BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JORDAN JONES, Claimant, vs. DEXTER LAUNDRY, Employer, and SENTINEL INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 21012114.01 A P P E A L D E C I S I O N Head Notes: 1402.20; 1402.40; 1402.50; 1802; 1803; 2401; 2501; 2701; 2907

Defendants Dexter Laundry, employer, and its insurer, Sentinel Insurance Company, appeal from an arbitration decision filed on February 17, 2023. Claimant, Jordan Jones, responds to the appeal. The case was heard on June 23, 2022, and it was considered fully submitted in front of the deputy workers' compensation commissioner on August 1, 2022.

In the arbitration decision, the deputy commissioner found claimant was a credible witness. The deputy commissioner found claimant carried his burden of proof to establish he sustained a cumulative injury arising out of and in the course of his employment, which manifested on or about February 10, 2020. The deputy commissioner found defendants failed to prove their Iowa Code section 85.23 notice defense. The deputy commissioner found claimant is entitled to receive temporary total disability benefits for the work injury from February 10, 2020, through May 4, 2020, and the deputy commissioner also found claimant is entitled to a running award of healing period benefits from July 1, 2020, through the present and continuing until such time as those benefits cease pursuant to Iowa Code section 85.34. The deputy commissioner found claimant is entitled to payment of past and future medical expenses causally related to the work injury. Lastly, the deputy commissioner ordered defendants to provide alternate medical care for claimant for the injury with Sebastian Harris, M.D. The deputy commissioner ordered defendants to pay claimant's costs of the arbitration proceeding in the amount of $2,385.70.

Defendants assert on appeal that the deputy commissioner erred in finding claimant proved he sustained a work-related injury. Defendants assert the deputy commissioner erred in finding defendants failed to prove their section 85.23 notice defense. Defendants assert the deputy commissioner erred in finding claimant is entitled to receive temporary disability benefits from February 10, 2020, through May 4, 2020. Defendants assert the deputy commissioner erred in finding claimant is entitled to a running award of healing period benefits. Defendants assert the deputy commissioner erred in finding defendants are liable for past and future medical expenses. Defendants assert the deputy commissioner erred in ordering defendants to provide claimant with alternate medical care with Dr. Harris.

Claimant asserts on appeal that the arbitration decision should be affirmed in its entirety.

Those portions of the proposed arbitration decision 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 17A.5 and 86.24, the arbitration decision filed on February 17, 2023, is affirmed in part and is modified in part.

I affirm the deputy commissioner's finding that claimant sustained a cumulative injury that arose out of and in the course of his employment.

The deputy commissioner found claimant's cumulative injury manifested on or about February 10, 2020, when he lost work due to his "disability/pain" for the first time. The deputy commissioner further opined that February 10, 2020, is the date claimant was plainly aware of his work injury. For the reasons that follow, the deputy commissioner's findings regarding the manifestation date of the injury are modified.

As explained by the Iowa Supreme Court, "a cumulative injury is manifested when the claimant, as a reasonable person, would be plainly aware (1) that he or she suffers from a condition or injury, and (2) that this condition or injury was caused by the claimant's employment." Herrera v. IBP, Inc., 633 N.W.2d 284, 288 (Iowa 2001). Once both factors are satisfied, "the injury is deemed to have occurred." Id.

Claimant testified he experienced significant pain throughout his entire body within a few weeks of working in the deburring and sorting position. (Hearing Transcript p. 18) He further testified he reported his symptoms to his immediate supervisor, Jason Knaak, in late October or early November, 2019. (Id.) Importantly, claimant testified at his deposition that because his whole body hurt, he did not definitively know that he had sustained an injury to his neck while working in the deburring and sorting position. (See Exhibit A, Depo. p. 16) However, in January 2020, claimant's condition progressed to a point where he "couldn't move [his] head at all." (Id.) At that time, claimant approached

management and asked to move to a different position because he could no longer physically handle the deburring and sorting position. (Id.) Claimant hoped that a change in positions would give his body time to heal or "fix" him. (Id.)

