Pursuant to Iowa Code sections 86.24 and 17A.15, I affirm and adopt as the final agency decision the proposed arbitration decision filed on February 22, 2018.

The facts recited by the presiding deputy are detailed and exhaustive and are incorporated herein.

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).

Claimant began working for the defendant employer on February 27, 2012. His duties included janitorial work, material handling, assembly tech, and most recent to the alleged date of injury, an inventory coordinator. The claimant asserted he suffered a cumulative injury working as an assembly tech. In his capacity as an assembly tech, claimant worked with a variety of tools including but not limited to power tools, IMPAC ratchets, hammers, and other vibratory tools. Claimant estimated that he spent approximately 50 percent of his time at work operating such hand tools. Defendants make the factual claim that claimant "acknowledged his earlier work as a material handler did not contribute to his hand condition." (Defendants' Appeal Brief, page 2) Claimant's testimony was that it was not a single tool that contributed to his hand condition but a combination of them used all day long. (Hearing Transcript, page 90)

> Q. And isn't it true that the symptoms that you complained of when they developed that they would occur randomly, they were not associated with any one activity or the use of any one tool?
>
> A. Correct.

(Tr. p. 90)

Claimant also testified that his symptoms would abate during the weekend but worsen when he returned to work. (Tr. p. 91)

> Q. Even while you were using this air wrench or immediately after using it, did that seem to make your symptoms worse during that period of time?
>
> A. No. I would say during the week and over the weekend my symptoms would definitely die down, and when I went back to work during the week it would definitely pick back up again.

Q. But when you're using those tools there was no time – even the tool you said was most troublesome, that didn't make your symptoms worse?

A. No. My pain was all day, numbness all day. It was constant.

Q. But you said it was random.

A. It is constantly random.

Q. Constantly random?

A. Consistent. It happened every couple of minutes.

(Tr. p. 91)

He also testified that activities at home also caused him pain. "I mean, it hurt the same whether I was doing my tool or holding my wife's hand." (Tr. p. 91) Defendants do not deny that the claimant's work required him to grab and use a variety of power tools but rather that the work had no effect on the claimant's hand condition. (Def. App. Brief, pp. 2-3) To the extent that there is a factual dispute, it is found that the claimant's work required him to use a variety of power tools and to grip, push, pull, and pinch continuously between 2 to 10 pounds. (Claimant's Exhibit 4, pp. 22-23)

The pain in claimant's hands began sometime in 2015. The claimant asserts that the pain began in June 2015. (Tr. pp. 99-100) There are some medical records and some other testimony that suggests the pain began in March 2015. However, it was not until June 2015 that claimant began to seek medical treatment. Sometime in June 2015, claimant approached his manager, Jim Flescher, and informed the manager of the pains claimant was experiencing in his right hand. (Tr. p. 39)

A. I approached my manager because I was having difficulties in my hands, my right hand mainly, and I was just – pain was up in my hand – arm. I was having trouble holding things, and so I went up to my manager and I said, "I'm going to have to make an appointment with the doctor because I'm having real bad pain. I'm not able to hold onto things." And he said, "Okay."

Q. Who was the supervisor at that time?

A. Jim Flescher.

Q. And so you reported pain and numbness and tingling?

A. Correct.

Q. And dropping tools?

A. Yes.

(Tr. p. 39) The manager did not offer to send claimant for any medical care. Defendants point out that claimant did not explicitly state that the injury was work-related at this time.

Claimant chose to consult with ZeHui Han, M.D., at Iowa Ortho on June 24, 2015. (Joint Exhibit 1) In the medical notes, it was documented that claimant's pain was aggravated by lifting, pushing and gripping. (JE 1, p. 1) Dr. Han diagnosed claimant with bilateral carpal tunnel syndrome and referred claimant for an EMG. (JE 1, p. 9) The EMG took place on July 15, 2015 and confirmed Dr. Han's initial diagnosis. (JE 1, p. 14) Upon claimant's return to Dr. Han on July 15, 2015, Dr. Han recommended surgical repair. (JE 1, p. 17)

Claimant then informed his manager of Dr. Han's recommendations. (Tr. p. 44) Claimant was directed to fill out an FMLA form. (Tr. p. 44) Defendants argue that this is further proof that the defendants were not aware that claimant was making a workplace injury claim.

However, the standard for notice is "when the employer, as a reasonable 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).

When claimant first approached his manager prior to June 24, 2015, regarding the claims of bilateral wrist pain, inability to hold items without dropping them, and difficulty with his work tasks because of the foregoing, the defendant was alerted to the possibility of a potential compensation claim. When the claimant returned to his manager with the diagnosis and surgical recommendations of Dr. Han, the employer was again alerted to the possibility of a potential compensation claim. Neither the code nor the case law interpreting the code requires the claimant to make a formal and specific work claim. Instead, claimant should inform the defendants of "the possibility of a potential compensation claim." Defendants knew that claimant's position required continuous pinching and grasping with the hands. Defendants knew that claimant's position required regular use of vibratory and/or power tools. That knowledge coupled with the information regarding claimant's bilateral wrist and hand pain was sufficient to meet the notice standard that there was the possibility of a potential compensation claim.

Defendants must prove by a preponderance of the evidence that there was a failure to give notice. Directing the claimant to fill out FMLA paperwork or the claimant not specifically drawing a direct line between his injuries and his work is not sufficient evidence to prove failure to give notice. They have not met that burden for the foregoing reasons.

