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.	FILED FEB 19 2019 WORKERS COMPENSATION	File No. 5058759 ARBITRATION DECISION Head Note Nos.: 1803, 2203, 2800

STATEMENT OF THE CASE

Cynthia Roman-Ties, claimant, filed a petition in arbitration seeking workers' compensation benefits from Cargill, Inc. (Cargill) and its insurer, Old Republic Insurance Company, as a result of an injury she allegedly sustained on October 5, 2015 or December 29, 2015, that allegedly arose out of and in the course of her employment. This case was heard in Cedar Rapids, Iowa, and fully submitted on July 21, 2018. The evidence in this case consists of the testimony of claimant, Kirsten Nelson, Joint Exhibits 1 - 7, Defendants' Exhibits A - J and Claimant's Exhibits 1 - 12. Both parties submitted briefs.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties agreed that Cargill's medical plan covered claimant's medical expenses until January 31, 2016 and that Cargill is entitled to a credit for payment of costs its insurance plan paid up to that date. (Transcript pages 7 and 8) The parties are now bound by their stipulations.

ISSUES

1. Whether claimant sustained an injury on October 5, 2015 or December 29, 2015, which arose out of and in the course of employment;

2. Whether the alleged injury is a cause of permanent disability and, if so;

3. Whether the alleged disability is an injury under Iowa Code Chapter 85 or an occupational disease under Iowa Code Chapter 85A.

4. If claimant has an occupational disease, is claimant only entitled to medical benefits under Iowa Code 85A. 5.

5. The extent of claimant's disability.

6. Whether claimant provided notice under Iowa Code sections 85.23 or 85A.18.

7. Commencement date of any permanent benefits.

8. Whether claimant is entitled to payment of medical expenses.

9. Whether claimant is entitled to payment of an independent medical examination.

10. Assessment of costs.

FINDINGS OF FACT

The deputy workers' compensation commissioner having heard the testimony and considered the evidence in the record finds that:

Cynthia Roman-Ties, claimant was 59 years old at the time of the hearing. Claimant obtained a GED in 1991. Claimant has no other post-secondary education. Claimant did receive training through Cargill and a local community college to be a certified boiler technician in 2013. (Transcript page 14; Exhibit 3, p. 30)

Claimant worked at Cargill for about 12 years. (Ex. B, p. 21) The last job claimant held at Cargill was boiler operator. (Tr. p.15) Claimant was in that position from 2012 until her last day at Cargill January 11, 2016. The last day she actually performed the boiler operator job was December 29, 2015. (Tr. pp. 15, 16) Claimant was earning $24.11 per hour plus union benefits at the time she resigned. (Exhibit 3, p. 35)

Claimant had a number of pulmonary function tests (PFT) while working for Cargill. She had one each year and she was not told that any of the PFT were abnormal. (JEx. 7, pp. 211, 212) Claimant's last routine PFT was in February 2015 and at that time claimant was not having any symptom of breathing difficulties. (JE. 7, p. 215)

Claimant obtained a position with Von Maur January 4, 2016 as a sales associate. (Tr. p. 92) Claimant submitted an application in September 2015 and was offered a position after Thanksgiving to start in January 2016. (Tr. pp. 47, 49; Ex. G, p. 53) Claimant worked in that position until July 2016. She was earning $14.50 per hour.

Claimant works as a sales associate at Kay's Jewelers for July 2016 through May 2017 earning $13.20 per hour plus commission. (Ex. 3, p. 35) Claimant was a sales associate for Sumberland from May 2017 through December 2017 earning $10.89 per hour. (Ex. 3, p. 35) Starting January 2018 and continuing up to the date of the hearing claimant was working at FedEx Office. Her position involved being an office center consultant, sales, copying and doing packaging orders. She is earning $13.25 per hour and works 36 – 40 hours a week. (Ex. 3, p. 37)

