BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

HAZEL MAE ROSS, Claimant, vs. AMERICAN ORDNANCE Employer, and NEW HAMPSHIRE INS. CO., Insurance Carrier, Defendants.	File No. 5043735 A P P E A L D E C I S I O N Head Note Nos.: 1803, 2401	FILED NOV 4 2015 WORKERS' COMPENSATION

Claimant Hazel Mae Ross appeals from an arbitration decision filed September 23, 2014. The case was heard on May 28, 2014, and it was considered fully submitted in front of the deputy workers' compensation commissioner on June 18, 2014.

The deputy commissioner determined claimant sustained an injury arising out of and in the course of her employment with defendant-employer American Ordnance on November 1, 2012. The deputy commissioner determined claimant failed to notify defendants her injury was work-related within 90 days after the injury occurred. Therefore, the deputy commissioner determined claimant's claim was barred by Iowa Code section 85.23.

Claimant asserts on appeal that the deputy commissioner erred in finding claimant failed to provide notice of the injury to defendants within 90 days. Claimant asserts that even if she failed to provide defendants with notice of the injury within 90 days after it occurred, the discovery rule applies in this case to extend the time during which claimant could report her injury such that claimant's notice to defendants at a later date satisfies the 90-day notice requirement. Claimant also asserts the deputy commissioner erred by not ruling on a motion for order nunc pro tunc which claimant filed on September 26, 2014, two days after the arbitration decision was filed.

Defendants assert that the findings of the deputy commissioner should be affirmed. Defendants also assert that the deputy commissioner did not err by not ruling on the motion for order nunc pro tunc.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, I reach the same analysis, findings and conclusions as those reached by the deputy commissioner. I also find that the deputy commissioner did not err by not ruling on the motion for order nunc pro tunc.

Pursuant to Iowa Code sections 86.24 and 17A.5, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on September 23, 2014, that relate to issues properly raised on intra-agency appeal with the following additional analysis:

ISSUES ON APPEAL

1. Whether claimant reported her work-related injury of November 1, 2012, to defendants within 90 days after it occurred.

2. If claimant did not report her work-related injury of November 1, 2012, to defendants within 90 days after it occurred, whether the discovery rule applies in this case to extend the time during which claimant could report her injury such that claimant's notice to defendants at a later date satisfies the 90-day notice requirement.

3. Whether the deputy commissioner erred in not ruling on the motion for order nunc pro tunc filed by claimant on September 26, 2014.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On November 1, 2012, while working for defendant-employer, claimant injured her right shoulder when she tried to catch a 64-pound box of C4 explosives which was falling off the end of a roll table. (Transcript, pp. 25-26)

The first issue to address is whether claimant reported her work-related injury of November 1, 2012, within 90 days after it occurred.

During her deposition which was taken on September 24, 2013, claimant testified that within a short time after the incident occurred, she had the following discussion with her supervisor, Scott Wilson:

> Q. What did you tell Scott?
>
> A. I told him I hurt my shoulder.
>
> Q. Anything else that you discussed besides the fact that you hurt your shoulder?
>
> A. Well, he had asked me if I need to go to the field hospital, and I said no because I didn't feel I was hurt that bad.

Q. Did you tell Scott how you hurt your shoulder?

A. I don't believe - - recall exact words or anything.

Q. Do you remember whether or not you said anything about hurting your shoulder while lifting a box?

A. I - - to be honest, I don't. I just, I guess, assumed since that's where it was.

Q. But you don't remember for sure?

A. No, I don't.

Q. All you remember for sure is that you told Scott that you "hurt your shoulder"?

A. Mm-hmm.

Q. Is that a yes?

A. Yes, and he said – asked me if I wanted to go to the field hospital.

(Exhibit H, p. 5, deposition pp. 17-18)

At the hearing, which took place on May 28, 2014, eight months after her deposition was taken, claimant changed her story. She testified as follows:

Q. And after you caught this box, did you feel pain somewhere in your body?

A. Yes. Yes, I did.

Q. Where at?

A. Up here on my shoulder.

Q. You're indicating your right - -

A. My right shoulder.

Q. Okay. Did you keep working?

A. Yes.

Q. Did you tell anybody about it?

A. I told Scott Wilson. He was my foreman.

Q. Okay. Tell me how you came about telling Mr. Wilson and what you told him.

A. Well, he was running back and forth through - - the bay that I was in was the only bay that you could go through to the other side of the line and he was coming through, and I told him, "Scott, a box has fallen, I hurt my shoulder."

