BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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| TERRY TILTON,<br><br>Claimant,<br><br>vs.<br><br>H.J. HEINZ COMPANY,<br><br>Employer,<br><br>and<br><br>LIBERTY MUTUAL INSURANCE COMPANY,<br><br>Insurance Carrier,<br>Defendants. | FILED<br>APR - 5 2018<br>WORKERS' COMPENSATION<br><br>File No. 5053002<br><br>APPEAL DECISION<br><br>Head Note Nos.: 1403.30; 2209; 2802 |

STATEMENT OF THE CASE

Claimant appealed an arbitration decision filed July 1, 2016. That decision found, in part, that claimant's claim for benefits was barred for failure to give timely notice under Iowa Code section 85.23.

The detailed arguments of the parties have been considered and the record of evidence has been reviewed de novo. Upon written delegation of authority by the workers' compensation commissioner under Iowa Code section 86.3, I render this decision a final agency decision on the behalf of the Iowa Workers' Compensation Commissioner.

ISSUES

1. What is the appropriate date of injury for claimant's cumulative injury.

2. Whether claimant's claim is barred by application of Iowa Code section 85.23.

3. Whether claimant's claim is barred by application of Iowa Code section 85.26.

4. Whether claimant sustained an injury that arose out of and in the course of employment.

5. Whether claimant's injury resulted in a permanent disability; and if so,

6. The extent of claimant's entitlement to permanent partial disability benefits.

7. Credit.

8. Whether defendants are liable for a penalty under Iowa Code section 86.13.

## FINDINGS OF FACT

Claimant was 56 years old at the time of hearing. (Transcript, page 43) Claimant began working with Heinz in 1999. (Tr. p. 44) Claimant began with Heinz as a "pre-weigher" where she weighed food. Claimant then worked in quality control. Claimant began in the "Clean As You Go" position in 2010. (Tr. p. 45)

Claimant's job description indicates that she spent approximately 65 percent of her time cleaning facility equipment, 15 percent monitoring chlorine barrels, 5 percent emptying trash cans, 5 percent assisting with product change over, and 10 percent setting up chemical sprayers and chlorine barrels. (Claimant's Exhibit 11, page 1) Claimant was required to lift, carry, push, and pull up to 100 pounds occasionally and 41-50 pounds frequently. (Ex. 11)

Claimant's prior medical history is relevant. From 2002 through 2013, claimant routinely treated with Dennis Bradley, D.C., for lower back pain. From 2002 through 2006, claimant treated approximately 30 times for lower back pain caused by lifting a grandchild, lifting bags of dog food, falling, mowing grass, working in a flooded home, cleaning her home, gardening and mowing. (Ex. P, pp. 1-19)

In 2004, claimant was evaluated by Matthew Gray, M.D., for lower back pain. Claimant underwent an MRI that showed a small disc herniation at the L4-5 levels. Claimant was scheduled for an epidural injection. Claimant also underwent treatment for depression. (Ex. L, pp. 1-2; Ex. M, p. 1)

In a December 3, 2004 record from St. Luke's Hospital, which appears to have been completed by claimant, claimant indicated she had lower back pain not related to a workers' compensation claim. (Ex. M, p. 2)

In April 2005 and June 2005, claimant completed two other forms indicating treatment for lower back pain that was not a workers' compensation claim. (Ex. M, pp. 3-4)

In February 2005, claimant was evaluated by Dr. Gray. Claimant had three epidurals and still had lower back pain. A second MRI was recommended. (Ex. L, p. 3) A second MRI performed in July 2005 showed a disc bulge at L4-5 and degenerative changes at L3-S1. (Ex. M, p. 6)

In August 2005, claimant treated with Chad Abernathey, M.D. Claimant had a chronic history of lower back pain. Conservative treatment was recommended. (Ex. 7, p. 1)

From February 16, 2006 through March 27, 2006, claimant was kept off work due to lumbar disc bulge/herniation causing severe lower back pain. (Ex. J, p. 22) From 2006 through 2008 claimant treated for lower back pain for approximately 50 different occasions with Dr. Bradley. (Ex. J, pp. 23-31)

On August 27, 2007, claimant completed a pain assessment form. Claimant indicated pain in the buttocks beginning several weeks prior. Claimant was not involved with a workers' compensation claim. (Ex. N, p. 9)

In July 2008, claimant was evaluated by Dr. Gray for pain in the left hip and left leg. Claimant had lower back pain from lifting and moving boxes while cleaning a flooded home. Claimant was noted to be on disability at work. A repeat MRI was recommended. (Ex. L, p. 7)