Even assuming that the defendants are correct that the claimant's information given to his manager was not sufficient notice, the claimant did give official notice on October 13, 2015. A first report of injury was filled out on that date and within the 90 days in which to provide notice. (Cl. Ex. 17)

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

Claimant first visited Dr. Han on June 24, 2015. At that time, Dr. Han diagnosed claimant with bilateral carpal tunnel syndrome. Claimant was sent for an EMG on July 15, 2015, and it was on that date upon which Dr. Han recommended surgery. Claimant had not missed work due to his condition nor had he received significant medical care even by July 15, 2015. However, he knew of his pain, the difficulty performing his work tasks, and the need for surgery by July 15, 2015. Therefore, the proper manifestation date of claimant's cumulative bilateral wrist pain was July 15, 2015. The first report of injury was filled out on October 13, 2015, which is 90 days from the date of manifestation. Thus, even if defendants were correct that they did not have actual knowledge in June or July, they still failed to show by a preponderance of the evidence that notice was not given within 90 days of the manifestation date.

Defendants also argue that there is a lack of medical evidence supporting the causation claim. There are only two expert opinions on the issue of causation in this case – Scott Shumway, M.D., a treating surgeon, and Sunil Bansal, M.D., an expert retained by claimant. Defendants did not provide an opinion from their own retained expert. They argue that Dr. Shumway's opinions are contradictory and Dr. Bansal's opinions were based on inaccurate information.

In Dr. Shumway's medical notes there is a check on a patient form that notes the care as "non-work comp." (JE 1, pp. 41-42) It is not obvious from the form whether the nurse filled out the information or whether Dr. Shumway did. The medical notes of Dr. Shumway state, "I do believe that his repetitive and somewhat forceful activities are a

significant exacerbating factor for his carpal tunnel syndrome." (JE 1, p. 46) There are no statements in Dr. Shumway's notes that disavow this causation statement. Defendants also assert that Dr. Shumway was given incorrect information by the claimant that he used impact wrenches or drills throughout the day. Claimant's testimony was that he used a variety of tools throughout the day in combination with the repetitive pushing, gripping, pulling, and pinching.

Because it was found that claimant's work did require repetitive gripping, pulling, pinching and pushing along with regular use of vibratory tools, the arguments of the defendants that Dr. Shumway and Dr. Bansal's opinions are based on faulty information are given low weight. Defendants are also critical that Dr. Bansal's signature appears on the report after it was sent to the claimant's attorney. This is not a fatal issue. Dr. Bansal's service was rendered on September 2, 2016, and other than the disagreement defendants have with the characterization of claimant's work, there was no substantive dispute over the factual summary or even the subjective testing conducted by Dr. Bansal. (Cl. Ex. 1) Dr. Shumway's medical notes and the opinion letter of Dr. Bansal align with claimant's history and day-to-day activities support the deputy's findings for both causation and permanency.

The deputy commissioner's finding regarding causation and permanency is affirmed.

Finally, the defendants take issue with the issuance of a penalty award. If a delay in commencement or termination of benefits occurs without reasonable or probably cause or excuse, the workers' compensation commissioner shall award additional weekly benefits in an amount not to exceed 50 percent of the amount of benefits that were unreasonably delayed or denied. Iowa Code section 85.13(4)(b). A reasonable or probable cause or excuse must satisfy the following requirements:

1. The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee;

2. The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits;

3. The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay or termination of benefits.

(Iowa Code section 86.13(4)(c))

Defendant has the burden to show compliance with this statutory provision in order to avoid the mandatory assessment of a penalty.

Claimant filed the arbitration petition on December 8, 2015. Defendants answered on December 10, 2015. Defendants argue that the immediate answer and denial fulfill their obligations under Iowa Code section 85.13. However, defendant's obligation does not end with a single denial. They have an ongoing duty to investigate and communicate their findings to the claimant.

The inquiry under the current provision of Iowa Code section 86.13 requires more than a reasonable or probable cause or excuse at the time the case comes to hearing. The law requires proof of a prompt investigation and that factual basis be provided to the injured worker at the time of the denial, delay, or termination of benefits. "Herein, defendant must show a timely investigation of claimant's report of a back injury, that the denial of the back claim is based on the results of that timely investigation, and that there was a timely communication to claimant of the reasons for the denial." Carolyn Marcine Jenson v. Cummins Filtration-Lake Mills, File Nos. 5032401 & 5032402, Appeal Decision September 24, 2012.

There are only two times that the defendants communicated with the claimant: the answer filed on December 10, 2015, and an email letter of March 2016. (Cl. Ex. 16) However, there is no indication in the email or in the answer what the basis of the denial was and what medical evidence it was based upon. There is no showing that an investigation took place, medical records were obtained, or experts were consulted with. Therefore, the findings of fact and conclusions of law that the deputy commissioner made in regards to the penalty claim are affirmed.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of February 22, 2018, is AFFIRMED.

The Order section of the February 22, 2018, arbitration decision is affirmed.

Defendants shall pay costs of this appeal, including the cost of the hearing transcript, pursuant to rule 876 IAC 4.33.

Signed and filed this 5th day of September, 2019.

JENNIFER GERRISH-LAMPE
DEPUTY WORKERS' COMPENSATION
COMMISSIONER

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