

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KELLY L. STILES,	:	
	:	
Claimant,	:	File No. 5064673
	:	
vs.	:	A P P E A L
	:	
ANNETT HOLDINGS, INC., d/b/a	:	D E C I S I O N
TMC TRANSPORTATION,	:	
	:	
Employer,	:	Headnotes: 1108; 1402.30; 1402.40;
Self-Insured,	:	1402.50; 1402.60; 1802; 1803; 1803.1;
Defendant.	:	2209; 2401; 2501; 2801; 2907

Defendant Annett Holdings, Inc., d/b/a TMC Transportation, appeals from an arbitration decision filed on November 15, 2019. Claimant Kelly Stiles cross-appeals. The case was heard on August 5, 2019, and it was considered fully submitted in front of the deputy workers' compensation commissioner on September 3, 2019.

In the arbitration decision, the deputy commissioner found claimant sustained a cumulative left shoulder injury that arose out of and in the course of his employment with defendant. The deputy commissioner determined this injury manifested on July 19, 2017. As a result, the deputy commissioner found the post-July 1, 2017, amendments to Iowa Code chapter 85 apply. The deputy commissioner found claimant provided timely notice of his injury and timely filed his petition. The deputy commissioner found claimant sustained 13 percent upper extremity impairment, which entitles him to receive 52 weeks of permanent partial disability (PPD) benefits under Iowa Code section 85.34(2)(n) (July 1, 2017). The deputy commissioner found claimant is also entitled to receive healing period benefits from August 16, 2017, through May 1, 2018. The deputy commissioner found defendant is responsible for all causally related medical bills in Exhibit 4, but declined to assess defendant with the cost of claimant's functional capacity evaluation (FCE).

On appeal, defendant asserts claimant failed to prove his left shoulder condition arose out of and in the course of his employment. Defendant additionally challenges the August 16, 2017, start date for healing period benefits.

On cross-appeal, claimant asserts the deputy erred in finding claimant's injury manifested on or after July 1, 2017. Claimant asserts his injury manifested sometime in

February or March of 2017, and that defendant had actual notice of the injury at that time. As a result, claimant asserts his injury should be treated as an unscheduled, whole-body injury under Iowa Code section 85.34(2)(u) (pre-July 1, 2017 amendments).

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 86.24 and 17A.15, the arbitration decision filed on November 15, 2019, is affirmed in part, modified in part, and respectfully reversed in part.

I affirm the deputy commissioner's finding that claimant sustained a cumulative injury to his left shoulder that arose out of and in the course of his employment. I affirm the deputy commissioner's findings, conclusions and analysis regarding this issue in its entirety.

Having determined claimant sustained a work-related cumulative injury, I must next address when this injury manifested.

The deputy commissioner found the injury manifested on July 19, 2017, when claimant reported his symptoms to Viraj Patel, M.D. The deputy commissioner also found that neither the injury nor its causal relationship would have been apparent to a reasonable person in early 2017. For the reasons that follow, the deputy commissioner's findings regarding the manifestation date are modified.

As explained by the Iowa Supreme Court, "a cumulative injury is manifested when the claimant, as a reasonable person, would be plainly aware (1) that he or she suffers from a condition or injury, and (2) that this condition or injury was caused by the claimant's employment." Herrera v. IBP, Inc., 633 N.W.2d 284, 288 (Iowa 2001). Once both factors are satisfied, "the injury is deemed to have occurred." Id.

Claimant testified he first noticed left shoulder symptoms six to seven months before his hospitalization on July 15, 2017, and that he first reported those symptoms to his fleet manager, Marty Coffey, around the same time. (Hearing Transcript, pp. 22, 24, 101) Importantly, claimant also testified he told Mr. Coffey he hurt his shoulder while he was unloading trucks: "I just said that I hurt it while I was unloading trucks. If - - now I didn't give him a step-by-step progression of it because cellphone is sketchy up in Canada." (Tr., p. 104)

Claimant decided not to pursue medical treatment for his left shoulder at the time because he was in Canada, but he testified it was hampering his production and he planned to seek treatment upon his return. (Tr., pp. 23, 102-03)

Based on claimant's uncontroverted testimony, I find claimant was aware he sustained a left shoulder condition or injury in January or February of 2017. I likewise find claimant believed in January or February of 2017 that his injury was caused by his employment. I therefore find claimant's cumulative left shoulder injury manifested and therefore occurred in January or February of 2017. The deputy commissioner's finding that claimant's injury manifested on July 19, 2017, is therefore modified.

The deputy commissioner is correct that claimant did not obtain treatment for his left shoulder until July of 2017. It was at this point that Dr. Patel restricted claimant from working and referred him to an orthopedic specialist. (Joint Exhibit 3, pp. 9-11) Again, however, claimant testified he had left shoulder symptoms he attributed to his job roughly six to seven months earlier. Thus, while claimant may have become more aware of the severity of his injury in July of 2017, he was aware of a work-related condition in January or February of 2017.