As a boiler operator at Cargill claimant worked with both natural gas and coal powered boilers. Claimant testified that in 2015 Cargill was burning more coal as it had acquired coal from a power company and it was cheaper to operate. (Tr. p. 26) Claimant described how she would come into contact with coal, coal dust and fly ash as a boiler operator. When the coal was unloaded claimant would use her hands to feel the moisture content of the coal. (Tr. p. 29; Ex. 8, p. 60) Claimant would go down to the pit where the coal was dumped and turn on a chute. If there was wet coal she would have to clean off the slides. Claimant would check on the pulverizer two to three times a day and would shovel out coal and rocks from the bottom of a grate she opened. (Tr. pp. 34, 35) Claimant would also come into contact with bottom ash. Three times a day she would shovel bottom ash. (JEx. 7, p. 219) Sometimes the air would blow and she would have a mouthful of dust. (Tr. p. 37) Claimant would use a dust mask when fly ash was loaded onto trucks. (JEx. 7, p. 215) An environment exposure monitoring report stated that filling truck with ash is a high dust area and the dirtiest job completed by boiler operators. (Ex. E, p. 36) (See also: Ex. 6, pp. 48 – 52 and JEx. 7, pp. 239, 240 and for addition description of exposure to materials.)

Claimant had a preoperative examination before her carpal tunnel surgery in July 2015. The exam was negative for COPD and asthma. (JEx. 3, p. 34)

Claimant visited her primary health care providers on September 4, 2015 after experiencing shortness of breath for about three days. (Tr. pp. 40, 62) Claimant was assessed with bronchitis. (JEx. 3, p. 39) Claimant testified that in her past she would occasionally have flair up of her bronchitis. (Tr. p. 64)

On September 4, 2015, claimant was seen by Lauren Zenisek, PA-C, for a cough with chest tightness and shortness of breath with an onset of three days ago. Claimant was assessed with Bronchitis. (JEx. 3, p. 39) Claimant's symptoms continued and she was further evaluated on September 18, 2013.

Claimant testified that she spoke to her supervisor Thomas Belfield about needing to go to an appointment with a specialist. Claimant said that she told Mr. Belfield that she thought her breathing problems could be related to the wet coal. (Tr. pp. 42, 43, 74; JEx. 7, p. 221) Claimant turned in work excuse slips for her physician to Mr. Belfield and discussed that she was having testing concerning breathing problems. (JE. 7, p. 232: JEx. 5, pp. 84, 85) During claimant's exit interview on January 11, 2016 claimant told Kirsten Nelson, from the HR Department at Cargill, that she believed that her exposure to coal was the cause of her lung problems. (Tr. pp. 76,105) Claimant

testified that she made the final decision to leave Cargill around the time she had vocal cord surgery on December 21, 2015. (JEx. 7, p. 231) Claimant's attorney sent a notice to Cargill on February 8, 2016 that claimant sustained an occupational exposure injury on or about January 4, 2016. (Ex. 5 p. 41; Ex. D, p. 28)

Mr. Belfield testified via deposition. He worked for Cargill from 2011 through November 2015. For a time he was the boiler supervisor and supervised claimant. (Ex. J, p. 62) Mr. Belfield remembered claimant telling him she was going to a lung specialist, but had no recollection of being told it was due to work exposure. (Ex. J, p. 63) Mr. Belfield said that if he was told about a work injury he would have to report it to the safety department. (Ex. J, p. 63) Mr. Belfield agreed that boiler operator would need to leave the control room when coal would clog a system, that there was exposure to some smoking pyrite and that the filters to the control room would become black and need to be changed. (Ex. J, p. 65)

Ms. Nelson testified that the first she heard that the claimant was claiming a work-related injury was during claimant's January 11, 2016 exit interview. (Tr. p. 109)

The job description of Boiler Operation lists "Atmospheric Conditions to Which Employee is Exposed on a Regular Basis" to include Odors, Gases, Dust and Seasonal Humidity. (Ex. 6, p. 45) Claimant and other boiler operators were monitored to exposure to certain chemicals in February 2014. Claimant was exposed to higher levels of nitrogen dioxide (NO_2) than the other boiler operators that may have been due to fumes from the temporary gas boiler. (Ex. F, pp. 50, 52)

