BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SANDRA CALLAHAN, Claimant, vs. HORSESHOE CASINO, Employer, and ZURICH AMERICAN, Insurance Carrier, Defendants.	FILED JUN 25 2015 WORKERS' COMPENSATION File No. 5042457 APPEAL DECISION Head Note Nos.: 1402.5, 2401, 2402, 2800

Defendants Horseshoe Casino and Zurich American appeal from an arbitration decision filed on May 1, 2014. Responding to the appeal is claimant, Sandra Callahan.

In the arbitration decision, this claim was found to be timely commenced and, despite the lack of a 90-day notice, the required notice was found to be unnecessary due to defendants' actual knowledge of the injury. Claimant was subsequently awarded permanent partial disability and medical benefits.

The record, which includes the transcript of the hearing before the deputy and all of the exhibits admitted into the record, has been reviewed de novo on appeal.

Claimant's exhibits were marked numerically with alphabetic subparts. Defendants' exhibits were marked alphabetically.

ISSUE ON APPEAL

In their appeal brief, defendants concede that claimant may have suffered a cumulative trauma, but assert a claim for this injury is barred by Iowa Code section 85.26 for failure to timely file the original notice and petition and, barred by Iowa Code section 85.23 for failure to provide timely notice to the employer.

FINDINGS OF FACT

Claimant, 61 years of age, was employed by the Horseshoe Casino as a blackjack dealer. Her position required her to stand at the table for one hour and 20 minutes at a time. She received a 15-minute break and then would return to the casino floor for another shift. While dealing, claimant was required to lean and stretch in order to effectively deal the cards. She also had to twist left and right to deal to all of the players. She estimated her hourly wage with tips to be $20.00 per hour. The parties stipulated that her gross earnings as of the date of the alleged injury were $712.18 per week. This was the best paying job claimant had ever held. Claimant is an outgoing person who enjoyed her job and she undoubtedly was good at her job. She had customers who specifically came to see her.

Claimant did not receive any medical treatment for her back prior to 2008. In 2008, she developed back pain which was significant enough to cause her to seek medical attention. She saw Anton F. Piskac, M.D., for leg and hip pain originally, which, after further testing and treatment was determined to be coming from the low back. (Exhibit D, page 7) Dr. Piskac diagnosed "chronic L5 radiculopathy" on November 3, 2008. (Ex. D, p. 10) Dr. Piskac filled out paperwork for the claimant under the Family and Medical Leave Act (FMLA) in November 2008, which allowed the claimant to take a brief leave of absence from work. The leave forms also allowed the claimant to take time off intermittently for treatment when she had low back pain. (Ex. D, p. 18)

On December 9, 2008, Dr. Piskac noted the following, in pertinent part:

> Sandra Callahan presents on December 8, 2008 with the complaint of low backache that continues to be persistent despite anti-inflammatory treatment. . . . [S]he is willing and ready to proceed with this [an MRI] at this time as she h as [sic] discomfort while at work and is having difficulty dealing cards and doing her job for the number of hours that she is expected to do so.

(Ex. D, p. 21)

In January 2009, Dr. Piskac noted that her low back pain was "improved." (Claimant's Ex. 5A, p. 2) In her deposition testimony, claimant admitted that she suffered back pain in 2008:

> Q. In 2008, did you receive any medical treatment for pain and discomfort that you attributed to your low back as a result of working at Horseshoe Casino?
>
> A. As far as I can remember, I had some MRIs, but the main thing was when I went--started going to Dr. Pesak[sic], he told me that my job

was what was causing my problem. And I also went to the psy- psychiatrist. I also went to a chiropractor.

(Ex. B, p. 10)

At hearing, claimant downplayed her 2008 complaints.

Q. There's a portion in the deposition that indicates that back in 2008 you were suffering from back pain. Is that accurate? In 2008 did you suffer from back pain?

A. No, not really back pain. I mean, my back sometimes hurt, but I just thought it had to do with my age.

(Tr. p. 37)

Also at hearing, claimant denied any knowledge that her pain in 2008 was work related. She testified as follows:

Q. Uh-huh. And you said: He said it was due to standing and bending repetitively, and that's at line 16 through 21 of page 11 of Exhibit B. Is that accurate? Did Dr. Piskac tell you back in 2008 that the back pain you were having was related to the Horseshoe?