Q. Okay. And what did he say when you told him that?

A. He asked me if I wanted to go to the hospital.

Q. And what did you tell him?

A. I said I didn't think I have hurt that bad.

Q. How long after the incident happened did you actually tell Mr. Wilson that you hurt your shoulder?

A. Not too long afterwards. I can't - -

Q. Hours, minutes?

A. Minutes. Less than an hour anyway.

Q. Did you specifically talk to him about dropping a box or a box dropping and you catching it, that that's what hurt you?

A. Yes.

Q. Did you have any discussion about the line at the time about changes that should be made?

A. Well, I asked him if I could get help.

Q. Okay. And what did he say?

A. He said sure.

Q. Okay. And did they bring help for you?

A. After lunch I had help.

Q. What time of the day did this injury happen?

A. Midmorning.

Q. You had been working at American Ordnance since 2005?

A. Yes.

Q. And this was 2012. What was your understanding of what you were supposed to do if you sustained an injury at work?

A. Tell the foreman

Q. Okay. And your foreman on this date was - -

A. Scott Wilson.

Q. And you told him?

A. I did.

Q. Were you supposed to fill out any kind of incident report?

A. No, he was. That was his job.

(Tr. pp. 26-27)

Scott Wilson testified at the hearing that claimant did not tell him her injury was work-related. Mr. Wilson testified as follows:

Q. And do you recall a conversation with Hazel Ross in the fall of 2012 as it pertains to her shoulder?

A. Yes. From what I remember, I was passing through G bay, which is our pack-out bay. I was going through there, and Hazel came up to me and she said, "Hey, Scott, my shoulder hurts a little bit."

And I said, "Are you all right?" And she said, "It's just really sore." And I said, "Would you like for me to call an ambulance?"

What happens is sometimes we can call an ambulance in. Because we're inside of a line, we can't get out. I asked her if she wanted me to call an ambulance and she said, "No." I said, "Would you like to see a doctor," and she said, "No, it's just a little sore. Can I trade off with one of the other girls?"

I said, "Sure. I have no problem with that. Let me know how things are going with all that."

And she said, "Oh, it will be all fine." She said, "I get my prescription for Celebrex filled some time soon, and I think that will make things a lot better."

And I said, "Oh, do you like Celebrex?" And the reason I asked because I just had some meniscus knee surgery, and I said, "It did good things for my knee, it helped out." And she said, "Oh, yeah, it's like a miracle drug," and just a little conversation like that, and then I didn't hear anything else from that point on.

Q. Did Ms. Ross make any statements to you about injuring her shoulder?

A. No.

Q. And did she make any statements to you about how she had the onset of shoulder pain?

A. No, nothing that I can remember. From I remember she just said, "My shoulder is really sore."

Q. When was the next time you heard anything about this?

A. In March of 2013, I believe is when it was.

(Tr. pp. 51-53)

Claimant was evaluated for her right shoulder by Atiba D. Jackson, M.D., orthopedic surgeon on January 11, 2013. (Ex. B, pp.1-2) Claimant did not request medical treatment from defendants. Instead, she went to Dr. Jackson on her own. (Ex. H, p. 6, depo. p. 23) At the appointment on January 11, 2013, Dr. Jackson injected claimant's shoulder with Kenalog and Lidocaine. (Ex. B, p. 2) In her deposition claimant stated the following:

Q. And after you saw Dr. Jackson in January, you still didn't have any conversations with the company about your shoulder, correct?