Claimant continued to work until December 29, 2015. She did not miss work, other than to attend medical appointments and her vocal cord operation, due to the breathing/lung issues. (Tr. p. 44) Claimant said that she did not bid for any other positions at Cargill, as she felt that the positions required use of stairs or exposure to dust and chemicals. (Tr. pp. 84, 85)

On October 2, 2015, claimant was told she had COPD and referred to a pulmonary specialist, John Cowden, M. D. (Tr. pp. 41, 42) Claimant said she suspected that work might be a cause of her COPD. (JEx. 7, p. 230) Claimant saw Dr. Cowden on October 5, 2015. Claimant expressed concern to Dr. Cowden that her work may be causing her breathing problems. (JEx. 5, p. 78, Tr. p. 71) Claimant had additional testing and returned to Dr. Cowden on October 22, 2015. Claimant testified she was told on that date that she had a permanent injury, and that her condition was related to her work at Cargill. (Tr. p. 46)

On October 2, 2015, PA Zenisek noted claimant's PFT showed severe COPD and recommended a referral to pulmonology. Claimant was called and told of the results of the testing and referred to Dr. Cowden on October 2, 2015. (JEx. 3, p. 48)

Claimant was examined by Dr. Cowden on October 5, 2015. Dr. Cowden is board certified in pulmonary medicine. (Ex. 2, p. 25) Dr. Cowden's summary of diagnoses was:

1. Possible work-related asthma
2. Significant work-place exposures
3. Chronic rhinitis, work-related
4. Severe airflow obstruction with air trapping – reversible
5. Consider hypersensitivity pneumonitis vc emphysema (reduced DLCO)
6. Severe anxiety
7. Severe dyspnea
8. Probable vocal cord dysfunction

(JEx. 5. p. 78) Dr. Cowden noted:

> She works at Cargill in a boiler room with gas and coal boilers. Current conditions by her description are not up to code given the improper venting and debris buildup. She is frequently exposed to plumes of coal dust and heat without respiratory protective devices as she is unable to work with a mask. When she blows her nose, the production is black. She states over the past year there have been multiple chemical leaks as well. Again, she does not wear face masks when working as they limit her breathing ability. She is concerned that her workplace exposure is causing irreparable damage to her lungs and overall health, however she is worried about her employment and feels unable to speak up. Per her report, Cargill management has informed her that they plan to reset and repair the boiler in the near future, thus reducing direct exposure, as they plan to continue to burn coal for another year.

(JEx. 5, pp. 78, 79) Claimant returned to Dr. Cowden on October 22, 2015 after additional testing. Dr. Cowden's assessment was,

1. Possible work-related asthma
2. Significant work-place exposures
3. Chronic rhinitis, work-related
4. Severe airflow obstruction with air trapping-reversible
5. Consider hypersensitivity pneumonitis vc emphysema (reduced DLCO)
6. Severe anxiety

7. Severe dyspnea

8. Probable vocal cord dysfunction

(JEx. 5, pp. 89, 90) Dr. Cowden noted claimant had a 17-year history of smoking and that claimant quit in February 1993. (JEx. 5, p. 90) On December 21, 2015, claimant underwent left vocal cord polypectomy. (JEx. 5, p. 93) Her preoperative examination on December 14, 2015 was positive for asthma/COPD. (JEx. 3, p. 56) Dr. Cowden last saw claimant on October 24, 2016. His assessment was,

1. Work-related asthma (now s/p job change with marked improvement in airflow and symptom control)

2. Chronic rhinitis, work-related

3. Vocal cord dysfunction

4. Mild airflow obstruction with reversibility

5. Emphysema

6. Severe anxiety

7. Linear opacities both lungs

8. Stable 3 mm LUL medial nodule (4/2016)

9. Stable 4 mm left lingular nodule (4/2016)

10. Stable 6 mm linear lesion (4/2016) lateral LLL

(JEx. 5, p. 107)