An MRI taken July 14, 2008 showed a posterior facet spur at the L5-S1 levels and a disc protrusion at L4-5. (Ex. N, p. 11) Claimant was evaluated by Farid Manshadi, M.D., in August 2008. Claimant was assessed at that time of having a neuroforaminal stenosis secondary to a large facet spur at the L4-S1 levels. Adjustments and stabilization exercises were recommended. (Ex. Q, pp. 1-2)

From 2009 to 2010 claimant continued to routinely treat with Dr. Bradley for lower back pain. (Ex. J, pp. 32-39)

On February 4, 2010, Dr. Bradley took claimant off work for two to four weeks. Dr. Bradley noted claimant had an L4 disc protrusion and bone spurs. He noted the condition was permanent. He indicated claimant would continue to have flare ups in the future, some which would cause claimant to miss work. (Ex. J, pp. 43-45)

In March 2010, claimant began treating with Stanley Mathew, M.D., for lower back pain radiating to the left leg. Claimant was assessed as having a left sacroiliac joint dysfunction. Claimant was given medication. (Ex. 1, p. 8)

Claimant returned to Dr. Mathew in July 2010. Claimant was initially taken off work from July 7, 2010 through July 12, 2010 for lower back pain. Claimant was not returned to work for full duty until September 8, 2010. (Ex. 1, p. 14-22)

Claimant continued to treat with Dr. Mathew for lower back pain from March 2011 through December 2011. Claimant underwent injections in May 2011 for back pain. In November 2011, claimant had an epidural steroid injection (ESI). (Ex. 1, pp. 27-42)

In February 2012, claimant underwent an electro diagnostic study to rule out an L5 radiculopathy. Testing was normal. (Ex. 1, p. 45) In April 2012, claimant fell while walking a dog, which exacerbated her lower back pain. (Ex. 1, p. 48)

In June 2012, claimant underwent radiofrequency lesioning of the lateral branches of S1-S4. At that time, claimant was noted to have a new onset of bilateral leg pain of an unknown etiology. (Ex. S, pp. 3-5)

In July and August 2012 claimant treated for anxiety. Records indicate that claimant's anxiety attack happened while running on a treadmill. (Ex. L, pp. 8-11)

On January 17, 2013, claimant was seen in the emergency room for a panic attack. (Ex. L, pp. 12-13) A January 23, 2013 note from Dr. Gray's office notes that claimant was taken off of work due to her anxiety issues. (Ex. L, p. 14)

On January 11, 2013, claimant treated with Dr. Mathew for lower back pain. Notes indicate claimant had been doing well with her lower back pain until she had a slip and fall that exacerbated her condition. (Ex. R, pp. 4-5)

Claimant testified at hearing that prior to April 15, 2013 she was on disability. Claimant testified that on April 15, 2013 she told her supervisor she could not stand the pain anymore and was going "back on disability". (Tr. p. 75)

Dr. Mathews testified at hearing that he agreed with claimant's decision to stop working on or about April 15, 2013. (Tr. p. 28-29)

In a May 3, 2013 letter, claimant's attorney gave notice to Heinz claimant sustained a work injury on or about April 13, 2013.

Claimant continued to treat with Dr. Mathew from May 2013 through December 2013 for lower back pain. (Ex. 1, pp. 62-69) On June 26, 2013, claimant saw Dr. Mathew. Claimant was kept off work for another six weeks due to back pain. (Ex. 1, p. 64) In September 2015, claimant saw Dr. Mathew again indicating she did not believe she could continue to work. (Ex. 1, p. 67)

Claimant continued to have follow up care with Dr. Mathew for lower back pain from April 2014 through December 2014. (Ex. 1, pp. 71-76) In October 2014 claimant was evaluated for lower back pain. Claimant indicated an improvement in her pain since leaving work. (Ex. 1, p. 75) In December 2014 claimant sought care for lower back pain. Claimant had significant exacerbation of her back pain after moving. Claimant requested, and was given lumbar injections. (Ex. 1, pp. 76-77)

On July 3, 2014, claimant underwent a psychological evaluation with Kevin Krumvieda, Ph.D. Claimant was seen by Dr. Krumvieda to assess eligibility for disability benefits. Claimant indicated she was assessed ten years prior for anxiety. Claimant was taking medication for anxiety. Claimant was assessed as having a mild to moderate level of depression and anxiety. Claimant had difficulty coping with her husband's death. Claimant indicated her physical limitations also contributed to her depression. (Ex. U)

