BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CYNTHIA DRISCOLL, n/k/a, CYNTHIA ROMAN-TIES, Claimant, vs. CARGILL, INC., Employer, and OLD REPUBLIC INS. CO., Insurance Carrier, Defendants.	File No. 5058759 A P P E A L D E C I S I O N Head Notes: 1108.40; 1803; 2203; 2800; 2907

Defendants Cargill, Inc., employer, and its insurer, Old Republic Insurance Company, appeal from an arbitration decision filed on February 19, 2019. Claimant Cynthia Driscoll, n/k/a Cynthia Roman-Ties, responds to the appeal. The case was heard and also considered fully submitted in front of the deputy workers' compensation commissioner on July 21, 2018.

In the arbitration decision, the deputy commissioner found claimant sustained a disablement due to an occupational disease pursuant to Iowa Code chapter 85A. The deputy commissioner found this disablement occurred as of December 30, 2015, which was the day after claimant's last day of work with defendant-employer. The deputy commissioner determined this disablement resulted in permanent impairment. The deputy commissioner found claimant provided notice of her disablement no later than January 11, 2016. As a result, the deputy commissioner found defendants failed to meet their burden to prove their affirmative 90-day notice defense. The deputy commissioner found claimant sustained 40 percent industrial disability due to her occupational disease.

On appeal, defendants argue claimant failed to meet the definition of "disablement" under Iowa Code chapter 85A and failed to prove she sustained a permanent aggravation of her preexisting COPD. In the alternative, defendants argue claimant's industrial disability is minimal. Defendants also raise the affirmative notice defense and argue claimant failed to give timely notice of her claim.

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 17A.5 and 86.24, those portions of the proposed arbitration decision filed on February 19, 2019, that relate to the issues properly raised on intra-agency appeal are affirmed in part without additional comment and affirmed in part with additional findings, conclusions, and analysis.

I turn first to whether claimant proved she sustained a "disablement" under the occupational disease statute. Iowa Code section 85A.4 provides, "Disablement as that term is used in this chapter is the event or condition where an employee becomes actually incapacitated from performing the employee's work or from earning equal wages in other suitable employment because of an occupational disease."

The deputy commissioner in this case determined claimant sustained a disablement that occurred on December 30, 2015 - the day after her last day of work for defendant-employer. For the reasons that follow, I agree. I acknowledge that as of December 30, 2015, claimant had no specific doctor-imposed work restrictions. However, claimant testified she left defendant-employer when she did because she was concerned about her "quality of life and breathing." (Hearing Transcript, p. 49) Claimant explained that "[i]n all departments there were numerous amounts of stairs and levels and grain dust or starch dust and chemicals." (Tr., p. 50)

Claimant's testimony is supported by the eventual opinions of John Cowden, M.D., Patrick Hartley, M.D., and even defendants' expert, Gregory Hicklin, M.D. Dr. Cowden indicated claimant would need "appropriate environmental control"; Dr. Hartley opined claimant "should be restricted from exposure to irritant chemicals, smoke, dust, fumes, or vapors"; and Dr. Hicklin noted claimant should "avoid situations that bother her." (Joint Exhibit 5, p. 102; Claimant's Ex. 1, p. 24; Def. Ex. A, p. 14)

Because claimant's employment with defendant-employer exposed her to conditions that irritated her condition, I agree with the deputy commissioner that as of December 30, 2015, she could no longer remain in that environment. With these additional findings, conclusions, and analysis, I therefore affirm the deputy commissioner's finding that December 30, 2015, was the day on which claimant became actually incapacitated from performing her work. In other words, I affirm the deputy commissioner's finding that claimant's disablement occurred as of December 30, 2015.