On June 16, 2016, Dr. Cowden responded to a request from claimant's attorney about her condition. Dr. Cowden wrote,

> This letter was requested to follow-up on questions after our phone call placed on April 8th, 2016 in regards to Cynthia Driscoll. I have been following this patient for a work-exacerbated asthma. Cynthia has not been specifically evaluated in an exposure chamber, however the environment as described included heavy particulate debris and multiple exposures, many of which may be implicated in symptoms though in total all are important. Cynthia's prognosis is good with appropriate environmental control. It is likely that her asthma will be a permanent diagnosis. Please feel free to contact me with any additional questions in regards to Ms. Driscoll.

(JEx. 5, 102)

Patrick Hartley, M.D., of the University of Iowa Hospitals and Clinics performed an independent medical examination of the claimant. The report is undated however he examined claimant on August 26, 2016. (Ex. 1, p. 10) Based upon correspondence from claimant's attorney, it appears that the actual IME report was not issued until possibly March 24, 2017. (Ex. 1, p. 9) Dr. Hartley noted that the medical reports showed claimant smoking up to 17 pack years. (Ex. 1, p. 16) Dr. Hartley's assessment was,

> It is my opinion that the claimant has obstructive lung disease, with reversibility demonstrated on spirometry in October 2015. Current spirometry (on the date of her IME) reveals continuing airflow obstruction, but without reversibility.
>
> It is more likely than not that her airflow obstruction is multifactorial in etiology. Pertinent factors include her prior cigarette smoking, and her occupational exposures to coal and combustion products including fly ash.
>
> With regard to her past cigarette smoking, I note that the documented history of her prior smoking varies throughout her medical record, ranging up to 17 pack years.
>
> Following my evaluation of the claimant, and review of the medical records and other documentation provided, it is my opinion, to a reasonable medical certainty, that her occupational exposures at Cargill were a substantial contributing factor to her obstructive lung disease.

(Ex. 1, p. 16) Dr. Hartley provided a 21 percent whole body impairment rating. Dr. Hartley recommended restrictions of claimant be restricted from exposure to irritant chemicals, smoke, dust fumes or vapors. (Ex. 1, p. 17) I find these are claimant's restrictions.

On September 13, 2017, Greg Hicklin, M.D., performed an IME of the claimant. Dr. Hicklin noted claimant reported that Dr. Cowden stated that she needed to stop working at Cargill or her condition would get worse. (Ex. A, p. 10) Dr. Hicklin's impression was:

> Mild obstructive-type ventilator defect.
>
> I believe that Mrs. Driscoll has chronic obstructive pulmonary disease. This is different than asthma in that it is not reversible and no documented fluctuations in flow rates. There has been a persistent obstructive-type ventilatory defect. . . .
>
> . . . .
>
> She worked in an environment where she was exposed to multiple respiratory irritants and had a history of worsening lung symptoms,

> shortness of breath, and cough in that environment and better away from the environment. Thus, I believe that the environmental exposures were an aggravating condition. I cannot identify any particular substances, but the ash and coal fumes seem high on my high. [sic]
>
> After leaving that environment, she feels better. She continues to have symptoms, but I think those are due to her underlying chronic obstructive pulmonary disease. Thus, I think her aggravation was probably temporary, not permanent.

(Ex. A, pp. 13, 14) Dr. Hicklin said claimant's impairment rating is closer to 10 percent rather than 25 percent and would not provide any permanent restrictions other than to avoid situations that bother her. (Ex. A, p. 14)

On January 11, 2018, Dr. Hartley wrote claimant's attorney after reviewing Dr. Hicklin's IME. Dr. Hartley did not agree with Dr. Hicklin's IME. Dr. Hartley wrote,

> It is my opinion, to a reasonable medical certainty, irrespective of whether her obstructive lung disease represents asthma, COPD or a combination thereof, that her occupational exposures at Cargill were a significant contributing factor to her obstructive lung disease.
>
> It remains my opinion that medical restrictions with regard to inhaled exposures are appropriate. I recommend that the claimant should be restricted from exposure to irritant chemicals, smoke, dust, fumes or by vapors. As I noted in my IME report:
>
> > It is possible that use of personal protective equipment (a fit-tested respirator, or a powered air purifying respirator) may permit the claimant to work for limited periods of time in an occupational setting where these environmental hazards exist. However, I would note that wearing a tight fitting respirator, or even a powered air purifying respirator, does increase the work of breathing, which can cause increased symptoms in a patient with underlying lung disease.