In a May 20, 2015 letter, Dr. Bradley indicated that claimant had bulging and degenerative discs. He believed claimant could only carry up to 10 pounds frequently. He noted claimant had difficulty standing, walking, or sitting in a car for over 30 minutes. (Ex. 2, p. 13)

In a November 2, 2015 letter, written by claimant's counsel, Dr. Mathew assessed claimant as having chronic lower back pain, sacroiliitis, and L5 radiculopathy. He opined that claimant's work at Heinz permanently aggravated claimant's preexisting lower back condition. He indicated claimant's job at Heinz was a substantial contributing factor in aggravating her chronic lower back pain. He supported claimant's decision to stop working. He indicated claimant's lower back condition was permanent. He found claimant had a 20 percent permanent impairment to her body as a whole using the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. He opined that he did not believe claimant was capable of full time employment. (Ex. 1, pp. 3-7)

In a December 6, 2015 report, Mark Mittauer, M.D., gave his opinions of claimant's mental health condition following an independent psychological evaluation. Dr. Mittauer assessed claimant as having an adjustment disorder with mixed anxiety and depressed mood. He opined that claimant would likely have an adjustment disorder as long as she had chronic back pain. He opined that claimant's work injury of April 2013 was a substantial contributing factor in her adjustment disorder and that working exacerbated her mental health condition. He opined that claimant's adjustment disorder was permanent in nature. He opined that claimant was not capable of working given her adjustment disorder. Dr. Mittauer recommended claimant have cognitive behavior therapy and be prescribed psychotropic medication. (Ex. 4, pp. 5-14)

In a January 5, 2016 letter, written by claimant's counsel, Dr. Bradley indicated he continued to treat claimant for problems associated with her lower back condition. He agreed that claimant's work at Heinz permanently aggravated her preexisting chronic lower back pain and that work permanently aggravated claimant's condition. He opined that claimant's job was a significant factor and the worsening of her condition. (Ex. 2, pp. 14-17)

In a January 9, 2016 report, Marc Hines, M.D., gave his opinions of claimant's condition following an IME. He opined claimant's lower back condition had its "etiology" in her work at Heinz. (Ex. 3, p. 15) He opined claimant had a 14 percent permanent impairment to the body as a whole. He limited claimant to lifting up to 10 pounds. (Ex. 3, pp. 7-16)

In a January 13, 2016 report, Barbara Laughlin, MA, gave her opinions of claimant's vocational opportunities. Ms. Laughlin opined that in the absence of a decrease in pain, or increase in physical abilities, claimant was unemployable. (Ex. 5)

In a February 6, 2016 report, Eli Sagan Chesen, M.D., gave his opinions of claimant's mental health following an independent psychological examination. He opined claimant had a mixed personality disorder that was a life-long condition. He opined that claimant's mixed personality disorder was not caused or materially aggravated by claimant's work at Heinz. He opined that Dr. Hines and Dr. Mittauer had over-diagnosed claimant. (Ex. V)

In a February 15, 2016 letter, written by claimant's attorney, Dr. Hines opined that claimant's job at Heinz permanently aggravated her preexisting lower back condition. He opined claimant's work at Heinz was a substantial contributing factor to her lower back condition. (Ex. 3, pp. 17-22)

In a February 12, 2016 report, Connie Oppedal, MS, gave her opinions of claimant's vocational opportunities. She opined that claimant could find work in approximately eight different job types and could earn between $9.00 to approximately $13.50 per hour. (Ex. X)

In a February 11, 2016 report, written by defendants' counsel, Dr. Abernathey indicated that claimant's degenerative condition to the lumbar spine was neither caused nor substantially aggravated by her work at Heinz. Dr. Abernathey opined that claimant's work at Heinz did not cause or change the condition of her back. He opined claimant, at most, sustained a temporary soft tissue aggravation of a preexisting condition. Dr. Abernathey opined claimant did not have a permanent impairment and did not require any permanent restrictions. He also opined claimant did not require any further medical care in relation to her temporary work injury at Heinz. (Ex. W)

At hearing, Dr. Mathew testified he is a physical medicine and rehabilitation physician at St. Luke's Hospital in Cedar Rapids. He indicated he had been treating claimant for low back pain since 2010. (Tr. pp. 18-19) Dr. Mathew testified that since 2010, claimant's condition had worsened. (Tr. pp. 20-23)

Dr. Mathew testified the worsening of claimant's back pain was due to her job at Heinz. (Tr. p. 28) He testified he agreed with claimant's decision to stop working at Heinz in April 2013. (Tr. p. 29) Dr. Mathew testified claimant's problems with the lumbar spine were work related. (Tr. p. 29)