Claimant began training for his new spot-welding position in January 2020. According to claimant, the majority of his symptoms improved during his two weeks of training. Unfortunately, his neck pain remained. After two weeks of training, defendant-employer started claimant on a new machine. Unfortunately, claimant's continued neck pain prevented him from operating the machine and he asked to be moved to yet another position. (Ex. A, Depo. p. 17) On January 27, 2020, claimant spoke with Eric Jensen and Doug House and agreed to be relocated to a less demanding position as soon as one became available. (See Ex. 7, p. 1) Defendant-employer had claimant sign a "Disqualifying of Job" form documenting the situation. (Id.)

The deputy commissioner is correct that claimant was plainly aware of his work injury on February 10, 2020; however, claimant testified that "everything but my neck" improved during the two-week training period for the spot-weld position. (Ex. A, Depo. p. 17) Following the two-week training period, claimant was assigned to a machine but was physically unable to operate the machine because he could not move his neck. (Id.) He subsequently requested a transfer to a less physically demanding position. (See Ex. 7, p. 1) While claimant may have become more aware of the severity of his injury on February 10, 2020, he was aware of a work-related neck condition on or about January 27, 2020.

Based on claimant's uncontroverted testimony, I find claimant was aware he sustained a neck injury or condition on January 27, 2020. I similarly find claimant believed on or about January 27, 2020, that his injury was caused by his employment. I therefore find claimant's cumulative neck injury manifested and therefore occurred on or about January 27, 2020. The deputy commissioner's finding that claimant's injury manifested on or about February 10, 2020, is therefore modified.

Having determined claimant's left shoulder injury manifested on January 27, 2020, I must now consider whether claimant provided timely notice of the injury. 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).

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. In 2017, the Legislature added the following sentence to section 85.23: "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." The undersigned has previously concluded that the Legislature's amendments to Iowa Code sections 85.23 and 85.26 codified the judicial precedent establishing the cumulative injury rule/manifestation test but did not

abrogate the discovery rule. Carter v. Bridgestone Americans, Inc., File No. 1649560 .01 (App. July 8, 2021).

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 workers' 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 deputy commissioner found claimant verbally communicated the circumstances of his injury and the symptoms he was experiencing to defendant-employer around the time he went off work in February 2020. (Arb. Dec., p. 6) The deputy commissioner further found defendants presented no competent evidence to support their notice defense. (Id.)

On January 29, 2020, claimant presented to Sebastian Harris, M.D. with complaints of neck pain. (JE2, p. 1) The medical record provides, "Patient started a new job within his employer. Patient is lifting large sheets of metal." (Id.) After collecting a verbal history and conducting a physical examination, Dr. Harris suspected claimant had sustained a repetitive injury. (JE2, p. 5) Dr. Harris prescribed physical therapy and instructed claimant to modify his work activities, if possible. (Id.)

Claimant testified that before he began physical therapy, he met with Katie Six, a human resources manager for defendant-employer to inquire about workers' compensation. (Hr. Tr., pp. 26-27) Claimant testified, "I did mention to Katie that I would like to make it official at that time that it was a work comp issue[.]" (Hr. Tr., p. 26) According to claimant, Ms. Six responded by telling him there would be a six-month waiting period while a third-party investigator investigated his claim. (Id.) When claimant stated he would not be able to wait that long, Ms. Six recommended he file for short-term disability benefits. (Hr. Tr., p. 29) Defendant-employer's payroll records indicate that claimant started receiving "sickness and accident" benefits on February 10, 2020. (Ex. I, p. 6) As such, it appears the above conversation with Ms. Six occurred between January 29, 2020, and February 10, 2020.

Ms. Six was listed as a witness for the defendants and was present at the evidentiary hearing. (Hr. Tr., p. 1) However, Ms. Six was not called to rebut claimant's testimony regarding the February 2020 meeting. I therefore accept claimant's testimony as accurate and find Ms. Six was alerted to the possibility of a potential workers' compensation claim through her conversation with claimant in early February 2020. Thus, I find defendant had actual knowledge of claimant's neck injury within 90 days of its occurrence. I affirm the deputy commissioner's finding that defendants failed to prove their notice defense under Iowa Code section 85.23.

