BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JENNIFER ASKVIG,	:	
Claimant,	:	File No. 5059459
vs.	:	A P P E A L
SNAP-ON LOGISTICS COMPANY,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	Head Note Nos: 1402.30; 1402.40; 1801; 1803.1; 2401; 2501; 2502; 2907

Claimant Jennifer Askvig appeals from an arbitration decision filed on July 11, 2018. Defendant Snap-On Logistics Company, self-insured employer, cross-appeals. The case was heard on April 16, 2018, and it was considered fully submitted in front of the deputy workers' compensation commissioner on May 18, 2018.

In the arbitration decision, the deputy commissioner found claimant failed to carry her burden of proof to establish that her right shoulder condition is causally connected to her job with defendant. The deputy commissioner found claimant's work-related injury is limited to her right upper extremity. The deputy commissioner found defendant failed to carry its burden of proof with respect to its affirmative 90-day notice defense. The deputy commissioner found claimant failed to prove she sustained any permanent disability to her right upper extremity but satisfied her burden of proof to establish entitlement to temporary total disability benefits from May 25, 2017, through July 11, 2017. The deputy commissioner found defendant failed to prove its entitlement to credit for payment of short-term disability benefits. The deputy commissioner found claimant is entitled to recover the cost of the medical treatment for her work-related right carpel tunnel syndrome but not for her right shoulder condition or for any other condition. The deputy commissioner found claimant is entitled to recover the cost of her independent medical examination (IME) and report by Mark Kirkland, D.O. The deputy commissioner ordered defendant to pay claimant's costs of the arbitration proceeding in the amount of $106.46.

In a nunc pro tunc order filed on August 2, 2018, the deputy commissioner corrected claimant's weekly benefit rate to $610.58.

On appeal, claimant asserts the deputy commissioner failed to address whether claimant sustained a cumulative trauma injury to her right arm and, if so, the appropriate manifestation date. Claimant additionally argues the deputy commissioner erred in her

determination that claimant did not sustain any permanent disability to her right arm. Lastly, claimant asserts the deputy commissioner erred in finding claimant did not sustain a work-related injury to her right shoulder.

On cross-appeal, defendant asserts the deputy commissioner erred in finding defendant failed to carry its burden of proof to establish its affirmative 90-day notice defense. Defendant also asserts the deputy commissioner erred by denying its motions to supplement the record. Defendant additionally asserts the deputy commissioner erred by finding defendant failed to establish its entitlement to a credit for short-term disability benefits and in finding claimant is entitled to reimbursement for medical expenses relating to her right arm and carpal tunnel.

Those portions of the proposed agency 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, those portions of the proposed arbitration decision filed on July 11, 2018, as corrected by the order nunc pro tunc filed on August 2, 2018, that relate to the issues properly raised on intra-agency appeal are affirmed in part without additional comment; affirmed in part with additional findings, conclusions, and analysis; and reversed in part.

I affirm the deputy commissioner's finding that claimant did not establish her right shoulder condition is causally connected to her employment with defendant. I affirm the deputy commissioner's finding that claimant failed to prove she sustained any permanent disability to her right arm. I affirm the deputy commissioner's finding that claimant established her entitlement to temporary total disability benefits from May 25, 2017, through July 11, 2017, for her right arm condition. I affirm the deputy commissioner's finding that claimant is entitled to recover the cost of the medical treatment for her work-related right carpel tunnel syndrome but not for her right shoulder condition or for any other condition. I affirm the deputy commissioner's denial of defendants' motion to reopen and supplement the record. I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to this issue.

Regarding whether claimant provided proper notice of her work injury under Iowa Code section 85.23, the deputy commissioner found defendant failed to carry its burden of proof with respect to its affirmative notice defense. I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to this issue and I add the following additional findings, conclusions, and analysis:

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 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).

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).