Claimant testified since leaving Heinz, she has not looked for work. (Tr. p. 68)

Claimant testified she has difficulty with standing and sitting for extended periods of time. Claimant said she has difficulty with sleeping. (Tr. p. 70)

Claimant testified she first realized her back problems were related to her job at Heinz in approximately 2001. (Tr. p. 91)

Claimant testified that her live-in boyfriend and family situation has caused her anxiety. (Tr. p. 94-95)

## REASONING AND CONCLUSIONS OF LAW

The first issue to be determined is the appropriate date of claimant's cumulative injury.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to reasonable person. The date of manifestation inherently is a fact-based determination. The fact finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should have known that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W. 2d 368 (Iowa 1985).

The 90-day limit for notice does not begin running until the employee, acting reasonably, should know his injuries are both serious and work connected. Robinson v. Department of Transp., 296 N.W.2d 809, 812 (1980). The statute of limitations also does not begin to run until the employee knows that the physical condition is serious enough to have a permanent adverse impact on his employment or employability. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001).

Disability is found to have manifested when an employee has knowledge of a permanent impairment of the injury, and the causal impact the injury would have upon a job. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 152 (Iowa 1997). The date of surgery has been used as a date of injury in some cumulative injury cases. Wetzell v. Packaging Corporation, File Nos. 5000444, 5000445 (App. 2003).

The last day of work for an employee has also been used in other cumulative injury cases as the date of injury. Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992). The last day of employment has been found to be an appropriate manifestation date, for some cases, because whatever impact the injury and disability will have on the employee's employability manifests itself when the employee leaves the employer's workforce. Meier v. John Deere Dubuque Works of Deere & Company, File No. 5002128 (App. July 22, 2004).

Based on the law detailed above, the manifest date of injury is when claimant knew, or should have known, the injury was work-related; and when the employee knew or should have known the injury was serious. An injury is considered serious, for the date of manifestation, when physical condition has a permanent adverse impact on the employment.

In this case, claimant testified she first realized her back problems were related to her job was sometime in 2001. (Tr. 91)

On February 4, 2010, Dr. Bradley took claimant off work for two to four weeks. Claimant was assessed as having an L4 disc protrusion and bone spurs. Dr. Bradley noted claimant's condition was permanent and would cause her to continue to miss work in the future. (Ex. J, pp. 43-44)

On July 7, 2010, claimant was taken off work by Dr. Mathew. (Ex. 1, pp 14 and 16) Claimant was not returned to work until September 8, 2010. (Ex. 1, pp. 19-21)

In brief, claimant was off work for approximately three months in 2010 due to her back condition. In the summer of 2010 claimant was taken off work for approximately two months due to lower back problems.

Based on Dr. Bradley's note, claimant knew her condition was permanent. In 2010, claimant missed approximately three months because of her back condition. At that time, claimant knew or should have known her back condition had a permanent adverse impact on her employment.

By 2001, claimant knew her condition was caused by work. By September 8, 2010, after missing a total of three months off from work due to her back, claimant knew or should have known her physical condition was serious enough to have a permanent adverse impact on her employment. Based on this record, it is found the manifestation date of claimant's injury was September 8, 2010.

The next issue to be determined is whether claimant's claim for benefits is barred by application of Iowa Code section 85.23.

Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days of the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice for actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notices met when the employer, has a reasonably conscientious manager, is alerted of the possibility of the potential compensation claim through information which makes the employer aware that the injury occurred and it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985).

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).

The 90-day limit for notice does not begin running until the employee, acting reasonably, should know the injury is both serious and work connected. Robinson v. Department of Transp., 296 N.W.2d 809, 812 (1980).

In this case, it is found claimant's manifestation date of injury is September 8, 2010. Claimant did not give notice of her injury until May 3, 2013. (Ex. 13, p. 1) Given this record, it is found claimant's claim for benefits is barred by application of Iowa Code section 85.23.

As claimant's claim for benefits is found barred by application of Iowa Code section 85.23, all other issues are moot.

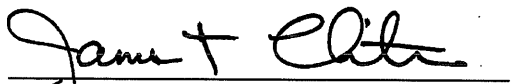
ORDER

THEREFORE IT IS ORDERED the arbitration decision, filed on July 1, 2016, is modified as detailed above.

That claimant shall take nothing from these proceedings.

That both parties shall pay their own costs.

Signed and filed this 5th day of April, 2018.



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