I affirm the deputy commissioner's finding that claimant is entitled to receive temporary total disability benefits for the work injury from February 10, 2020, through May 4, 2020, without additional analysis.

I affirm the deputy commissioner's finding that claimant is entitled to a running award of healing period benefits from July 1, 2020, through the present and continuing until such time as those benefits cease pursuant to Iowa Code section 85.34.

Defendants assert on appeal that a running award is not justified in this case as three medical providers agree upon the maximum medical improvement (MMI) date of July 30, 2020. While it is true that July 30, 2020, has been discussed by Dr. Harris, Dr. Wenzel, and Dr. Schmitz as a possible MMI date, it cannot be said that all three medical providers definitively placed claimant at MMI.

Dr. Schmitz is the only medical provider to place claimant at MMI. (Ex. E, p. 6) However, Dr. Schmitz's report provides no explanation as to how he arrived at July 30, 2020, as claimant's MMI date. Like the deputy commissioner, I do not find Dr. Schmitz's opinions to be convincing in this matter.

Dr. Wenzel recommended claimant receive a second opinion with a different neurosurgeon to discuss the possibility of undergoing a microdiscectomy. (Ex. 1, p. 6; see JE2, p. 116) If the second neurosurgeon determined no additional surgery is warranted, Dr. Wenzel recommended claimant receive a referral to a pain clinic for medication management and an evaluation for medial branch blocks and radiofrequency ablation. (Ex. 1, p. 6) When asked to address claimant's MMI status, Dr. Wenzel opined that the MMI date would be July 30, 2020, if the second neurosurgical opinion did not recommend surgery. (Id.) A recommendation for a second neurosurgical opinion and a potential referral to a pain clinic is not consistent with a finding of MMI.

Shortly after receiving Dr. Wenzel's IME report, claimant provided that report to Dr. Harris. (See JE2, p. 116) After discussing Dr. Wenzel's report with Dr. Harris, claimant told Dr. Harris that he did not wish to pursue any referrals at that time, as he was supposed to have his hearing for disability benefits in the near future. (JE2, p. 116) The medical record provides, "If patient's appeal is denied will perhaps follow-up to seek referral." (Id.) The medical record further provides, "letter created labeled as treating source statement as requested[.]" (Id.) The letter provides, in part, "Date of maximum medical improvement was 7/30/2020." (JE2, p. 117) This assertion appears to be driven by Dr. Harris' desire to support claimant's application for social security disability benefits at the upcoming hearing, rather than a genuine belief in his medical progress, as evidenced by his recommendations for further treatment contradicting the notion of MMI. (See JE2, p. 135)

When ongoing care "will provide relevant evidence to make a full and fair assessment of conflicting medical opinions over the existence of a permanent impairment, the decision must not be made until maximum medical improvement has occurred." Bell Bros, Heating v. Gwinn, 779 N.W.2d 193, 201 (Iowa 2010). "[A] procedure that allows for the adjudication of issues before the relevant evidence is known could undermine the entire system of workers' compensation by creating the risk of either denying permanent disability benefits to a deserving claimant or requiring an employer to pay permanent disability benefits to a worker who did not suffer a permanent impairment." Id.

In this case, Dr. Harris and Dr. Wenzel recommended that claimant present for a second neurosurgical evaluation and/or receive a referral to the UIHC pain clinic. (Ex. 1, p. 6; JE2, pp. 73, 80) Dr. Harris provided claimant with a referral to Mercy Cedar Rapids in June 2021. (JE2, p. 135) Claimant followed up with Dr. Harris as to the status of his referral on August 11, 2021, September 2, 2021, and September 14, 2021. (JE2, p. 137) Unfortunately, claimant was notified on or about September 20, 2021, that at least one of the providers at Mercy Cedar Rapids did not accept his medical insurance, and the other surgeon had recently resigned. (See JE2, p. 138; Hr. Tr., p. 42) Shortly thereafter, the focus of claimant's medical care shifted to an acoustic schwannoma located in claimant's right ear. (See JE3, p. 8) The schwannoma was eventually excised on March 28, 2022. (JE3.1, pp. 29-32) At hearing, claimant testified he continues to experience pain and limitations attributable to his neck injury. (Hr. Tr., pp. 46-47)

