BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TERRY TILTON, Claimant, vs. H.J. HEINZ COMPANY, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5053002 REMAND DECISION Head Note Nos.: 1403.30, 2209, 2802

This matter is before the Iowa Workers Compensation Commission on remand from the Iowa Court of Appeals from a decision dated July 24, 2019.

This matter was initially heard on March 16, 2016. An arbitration decision was filed on July 1, 2016. That decision found, in part, claimant's claim for benefits was barred for failure to give timely notice under Iowa Code section 85.23.

An appeal decision modified and affirmed that decision on April 5, 2018.

A petition for judicial review was filed. In the ruling of the petition for judicial review, the district court concluded the agency applied the incorrect legal standard and remanded the case back to the agency. Defendant employer appealed that decision.

In a July 24, 2019 appeal decision, the Iowa Court of Appeals, in part, remanded the case back to the district court with an entry of an order to reverse the agency and remand for further proceedings regarding a proper date for manifestation of the injury. This remand was delayed, in part, in getting access to the record.

Upon written delegation of authority by the Workers' Compensation Commissioner under Iowa Code section 86.3, I render this decision as a final agency decision on behalf of the Iowa Workers' Compensation Commissioner.

ISSUE

As required by the decision from the Iowa Court of Appeals, the sole issue on remand is what is the proper manifestation date of the injury for purposes of Iowa Code section 85.23

FINDINGS OF FACT

The findings of fact in the agency appeal decision adequately details the record in this case. The findings of fact in this remand decision will only address facts relevant to the issue on remand.

Claimant was 56 years old at the time of hearing. (Transcript, page 43) Claimant began working with Heinz in 1999. (Tr. p. 44) Claimant began with Heinz as a "pre-weigher" where she weighed food. Claimant then worked in quality control. Claimant began in the "Clean As You Go" position in 2010. (Tr. p. 45)

Claimant's job description indicates that she spent approximately 65 percent of her time cleaning facility equipment, 15 percent monitoring chlorine barrels, 5 percent emptying trash cans, 5 percent assisting with product change over, and 10 percent setting up chemical sprayers and chlorine barrels. (Claimant's Exhibit 11, p. 1) Claimant was required to lift, carry, push, and pull up to 100 pounds occasionally and 41-50 pounds frequently. (Ex. 11)

Claimant testified she first realized her back problems were related to her job at Heinz in approximately 2001. (Tr. p. 91)

From 2002 through 2010, claimant routinely treated with Dennis Bradley, D.C., for lower back pain. From 2002 through 2006, claimant treated approximately 30 times for lower back pain caused by lifting a grandchild, lifting bags of dog food, falling, mowing grass, working in a flooded home, cleaning her home, gardening and mowing. (Ex. J, pp. 1-19)

In 2004, claimant was evaluated by Matthew Gray, M.D., for lower back pain. Claimant underwent an MRI that showed a small disc herniation at the L4-5 levels. Claimant was scheduled for an epidural injection. (Ex. L, pp. 1-2; Ex. M, p. 1)

In July of 2005, claimant was evaluated by Dr. Gray. Claimant had three epidurals (ESI's) and still had lower back pain. A second MRI was recommended. (Ex. L, p. 3) A second MRI performed in July 2005 showed a disc bulge at L4-5 and degenerative changes at L3-S1. (Ex. M, p. 6)

In August 2005, claimant treated with Chad Abernathey, M.D. Claimant had a chronic history of lower back pain. Conservative treatment was recommended. (Ex. 7, p. 1)

From February 16, 2006 through March 27, 2006, claimant was kept off work due to a lumbar disc bulge/herniation causing severe lower back pain. (Ex. J, p. 22) From 2006 through 2008 claimant treated for lower back pain for approximately 50 different occasions with Dr. Bradley. (Ex. J, pp. 23-31)

In July 2008, claimant was evaluated by Dr. Gray for pain in the left hip and left leg. Claimant had lower back pain from lifting and moving boxes while cleaning a flooded home. Claimant was noted to be on disability at work. A repeat MRI was recommended. (Ex. L, p. 7)

An MRI taken July 14, 2008 showed a posterior facet spur at the L5-S1 levels and a disc protrusion at L4-5. (Ex. N, p. 11) Claimant was evaluated by Farid Manshadi, M.D., in August 2008. Claimant was assessed at that time of having a neuroforaminal stenosis secondary to a large facet spur at the L4-S1 levels. Adjustments and stabilization exercises were recommended. (Ex. Q, pp. 1-2)

From 2009 to 2010 claimant continued to routinely treat with Dr. Bradley for lower back pain. (Ex. J, pp. 32-39)

On February 4, 2010, Dr. Bradley took claimant off work for two to four weeks. Dr. Bradley noted claimant had an L4 disc protrusion and bone spurs. He noted the condition was permanent. He indicated claimant would continue to have flare-ups in the future, some of which would cause claimant to miss work. (Ex. J, pp. 43-45)

In March 2010, claimant began treating with Stanley Mathew, M.D., for lower back pain radiating to the left leg. Claimant was assessed as having a left sacroiliac joint dysfunction. Claimant was given medication. (Ex. 1, p. 8)

Claimant returned to Dr. Mathew in July 2010. Claimant was initially taken off work from July 7, 2010 through July 12, 2010 for lower back pain. Claimant was not returned to work for full duty until September 8, 2010. (Ex. 1, p. 14-22)

Claimant continued to treat with Dr. Mathew for lower back pain from March 2011 through December 2011. Claimant underwent injections in May 2011 for back pain. In November 2011, claimant had an epidural steroid injection (ESI). (Ex. 1, pp. 27-42)