With respect to defendants' 90-day notice defense, Iowa Code section 85A.10, the section regarding liability for the last injurious exposure, states "notice . . . shall be given and made to the employer as required under this chapter." Iowa Code section 85A.18 provides additional specifics:

> Except as herein otherwise provided, procedure with respect to notice of disability or death, as to the filing of claims and determination of claims shall be the same as in cases of injury or death arising out of and in the course of employment under the workers' compensation law. Written

> notice shall be given to the employer of an occupational disease by the employee within ninety days after the first distinct manifestation thereof . . .

Thus, a claimant with an occupational disease must either provide written notice of the disease within 90 days of its first distinct manifestation or follow the notice provisions of Iowa Code chapter 85.23, which is the notice provision for cases of injury arising out of and in the course of employment. See Iowa Code section 85A.18.

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).

In at least one case, the Iowa Court of Appeals has held that the "first distinct manifestation" for purposes of the 90-day notice provision of Iowa Code section 85A.18 occurs "when the disease progresses to the point that the employee because of pain or physical inability is no longer able to work." Croft v. John Morrell & Co., 451 N.W.2d 501, 503 (Iowa Ct. App. 1989) In this case, I found claimant was no longer able to work after December 29, 2015. There is no evidence in the record, however, that claimant provided *written* notice of her injury to defendant-employer within 90 days of December 29, 2015.

The question then becomes whether claimant provided notice as in cases of work-related injuries. See Iowa Code section 85A.18 (noting "procedure with respect to notice . . . shall be the same as in cases of injury or death arising out of and in the course of employment"). As with Iowa Code section 85A.18, 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).

Defendants assert on appeal that claimant's date of injury is on or before October 5, 2015. They rely on the "well settled principles on determining injury date" in Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001). (Def. Appeal Brief, p. 9) However, the brucellosis at issue in Burress was determined to be an injury under Iowa Code chapter 85 and not an occupational disease under chapter 85A. IBP, Inc. v Burress, 779 N.W.2d at 218.

In the context of occupational diseases, however, "[t]he use of the term 'date of injury' is not appropriate . . . because there is no 'injury' suffered. Disablement is the key term." 15 Iowa Practice Series, Workers' Compensation § 18:4 (2019). The date of

disablement is the triggering occurrence. See Iowa Code § 85A.4; Mitchell v. Burns Philp Food, Inc., File No. 5000468 (App. Dec., Nov. 21, 2003). As discussed, I found claimant's disablement occurred as of December 30, 2015.

Claimant informed a human resources representative during her exit interview on January 11, 2016, that she was claiming a work-related lung or breathing injury. (Tr., p. 105; 111-112) Because January 11, 2016, is less than 90 days after December 30, 2015, I find defendants were timely alerted to the possibility of a workers' compensation claim. I therefore find the actual knowledge alternative to notice was met. With these additional findings, conclusions, and analysis, I affirm the deputy commissioner's determination that defendants failed to carry their burden to prove their affirmative 90-day notice defense.

Finally, I turn to whether claimant's disablement was permanent, and if so, the extent of claimant's industrial disability.

I affirm the deputy commissioner's finding that claimant's disablement was permanent and resulted in permanent impairment. I affirm the deputy commissioner's reliance on the opinions of Dr. Hartley and Dr. Cowden over the opinions of Dr. Hitchon in making this determination. I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to this issue.

I likewise affirm the deputy commissioner's finding that claimant sustained 40 percent industrial disability as a result of her work-related occupational disease. I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to this issue.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on February 19, 2019 is affirmed in its entirety with the additional findings, conclusions, and analysis as set forth above.

Defendants shall pay claimant two hundred (200) weeks of permanent partial disability benefits for her occupational disease at the weekly rate of six hundred ninety-nine and 24/100 dollars ($699.24) commencing December 30, 2015.

Defendants 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).

Defendants shall pay medical expenses as set forth in the arbitration decision.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding in the amount of two thousand two hundred eighty-eight and 12/100 dollars ($2,288.12), and the defendants shall pay the costs of the appeal, including the cost of the hearing transcript.

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

Signed and filed on this 3rd day of April, 2020.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Thomas M. Wertz Via WCES

James M. Peters Via WCES