

IN THE COURT OF APPEALS OF IOWA

No. 9-301 / 08-1784
Filed July 2, 2009

MERCY MEDICAL CENTER – NORTH IOWA,
Petitioner-Appellant,

vs.

DEBRA J. FISTLER,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg,
Judge.

An employer appeals the decision of the workers' compensation
commissioner awarding her healing period benefits for a cumulative injury.

AFFIRMED.

Lee P. Hook and Joseph M. Barron of Peddicord, Wharton, Spencer,
Hook, Barron & Wegman, L.L.P., Des Moines, for appellant.

Robert S. Kinsey III of Brown, Kinsey, Funkhouser & Lander, P.L.C.,
Mason City, for appellee.

Considered by Mahan, P.J., and Mansfield, J., and Beeghly, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

BEEGHLY, S.J.**I. Background Facts & Proceedings**

Debra Fistler was employed by Mercy Medical Center – North Iowa, as a custodian. Her job involved work above shoulder height. In 2002 she had pain in her right shoulder, and was diagnosed with calcific tendinitis.¹ Fistler had surgery on her right shoulder on August 22, 2002. She returned to work without restrictions.

In 2004, Fistler again experienced pain in her right shoulder. An x-ray in September 2004 showed the calcific tendinitis had regrown. At a pre-operative physical on October 1, 2004, Dr. James Coddington told Fistler her problems were caused by repetitive over-head motions. Fistler testified she told her supervisors, Charlene Olswold, Debbie Patterson, and Hal Hudson, the same day that Dr. Coddington had informed her that her shoulder problem was work related. Fistler had a second surgery on her right shoulder on October 5, 2004.

Fistler returned to work in January 2005 with restrictions. She had continuing pain, which was aggravated by overhead work, such as scrubbing and dusting. She had a third surgery on May 4, 2006, on her right shoulder. She had continuing work restrictions and had not returned to work. Dr. Coddington, Dr. Darron Jones, Dr. James Nepola, and Dr. Kary Schulte all gave the opinion that Fistler's shoulder condition was aggravated by work at or above shoulder level.

Fistler filed a claim for workers' compensation benefits on October 10, 2005. At the time of the administrative hearing on October 17, 2006, she had not

¹ "Calcific tendinitis" is a calcium deposit in a chronically inflamed tendon, especially a tendon of the shoulder. *Taber's Cyclopedic Medical Dictionary* 285 (18th ed. 1997).

reached maximum medical improvement, and the parties agreed that the issue of permanent industrial disability was not ripe for consideration, but the issue of healing period benefits would be considered. The employer claimed Fistler's claims were barred by the notice provision of Iowa Code section 85.23 (2005), and the statute of limitations found in section 85.26.

A deputy workers' compensation commissioner determined that the manifestation date and discovery date for Fistler's injury was October 5, 2004 "as this was the date when the claimant was both aware of the job related nature of her condition and that it was a serious injury from which she may not recover fully." The deputy found "[u]ntil her doctors told her that her condition was materially aggravated by working overhead there was no reason for her to believe it was work related." The deputy found Fistler's testimony credible that she had informed her supervisors she had a work-related injury on October 1, 2004. The deputy concluded Fistler's claims were not barred by sections 85.23 or 85.26. Fistler was awarded healing period benefits. The workers' compensation commissioner affirmed and adopted the deputy's findings.

The employer filed a petition for judicial review. The district court noted that the commissioner had found "Fistler was credible in regard to her testimony at the hearing in this matter." The court found the commissioner's findings were supported by substantial evidence in the record when viewed as a whole. The court stated, "the ultimate question is not whether the evidence supports a different finding, but whether the evidence supports the findings actually made."

The court affirmed the decision of the commissioner. The employer now appeals.

II. Standard of Review

Our review is governed by the Iowa Administrative Procedure Act. Iowa Code ch. 17A; *Acuity Ins. v. Foreman*, 684 N.W.2d 212, 216 (Iowa 2004). We review the district court's decision by applying the standards of section 17A.19 to the agency decision to determine if our conclusions are the same as those reached by the district court. *Univ. of Iowa Hosps. & Clinics v. Waters*, 674 N.W.2d 92, 95 (Iowa 2004).

III. Merits

Section 85.23 provides that a injured employee must give notice to the employer, or the employer must have actual notice of the injury, within ninety days of the occurrence of the injury. *George A. Hormel & Co. v. Jordan*, 569 N.W.2d 148, 153 (Iowa 1997). Under section 85.26(1), an action for benefits must be filed within two years from the date of the occurrence of the injury for which benefits are claimed.

For a cumulative injury, the date of occurrence is the date when the injury manifests itself. *Oscar Mayer Foods Corp. v. Tasler*, 483 N.W.2d 824, 829 (Iowa 1992). "Manifestation' is best characterized as '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.'" *Id.* (citation omitted).

The determination of the date of manifestation is a factual finding, and the commissioner is given a substantial amount of latitude in making this determination. *Id.* As long as the commissioner's determination of the date of manifestation is supported by substantial evidence, the findings will not be disturbed on appeal. *Id.* at 830.

We are bound by the commissioner's factual findings if they are supported by substantial evidence in the record as a whole. *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006). Evidence is substantial when a reasonable person could accept it as adequate to reach the same finding. *Asmus v. Waterloo Community School Dist.*, 722 N.W.2d 653, 657 (Iowa 2006). The ultimate question is not whether the evidence might support a different finding, but whether the evidence supports the findings actually made. *IBP, Inc. v. Harpole*, 621 N.W.2d 410, 420 (Iowa 2001).