In February 2012, claimant underwent an electrodiagnostic study to rule out an L5 radiculopathy. Testing was normal. (Ex. 1, p. 45) In April 2012, claimant fell while walking a dog, which exacerbated her lower back pain. (Ex. 1, p. 48)

In June 2012, claimant underwent radiofrequency lesioning of the lateral branches of S1-S4. At that time, claimant was noted to have a new onset of bilateral leg pain of an unknown etiology. (Ex. S, pp. 3-5)

On January 11, 2013, claimant treated with Dr. Mathew for lower back pain. Notes indicate claimant had been doing well with her lower back pain until she had a slip and fall that exacerbated her condition. (Ex. R, pp. 4-5)

Claimant testified at hearing that prior to April 15, 2013 she was on disability. Claimant testified that on April 15, 2013 she told her supervisor she could not stand the pain anymore and was going "back on disability." (Tr. p. 75)

In a May 3, 2013 letter, claimant's attorney gave notice to Heinz claimant sustained a work injury on or about April 13, 2013. (Ex. 13, p. 1)

REASONING AND CONCLUSIONS OF LAW

The first issue to be determined is the appropriate date of claimant's cumulative 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).

For a cumulative injury, the beginning of that period may not begin, under the discovery rule, until the worker knows the nature of the disability, the seriousness of the disability, and the probable compensable nature of the disability. Chapa v. John Deere Ottumwa Works, 652 N.W.2d 187 (Iowa 2002). See also Larson Mfg. Co. v. Thorson, 763 N.W.2d 842, 854–55 (Iowa 2009); Midwest Ambulance Serv. v. Ruud, 754 N.W.2d 860, 865 (Iowa 2008); Swartzendruber v Schimmel, 613 N.W.2d 646 (Iowa 2000).

In this case, defendants have the burden of proof to show claimant knew the nature of her injury, the seriousness of the disability, and the probable compensable nature of the disability.

As noted in the findings of fact, claimant testified she knew her back problems were related to her job in 2001. (Tr. 91) Claimant testified she knew she was having back problems in 2001. (Tr. 91, Ex. J, pp. 1-19) Based on this record, claimant knew the nature of her injury and the probable compensable nature of her injury in 2001.

From 2002 through 2006, claimant treated with Dr. Bradley approximately 30 times for back pain. (Ex. J, pp. 1-19)

By July of 2005, claimant had undergone three epidural steroid injections for her back and still had back pain. (Ex. L, p. 3)

In February and March of 2006 claimant was off work for approximately six weeks due to disc herniations causing severe back pain. (Ex. J, p. 22)

On February 4, 2010, claimant treated with Dr. Bradley for low back pain. Dr. Bradley took claimant off work for two to four weeks. He noted claimant had an L-4 disc protrusion and bone spurs. Dr. Bradley told claimant her condition was permanent. Dr. Bradley told claimant she would continue to have flare-ups of back pain that would cause claimant to miss more work in the future. (Ex. J, pp. 43-45)

Between 2002 to 2010, claimant treated approximately 140 times with Dr. Bradley for back pain. (Ex. J, pp. 1-40) During that period of time she also saw Drs. Gray, Abernathey, Manshadi and Matthew for treatment for back pain. (Ex. L, pp. 1-2, 7; Ex. M, pp. 1-2, 6; Ex. Q, pp. 1-2; Ex. 1, pp. 8, 14-22; Ex. 7, p. 1) By July of 2005 claimant had already undergone three ESI's and still had back pain. (Ex. L, p. 3) In 2006 claimant was kept off work approximately six weeks for back pain. (Ex. J, p. 22) Finally, on February 4, 2010, Dr. Bradley again took claimant off work for two to four weeks. At that time, he told claimant her condition was permanent and he told claimant she would continue to miss work due to her back condition. (Ex. J, pp. 43-45)

From 2002 through 2010, claimant treated with Dr. Bradley approximately 140 times for back pain. During the same period, she saw at least four other doctors for back pain. By July of 2005 she had three unsuccessful ESI's for back pain. Claimant was off work for six weeks in 2006 due to back problems. On February 4, 2010, Dr. Bradley took claimant off another two to four weeks for back pain. At that time, he told claimant her condition was permanent and that she would continue to miss work in the future due to back pain. Based on this record, claimant knew or should have known at least by February 4, 2010, of the seriousness of her disability.

Claimant knew the nature of her injury and the compensability of her injury in 2001. She knew, or should have known, of the seriousness of her disability on or before February 4, 2010. Based on this record, it is found the manifestation date of claimant's injury is February 4, 2010.

The next issue to be determined is whether claimant's claim for benefits is barred by application of Iowa Code section 85.23.

Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days of the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice for 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 of the possibility of the potential compensation claim

through information which makes the employer aware that the injury occurred and it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985).

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).

The 90-day limit for notice does not begin running until the employee, acting reasonably, should know the injury is both serious and work connected. Robinson v. Department of Transp., 296 N.W.2d 809, 812 (1980).

In this case, it is found claimant's manifestation date of injury is February 4, 2010. Claimant did not give notice of her injury until May 3, 2013. (Ex. 13, p. 1) Given this record, it is found claimant's claim for benefits is barred by application of Iowa Code section 85.23.

As claimant's claim for benefits is found barred by application of Iowa Code section 85.23, all other issues are moot.

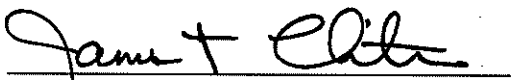
ORDER

THEREFORE, IT IS ORDERED

That claimant shall take nothing from these proceedings.

That both parties shall pay their own costs.

Signed and filed this 4th day of February, 2021.



JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Thomas M. Wertz (via WCES)

Nathan R. McConkey (via WCES)