A. I tried.

Q. Tell me about that.

A. We tried getting ahold of Nick Kieler.

Q. Who's "we"?

A. My husband and I.

Q. I have that you saw Dr. Jackson January 11, 2013?

A. Yes.

Q. And did you have that injection at that same office visit?

A. Yes.

Q. And then after you had tried - - said that you and your husband tried to get a hold of Nick Kieler?

A. Kieler.

Q. And who was Nick?

A. Safety, head of safety.

Q. And what was the purpose of trying to get a hold of Nick?

A. That I wanted something done.

Q. What do you mean you "wanted something done"?

A. I wanted looked at, my shoulder, and that's who they told me to get a hold of.

Q. Who's "they"? You said that's who they told you to get - -

A. People at work, just - -

Q. Like coworkers?

A. Yeah.

Q. Just to be clear, you said you wanted - - was it January that you decided you wanted to go on work comp or collect work comp, or what was it you were looking for?

A. I didn't say I wanted to go on work comp.

Q. What did you mean you "wanted something done"?

A. I wanted looked at on my shoulder. I was in a lot of pain, and I didn't realize how bad it was hurt.

Q. And why did you want the company to get involved with having somebody look at your shoulder?

A. Because I got hurt at work.

Q. So what did you and your husband do to try to get a hold of Nick Kieler?

A. We kept trying to call and call and leave messages, and he never called back. So I talked to my new supervisor, which is Dino Ganakes.

Q. Dino, you said?

A. Dino.

Q. Dino. What did Dino say?

A. He's the one that finally got me in to see the field doctor.

Q. And who was that that you saw?

A. Roger Nevling.

Q. When did you see Roger Nevling?

A. I don't remember the date.

Q. Do you think that would have been in March?

A. Probably, yes.

Q. And my records indicate that the injury was reported to Roger Nev - - the injury was reported to American Ordnance March 13, and then you saw Roger Nevling the next day; does that sound about right?

A. Yes.

(Ex. H, pp. 6-7, depo. pp. 24-27)

When claimant testified at hearing regarding her alleged attempts to contact Mr. Kieler to report the injury, she told a different story:

Q. Okay. After the shot wore off, was the pain and discomfort in the same location in your right shoulder as it was on November 1, 2012?

A. Yes.

Q. So what did you do at that point?

A. Well - -

Q. Let me give you the time. After the shot from January 11, 2013, started wearing off, what did you do?

A. Well, I was on a different line, and my husband and I talked and he said, "We should call Nick Keeler." We tried getting ahold of him.

Q. Who was Nick Keeler?

A. He's safety.

Q. Okay. And when did you try to get ahold of him? What month?

A. January through February.

Q. Okay. And what did you do to try to get ahold of him?

A. Called and leave messages, and then he finally contacted my husband at work and said that he would do whatever he could to make it better.

Q. Okay. Did he do anything?

A. No.

Q. Okay. So did you do something else in terms of trying to get care?

A. I did. I talked to Dino Ganakes.

Q. Who is Dino Ganakes?

A. He was my foreman on 4B.

(Tr. pp. 32-33)

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

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

The purpose of the 90-day notice or 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 to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it

may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

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).

Claimant testified in her deposition that she could not recall telling Mr. Wilson she injured her shoulder at work. Claimant gave a significantly different story at hearing by stating she specifically told Mr. Wilson she injured her shoulder at work. Claimant stated in her deposition she and her husband tried to contact Nick Kieler, head of safety, in January and February 2013 to report her injury and claimant alleges Mr. Kieler never responded. Claimant testified at hearing that Mr. Kieler spoke to her husband, promised to look into the matter, and then did nothing.

Claimant was deposed on September 24, 2013, less than a year after the injury occurred. The hearing took place on May 28, 2014, eight months after claimant was deposed. Nowhere in the record is there any explanation from claimant as to why her memory of what occurred on November 1, 2012, was so different and so much more detailed at hearing than it was when she was deposed. Nowhere in the record is there any explanation for the discrepancy in claimant's testimony regarding her alleged efforts to contact Mr. Kieler.

