

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DANIELLE PETERSON,

Claimant,

vs.

SIEMENS ENERGY, INC.,

Employer,

and

TRAVELERS INDEMNITY CO. OF CT,

Insurance Carrier,  
Defendants.

**FILED**

JAN 24 2017

WORKERS COMPENSATION

File No. 5053542

ARBITRATION DECISION

Head Note Nos.: 1100, 2401, 2402

STATEMENT OF THE CASE

Claimant, Danielle Peterson, has filed a petition in arbitration and seeks workers' compensation benefits from Siemens Energy, Inc., employer, and Travelers Indemnity CO. of CT., insurer, defendants.

Deputy workers' compensation commissioner, Stan McElderry, heard this matter in Des Moines, Iowa.

ISSUES

The parties have submitted the following issues for determination:

1. Whether there is a lack of timely notice under Iowa Code section 85.23;
2. Whether the alleged injury of March 5, 2015 is a cause of permanent disability;
3. Whether the claimant is entitled to receive permanent disability; and
4. Independent medical evaluation (IME) pursuant to Iowa Code section 85.39.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

The claimant was 38 years old at the time of hearing. In July of 2013 the claimant was a grinder for the defendant. In July of 2013 she noticed carpal tunnel like

symptoms in her hands from using the grinders at work. She was directed to Great River Medical Center in Burlington and first seen on August 20, 2013. (Exhibit 4) She received conservative care of therapy, medication and placed on light duty which removed her from the grinder position. She had EMG testing and was sent to Scott B. Neff, D.O. (Ex. 2) Dr. Neff diagnosed carpal tunnel and de Quervain's tenosynovitis. (Ex. 2, p. 7) He further opined that the conditions were work related at least in part, and that carpal tunnel decompressive surgery on both sides and decompression for the de Quervain's should be performed. (Ex. 2, p. 9) The insurer, Liberty Mutual, denied the claim and treatment on the basis of Dr. Neff's opinion.

The claimant was returned to work in the finishing department, where she remains. She fills defects with putty and a blade. She saw her family doctor, Jeremy Murphy, M.D., on March 3, 2015. (Ex. C, p. 7) Dr. Murphy noted that the trouble dated back two years and right carpal tunnel surgery and de Quervain's surgery were planned. Dr. Gause performed the right side surgery on in March of 2015, and the left side in May of 2015. The surgeries were exactly as Dr. Neff had recommended.

The claimant filed a petition for workers' compensation benefits on August 20, 2015 alleging an injury date of March 5, 2015. (Agency file) An answer denying the petition was filed. Additionally a November 3, 2015 denial letter was sent out by Travelers, the workers' compensation insurer, for the March 5, 2015 date. (Ex. E)

At hearing the claimant admitted that she provided no notice of an alleged March 2015 injury date until her petition was filed August 20, 2015. She further testified that this was because she believed the surgeries in 2015 all were part of her 2013 claim.

The claimant had an IME with Richard Neiman, M.D., on August 31, 2016. (Ex. 7) He charged \$850.00 for the IME for which claimant wants reimbursed. Dr. Neiman opined that the bilateral upper extremity problems: "[g]oes back to around July 13, 2013 . . ." (Ex. 7, p. 37) He opined a 5 percent upper extremity impairment for each extremity for a total of 10 percent, which he converted into 6 percent of the body as a whole (BAW).

Joshua D. Kimelman, D.O., examined the claimant for the defendants on September 22, 2016. (Ex. D) Dr. Kimelman opined zero percent impairment and without a work study would not opine as to the right upper extremity, but found no causal connection for the left. (Ex. D, p. 5) Neither is particularly helpful as the opinion as to the left seems based on a failure to understand the claimant's job. (Ex. D, p. 5)

The record does not establish a new work injury on March 5, 2015. But even if it did, the claimant did not provide notice of the injury within 90 days.

The parties stipulated that the claimant's average weekly rate for the 13 weeks preceding March 5, 2015 was \$836.00, and that the claimant was single and entitled to 1 exemption. As such, the claimant's weekly rate is \$557.33. The parties also

stipulated that the commencement date for any permanent partial disability benefits is August 26, 2015.

### REASONING AND CONCLUSIONS OF LAW

The first issue is whether the claimant gave timely notice of injury pursuant to Iowa Code Section 85.23.

The defendants have raised the issue of lack of notice of the 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 an affirmative defense. Delong v. Iowa State Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940). In Reddick v. Grand Union Tea Co., 230 Iowa 108, 296 N.W. 800 (1941) the Iowa Supreme Court has ruled that once claimant sustains the burden of showing that an injury arose out of and in the course of employment, claimant prevails unless defendant can prove by a preponderance of the evidence an affirmative defense. 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. Dept. of Transportation, 296 N.W.2d 809, 811 (Iowa 1980). The time period for notice of claim does not begin to run until claimant, as a reasonable man, should recognize the nature, seriousness and probable compensable character of his injury or disease. Robinson v. Dept. of Transportation, Id. An employee may provide information to an employer at the time of injury which would satisfy the actual knowledge notice requirement under Iowa Code section 85.23 without nullifying his right to the benefits under the discovery rule. Dellinger v. City of Sioux City, 368 N.W.2d 176, 180 (Iowa 1985). The purpose of the notice requirement is to alert the employer to the possibility of a claim so that an investigation can be made while the information is fresh. Id. Although claimant may have reported an injury when it occurred, such knowledge is not necessarily knowledge of its nature, seriousness and probable compensable character.

It is undisputed that the claimant knew her bilateral upper extremities injuries were serious (surgery recommended), affecting work (was moved to different duties) in 2013 or 2014. The claimant knew on March 5, 2015 that her surgery was due to the work injuries. However, the employer was not notified until the petition was filed August 20, 2015 that the claimant was claiming a March 5, 2015 work injury. This is past the 90-day requirement of Iowa Code section 85.23. The claimant failed to provide timely notice of the injury to her employer. As such, all other issues are moot.

### ORDER

THEREFORE IT IS ORDERED:

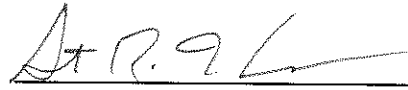
That the claimant take nothing.

Defendants shall receive credit for all benefits previously paid.

The parties shall bear their own costs pursuant to rule 876 IAC 4.33.

Defendants shall file subsequent reports of injury as required by the agency.

Signed and filed this 24<sup>th</sup> day of January, 2017.

  
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-STAN MCELDERRY  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

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SRM/srs

**Right to Appeal:** This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876 4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.