A. Not until 2011 and 2012.

.....

Q. When—now, when he asked you that question, do you now believe that any kind of back pain that you would have had in 2008 was related—

A. No.

(Tr. pp. 39-40)

In 2009 and 2010, claimant was utilizing intermittent FMLA. She was leaving work early on a fairly regular basis. Based upon the testimony of Rodney Jobman, Horseshoe Risk & Safety Manager, as well as the corresponding employment records, it is unclear precisely to which condition this leave was related. (Ex. C, pp. 35-36, Depo. Ex. 8) Claimant also had difficulty with tension headaches during this time frame. Her medical file reflects that claimant did not receive treatment for her low back between January 2009 and October 2011. She did receive regular treatment for the tension headaches. On May 4, 2009, Dr. Piskac noted claimant "is now missing about three partial days a month due to headaches." (Ex. 5B, p. 1) At the same visit, he stated that her "back still bothers her some and she continues to smoke one-half pack per day." Id.

In her deposition, claimant stated that her low back pain was the reason for her many absences from her job between 2008 and 2010. (Ex. C p. 14) At hearing, claimant testified that this testimony was in error. She testified that these absences were not due to back pain, but muscle tension headaches. (Tr. p.38) She stated that she was incorrect at the deposition because she was "messed up" and nervous because her car had been broken into during the night before the deposition and her purse was taken, apparently containing a credit card that was used to charge about $2,000.00. (Tr. p. 37)

In October 2011, claimant had an incident at home which caused her low back to flare up. (Ex. 5M, p. 25) Shortly thereafter, she began seeing William Bruening, D.C., for pain in her low back. On October 10, 2011, Dr. Bruening diagnosed "severe lumbago" in claimant's low back. (Ex. F, p. 10) He took claimant off work from October 3, 2011 until October 31, 2011 and wrote the following, "Incapacitated, unable to perform any activities of daily living." (Ex. F, p. 10) When Dr. Bruening returned claimant back to work, he recommended reduced hours. He specifically indicated that claimant may need to leave work early if the lower back pain became aggravated. (Ex. F, p. 11) Dr. Bruening then took her off work again from November 2, 2011 to December 5, 2011. (Ex. F, p. 11) Dr. Bruening added at this point that claimant had an MRI which showed disk desiccation and degenerative changes throughout most of her lumbar spine. (Ex. F, p. 13)

In her deposition claimant testified as to what Dr. Bruening told her about her ability to continue at Horseshoe:

> Q. Dr. Bruening?
>
> A. Bruening, yes. He started telling me in 2011 that I couldn't continue what I was doing. I was going to him about three or four times a week.
>
> Q. Okay. So back in 2011 Dr. Bruening was telling you you can no longer continue being a dealer at Horseshoe?
>
> A. Yes. And I told him that at $20 an hour, that's like telling me, you know, my livelihood is going to go, because I knew I was not going to make anything that, you know, significant again. I mean, $20 an hour is a lot.

(Def. Ex. B, p. 27)

The medical reports confirm that claimant was seeing Dr. Bruening multiple times per week during that time frame. (Cl. Ex. 2C, p. 3)

At hearing, claimant testified that the first time she learned that her back problems were caused by her work was at the first visit with Dr. Bruening in 2012.

(Tr. p. 43) She also testified that it was not until 2012 or the end of 2011 she learned from Dr. Bruening that she could not continue in the Casino job. (Tr. p. 43-44)

Claimant was on intermittent FMLA for her low back when she returned to work from her 2011 leave of absence. She was able to leave later in her shift when her low back was really bothering her although the employer did not provide detailed records that quantified how much or how often. While the claimant knew she would not be able to continue the job, she continued to attempt to do it without reporting it as a work injury.