(Ex. 1, p. 24)

I find claimant has COPD/asthma as a result of her occupational exposure at Cargill.

The claimant's credible testimony, testimony of Mr. Belfield and Cargill's descriptions of working conditions prove claimant was exposed to significant occupational exposure to various substances. I find that claimant's exposure to coal dust, fly ash, bottom ash, dust, pyrite smoke and chemicals was more prevalent than everyday life.

I find claimant has suffered a personal injury that arose out of and in the course of her employment with Cargill. I find that claimant has an occupational disease due to her exposure to substances at Cargill.

I find the date of claimant's injury to be December 30, 2015, the day after she was exposed to the substances that caused her occupational disease. I find this is the day that claimant could not work for Cargill.

Claimant was employed at the time of the hearing and has been able to find a number of other jobs since she left Cargill. Claimant has extensive experience in retail, however, the positions she has been able to obtain pay significantly less than her work at Cargill. Claimant is precluded from working in environments that would expose her to dust and fumes. I find claimant has a 40 percent loss of earning capacity.

Claimant has requested medical expensed be paid by the defendants. (Ex. 11, pp. 73 – 82) The parties agreed that Cargill's insurance carrier paid the insurance portion of these cost until January 31, 2016. Claimant had co-payments in the amount of $240.00 from October 31, 2015 through October 22, 2017. (Ex. 11, p. 73) I find that the medical expenses submitted in Exhibit 11 are causally related to claimant's workplace exposure to fumes and dusts and her occupational injury.

Claimant has requested reimbursement of costs of $788.12 and the IME expense of Dr. Hartley of $3,000.00. (Ex. 12, p. 83) I find these costs are reasonable.

RATIONAL AND CONCLUSIONS OF LAW

The first issue is whether this is a case under Chapter 85 or 85A of the Iowa Code.

85A.8 Occupational disease defined.

> Occupational diseases shall be only those diseases which arise out of and in the course of the employee's employment. Such diseases shall have a direct causal connection with the employment and must have followed as a natural incident thereto from injurious exposure occasioned by the nature of the employment. Such disease must be incidental to the character of the business, occupation or process in which the employee was employed and not independent of the employment. Such disease need not have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have resulted from that source as an incident and rational consequence. A disease which follows from a hazard to which an employee has or would have been equally exposed outside of said occupation is not compensable as an occupational disease.

In McSpadden v. Big Ben Coal Co. 288 N.W.2d 181 (Iowa 1980), the court determined that to qualify for benefits under chapter 85A, a claimant must prove two things: first, that the disease is causally related to the exposure to harmful conditions of employment; and second, that those harmful conditions are more prevalent in the employment concerned than in everyday life. McSpadden, 288 N.W.2d at 190.

In IBP, Inc. v. Burress, 779 N.W.2d 210, 214 (Iowa 2010) the supreme court held;

> The legislature has set forth two workers' compensation schemes: one for injuries under Iowa Code chapter 85 and one for occupational diseases under chapter 85A. In order to qualify for workers' compensation benefits under chapter 85, the employee must demonstrate "(1) the claimant suffered a 'personal injury,' (2) the claimant and the respondent had an employer-employee relationship, (3) the injury arose out of the employment, and (4) the injury arose in the course of the employment." Meyer v. IBP, Inc., 710 N.W.2d 213, 220 (Iowa 2006). Comparatively, to recover under chapter 85A, "the disease must be causally related to the exposure to harmful conditions of the field of employment," and "those harmful conditions must be more prevalent in the employment concerned than in everyday life or in other occupations." McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 190 (Iowa 1980).

