IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

MARIA DEL ROSARIO ROMERO, **Petitioner,** **vs.** **CURLY'S FOODS,** **Respondent/Employer,** **and** **SAFETY INTERNATIONAL,** **Respondent/Insurance Carrier.**	WORKERS COMPENSATION **Case No. CVCV056264** **RULING ON PETITION FOR JUDICIAL REVIEW**

This matter came before the court for argument on September 21, 2018. Petitioner Maria Del Rosario Romero, ("Romero") was represented by Attorney James Byrne. Respondent Curly's Foods, ("Employer") was represented by Attorney Deena Townley. Upon review of the court file, the administrative record and applicable law, the court enters the following ruling.

I. FACTUAL FINDINGS AND PROCEDURAL HISTORY

Romero is fifty-nine years old. (Transcript p. 8) She is originally from Mexico and had a fifth grade education in Mexico with no formal education in the United States. (Transcript pp. 8-9) She has lived in the United States for the past thirty years. (Transcript p. 10) Her work history includes filed work (packing fruit) and packing cheese in California; and trimming and packaging meat at Tyson's in Nebraska. (Transcript pp. 11-13) Romero began working for Curly's in 2003. (Transcript p. 13) Romero worked various jobs throughout her near ten-year employment, and in May 2013, she was assigned to a position where she was responsible for checking bags of ribs to make sure they were sealed properly; and separating bags of meat

product that were stuck together. (Transcript pp. 14-19) The position required her to repetitively reach out, grab the bags, and pull them apart using her shoulder strength as well as pulling off bags not sealed properly. (Transcript p. 20) Romero estimated that the bags weighed between ten and fifteen pounds. (Transcript p. 21) Romero visited her health care provider on July 15, 2013 with complaints of left shoulder pain of two months duration. (Arb. Ex. 1) At that appointment, Romero attributed the pain to a switch in her job duties at work. (Id.) Romero sought treatment for various problems throughout 2013 and early 2014, including treatment for her left shoulder pain. (Arb. Ex. 3)

Romero testified that shortly after the job switch in May 2013, she reported her shoulder pain to her supervisor, who sent her to the plant nurse. (Transcript pp. 18-19, 22) She stated she was given pills and ice and sent back to work. (Transcript p. 22) The plant nurse testified, however, that Romero did not see her in May 2013 regarding the shoulder pain, as the first that she learned of it was March 28, 2014. (Transcript pp. 88-89) The plant nurse also testified that if Romero had come to see her in May 2013, she would have had a record of the visit, and no such record existed. (Transcript p. 89) The Human Resource Director also testified that there is no company record to establish that Romero talked to her supervisor regarding the shoulder pain in May 2013. (Transcript p. 64) However, she did admit a superior to Romero was Oscar Munoz, who speaks Spanish, and if Romero went to Munoz about pain he would have typically sent her to the nurse's station. (Transcript p. 65) The employer claims that it was not aware of Romero's left shoulder injury until March 27, 2014. (Transcript p. 67) Romero claims that she did not realize her injury was serious until either March 27, 2014 when she believed she filled out the FMLA paperwork or May 22, 2014 when her doctor told her if she found a different job it may benefit her shoulder long term. (Arb. Ex. p. 44)

Romero underwent surgery on her left shoulder on June 6, 2014. (Arb. Ex. 3 p. 47) Romero's doctor issued her a note on July 23, 2014, stating that she should remain off work until September 4, 2014. (Arb. Ex. 3 p. 57) On September 4, 2014, Romero returned to her doctor with some improvement, but continued pain, and he said that she should stay off work until at least October 20, 2014. (Arb. Ex. 3 p. 63) On September 8, 2014, the employer sent Romero a letter, notifying her that she was being placed on indefinite leave. (Arb. Ex. 12 p. 145) The employer told Romero that when she was able to return to work she could contact the HR department, and that they would see if there were any employment opportunities available for her. (Id.) Since that time Romero has had continuous problems with her left shoulder.

On February 27, 2015, Romero filed a petition with the Iowa Division of Workers' Compensation, alleging she sustained a work-related injury on March 27, 2014. The matter came before the deputy workers' compensation commissioner for an arbitration hearing on February 25, 2016. The deputy commissioner issued the arbitration decision on October 14, 2016, finding Romero was barred from bringing the claim by the statute of limitations requiring an employee give notice to their employer of a work-related injury within ninety-days of its manifestation and the employee having reason to know of its serious nature and compensable character. Romero appealed the decision. The workers' compensation commissioner issued an appeal decision affirming the deputy commissioner on April 10, 2018. Romero filed the present Petition for Judicial Review on May 7, 2018.

II. STANDARD OF REVIEW

Chapter 17A of the Iowa Code governs judicial review of administrative agency action. The district court acts in an appellate capacity to correct errors of law on the part of the agency. *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006). Relief is appropriate where "substantial

rights of a party have been prejudiced because the agency action [...] is unsupported by substantial evidence, is unreasonable, arbitrary, or capricious, or is affected by other error of law." *Dico, Inc. v. Iowa Emp't Appeal Bd.*, 576 N.W.2d 352, 354 (Iowa 1998). The standard of review on appeal depends on whether the basis for the petition involves an issue of finding of fact, interpretation of law, or application of law to fact. *Meyer*, 710 N.W.2d at 218-19.

