BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ZINETA KUDIC, Claimant, vs. IOC BLACK HAWK COUNTY, INC., Employer, and LIBERTY MUTUAL, Insurance Carrier, Defendants.	File Nos. 5066504, 5066505 A P P E A L D E C I S I O N Head Notes: 1100, 1108, 1403.3, 1403.3, 1801, 1802, 1803, 2800, 2802

Defendants IOC Black Hawk County, Inc., employer, and its insurer, Liberty Mutual, appeal from a ruling on defendants' motion to exclude exhibits (hereinafter "ruling") filed on November 19, 2019, and from an arbitration decision filed on March 13, 2020. Claimant Zineta Kudic cross-appeals from the arbitration decision. The case was heard on November 15, 2019, and it was considered fully submitted in front of the deputy workers' compensation commissioner on December 6, 2019.

In the ruling, the deputy commissioner denied defendants' motion to exclude, and allowed all of claimant's exhibits into the record. With respect to Claimant's Exhibits 1 and 3, the deputy commissioner determined admission of the exhibits was not unfairly prejudicial, that claimant substantially complied with the rules, and that there was good cause to exclude any imperfect compliance. Regarding Exhibit 2, the deputy commissioner determined defendants failed to show they were unfairly prejudiced. With respect to Exhibit 7, the deputy commissioner admitted the exhibit and reiterated it is claimant's burden to prove entitlement to reimbursement for medical expenses.

In the arbitration decision, the deputy commissioner found claimant's back complaints arose out of and in the course of her employment with defendant-employer. The deputy commissioner found defendants had notice of the injury as of January 28, 2018. The deputy commissioner determined the proper date of injury was January 28, 2018, as well. The deputy commissioner determined claimant's date of maximum medical improvement (MMI) was April 18, 2018. The deputy commissioner found claimant sustained 75 percent industrial disability as a result of the work injury, and is entitled to reimbursement for medical expenses related to the work injury.

On appeal, defendants argue the deputy commissioner erred in admitting Claimant's Exhibits 1, 2, 3 and 7. Defendants additionally assert the deputy erred in fixing the date of injury as of January 28, 2018, and in finding defendants failed to prove their Iowa Code section 85.23 90-day notice defense.

On cross-appeal, claimant asserts the deputy commissioner erred in not finding her to be permanently and totally disabled. Claimant additionally asserts the deputy commissioner erred in adopting an MMI date of April 18, 2018, and not awarding any additional healing period benefits. Lastly, claimant seeks an order stating defendants will hold claimant harmless against any subrogation claims relating to medical expenses.

Those portions of the proposed agency decisions 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 ruling filed on November 19, 2019, and the arbitration decision filed on March 13, 2020, are affirmed in their entirety with the additional analysis provided below.

I will first address defendants' appeal of the admission of Claimant's Exhibits 1, 2, 3 and 7. Regarding the admission of Claimant's Exhibits 1 and 3, defendants argue the deputy commissioner erred because claimant's expert witness designation was deficient. With the following additional analysis, I affirm the deputy commissioner's admission of Claimant's Exhibits 1 and 3.

Iowa Administrative Code rule 876-4.19(3) pertains to prehearing procedure. More specifically, subpart (b) addresses the requirements for expert witness designations and subpart (e) sets forth the potential consequences for failing to meet those requirements. 876 IAC 4.19(3)(e) states:

> If evidence is offered at hearing that was not disclosed in the time and manner required by these rules, . . . the evidence will be excluded <u>if the objecting party shows that receipt of the evidence would be unfairly prejudicial</u>. Sanctions may be imposed pursuant to 876-4.36(86) in addition to or in lieu of exclusion if exclusion is not an effective remedy for the prejudice.

(emphasis added).

Even assuming claimant's expert witness designation was deficient, defendants failed to provide any evidence that they were unable to obtain an expert opinion as a result of those deficiencies. In fact, defendants offered no evidence whatsoever that they attempted to seek out an expert's opinion or expended any resources at any point after receipt of claimant's expert witness designation.

Defendants argue they were prejudiced because they were "precluded from knowing which, if any, of the physicians or other experts listed by Claimant should be investigated in order to prepare their defense." However, after receiving the report of Richard Kreiter, M.D., defendants did nothing. They did not attempt to depose Dr. Kreiter, for example, nor did they attempt to acquire the opinions of a competing expert.

Defendants acknowledge they received the report of Dr. Kreiter in a timely manner. Though claimant was only required to serve this report 30 days before hearing (see 876 IAC 4.19(3)(d)), it was served roughly 60 days before hearing. In other words, defendants knew roughly 60 days before hearing which expert should be investigated and what opinions were being offered, effectively curing any alleged deficiencies contained in the expert witness designation. Again, however, defendants did nothing to investigate.