The court, in explaining the scope of occupational disease and workers' compensation stated;

> What types of diseases are strictly occupational diseases and not injuries is debatable. Prior to 1973, chapter 85A restricted recovery for occupational diseases to seventeen diseases specifically listed in Iowa Code section 85A.9 (1971). See McSpadden, 288 N.W.2d at 190. In 1973, the legislature repealed that section and broadened the definition of occupational disease in section 85A.8. Id.; see also 1973 Iowa Acts ch. 144, § 24. Currently, chapter 85A makes reference to only two diseases, brucellosis in section 85A.11 and pneumoconiosis ("the characteristic fibrotic condition of the lungs caused by the inhalation of dust particles") in section 85A.13. Our case law has permitted recovery for allergic contact dermatitis and lead intoxication under chapter 85A. See Doerfer Div. of CCA v. Nicol, 359 N.W.2d 428, 432 (Iowa 1984); Frit Indus. v. Langenwalter, 443 N.W.2d 88, 91 (Iowa Ct.App.1989). But see St. Luke's Hosp. v. Gray, 604 N.W.2d 646, 652 (Iowa 2000) (allergic reactions may be considered injuries under chapter 85). In McSpadden, we noted other states considered the following to be occupational diseases: chronic bronchitis, kidney disorder and asthma caused by inhalation of paint fumes, and pulmonary disease caused by inhalation of smoke and fumes. McSpadden, 288 N.W.2d at 190-91 n. 5. Although chapter 85A no longer

> limits recovery for occupational diseases to a specific schedule, section 85A.8 and our case law indicate an occupational disease is generally acquired from repeated exposure to a toxin in the workplace. See Doerfer, 359 N.W.2d at 432-33.

IBP, Inc. v. Burress, 779 N.W.2d 210, 215–16 (Iowa 2010).

> Compensation for occupational disease also requires proof of disability. Iowa Code § 85A.5. "Disablement" is defined in the act as "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...." Iowa Code § 85A.4; See Doerfer Div. of CCA v. Nicol, 359 N.W.2d 428, 438 (Iowa 1984).

Noble v. Lamoni Prod., 512 N.W.2d 290, 293 (Iowa 1994).

> Disability under Iowa Code chapter 85A is determined by a consideration of age, education, qualification, experience and inability, due to injury, to engage in the employment for which the claimant is fitted. McSpadden, 288 N.W.2d at 192. These factors also apply in determining a claimant's capacity to perform his work or earn equal wages in other suitable employment, the standards for determining disability under Iowa Code section 85A.4. Id.

Doerfer Div. of CCA v. Nicol, 359 N.W.2d 428, 438 (Iowa 1984).

> 85A.12 Disablement or death following exposure — limitations.
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> An employer shall not be liable for any compensation for an occupational disease unless such disease shall be due to the nature of an employment in which the hazards of such disease actually exist, and which hazards are characteristic thereof and peculiar to the trade, occupation, process, or employment, and such disease actually arises out of the employment, and unless disablement or death results within three years in case of pneumoconiosis, or within one year in case of any other occupational disease, after the last injurious exposure to such disease in such employment, or in case of death, unless death follows continuous disability from such disease commencing within the period above limited for which compensation has been paid or awarded or timely claim made as provided by this chapter and results within seven years after such exposure.
>
> In any case where disablement or death was caused by latent or delayed pathological conditions, blood, or other tissue changes or malignancies due to occupational exposure to X rays, radium, radioactive substances or machines, or ionizing radiation, the employer shall not be

> liable for any compensation unless claim is filed within ninety days after disablement or death or after the employee had knowledge or in the exercise of reasonable diligence should have known the disablement was caused by overexposure to ionizing radiation or radioactive substances, and its relation to employment.