Like the deputy commissioner, I conclude that the record is not yet complete with respect to claimant's entitlement to permanent disability. The outcome, findings, recommendations, and actual treatment after a follow-up neurosurgical evaluation are important factors in determining claimant's permanent disability, if any. Therefore, I affirm the deputy commissioner's finding that claimant has not yet achieved MMI. Any claim for permanent disability should be determined on review-reopening after claimant has achieved MMI. Bell Bros. Heating v. Gwinn, 779 N.W.2d 193 (Iowa 2010).

I affirm the deputy commissioner's finding that claimant is entitled to reimbursement for the medical expenses outlined in Exhibits 3 and 4.

I affirm the deputy commissioner's finding that defendants are liable for future medical treatment related to the work injury. However, I respectfully disagree with the deputy commissioner's order that defendants authorize Sebastian Harris, M.D. as a treating physician. While I acknowledge Dr. Harris' qualifications and competence in diagnosing and treating claimant's condition, I hold reservations regarding his apparent willingness to tailor his medical opinions to accommodate claimant's desired outcome in his claims for unemployment and social security disability benefits. Claimant confirmed that at the evidentiary hearing. (Tr., pp. 109-110) Indeed, claimant testified to his belief that Dr. Harris would lie for him and provide falsified statements to help his case. (Id.)

Defendants are ordered to authorize treatment with an appropriate physician of claimant's choosing other than Dr. Harris. Defendants are also ordered to arrange and pay for the neurosurgical evaluation recommended by Dr. Wenzel. The neurosurgical evaluation shall be performed by a provider of claimant's choosing.

Some of the findings by the deputy commissioner in the arbitration decision were based on the deputy commissioner's findings regarding claimant's credibility. The deputy commissioner found claimant to be a credible witness. Defendants assert claimant was not credible. I find the deputy commissioner correctly assessed claimant's credibility. While I performed a de novo review on appeal, I give considerable deference to findings of fact which are impacted by the credibility findings, expressly or impliedly made, regarding claimant by the deputy commissioner who presided at the arbitration hearing. I find nothing in the record in this matter which would cause me to reverse the deputy commissioner's findings regarding claimant's credibility.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed February 17, 2023, is affirmed in part and is modified in part.

Defendants shall pay Claimant temporary benefits from February 10, 2020, through May 4, 2020, at the stipulated weekly rate of four hundred sixty-four and 97/100 dollars ($464.97).

Defendants shall pay Claimant a running award of healing period benefits commencing on July 1, 2020, at the stipulated weekly rate of four hundred sixty-four and 97/100 dollars ($464.97), until such time as benefits shall cease pursuant to Iowa Code section 85.34.

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.

Defendants shall pay the medical expenses set forth in Claimant's Exhibits 3 and 4.

Defendants are liable for all future medical treatment related to the work injury.

Defendants shall authorize treatment for the work injury with an appropriate physician of claimant's choosing other than Dr. Harris.

Defendants shall arrange and pay for the neurosurgical evaluation recommended by Dr. Wenzel. The neurosurgical evaluation shall be performed by a provider of claimant's choosing.

Defendants shall receive credit for disability income paid under Iowa Code section 85.38(2), in the amount of two thousand ninety-six and 24/100 dollars ($2,096.24), as stipulated by the parties.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding in the amount of two thousand three hundred eighty-five and 70/100 dollars ($2,385.70), and defendants shall pay the costs of the appeal, including the cost of the hearing transcript.

Pursuant to rule 876 IAC 3.1(2), defendants shall file subsequent reports of injury as required by this agency.

Signed and filed on this 8th day of August, 2023.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Nick Platt (via WCES)

Jason Wiltfang (via WCES)