

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KELLY MITCHELL,

Claimant,

vs.

PERKINS & MARIE CALLENDER'S, LLC,

Employer,

and

ACE FIRE UNDERWRITERS  
INSURANCE CO.

Insurance Carrier,  
Defendants.

File No. 5041461

**FILED**

**SEP 29 2016**

A P P E A L

WORKERS' COMPENSATION

D E C I S I O N

Defendants appeal from an arbitration decision filed March 23, 2015. The case was heard on June 10, 2014, in front of the deputy workers' compensation commissioner and considered fully submitted September 30, 2014.

On July 7, 2015, the defendants filed their reply brief. On July 7, 2016, the case was delegated to the undersigned to issue the final agency decision of the intra-agency appeal.

The issues included whether the claimant sustained an injury on March 10, 2011, which arose out of and in the course of her employment, whether the injury was the cause of some temporary disability, and if so, whether claimant was entitled to a running award of benefits or in the alternative whether the injury was the cause of some permanent disability and the extent of that disability. Defendants asserted notice and statute of limitations defenses.

The Deputy Commissioner found in favor of the claimant. He determined that as a result of the cumulative nature of claimant's injury she did not know the nature, seriousness and probable compensable character of her injuries until March 10, 2011, the day she received medical treatment and was given restrictions. Defendants had actual notice as of March 10, 2011, and since the petition was filed on August 24, 2012, claimant had timely filed.

Having ruled against the defendants on the statute of limitations and notice claim, the deputy commissioner went on to find the claimant experienced an aggravation of a pre-existing condition, specifically that she had sustained cervical radiculopathy

bilaterally, right worse than left; degenerative shoulder changes; shoulder impingement with osteophyte formation; bilateral ulnar neuropathy; and bilateral carpal tunnel syndrome. He further found that the claimant needed additional treatment, and she was not at maximum medical improvement nor was she able to continue to work at substantially similar employment. No finding of permanency was made at the time.

On April 3, 2015, the defendants timely filed a notice of appeal.

The basis of the defendants' appeal was that the claimant failed to prove that her condition was causally related to her work, that her claim was barred by the notice defense as well as statute limitations, that the claimant was offered work within her restrictions and that claimant stopped working voluntarily, thereby disqualifying her for any temporary benefits.

Claimant asserts the findings of the deputy commissioner should be affirmed on appeal. The detailed arguments of the parties have been considered and the record of evidence has been reviewed de novo. Pursuant to Iowa Code sections 86.24 and 17A.5, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on March 23, 2015, that relate to issues properly raised on intra-agency appeal with the following additional comments:

The primary dispute as it relates to the causation argument was the reliance of the Deputy on David Segal, M.D. The defendants believe and argue that Dr. Segal's opinion was based upon inaccurate job duty figures as well as inaccurate history and therefore Dr. Segal's opinions are not valid.

The arbitration decision addressed the issue of possible exaggeration in terms of the numerosity of claimant's lifting at work as well as the weights. The deputy noted that Dr. Segal did not refer to any specific weight or frequency of lifting in his reports but rather that Dr. Segal based his opinion on the length of the claimant's symptoms, that her condition continued to deteriorate as she continued to work, and that whatever condition she had previous to March 10, 2011, she was able to work through that pain and discomfort.

Regardless of whether claimant waited on 60 to 80 customers in a weekday or 80 to 100 people, claimant's work involved carrying trays of food to a significant number of customers on a daily basis. Even assuming that her supervisor Rick Frazier's testimony regarding the number of people served is accurate, she still served at least 10 customers per hour for 20 hours a week carrying at least 4 to 5 trays per hour at approximately 12 pounds per tray. This is in excess of what an ordinary person would do on a daily basis. It is this common sense understanding that a waitress would carry more weight per day serving customers food 20 hours per week that led to giving David Tearse, M.D.'s opinion lower weight. Dr. Tearse opined the claimant would have developed this condition regardless of her job, but he makes no accommodations and does not appear to take into consideration the claimant's work and how it would differ

from someone who is not a waitress and had the same or similar physical condition. Dr. Segal noted that although work was not a causal factor, it provided a permanent aggravation. (Exhibit 7, page 3)

In deposition testimony, Dr. Tearse acknowledged that the work could have aggravated claimant's condition. He did not believe the claimant to be a malingerer or that her condition was not authentic. He treated her shoulder condition from December 2011 through May 2013. He was unaware that claimant continued to work for the defendant while he was treating her and while her condition worsened.

I agree with the Deputy Commissioner that Dr. Segal's opinions were most thoughtful and well documented by the medical records. He noted also that the claimant was provided work restrictions of no lifting or only minimal lifting over the shoulders. These restrictions were imposed by Shirley Pospisil, M.D., and confirmed by all of her providers including Cassim Ingram, M.D. Dr. Pospisil believed that claimant's condition would not be permanent but she gave no opinion as to whether the conditions were an aggravation of a pre-existing condition.

The restrictions were provided to the defendant employer and were observed by the defendant employer. Dr. Segal wrote "I think it is important to think why would she have these restrictions in place if doing these repetitive actions would not be an aggravating factor. Generally restrictions are put in place to promote healing and prevent aggravation." (Ex. 7, p. 3)

I affirm the deputy commissioner's causation finding that the claimant's pre-existing condition was aggravated by her work and that she has not yet returned to a pre-injury baseline.