In June, 2012, claimant reinitiated regular visits to Dr. Bruening. In the office visits thereafter, Dr. Bruening repeatedly noted that her low back condition was "inadequately controlled" which caused her to struggle at work and with activities of daily living. (Cl. Ex. 2J, pp. 1-7) On August 2, 2012, Dr. Bruening diagnosed a disk protrusion or prolapse. (Cl. Ex. 2J, p. 7)

On August 10, 2012, claimant saw Chris Cornett, M.D. at UNMC Orthopedics. He recounted the following history. "She states that she has had low back pain for years. She works in a casino and that all the standing aggravates her back pain." (Cl. Ex. 4A, p. 1) He diagnosed degenerative disk disease, diffuse in nature. He recommended physical therapy. (Cl. Ex. 4A, p. 1)

On August 13, 2012, claimant filled out and submitted an injury report to the Casino. (Cl. Ex. C, Depo. Ex. 3) The report states she was injured from her repetitive work activities. (Id.) She elaborates as follows: "my lower back is ok when I get to work but by 1 or 2:00 p.m. in the afternoon it is killing me." (Id.) She went on to describe the onset as follows: "This mainly started in 2008 got FMLA from my Dr. have been using that untell [sic] it ran out. It has been continuous since 2008 the pain in the lower part of my back feels like a knife." She went on to reference her job and the diagnosis of degenerative disk disease. (Id.)

Claimant testified as follows in her deposition concerning reports of injury prior to August 13, 2012:

> Q. Tell me about when you first reported any low back injury to Horseshoe that you attributed to being employed at Horseshoe.
>
> A. That was July or August of 2012 is when I put a claim in.

(Ex. B. p. 16)

> Q. Prior to July or August 2012, had you ever formally reported or had you reported to Horseshoe your low back injury?
>
> A. Just to my supervisors. They all knew it.

(Ex B. p. 17)

Claimant then stated she received workers' compensation benefits for a prior back injury at Horseshoe, but could not remember when it occurred. (Ex. B. pp. 9-20) She testified that her supervisors, Sandy Mason O'Toole and Crystal Nedimeier knew about her back complaints when she applied for other jobs at the Casino for a period of 6 ½ years before leaving the Casino in an effort to find something more suitable for her back condition. (Ex. B, pp. 8-9)

The Casino's manager of risk and safety, Rodney Jobman, testified in his deposition that although claimant's supervisor was aware of claimant's back problems, the first time he or the supervisor had notice that claimant was claiming her back problems were caused by her Casino employment, was when he received the notice from claimant on August 13, 2012. She had been taking time off for back problems, but she took FMLA leave based on paperwork from her doctor. Such leave is used for a non-occupational injury or medical condition. (Ex. C, pp. 6-12)

In response to her injury claim, the employer sent claimant to see Arthur West, M.D., an occupational medicine doctor at Concentra. Dr. West stated the following history of illness. "She states the pain began in 2008 but she did not make an injury claim until 2 weeks ago. She has been seeing a chiropractor and was told that she has degenerative disease of the lumbar region. The patient denies any injury to her back." (Def. Ex. C, Jobman Depo. Ex. 5) Based upon this assessment, the claim was denied. A letter outlining the denial was never sent to the claimant as required under Iowa law. Instead, the employer provided notice of the denial of the claim through Dr. West. (Cl. Ex. 7, p. 4); See also 876 IAC section 3.1(2).

In November, 2012, claimant was evaluated by Charles Taylon, M.D., at Creighton Clinic. Dr. Taylon noted the claimant's history. "She informed us that she never had a problem with her lumbar spine until a work-related injury in 2008. She began working for Horseshoe Casino as a dealer in 2006. It required her to stand continuously and repetitively. She developed low back pain and right leg pain." (Cl. Ex. 1A, p. 1) Dr. Taylon went on to describe the claimant's decision to quit working and that this "helped her considerably." He reviewed the 2011 MRI, determined she was not a surgical candidate and diagnosed "mechanical low back pain." He assessed a 5 percent impairment rating. No further care was recommended.

At the time the claimant quit her employment at the casino, she had secured employment with Omni Reservations as a reservation sales agent. This position started at $9.00 per hour and commenced on August 27, 2012. (Def. Ex. G, p. 1) The claimant was still employed by Omni at the time of hearing.

Lastly, I find that defendants did not pay any voluntary weekly disability benefits to claimant for her alleged injury in this case prior to the arbitration hearing.

