

Claimant asserts on appeal the deputy commissioner erred in finding claimant knew, or should have known, in May 2013 that her bilateral shoulder condition was serious enough to have a permanent, adverse impact upon her employment, such that claimant was required to give defendants notice of her condition within 90 days of May 2013. Claimant asserts the deputy commissioner erred in failing to find that under the discovery rule, the 90-day notice period of section 85.23 did not begin to run until March 27, 2014, with the result that because claimant gave notice of her injuries to defendants on that date, her claim is not barred by section 85.23. Claimant asserts the deputy commissioner erred in failing to award claimant either substantial industrial disability benefits or permanent total disability benefits for her bilateral shoulder condition.

Defendants assert on appeal that the arbitration decision should be affirmed in its entirety.

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

I have performed a de novo review of the evidentiary record and the detailed arguments of the parties and I reach the same analysis, findings, and conclusions as those reached by the deputy commissioner.

Pursuant to Iowa Code sections 17A.5 and 86.24, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on October 14, 2016, which relate to the issues properly raised on intra-agency appeal.

I find the deputy commissioner provided sufficient analysis of all the issues raised in the arbitration proceeding. I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to those issues. I affirm the deputy commissioner's finding that the evidence in this matter establishes that the correct manifestation date for claimant's work-related bilateral shoulder condition is May 2013. I affirm the deputy commissioner's finding that claimant knew, or should have known, in May 2013 that her bilateral shoulder condition was serious enough to have a permanent, adverse impact upon her employment, such that claimant was required to give defendants notice of her shoulder condition within 90 days of May 2013, which would be August 29, 2013, at the latest. I affirm the deputy commissioner's finding that claimant did not provide defendants with notice of her bilateral shoulder condition until March 27, 2014, which was 210 days after August 29, 2013. I affirm the deputy commissioner's finding that claimant's claim for her bilateral shoulder condition is barred by claimant's failure to comply with the 90-day notice requirement contained in Iowa Code section 85.23. I affirm the deputy commissioner's finding that claimant is entitled to receive nothing in this matter. I affirm the deputy commissioner's order that the parties bear their own costs of the arbitration proceeding. I affirm the deputy commissioner's findings, conclusions and analysis regarding those issues and I provide the following brief additional analysis for my decision:

This is one of those extremely rare cases where a claim should be barred by a claimant's failure to comply with the 90-day notice requirement contained in Iowa Code section 85.23. This is a fact-specific finding which applies only to this case. In her briefs on appeal, claimant contends she was not aware of the seriousness of her bilateral shoulder condition until March 27, 2014, which was found to be when claimant actually reported that condition to defendants. (Transcript page 59) However, claimant did not actually state in her testimony at hearing that March 2014 is when she realized the seriousness of her condition and that conclusion cannot be inferred from her testimony.

Claimant concedes she realized her bilateral shoulder condition was both work-related and serious in May 2013 because she testified she reported the condition to defendants at that time. (Hearing Transcript, pp. 22-23, 34) However, Kathy Peterson, defendant-employer's human resources manager, and Kris Carr, defendant-employer's occupational health nurse, both testified claimant never reported her shoulder condition to defendants until March 27, 2014. (Tr. pp. 59-60, 87-92) The deputy commissioner found Ms. Peterson and Ms. Carr to be more credible than claimant on this point and I affirm the deputy commissioner's finding in that regard.

Claimant makes a contradictory argument. On the one hand, claimant contends she reported the bilateral shoulder condition to defendants in May 2013, which would have been a timely report under section 85.23. By stating this, claimant concedes she recognized the seriousness of her condition in May 2013. On the other hand, claimant argues she didn't know the seriousness of her condition until March 27, 2014, which was 300 days or more after she testified she reported it. If claimant's assertion that she reported the condition in May 2013 cannot be believed, she cannot then fall back on the assertion that she did not realize the seriousness of the condition until March 27, 2014, which is when it has been found claimant actually reported the condition to defendants. Because claimant's testimony that she reported the condition in May 2013 is a concession that she realized the seriousness of the condition when she claims she reported it, she cannot have it both ways and assert that the discovery rule gives her until 90 days after March 27, 2014, to report the condition and still be in compliance with Iowa Code section 85.23. I therefore affirm the deputy commissioner's finding that claimant's claim for her cumulative bilateral shoulder condition is barred by the 90-day notice requirement contained in section 85.23.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on October 14, 2016, is affirmed in its entirety.

Claimant takes nothing from these proceedings.

Pursuant to rule 876 IAC 4.33, the parties shall pay their own costs of the arbitration proceeding, and claimant shall pay the costs of the appeal, including the cost of the hearing transcript.

Signed and filed on this 10th day of April, 2018.

Joseph S. Cortese II

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WORKERS' COMPENSATION
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