The standard when the claim is that there was an error in finding of fact is whether the agency's decision is supported by substantial evidence. *Id.* at 218. When the claim is that an agency made an incorrect interpretation of law, the question is whether the agency's interpretation was erroneous. *Id.* at 219. If the agency's interpretation is erroneous, the court is not bound by the agency's interpretation and may substitute its own interpretation. *Id.* If the challenge is to the application of the law to the facts, then the claim of error lies with the ultimate conclusion reached. *Id.* The question in these circumstances is "whether the agency abused its discretion by, for example, employing wholly irrational reasoning or ignoring important and relevant evidence." *Id.*

III. APPLICABLE LAW & ANALYSIS

Romero contends the commissioner erred legally in its finding Romero did not give timely notice to her employer regarding her shoulder injury. However, Romero's argument is based upon a disagreement with the commissioner's finding of fact regarding the appropriate date that the injury required notice to the employer rather than a legal error. The commissioner affirmed and adopted the relevant portions of the deputy commissioner's arbitration decision filed on October 14, 2016.

The Iowa Code states, in relevant part:

> Unless the employer or the employer's representative shall have actual knowledge of the occurrence of an injury received within ninety days from the date of the

> occurrence of the injury, or unless the employee [...] shall give notice thereof to the employer within ninety days from the date of the occurrence of the injury, no compensation shall be allowed. For the purposes of this section, 'date of the occurrence of the injury' means the date that the employee knew or should have known that the injury was work-related.

Iowa Code § 85.23. The Iowa Supreme Court has held that the clock on the ninety-day statutory requirement begins to run on a cumulative injury when the injury "manifests" itself. *Larson Mfg. Co. v. Thorson*, 763 N.W.2d 842, 854 (Iowa 2009) (citing *Herrera v. IBP, Inc.*, 633 N.W.2d 284, 288 (Iowa 2001)). A cumulative injury manifests itself when "the claimant, as a reasonable person, would plainly be aware (1) that he or she suffers from a condition or injury, and (2) that this condition or injury was caused by the claimant's employment." *Id.* Likewise, the statutory period does not start until an employee recognizes or should recognize "the nature, seriousness and probable compensable character of the disability." *Larson*, 763 N.W.2d at 854 (internal citations omitted). Finally, "a claimant is deemed to know the nature, seriousness and probable compensable character of an injury when she knows her physical condition is serious enough to have a permanent adverse impact on her employment or employability." *Id.* at 855.

Romero argues that the deputy commissioner erred legally by failing to apply the above standards as to when Romero reasonably discovered her injury would have a permanent adverse impact on her employment. Romero further argues the commissioner erred legally by adding Romero's statement that she reported her bilateral shoulder pain to the employer in May of 2013 equates to a concession that she recognized the seriousness of her condition in May 2013. The deputy commissioner's decision, however, did contain the requisite analysis regarding when the ninety-day statute of limitations period began. Further, the commissioner's comments regarding the contradiction in Romero's argument about whether she gave notice to her employer when she alleges she spoke to the employer about her injury in May 2013 do not constitute legal error.

The deputy commissioner discussed the standards the Iowa Supreme Court laid out in *Larson*, even if the decision does not cite *Larson* itself. The deputy commissioner explained, in relevant part:

> 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 [...] Claimant must know enough about the condition or incident to realize that it is work connected and serious. Claimant's realization that the injurious condition will have a permanent adverse impact on employability is sufficient to meet the serious requirement.

Arb. Dec. at 14 (referencing *Herrera v. IBP, Inc.*, 633 N.W.2d 284 (Iowa 2001); *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 decision goes on to explain the rules surrounding cumulative injury, and when the injury in those cases is deemed to have manifested:

> Manifestation is best characterized as that 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 [...] 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.

Arb. Dec. at 14 (referencing *Herrera*, 633 N.W.2d; *Oscar Mayer Food Corp. v. Tasler*, 483 N.W.2d 824 (Iowa 1992); *McKeever Custom Cabinets v. Smith*, 379 N.W.2d 368 (Iowa 1985)). The decision goes on to quote the exact language the Court used from *Herrera* in the *Larson* decision.

The deputy commissioner then points to the factual circumstances that evidence the date of manifestation as well as when Romero would know the seriousness of her condition:

1) Romero's testimony pointing to May 2013 as when she began experiencing shoulder difficulties. Arb. Dec. at 15.

2) Romero reporting a change of work duties to the medical providers at Siouxland Community Health Center on July 15, 2013. The report indicated that Romero had the pain for two months. Arb. Dec. at 15.

3) Romero did not dispute that she understood that she had a shoulder injury and it was compensable as of May 2013. Arb. Dec. at 16.