As noted by the deputy commissioner, claimant testified at hearing that she asked one of defendant's safety representatives, Kathy Reddell, about what she needed to do if her personal health insurance "wasn't going to cover it if they came back and said it was work comp." (Hearing Transcript, p. 70) Claimant said she "went in to talk to [Reddell] about if Aetna happened to deny [the claim] saying that it was work-related." (Tr., p. 71) She also testified she followed up with Reddell a few days later:

> Q. When you said [Reddell] followed up with you, then, a couple of days later, what was that conversation?
>
> A. Well, it was more of a quick conversation, that one, because when I first went in there, she had misunderstood what I was saying. She misunderstood, thinking I was asking for work comp, when I was asking what to do if my insurance denied it. So after speaking to her insurance lady, I think she clarified [Reddell's] thought process and said it was if Aetna denied my comp claim, just come back in and talk to her, and then we'd go from there.

(Tr., p. 73)

I recognize that at the time of her conversations with Reddell claimant had not been told by any physicians that her condition was work-related, nor had her personal health insurance asked for clarification regarding the source of her injury. However, the possibility had clearly arisen in claimant's mind, as she verbalized her concern that her personal health insurance may view the claim as work-related. I find the nature of this conversation, particularly the discussion about workers' compensation coverage, should have alerted Reddell to the possibility that claimant's injury might be work-related.

This is all that is required to establish the actual knowledge alternative to notice. See Robinson, 296 N.W.2d at 811 (adopting the standard that an employer has actual knowledge when facts would indicate "to a reasonably conscientious manager that the case might involve a potential compensation claim" (emphasis added)). While I agree with the deputy commissioner that the evidence is weak, defendant did not rebut

claimant's testimony regarding her conversation with Ms. Reddell, and defendant carries the burden of proof. In a close call such as this, it bears repeating the well-established principle that "chapter 85 is liberally construed in favor of the employee, with any doubt in its construction being resolved in the employee's favor. Larson Mfg. Co. v. Thorson, 763 N.W.2d 842, 859–60 (Iowa 2009). I therefore affirm the deputy commissioner's finding that defendant had actual knowledge of claimant's injury.

Claimant testified this conversation with Ms. Redell occurred between March 21, 2017, when she first saw Michael Crane, M.D., and her right carpal tunnel surgery on June 13, 2017. (Tr., p. 71) Thus, I find defendant had actual knowledge of claimant's injury no later than June 13, 2017.

The question then becomes whether this actual knowledge was acquired within 90 days from the date of the occurrence of claimant's right arm injury.

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).

In this case, when asked at what point she felt she "had a condition that was going to have an impact on your ability to work" she responded, "I would say probably around when I'd seen Dr. Crane for the first time," which was March 21, 2017. (Tr., p. 50) This is consistent with claimant's testimony that she went to Reddell sometime after that appointment to discuss what happened if her personal insurance denied her claim. I therefore find the manifestation date and discovery date for claimant's injury is March 21, 2017.

As discussed above, I found defendant had actual knowledge of claimant's injury no later than June 13, 2017. June 13, 2017 is less than 90 days from March 21, 2017. I therefore find defendant had timely notice of claimant's injury under Iowa Code section 85.23. With these additional findings, conclusions, and analysis, I affirm the deputy commissioner's determination that defendant did not meet its burden of proof regarding its affirmative notice defense.

Regarding the credit issue, the deputy commissioner found defendant failed to prove its entitlement to credit for payment of short-term disability benefits. For the reasons that follow, the deputy commissioner's finding is reversed.

As the deputy commissioner correctly noted:

> [f]or many years this agency has held that an employer is entitled to a credit for the net remaining after deducting payroll and income taxes from disability payments made under a group plan. Harney v. Univ. of Iowa, File No. 5036605 (App. June 17, 2014); King v. Marion Indep. Cmty. Sch. Dist., File 5036224 (App. June 10, 2013); Waters v. Univ. of Iowa Hosp. & Clinics, File No. 1159901/1205026 (App., January 20, 2001); Taylor v. Univ. of Iowa, File No. 886089 (App., May 18, 1993); Preul v. Farmland Foods, File No. 879940 (Arb. July 6, 1990); Beller v. Iowa State Penitentiary, File No. 799401 (Arb. January 23, 1990).