Hypothetical prejudice does not equate to unfair prejudice. With this additional analysis, I affirm the deputy commissioner's admission of Claimant's Exhibits 1 and 3.

With respect to Claimant's Exhibit 2, defendants argue the deputy commissioner erred in admitting the report of Lydia Mustafic, M.D., because claimant failed to properly designate Dr. Mustafic as an expert witness. Defendants argue the deputy commissioner's reliance on Schoenfeld v. FDL Foods, Inc., 560 N.W.2d 595 (Iowa 1997) was in error because Dr. Mustafic was not an authorized treating physician.

It is worth nothing that the doctor at issue in Schoenfeld was not an authorized treating physician, as the defendants in that case denied liablity for the claimant's claim. Id. at 597-98. Regardless, however, the holding in Schoenfeld was not dependent on whether the physician was authorized; the question was whether there was unfair surprise to defendants. As the court explained:

> Field was Schoenfeld's treating physician. His evaluation report is limited to an assessment of the right knee he treated. As such, the duty to designate a treating physician as an expert witness under rule 125(c) is limited. See Carson v. Webb, 486 N.W.2d 278, 280 (Iowa 1992). Field had provided the employer with detailed medical information from the date Schoenfeld was first examined in November 1992 to his last treatment in April 1993. The employer had also received the hospital operative records and had offered them as exhibits at the hearing.
>
> The Deputy's pretrial order stated additional exhibits would be allowed if there was no unfair surprise to the other party. Schoenfeld's petition claimed permanent partial disability benefits. Field was the treating physician and the logical person to evaluate the permanency of the injury.

> FDL Foods was not unfairly surprised by the admission of the evaluation report.

Id.

In this case, Dr. Mustafic treated claimant's back condition, and as correctly noted by the deputy commissioner, defendants were provided with all of Dr. Mustafic's prior treatment notes. Further, given Dr. Mustafic's involvement with claimant's treatment, it was logical for Dr. Mustafic to offer opinions on claimant's back condition. Like in Schoenfeld, therefore, I find defendants were not unfairly surprised by Dr. Mustafic's report.

With this additional analysis, I affirm the deputy commissioner's decision to admit Claimant's Exhibit 2 into evidence.

Lastly, defendants appeal admission of Claimant's Exhibit 7, yet defendants' arguments relating to this exhibit relate to the weight to be given to the exhibit - not to its admissibility. I reiterate the deputy commissioner's ruling that claimant still maintains the burden to prove that any claimed medical expenses are related to the alleged work injury. I therefore affirm the deputy commissioner's decision to admit Claimant's Exhibit 7 into evidence.

Turning to the merits of claimant's claim, I affirm the deputy commissioner's finding that claimant's back complaints arose out of and in the course of her employment. I affirm the deputy commissioner's findings, conclusions and analysis regarding the above-stated issue in their entirety.

With the following additional analysis, I also affirm the deputy commissioner's finding that defendants had notice of claimant's injury as of January 28, 2018.

Iowa Code section 85.23, post-July 1, 2017, states:

> Unless the employer or the employer's representative shall have actual knowledge of the occurrence of an injury received within ninety days from the date of the occurrence of the injury, or unless the employee or someone on the employee's behalf . . . shall give notice thereof to the employer within ninety days from the date of the occurrence of the injury, no compensation shall be allowed. For the purposes of this section, "date of the occurrence of the injury" means the date that the employee knew or should have known that the injury was work-related.

In other words, 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).

In this case, when claimant filed her request for a reasonable accommodation dated January 28, 2018, she indicated she was "being over worked" and that she was requesting the accommodation to "ease [her] back pain" so that she was "not over doing it." (Defendants' Exhibit A, pp. 1-2) This form not only alerted defendants to claimant's potential injury (her back) but also to the possibility that it was a result of her job (being "over worked"). Thus, like the deputy commissioner, I find January 28, 2018, was the point at which a reasonably conscientious manager would have been alerted to the possibility of a potential workers' compensation claim.

If the January 28, 2018, request for accommodation left any doubt, the form filled out two days later by Dr. Mustafic and provided to defendants left no doubt. Dr. Mustafic noted claimant's "low back pain is exacerbated by stripping over 30-40 rooms per day and standing for long periods of time." (Def. Ex. A, p. 3) This form identified claimant's condition (low back pain) and that it may be work related (exacerbated by stripping rooms). Thus, I find January 30, 2018 was another point at which a reasonably conscientious manager would have been alerted to the possibility of a potential workers' compensation claim.