4) Romero claimed to have told her supervisor and an on-site nurse about the problem in May 2013, but the HR Administrator and nurse refuted this testimony. The nurse's notes did not contain any indication that Romero had visited her. Arb. Dec. at 16.

The decision also contains nine pages of facts laying out the timeline of Romero's injury, medical appointments, and communications with her employer. This court's intensive review of the record reveals the deputy's findings are supported by substantial evidence in the record. After acknowledging the standards regarding when the ninety-day period begins, the deputy commissioner found Romero's injury manifested itself in May 2013. The deputy commissioner further found Romero did not give notice of her injury until March 27, 2014. The court does not find legal error in the deputy's decision.

On appeal, the commissioner adopted the deputy commissioner's findings of fact and conclusions of law. App. Dec. at 2. The commissioner affirmed the findings that the correct manifestation date was May 2013, and in May 2013 Romero knew or should have known her condition was serious enough to have a permanent, adverse impact upon her employment, such that Romero was required to give her employer notice within ninety days of May 2013. App. Dec. at 2. The commissioner also affirmed the finding Romero did not provide her employer notice until March 27, 2014. App. Dec. at 2. The commissioner went on to provide additional analysis, which is where Romero argues the commissioner committed legal error.

Specifically, Romero argues the commissioner improperly considered Romero's statement that she reported her injury to the nurse in May 2013. The commissioner explained, in relevant part:

> Claimant makes a contradictory argument. On the one hand, claimant contends she reported the bilateral shoulder condition to defendants in May 2013, which would have been a timely report under section 85.23. By stating this, claimant concedes she recognized the seriousness of her condition in May 2013. On the other hand, claimant argues she didn't know the seriousness of her condition until March 27, 2014, which was 300 days or more after she testified she reported it. If claimant's assertion that she reported the condition in May 2013 cannot be believed, she cannot then fall back on the assertion that she did not realize the seriousness of the condition until March 27, 2014, which is when it has been found claimant actually reported the condition to defendants.

App. Dec. at 3. Here, the commissioner makes it clear the evidence does not support a finding Romero reported her injury during May 2013. The commissioner did not find this "concession" to be the only reason Romero knew of the seriousness of her injury in May 2013. The commissioner adopted the findings of fact and conclusions of law of the deputy commissioner, and the deputy commissioner's decision cites numerous facts that lead to the conclusion May 2013 was the appropriate date for purposes of the statute. The commissioner's comments regarding the contradictory nature of Romero's argument go toward his assessment of the credibility of Romero's argument, rather than a conclusion that this "concession" was the determining factor in deciding when Romero became aware of the seriousness of her injury. The court does not find the commissioner committed legal error.

The final question in this case is whether the agency's findings were supported by substantial evidence. The employer had the burden of proof in establishing its affirmative defense that Romero's claim was barred by the ninety-day statute of limitations. *See Reddick v. The Grand Union Tea Company*, 296 N.W. 800 (1941). In *Larson*, the Court explained, "[s]ubstantial evidence is the quantity and quality of evidence that would be deemed sufficient

by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance." *Larson*, 763 N.W.2d at 850. Further, the question "is not whether the evidence supports different findings than those made by the commissioner, but whether the evidence supports the findings actually made." *Id.* (internal citations omitted). Evidence may be substantial even if the court would have drawn a different conclusion from the fact finder. *Christiansen v. Iowa Bd. of Educ. Examiners*, 831 N.W.2d 179, 192 (Iowa 2013).

The court finds the commissioner's decision was supported by substantial evidence. The deputy commissioner thoroughly examined the facts surrounding Romero's injury. In over nine pages of the opinion, the deputy commissioner considered Romero's work history, history with the employer, and medical history. Arb. Dec. at 6-16. The decision included reference to Romero's visits with her medical providers as well as the opinions of those providers, as shown through exhibits that were provided to the deputy commissioner. The commissioner adopted the findings of fact and conclusions of law of the deputy commissioner. Though a different finder of fact examining Romero's case may have come to a different conclusion that is not the question before the court. The question is whether the evidence in the record when viewed as a whole supports the findings actually made. The deputy commissioner's decision highlights the evidence that led to the finding Romero's shoulder pain manifested in May 2013, and she knew or should have known at that time about the serious nature and compensable character of the injury. Substantial evidence also supports the finding Romero did not inform her employer about the injury until March 27, 2014. The commissioner's decision was supported by substantial evidence.

IV. ORDER

IT IS THEREFORE ORDERED that the Petition for Judicial Review is DENIED and the decision of the Iowa Workers' Compensation Commissioner is AFFIRMED.

Costs to Petitioner.

Clerk to send copy to:

Counsel of Record

Iowa Workers' Compensation Commissioner

State of Iowa Courts

Type: OTHER ORDER

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CVCV056264	MARIA DEL ROSARIO OMERO VS CURLYS FOODS ET AL

So Ordered

Karen A. Romano, District Court Judge,
Fifth Judicial District of Iowa