In this case, the commissioner found the date of manifestation of the injury was October 5, 2004. The deputy found that the calcific tendinitis in Fistler's right shoulder was "a condition for which a job connection is not readily recognized without the assistance of a medical professional." We find there is substantial evidence in the record to support the commissioner's finding that a reasonable person, such as Fistler, would not be aware that her cumulative shoulder injury was work related until she was informed of this by Dr. Coddington on October 1,

2004.² Fistler testified she was not given any reason to suspect that the deposit of calcium in her right shoulder tendon was related to her work. We affirm the commissioner's determination that the date of manifestation was October 5, 2004.

This does not end our inquiry, however. See *Herrera v. IBP, Inc.*, 633 N.W.2d 284, 288 (Iowa 2001) (noting that the preferred analysis is to first determine the date the injury is deemed to have occurred, and then consider application of the discovery rule). Although the date of manifestation is important to notice and statute of limitations issues, the time periods actually begin to run on the date of discovery. *Larson Mfg. Co., Inc. v. Thorson*, 763 N.W.2d 842, 854 (Iowa 2009).

Under the discovery rule, the time periods begin to run when the employee, as a reasonable person, is aware: (1) he or she suffers from a condition or injury; (2) that this condition or injury was caused by working conditions; and (3) his or her physical condition is serious enough to have a permanent adverse impact on employment or employability. *Herrera*, 633 N.W.2d at 288. The employee, acting as a reasonable person, must recognize the nature, seriousness, and probable compensable character of the injury. *George A. Hormel*, 569 N.W.2d at 153.

“The question of whether a claimant knew, or should have known, of the nature, seriousness, and probable compensability of her injury is a question of

² Dr. Coddington's notes of February 14, 2003 state, “Tendonitis of the right shoulder with impingement, seems to be aggravated by recent work above her head.” However, Fistler denied that Dr. Coddington told her at that time about a connection between work and her tendonitis and Dr. Coddington could not recall whether he communicated the information in his notes to Fistler.

fact to be determined by the commissioner.” *Midwest Ambulance Serv. v. Ruud*, 754 N.W.2d 860, 865 (Iowa 2008). The commissioner’s findings on this issue should be affirmed if they are supported by substantial evidence. *Id.* The burden is on the unsuccessful party to show that the commissioner’s findings were lacking in substantial evidence. *Id.*

The commissioner found the date of discovery was October 5, 2004, stating, “this was the date when the claimant was both aware of the job-related nature of her condition and that it was a serious injury from which she may not recover fully.” The employer contends there is not substantial evidence in the record to support the commissioner’s determination that the discovery date for Fistler’s claims was October 5, 2004. It claims Fistler *should* have been aware, as a reasonable person, of the causal relationship between her injury and her employment in 2002 or 2003, at or shortly after the time of her first surgery, and that her condition was serious. The employer claims the commissioner employed an incorrect rule, in that the commissioner looked at what Fistler knew, as opposed to what a reasonable person would know.

Our review of the deputy’s decision, which was adopted by the commissioner, shows the correct rule was properly cited and applied. In applying the rule, the deputy stated, “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 both serious and work connected.”³ We conclude the commissioner considered what a reasonable person in Fistler’s situation would have known, and not only what Fistler specifically knew.

In discussing the date of manifestation, we have already discussed the first two elements of the discovery rule—whether Fistler suffered an injury and whether her injury was caused by her employment, and found there was substantial evidence in the record to support the commissioner’s findings. See *Herrera*, 633 N.W.2d at 288. There is also substantial evidence in the record to support the commissioner’s findings on the third issue, that it was not until October 5, 2004, that Fistler, as a reasonable person, knew her physical condition was “serious enough to have a permanent adverse impact on [her] employment or employability.” See *id.*

Fistler’s first surgery was fairly limited in scope. Fistler testified that in the first surgery the doctor “said he was going to go in with just a needle and try to break up the calcification.” She was off work for a short period of time and returned to work without restrictions. Her second surgery, performed on October 5, 2004, was more extensive. Fistler stated “the second surgery consisted of was an open surgery, where he had to cut into the rotator cuff, quite a large cut, because it was a large calcium deposit that he had to remove.” She was off work

³ Fistler had only an eighth grade education. She was fifty-five years old at the time of the administrative hearing. Her employment history was primarily as a housekeeper or custodian. See *Kuhle v. Lecy Chiropractic*, 711 N.W.2d 244, 248 (S.D. 2006) (holding in a workers’ compensation case that the claimant’s education should be taken into account in determining whether a “reasonable” person would have been on inquiry notice).

for a longer period of time after the second surgery, and still had work restrictions at the time of the administrative hearing. We conclude there is substantial evidence in the record to support the commissioner's determination that Fistler first knew she had a serious condition as of October 5, 2004.

We find there is substantial evidence to support the commissioner's findings that the ninety-day notice period for section 85.23, and the two-year statute of limitations for section 85.26 both began to run on October 5, 2004. Fistler's notice to her employer on October 1, 2004, was within the ninety-day period. Furthermore, her petition filed on October 10, 2005, was within the two-year statute of limitations. We affirm the decision of the district court and the workers' compensation commissioner.

AFFIRMED.