BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOSEPH BUEHLMANN,

Claimant,

vs.

KAS INVESTMENT CO. INC. D/B/A SWANSON GLASS, INC.,

Employer,

and

SFM SELECT INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File Nos. 5047676, 5047678, 5054510

APPEAL

DECISION

Head Note Nos.: 1108, 2209, 4000.2

On January 12, 2017, defendants filed an appeal of the proposed arbitration decision issued on December 30, 2016. Claimant filed a cross-appeal on January 17, 2017 on the claims raised by defendants and then a second appeal on January 17, 2017 for the claim found not to be compensable. These appeals were consolidated and one briefing schedule was issued. In the claimant's brief, he dismisses his appeal and cross-appeal.

On July 20, 2018, this matter was delegated to the undersigned for final agency action.

There are three claims of injury brought by claimant. The three claims were consolidated, heard and considered fully submitted on April 28, 2016. The deputy issued a decision on December 30, 2016, finding that for File No. 5047676, claimant had sustained a 20 percent industrial disability arising out of an accepted shoulder injury. For File No. 5047678, no compensable injury was found. For 5054510, the deputy relied on the opinion of Sunil Bansal, M.D., and found claimant sustained a compensable back injury for which claimant had not reached MMI. A running healing period award was ordered.

The undersigned has reviewed the record of evidence de novo. Pursuant to Iowa Code sections 86.24 and 17A.15, I affirm and adopt as the final agency decision the proposed arbitration decision filed on December 30, 2016.

The facts recited by the presiding deputy are detailed and exhaustive and are incorporated herein. While defendants have raised three separate issues including compensability, penalty and entitlement to reimbursement under section 85.39, I will address only the first two in detail.

Defendants primary argument is that claimant suffered from a history of back pain and gave varying accounts of how and when that back pain exacerbated. Defendants argue that John Kuhnlein, D.O.'s expert opinion should be given more weight than Dr. Bansal's opinion who defendants characterized as a claimant's doctor.

The deputy relied on Dr. Bansal's opinions because those opinions were more consistent with the claimant's behavioral history in that claimant continued to work his heavy duty lifting position until April 2015. Further, there was medical evidence showing that claimant's back was stable in April 2013. While claimant did have back treatment in 1993-94, 2008, and 2012, claimant was not actively treating for his back pain in the two years leading up to April 2015 and he was working a full duty heavy labor position that required lifting of over 50 pounds. Dr. Kuhnlein acknowledged that claimant's work was of the type that could produce a back injury as claimant's work was at the heavy physical demand level and required claimant to be placed in awkward physical conditions.

Claimant's testimony about when his back pain worsened did vary; however, that is to be expected of a cumulative injury where the work duties erodes an employee's health and then culminates in a disabling and compensable injury. I affirm and adopt the hearing deputy's finding that claimant sustained a back injury arising out of his work that manifested on June 26, 2015, the day after an MRI revealed a nerve disk bulge touching claimant's nerves.

Defendants argue that this manifestation date is inappropriate and that a more logical date would be an earlier one, but defendants do not offer alternative dates. The Iowa Supreme Court directs us that an injury is manifested on "`the date on which both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person.'" McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985) (quoting Belwood Nursing Home v. Indus. Comm'n, 115 Ill.2d 524, 106 Ill.Dec. 235, 505 N.E.2d 1026, 1029 (1987)).

Further, in Herrera v. IBP, Inc., 633 N.W. 2d 284,287 (Iowa 2001), the Iowa Supreme Court clarified that for the causal relationship of the injury to the claimant's employment to be "plainly apparent", the claimant must know or should know of the nature, seriousness, and probable compensable character of his injury or condition.

> " [A] cumulative injury is manifested when the claimant, as a reasonable person, would be plainly 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. Upon the occurrence of these two circumstances, the injury

> is deemed to have occurred. Nonetheless, by virtue of the discovery rule, the statute of limitations will not begin to run until the employee knows that the physical condition is serious enough to have a permanent adverse impact on the claimant's employment or employability, i.e., the claimant knows or should know the `nature, seriousness, and probable compensable character' of his injury or condition.

Id. (citing Orr, 298 N.W.2d at 257)

Claimant did know on or around June 11, 2015, that he believed his low back condition was related to his work, but he was not aware of the nature and seriousness of his low back condition until after the MRI. In fact, claimant believed, and testified to this belief on more than one occasion, that his work helped to alleviate the soreness in his back. He did not fully realize or appreciate that his heavy duty lifting at awkward positions was exacerbating a pre-existing condition until further medical visits in the summer of 2015. Thus, June 26, 2015, is the appropriate manifestation date.

As it relates to the penalty, defendants have an ongoing responsibility to investigate a worker's complaint. See Iowa Code 86.13(4)(c) (1). The evidence shows that defendants were aware of claimant's injury in August 2015 but took no action to obtain medical records, a deposition or an IME until 2016. This delay was not reasonable and therefore the penalty imposed for the delay was appropriate.

Pursuant to Iowa Code sections 86.24 and 17A.15, I affirm and adopt as the final agency decision the proposed arbitration decision filed on December 30, 2016.

ORDER

IT IS THERFORE ORDERED that the arbitration decision filed December 30, 2016, is AFFIRMED.

Defendants shall pay the costs of the appeal, including the preparation of the hearing transcript.

Signed and filed this 30th day of August, 2018.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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