(Arbitration Decision, p. 18)

However, while the deputy commissioner was correct that defendant provided no analysis regarding how it calculated its claimed credit, I disagree that defendant did not provide sufficient evidence of the net amount paid to claimant.

Defendant, in Exhibit H, pages 72-a through 72-l, provided claimant's payroll check detail. Claimant's disability payments and tax deductions are identifiable on those pages.

Claimant is entitled to temporary total disability benefits from May 25, 2017, through July 11, 2017, for her right arm condition. According to Exhibit H, claimant began receiving short-term disability benefits for the pay period ending June 24, 2017. (See Exhibit H, p. 72-a) These payments continued through the end of claimant's entitlement to temporary total disability benefits. (See Ex. H, p. 72-b)

For the one-week period ending June 24, 2017, claimant received $300.00 in short-term disability benefits and $40.27 was deducted in taxes, meaning the net amount paid to claimant was $259.73. For the one-week period ending July 1, 2017, claimant received $350.00 in short-term disability benefits and $52.73 was deducted in taxes, meaning the net amount paid to claimant was $297.27. For the one-week period ending July 8, 2017, claimant received $350.00 in short-term disability benefits and $52.72 was deducted in taxes, meaning the net amount paid to claimant was $297.28. (Ex. H, p. 72-a) Thus, from the one-week period ending June 24, 2017 through the one-week period ending July 8, 2017, claimant received $854.28 ($259.73 + $297.27 + $297.28) in net short-term disability payments. Because claimant is entitled to temporary total disability benefits for this period, I find defendant is entitled to a credit for the net amount of short-term disability in the amount of $854.28 from the one-week period ending June 24, 2017 through the one-week period ending July 8, 2017.

Claimant also received $350.00 in short-term disability benefits for the one-week period ending July 15, 2017, from which $52.72 was deducted in taxes, meaning the net amount paid to claimant was $297.28. (Ex. H, pp. 72-a-b) This equates to a daily net payment of $42.47 ($297.28 / 7). Claimant established her entitlement to temporary total disability benefits through July 11, 2017. The net short-term disability payments for July 9, 2017, July 10, 2017, and July 11, 2017 amount to $127.41 ($42.47 x 3). I therefore find defendant is entitled to a credit for the net amount of short-term disability in the amount of $127.41 for July 9, 2017 through July 11, 2017.

In total, I find defendants established their entitlement to a credit against claimant's temporary total disability benefits in the amount of $981.69 ($854.28 + $127.41). The deputy commissioner's finding that defendant did not establish its entitlement to credit is therefore reversed.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on July 11, 2018, as corrected by the nunc pro tunc order filed on August 2, 2018, is affirmed in part without additional comment, affirmed in part with additional findings, conclusions, and analysis, and reversed in part.

Defendant shall pay claimant temporary total disability benefits from May 25, 2017, through July 11, 2017, at the rate of six hundred ten and 58/100 dollars ($610.58) per week.

Defendant is entitled to a credit in the amount of nine hundred eighty-one and 69/100 dollars ($981.69).

Defendant 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 Tech., File No. 5054686 (App. Apr. 24, 2018).

Defendant is responsible for all causally related medical expenses, including medical mileage.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding in the amount of one thousand five hundred and 00/100 dollars ($1,500.00) for the cost of Dr. Kirkland's independent medical examination; one thousand eight hundred thirty-five and 00/100 dollars ($1,835.00) for the cost of Dr. Kirkland's report; one hundred and 00/100 dollars ($100.00) for the filing fee; and six and 46/100 dollars ($6.46) for the cost of service.

Pursuant to rule 876 IAC 4.33, the parties shall split the costs of the appeal, including the cost of the hearing transcript.

Defendant shall file subsequent reports of injury as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed on this 5th day of February, 2020.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Mark S. Soldat Via WCES

Joni L. Ploeger Via WCES