

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

---

TERRY TILTON,

Claimant,

vs.

H.J. HEINZ COMPANY,

Employer,

and

LIBERTY MUTUAL INSURANCE  
COMPANY,

Insurance Carrier,  
Defendants.

**FILED**

JUL 01 2016

WORKERS COMPENSATION

File No. 5053002

ARBITRATION DECISION

Head Note No.: 1803

---

STATEMENT OF THE CASE

Claimant, Terry Tilton, has filed a petition in arbitration and seeks workers' compensation benefits from, Heinz, employer, and Liberty Mutual Insurance, insurance carrier, defendants.

Deputy workers' compensation commissioner, Stan McElderry, heard this matter in Cedar Rapids, Iowa.

ISSUES

The parties have submitted the following issues for determination:

1. Whether the claimant suffered an injury arising out of and in the course of employment on April 15, 2013, and if so, the extent of disability;
2. Rate;
3. Lack of timely notice;
4. Untimely claim; and
5. Credit under Iowa Code section 85.38(2); and

6. Penalties.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

The claimant was 56 years old at the time of hearing. The claimant worked at Heinz from 1999 until April 15, 2013. She initially worked as a pre-weigher where she weighed food for soup recipes. She then worked in quality control. She began a "Clean As You Go" position in 2010. The main issue is whether or not she suffered a cumulative injury which manifested on or about April 15, 2013 which arose out of and in the course of her employment.

The "Clean As You Go" position was custodial. The majority of the job was wheeling 20 gallon barrels of a chorine water mixture to various areas in the plant. The barrels normally rolled fairly easily, but could be more difficult if wheels were worn or broken. The position also provided all cooking stations with stocked sanitation carts, cleaned up food meshes or spills with a squeegee, wheeling trash barrel to trash area, cleaned barrels, cleaned drums, cleaned the can opener, and cleaned and moved buckets weighing from 4-50 pounds.

The claimant testified that she knew in 2001 that there was a relationship between her back problems and work. She also testified that she altered the way she worked by 2011 due to the seriousness of the back problems that she connected to work. Thus at the latest the claimant knew by 2011 that her condition was work related, serious, and potentially compensable. However she did not provide notice to her employer until May of 2013 (Exhibit 13, page 1), and did not file a petition for benefits until 2015. Thus the claimant did not provide notice to the employer within 90 days of the most generous manifestation date of 2011, and did not file a petition until 2015 on a claim where no benefits were paid. No other issues are apposite.

REASONING AND CONCLUSIONS OF LAW

The first issue is timely notice.

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).

The time period both for giving notice and filing a claim does not begin to run until the claimant as a reasonable person, should recognize the nature, seriousness, and probable compensable character of the injury. The reasonableness of claimant's conduct is to be judged in light of claimant's education and intelligence. Claimant must know enough about the condition or incident to realize that it is work connected and serious. Claimant's realization that the injurious condition will have a permanent adverse impact on employability is sufficient to meet the serious requirement. Positive medical information is unnecessary if information from any source gives notice of the condition's probable compensability. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Orr v. Lewis Cent. Sch. Dist., 298 N.W.2d 256 (Iowa 1980); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

The claimant knew no later than 2011 that her back injury was connected to work, serious, affecting her work, and possibly compensable but she did not provide notice to the defendants until May of 2013. Based on this record, claimant's claim for benefits is barred by application of Iowa Code section 85.23. The claimant failed to give timely notice of her injury to her defendant employer. For this reason, claimant's claim is barred under application of Iowa Code section 85.23.

#### Statute of Limitations.

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 a 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 know, 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 facts of this case establish claimant was aware of the nature, seriousness, and probable compensability of her injury well before April 15, 2013, the date of injury that claimant alleged on the face of her petition. The petition was filed March 27, 2015. No benefits were paid on the claim. Claimant did not comply with Iowa Code

section 85.26(1). She filed her petition in an untimely fashion. It was filed more than two years after the date of injury. All other issues are therefore moot.

ORDER

THEREFORE IT IS ORDERED:

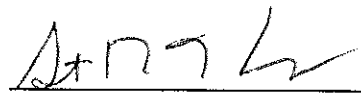
That the claimant take nothing.

Defendants shall receive credit for all benefits previously paid.

Costs are taxed to the defendants pursuant to rule 876 IAC 4.33.

Accrued benefits shall be paid in lump sum together with interest pursuant to Iowa Code section 85.30 with subsequent reports of injury pursuant to rule 876 IAC 3.1.

Signed and filed this 1<sup>st</sup> day of July, 2016.



STAN MCELDERRY  
DEPUTY WORKERS' COMPENSATION  
COMMISSIONER

Copies to:

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

Nathan R. McConkey  
Attorney at Law  
2700 Westown Pkwy., Ste. 170  
West Des Moines, IA 50266-1411  
nmconkey@desmoineslaw.com

SRM/srs

**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.