CONCLUSIONS OF LAW

Iowa Code section 85.26(1) requires an employee to bring an original proceeding for benefits within two years from the date of the occurrence of the injury if the employer has paid the employee no weekly indemnity benefits for the claimed injury. The untimeliness of a claim is an affirmative defense which the employer must plead and prove by a preponderance of the evidence. Dart v. Sheller-Globe Corp., II Iowa Industrial Comm'r Rep. 99 (App. 1982.)

Iowa Code section 85.23 requires the employee to provide notice of a work injury within 90 days from the date of the occurrence of the injury under Iowa Code section 85.23. Lack of such notice is also an affirmative defense. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940). Although an employer may have actual knowledge of an injury, the actual knowledge requirement under Iowa Code section 85.23 is not satisfied unless the employer has information putting him on notice that the injury may be work related. Robinson v. Department of Transp., 296 N.W.2d 809, 811 (Iowa 1980).

However, 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 so-called discovery rule. 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. 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 arbitration decision discussed extensively the issue of the date when disability manifested in the cumulative injury to claimant's back. The date of injury is the manifestation date. 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. 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 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. Id.

In cumulative injury cases, such as the one claimed in this case, the manifestation date is not the only date utilized to determine the timeliness of the filing of a claim or the timeliness of the required notice. The commencement of the time period may be extended 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).

In this case, the claimant alleged an injury date or manifestation date of August 7, 2012. Claimant testified that this was the time frame when she concluded that she would be unable to continue in her position as a dealer for the employer. Nevertheless, the manifestation date is the date on which both the fact of the injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. This occurred before August 7, 2012. Claimant's awareness that her back problems would have a permanent adverse impact on her Casino employment also occurred before August, 2012.

The employer argues that the claimant's injury or the time of manifestation occurred in 2008, when she first experienced back pain and sought medical treatment. I cannot agree. There may have been a prior onset of back pain in 2008, but then the symptoms subsided for the most part. Although claimant's many inconsistent testimonies indicates she is not credible, her claim at hearing that she did not take off work after 2008 for back problems until October 10, 2011 is substantiated by the medical records. There is no mention in any of the medical records or leave forms of the claimant leaving work due to low back pain from 2009 to October 2011. This is quite similar to the facts in the McKeever case in which the claimant had some prior intermittent problems before the manifestation date found in that case. It was only after October, 2011, that claimant in this case resumed treatment for her back and began taking time off work due to back problems. She continued taking some time off work until she left her employment with the Casino.

I agree with the finding that the correct injury date is October 10, 2011, because the medical evidence supports that date as the manifestation date for this particular injury. Claimant admitted in her deposition she was aware in 2011 from discussions with Dr. Bruning that she could not continue at the Casino due to her back problems. Her testimony at hearing to change this to 2012 is not credible. Therefore, I agree with the presiding deputy that the two-year statute of limitation does not bar this claim because the Petition was filed on November 29, 2012, which was less than two years after October 10, 2011.

However, I disagree with the presiding deputy on the notice issue. Given a manifestation date of October 10, 2011, Iowa Code section 85.23 required claimant to provide the employer with notice on or before January 8, 2012, that her condition was work related. Even if we consider claimant's testimony that she did not learn she could not continue in her job due to back problems until late 2011, claimant still had to provide notice by April, 2012. She did not provide notice until August 13, 2012.

While it clearly appears the employer was aware for quite some time before August, 2012, that claimant had a low back condition, I do not agree with the finding that the employer had actual knowledge before August 13, 2012, that the condition was

work related. There simply is no credible evidence in the record to support such a finding. Claimant's testimony regarding actual notice is extremely vague and flimsy and it directly contradicts her deposition testimony. Even if claimant's testimony at hearing could be believed, the deposition testimony of Rod Jobman clearly provides a basis for concluding that the employer did not have actual knowledge of the causation of Ms. Callahan's condition at any time before Ms. Callahan reported the injury on August 13, 2012.

Therefore, this claim is barred due to lack of compliance with the notice requirement in Iowa Code section 85.23.

ORDER

The arbitration decision is reversed and the following is ordered:

Claimant shall take nothing from these proceedings.

Claimant shall pay the costs of the arbitration and appeal proceedings pursuant to administrative rule 876 IAC 4.33.

Signed and filed this 25th day of June, 2015.

Joseph S. Cortese II

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WORKERS' COMPENSATION
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