In other words, I find defendants had actual notice on January 28, 2018, or January 30, 2018, at the latest. With this additional analysis, the deputy commissioner's finding regarding notice is affirmed.

I likewise affirm the deputy commissioner's finding that claimant's proper date of injury is January 28, 2018. I offer the following additional analysis.

In the decision, the deputy commissioner applied the Iowa Supreme Court's well-established rules for determining the manifestation date of an injury and the discovery rule to arrive at the January 28, 2018, date of injury. Effective July 1, 2017, however, the legislature amended Iowa Code section 85.23 to define "date of the occurrence of the injury" as "the date that the employee knew or should have known that the injury was work-related." While it has not been decided whether the legislature's amendment to Iowa Code section 85.23 affects the discovery rule or the rules used to establish the manifestation date of an injury, that decision is irrelevant in this case because the outcome is the same under both scenarios.

In other words, if the discovery rule and manifestation date rules still apply, I affirm the deputy commissioner's findings, conclusions and analysis as set forth in the arbitration decision. But should it be determined that these analyses are no longer applicable under the legislature's amendment, I likewise find claimant did not know or

should not have known that her back complaints were work-related until January 28, 2018.

As correctly noted by the deputy commissioner, claimant had back pain in 2015 that she thought was "from her job," but the provider "refused" to write a note to defendant-employer indicating that the pain she was having was work-related. (Def. Ex. G, p. 2) In addition to the provider refusing to opine that claimant's pain was work-related, claimant continued working at her normal job without restrictions.

It was not until January 28, 2018, that claimant requested an accommodation due to her back complaints and clearly indicated she believed those complaints were related to her job. She indicated on the form that she believed the complaints were due to "being over worked." (Def. Ex. A, p. 1-2) While she apparently indicated she believed her complaints in 2015 were due to her job, the medical provider declined to sign off on claimant's belief, claimant continued working, and there was a significant gap in treatment between 2016 and late-2017. Thus, I find it was on January 28, 2018, that claimant knew, or should have known, that the injury was work related. Under amended Iowa Code section 85.23, therefore, January 28, 2018, is the date of the occurrence of the injury.

Because January 28, 2018, is the date of the occurrence of the injury and the date on which defendants had actual notice, I affirm the deputy commissioner's determination that defendants' section 85.23 90-day notice defense fails.

I affirm the deputy commissioner's finding that claimant reached MMI as of April 18, 2018. I affirm the deputy commissioner's finding that claimant sustained 75 percent industrial disability as a result of the work injury. I affirm the deputy commissioner's findings, conclusions and analysis regarding the above-stated issues in their entirety.

I also affirm the deputy commissioner's finding that claimant is entitled to receive reimbursement from defendants only for the medical bills related to claimant's low back injury and leg pain and only to the extent that medical providers were paid (and not any gross charges). Claimant on appeal seeks inclusion of a hold harmless order for any subrogation claims.

Claimant is entitled to an order of reimbursement only if she has paid treatment costs; otherwise, to an order directing the responsible defendants to make payments directly to the provider. See, Krohn v. State, 420 N.W.2d 463 (Iowa 1988); Terry Wille, Claimant, File No. 5041848, 2020 WL 6597223, at *15 (Nov. 3, 2020). Thus, the order will be modified to reflect this clarification.

ORDER

IT IS THEREFORE ORDERED that the ruling filed on November 19, 2019, and the arbitration decision filed on March 13, 2020, are affirmed in their entirety with the above-stated additional analysis.

Defendants' motion to exclude is denied and Claimant's Exhibits 1, 2, 3 and 7 are admitted into evidence over defendants' objections.

Defendants shall pay claimant three hundred seventy-five (375) weeks of permanent partial disability benefits at the weekly rate of three hundred twenty-two and 86/100 dollars ($322.86) per week from April 19, 2018.

Claimant is entitled to temporary total disability benefits from March 26, 2018, through April 18, 2018, at the rate of three hundred twenty-two and 86/100 dollars ($322.86) per week.

Defendants shall reimburse claimant for all out-of-pocket medical expenses, shall pay or satisfy all outstanding medical expenses, liens, or subrogation claims, and shall hold claimant harmless for all medical expenses incurred for treatment, testing, or examination of claimant's work-related low back injury radiating into the leg.

Defendants shall receive credit for all weekly benefits paid to date.

Defendants shall pay accrued weekly benefits in a lump sum together with interest 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.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration hearing, and the parties shall split the costs of the appeal, including the cost of the hearing transcript.

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 on this 17th day of December, 2020.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Adnan Mahmutagic (via WCES)

Jason Lehman (via WCES)