In McSpadden v. Big Ben Coal Co. 288 N.W.2d 181 (Iowa 1980), the court determined that to qualify for benefits under chapter 85A, a claimant must prove two things: first, that the disease is causally related to the exposure to harmful conditions of employment; and second, that those harmful conditions are more prevalent in the employment concerned than in everyday life. McSpadden, 288 N.W.2d at 190. Claimant has proven the COPD/asthma is causally related to her work and the harmful conditions were more prevalent in employment than in everyday life.

In Noble v. Lamoni Products, 512 N.W.2d 290 (Iowa 1994), the Iowa court determined that the concept of disease encompasses invasion of the body by outside agents, including disease organisms and toxic substances, while injury involves trauma to the body. A claim for occupationally aggravated COPD/asthma should, accordingly, be considered under chapter 85A.

I find that Chapter 85A is applicable to this case.

85A.18 Notice of disability or death — filing of claims.

> 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, and in the case of death from such an occupational disease, written notice of such claim shall also be given to the employer within ninety days thereafter. (Emphases supplied)

The Iowa Court of Appeals has interpreted this section to mean that the date for beginning the 90-day notice starts when the disease progresses to the point that the employee, because of pain or physical defendant, is no longer able to work. See Croft v. John Morrell & Co., 451 N.W.2d 501 (Iowa Ct. App. 1989). ("We hold that the date for beginning the 90-day notice period under section 85A.18 starts 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 find that the employer had actual notice, as well as notice within 90 days after the first manifestation.

The claimant here presented credible evidence that the employer had actual notice when she spoke to Mr. Belfield about her concerns that her work could be the clause of her conditions. I acknowledge that Mr. Belfield testified that he did not remember being told by claimant, but I find claimant's version more credible. Mr. Belfield did remember claimant telling him she needed time off to see a lung specialist for her breathing. This appears to have occurred in mid-October 2015 before claimant's second appointment with Dr. Cowden. The employer's actual knowledge of the disease obviates the necessity of giving statutory notice. Doerfer Div. of CCA v. Nicol, 359 N.W.2d 428 (Iowa 1984).

Aside from actual notice, claimant provided notice within 90 days of when she could no longer work. I found this day was December 30, 2015. Claimant informed HR on January 11, 2016 and claimant's attorney sent a letter to Cargill on February 8, 2016. Claimant was being continuingly exposed to substance that caused her COPD/asthma. The last day of injurious exposure was December 29, 2015. Claimant was informed by Dr. Cowden that further exposure could lead to greater harm. Defendants have not met their burden of proof for the affirmative defense of lack of notice.

The next issue then is if the claimant suffered a disablement as a result of his occupational disease, and whether the disablement manifested within one year of the date of last exposure.

> 85A.4 Disablement defined.
>
> 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 as defined in this chapter in the last occupation in which such employee is injuriously exposed to the hazards of such disease.

The claimant's last day with the employer was the last date of exposure to fumes and dust. The manifestation date of the claimant's disablement is the last date of work for the employer. Dr. Cowden informed claimant her condition would get worse if she kept working. (Ex. A, p. 10) Claimant could not continue working in a dusty environment any more at that point. Claimant's ability to work in suitable occupation was significantly compromised at that time. December 30, 2015 is the first day for commencement of permanent disability benefits. Claimant found other work, however Chapter 85A has not been interpreted to require total incapacity to work in order to be eligible for benefits under Chapter 85A.

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or

source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

There are three well-qualified physicians in this case with differing opinions.

Dr. Hicklin states that the work exposure only caused a temporary aggravation of claimant's per-existing COPD. Dr. Hicklin finds claimant has COPD, which is a permanent impairment. I do not find his opinion as convincing as Dr. Cowden and Dr. Hartley. Dr. Cowden found that claimant work place exposure cause her asthma. Dr. Hartley opined that claimant's lung condition, whether COPD or asthma or a combination of the two was caused by work and was permanent.

Claimant had annual lung testing through Cargill and there is no evidence of COPD in that testing. Claimant received treatment for bronchitis in the past and that condition would resolve. It was not until October 2015 that claimant was diagnosed with COPD/asthma and that a connection was made medically that it was connected to her work. I find claimant has suffered a personal injury that arose out of and in the course of her employment with Cargill. I find that she has a permanent impairment.