Having determined claimant's left shoulder injury manifested in January or February of 2017, I must therefore consider whether claimant provided timely notice of the injury. However, because I found claimant's injury occurred prior to July 1, 2017, the Legislature's changes to Iowa Code chapter 85 do not apply in this case. Thus, the deputy commissioner's application of the amended versions of Iowa Code sections 85.23 and 85.26 is reversed. I find the pre-July 1, 2017 version of the law applies.

As such, 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 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. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

As discussed above, claimant's uncontroverted testimony was that he told Mr. Coffey in January or February of 2017 that he was having symptoms and that he "hurt it while [he] was unloading trucks." (Tr., p. 104) I therefore find Mr. Coffey was alerted to the possibility of a potential workers' compensation claim through his conversations with claimant in early 2017. Thus, I find defendant had actual knowledge of claimant's left shoulder injury within 90 days of its occurrence. Defendant failed to prove its notice defense under Iowa Code section 85.23.

Because I found defendant failed to prove its notice defense, I must now address the extent of claimant's disability. On appeal, defendant challenges whether August 16, 2017, is the appropriate start date for claimant's temporary benefits. On the hearing report, however, claimant indicated he was seeking temporary benefits from August 16, 2017, through May 1, 2018. Defendant then stipulated that if it is liable for the alleged injury, claimant is entitled to benefits for this period of time. (Hearing Report, p. 1) Given defendant's stipulation on the hearing report, I affirm the deputy commissioner's finding that claimant is entitled to receive healing period benefits from August 16, 2017, through May 1, 2018.

With respect to claimant's permanent disability, the deputy commissioner awarded benefits as a scheduled member shoulder injury under Iowa Code section 85.34(2)(n) (July 1, 2017). However, having determined claimant's injury occurred before July 1, 2017, I find claimant's left shoulder injury entitles him to benefits under the former version of Iowa Code section 85.34(2)(u) pertaining to unscheduled, body as a whole injuries.

Because claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the Legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in terms of percentages of the total physical and mental ability of a normal man."

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

Compensation for permanent partial disability shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Iowa Code section 85.34.

Claimant, who was in his late-50s at the time of the hearing, is a high school graduate who enlisted in the Marine Corp upon graduation. (Tr., p. 7) After he was honorably discharged from the Marines, claimant worked in some factory jobs before joining the Indiana Department of Transportation for roughly a decade. (Tr., pp. 9-10) He then briefly worked in another factory before being hired by defendant as an over-the-road trucker. (Tr., p. 11)

After claimant's left shoulder surgery, he did some maintenance and janitorial work for a hotel. (Tr., p. 39) He was subsequently hired as a custodian for a school and

was performing that job at the time of the hearing. (Tr., p. 40) The position does not require regular heavy lifting or overhead work. (Tr., pp. 41-42)

Though Madhu Rao, D.O., assigned a six percent whole body impairment, he did not address whether claimant required any permanent restrictions. (Claimant's Ex. 1, p. 2) As a result, claimant participated in an FCE before hearing that placed him in the medium to heavy physical demand level. (Cl. Ex. 3, p. 5) More specifically, he fell "in the heavy physical demand level except with overhead activities where he is in the medium physical demand level" with a maximum lift of 30 pounds from waist to overhead. (Cl. Ex. 3, pp. 5-6) Claimant testified he believes the limitations set forth in the FCE are roughly accurate. (Tr., p. 44)

While claimant was able to perform his custodial job at the time of the hearing, claimant credibly testified he does not believe he could perform his former trucking job with defendant. (Tr., p. 44-45)

Claimant was earning \$14.85 per hour at the time of the hearing and working 40 hours per week. (Tr., p. 41) That amounts to gross earnings of \$594.00 per week. As stipulated in the hearing report, claimant's gross earnings were \$1,286.74 per week at the time of his injury. That amounts to nearly a 50 percent loss of actual earnings.

With the exception of overhead lifting, however, claimant is still capable of performing within the heavy physical demand level. While his physical limitations would no doubt limit him from returning to some of his former manual labor work, not all manual labor work requires significant overhead lifting.

Considering these and all other factors relevant to the industrial disability analysis, I find claimant sustained 35 percent industrial disability as a result of his cumulative work-related left shoulder surgery.

This entitles claimant to 175 weeks of PPD benefits. The deputy commissioner's award of 52 weeks of PPD benefits is therefore modified.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed November 15, 2019, is affirmed in part, modified in part, and respectfully reversed in part.

Defendant shall pay claimant one hundred seventy-five (175) weeks of permanent partial disability benefits at the stipulated weekly rate of seven hundred thirty-one and 16/100 dollars (\$731.16), commencing on the stipulated commencement date of May 2, 2018.

Defendant shall pay claimant healing period benefits from August 16, 2017, through May 1, 2018, at the stipulated weekly rate of seven hundred thirty-one and 16/100 dollars (\$731.16).

Defendant shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Defendant is responsible for all causally related medical expenses itemized in Exhibit 4 as set forth in the arbitration decision.

Pursuant to rule 876 IAC 4.33, defendant pay the costs of the appeal, including the cost of the hearing transcript.

Pursuant to rule 876 IAC 3.1(2), defendant shall file subsequent reports of injury as required by this agency.

Signed and filed on this 2nd day of October, 2020.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Troy Skinner (via WCES)

Sasha Monthei (via WCES)