Turning to the issue of whether the claim was barred either by notice or statute limitations, the Supreme Court has been clear that when examining a cumulative injury, the date of manifestation is when the claimant knows or should know the nature or seriousness and probable compensable character of her injury. Herrera v. IBP Inc. 633 N.W.2d 284, 288 (Iowa 2011) Specifically, a cumulative injury is manifested when the claimant would be plainly aware that she suffers from a condition or injury and that this condition or injury was caused by the claimant's employment. It is upon the occurrence of these two circumstances that an injury is deemed to have occurred. *Id.*

The claimant understood the nature of seriousness and probable compensable character of her injuries when she received medical treatment for those injuries and was given work restrictions. While claimant did testify, and the medical records do support, that claimant first started noticing symptoms in September 2010, she did not first seek medical treatment until March 2011. It was at that point that she understood the seriousness of her condition and how it related to her work.

Based upon the discovery rule as defined and applied by the Iowa Supreme Court,

March 10, 2011, is the appropriate manifestation date and therefore the notice and statute limitations timeline would begin on March 10, 2011.

Defendants knew of the claimant's injury in March 2011, and she filed a petition on August 24, 2012, which was within the two-year statute of limitations.

I affirm the finding that the date of manifestation was March 10, 2011. The claim is not barred by either notice or the statute limitations.

Defendants argue that even if the manifestation date is March 10, 2011, the claimant must commence an action for workers' compensation benefits within two years of the occurrence of the injury. The initial petition was filed August 24, 2012, but it was not until June 9, 2014, that the claimant amended her petition to allege a cumulative injury of March 10, 2011, which was three years after the newly alleged injury date.

The amendment to the pleading has already been allowed. The time to object to the amendment has passed. However, even if the objection to the amendment could be renewed, the case law does not support the defendants' argument. It is not upon the amendment which the statute runs but on the actual filing itself. The defendant provided no legal support for their argument and the undersigned could not find one either.

The next issue is whether the claimant is entitled to healing period or temporary total disability benefits. Claimant continued to work until March 26, 2012. She voluntarily restricted and reduced her hours. The defendant was accommodating the claimant's work restrictions. When she declined work within her restrictions, defendants argue, she is not entitled to any temporary benefits.

Iowa Code section 85.33(3) provides:

3. If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, and be compensated with temporary partial benefits. If the employee refuses to accept the suitable work with the same employer, the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal. If suitable work is not offered by the employer for whom the employee was working at the time of the injury and the employee who is temporarily partially disabled elects to perform work with a different employer, the employee shall be compensated with temporary partial benefits.

Iowa Code section 85.33(3)

Iowa Code section 85.33(3) disqualifies an employee from receiving temporary

partial, temporary total, and healing period benefits if the employer offers "suitable work" that the employee refuses. Iowa Code section 85.33(3) Suitable work is a question of fact. Neal v. Annett Holdings, Inc., 814 N.W. 2d 512, 518 (Iowa 2012)

Dr. Ingram opined that the claimant would have reached MMI on September 14, 2012. There are no medical records recommending claimant be taken off of work entirely, only that the claimant be provided work restrictions.

Suitable work is defined as consistent with the claimant's disability. While Dr. Pospisil gave her restrictions and defendant employer accommodated those restrictions, claimant could no longer work. At this point, the work was no longer suitable.

The claimant credibly testified that she was not able to keep up with the work even within her restrictions. She testified that she quit work in March 2012 because she could not handle the pain. This is consistent with medical records which notes she attempts to work within her restrictions but has pain because she overdoes it. (Ex. 1, p. 21) Her recent last restrictions from Dr. Pospisil included no lifting, carrying limited to 10 pounds, and shifts of only four hours per day (Ex. 1, p. 1) Dr. Tearse imposed restrictions which limited above the shoulder reaching. (Ex. 6, p. 2)

The claimant cannot return to substantially similar work but rather needs additional treatment. Dr. Segal recommended the claimant not return to her job as it could potentially cause reactivation.

According to Waldinger Corp. v. Mettler, 817 N.W. 2d 1, 10 (Iowa 2012), an employee can have intermittent healing periods. An attempt to return to work that fails does not preclude recovery for healing period or temporary permanent benefits.

In this case, the claimant attempted to return to work until such time as the work was too difficult. While no doctor said she could not work, she had significant limitations including the number of hours she could work, the weights she could lift, what work she could do at or above shoulder height. She attempted to perform the tasks within her restrictions but could not.

Based upon the claimant's physical condition, she is not at MMI and she cannot return to work or substantially similar work. Therefore, she fits the definition of entitlement for temporary benefits.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, pursuant to Iowa Code sections 86.24 and 17A.15, I affirm and adopt as the final agency decision the proposed arbitration decision filed in this matter on March 23, 2015.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay unto claimant running healing period benefits from March 15, 2012, at the rate of one hundred eighty-six and 37/100 dollars (\$186.37) per week and continuing until the requirements for termination of healing period are met.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

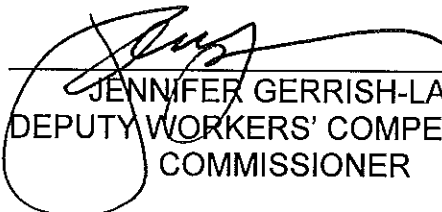
Defendants shall pay the claimant's prior medical expenses submitted by claimant at hearing.

Defendants shall pay the future medical expenses of the claimant necessitated by the work injury.

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

Costs of the arbitration proceedings as well as costs of the appeal proceedings are taxed to the defendants.

Signed and filed his 9th day of September, 2016.

  
JENNIFER GERRISH-LAMPE  
DEPUTY WORKERS' COMPENSATION  
COMMISSIONER

Copies To:

John J. Rausch  
Attorney at Law  
P.O. Box 905  
Waterloo, IA 50704-0905  
[rauschlawfirm@dybb.com](mailto:rauschlawfirm@dybb.com)

Charles E. Cutler  
Attorney at Law  
1307 50<sup>th</sup> St.  
West Des Moines, IA 50266  
[ccutler@cutlerfirm.com](mailto:ccutler@cutlerfirm.com)