Since 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 the 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 begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

In assessing an unscheduled, whole-body injury case, the claimant's loss of earning capacity is determined as of the time of the hearing based upon industrial disability factors then existing. The commissioner does not determine permanent disability, or industrial disability, based upon anticipated future developments. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009).

Claimant has restrictions that limit some types of work she can perform. Claimant is not to be exposed to dust and fumes. Claimant has been able to find other employment at a significant reduction in wages. Claimant is well-motivated to work and can work in controlled environments. Claimant ability for retraining is not positive given her age. Claimant has been able to work in retail sales settings. Considering all the factors of industrial disability I find claimant has a 40 percent industrial disability, which entitled claimant to 200 weeks of permanent partial disability benefits.

Claimant has a permanent impairment and could not continue employment with Cargill. Claimant is entitled to indemnity payments, as well as medical benefits.

Based upon the evidence, claimant was examined by Dr. Hartley for purposes of an IME before defendants obtained the rating and report by Dr. Hicklin in September 2017. Dr. Hartley's IME was issued around March 2017. Claimant is not entitled to the costs of and IME under Iowa Code 85.39.

Claimant can be reimbursed the cost of the report. An itemized bill shows that Dr. Hartley spent three hours on the report and charged $600.00 per hour. (Ex. 12, p. 87) I find that claimant is entitled to $1,500.00 for the cost of this report under 876 IAC 4.33. I award claimant additional costs in the amount of $788.12 pursuant to 876 IAC 4.33 for filing and service fees, depositions cost and for a second report by Dr. Hartley. Total costs awarded are $2,288.12.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975). Pursuant to Iowa Code section 85.27, claimant is entitled to payment of reasonable medical expenses incurred for treatment of a work injury. Claimant is entitled to an order of reimbursement if he/she has paid those expenses. Otherwise, claimant is entitled only to an order directing the responsible defendants to make such payments directly to the provider. See Krohn v. State, 420 N.W.2d 463 (Iowa 1988).

In cases where the employer's medical plan covers the medical expenses, claimant is entitled to an order of reimbursement only if he has paid treatment costs; otherwise, the defendants are ordered to make payments directly to the provider. See

Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Where medical payments are made from a plan to which the employer did not contribute, the claimant is entitled to a direct payment. Midwest Ambulance Service v. Ruud, 754 N.W.2d 860, 867-68 (Iowa 2008)("We therefore hold that the commissioner did not err in ordering direct payment to the claimant for past medical expenses paid through insurance coverage obtained by the claimant independent of any employer contribution.") See also: Carl A. Nelson & Co. v. Sloan, (Iowa App. 2015) 873 N.W.2d 552 (Iowa App. 2015) (Table).

I found that the medical expenses in Exhibit 11 are causally related to claimant's occupational disease. Defendants shall pay the medical expenses found in Exhibit 11.

ORDER

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.

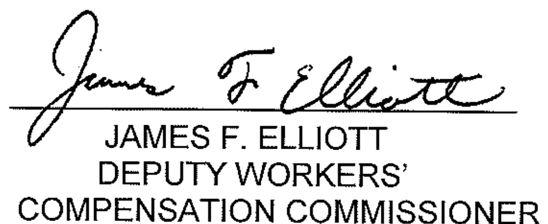
Defendants shall pay medical expenses as set forth in this decision.

Defendants shall pay claimant costs of two thousand two hundred eighty-eight and 12/100 dollars ($2,288.12).

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 file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Signed and filed this 19th day of February, 2019.



JAMES F. ELLIOTT
DEPUTY WORKERS' COMPENSATION COMMISSIONER

Copies To:

Thomas M. Wertz
Attorney at Law
PO Box 849
Cedar Rapids, IA 52406-0849
twertz@wertzlaw.com

James M. Peters
Attorney at Law
115 Third St., SE, Ste. 1200
Cedar Rapids, IA 52401-1266
jpeters@spmblaw.com

JFE/kjw

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.