Claimant's discussion with Mr. Wilson on the day she was injured was not sufficient to tell Mr. Wilson, or defendant-employer, that her shoulder problem was work-related. It was not enough for claimant to simply tell her supervisor she had shoulder pain. Claimant needed to tell the employer she thought her shoulder problem was related to her job. Claimant needed to alert the employer that it was necessary to investigate a work-related injury. Claimant needed to report the injury as work-related on or before January 29, 2013, 90 days after the injury occurred.

Because claimant's testimony at hearing is significantly different than her deposition testimony, I find claimant's testimony at hearing was not credible. I find Mr. Wilson's testimony at hearing to be credible, particularly since his testimony is consistent with the testimony claimant gave during her deposition.

Exhibit C documents that claimant reported the injury to defendant-employer on March 14, 2013. Therefore, based on the above-quoted testimony, which documents claimant's changing stories and lack of credibility, along with Exhibit C, I find claimant did not actually inform defendant-employer that her shoulder condition was work-related until March 14, 2013, when she spoke with Mr. Ganakes. I affirm the deputy commissioner's finding that while claimant reported her shoulder problem to her supervisor on the day it occurred, defendants have proven by a preponderance of the evidence that claimant did not tell her supervisor, or anyone else on behalf of defendants, that her shoulder problem was work-related. March 14, 2013, was 134 days after the injury occurred, which is 44 days beyond the 90-day deadline established

by Iowa Code Section 85.23 for reporting the injury. Therefore, claimant's claim is barred.

Claimant contends that the discovery rule applies in this case to extend the time during which she could report her injury such that her notice to defendants on March 14, 2013, rather than January 29, 2013, satisfies the 90-day notice requirement. Claimant contends that the discovery rule applies because claimant did not fully appreciate the extent of her injury.

Under the discovery rule, the time within which a proceeding must be commenced does not begin to run until the injured worker, as a responsible person, should recognize the nature, seriousness, and probable compensable character of the condition. Johnson v. Heartland Specialty Foods, 672 N.W.2d 326 (Iowa 2003); Orr v. Lewis Cent. Sch. Dist., 298 N.W.2d 256 (Iowa 1980). The discovery rule can be applied to both the statute of limitations and the 90-day notice requirement. IBP, Inc., v. Burress, 779 N.W.2d 210 at 218 (Iowa 2010)

The key question is when, as a responsible person, should claimant have recognized the nature, seriousness, and probable compensable nature of her right shoulder condition?

In her deposition, claimant testified as follows:

Q. So if we use November as your - - November 1 as your injury date, you would have continued without doctoring all of November and all of December and then a week or two in January; is that correct?

A. Yes.

Q. What did you do during those two months?

A. I took a lot of ibuprofen. I used those patches (indicating).

Q. How did you get the patches?

A. You can buy them at the drugstore.

Q. That was over-the-counter patches?

A. Yes.

Q. Does American Ordnance have a company nurse, health department?

A. Yes.

Q. And you never went there; correct?

A. No.

(Ex. H, p. 5, depo. pp. 20)

Later in her deposition, claimant stated the following:

Q. So the first doctor that you saw for your shoulder would have been Dr. Jackson on January 11, 2013; correct?

A. Yes.

Q. And it wasn't until after you saw Dr. Jackson that you made an effort to follow up with the company to get something done; is that correct?

A. Yes.

Q. When you had those injuries at Vista, did they provide you with medical treatment?

A. Yes.

Q. So you have an idea of as to how - - workers' compensation, if you get hurt at work they'll provide you with medical treatment?

A. Yes.

Q. But you didn't ask for that at American Ordnance until sometime in January or later.

A. I didn't feel I was that hurt.

(Ex. H, p. 9, depo. pp. 33-34)

At hearing, claimant testified as follows:

Q. What happened then over the next couple of months after the injury?

A. I kept working, but it hurt really bad.

Q. Did you keep working without restrictions, working full duty?

A. Yes.

Q. Okay. What did you end up doing? Did you end up seeing a doctor?

A. I did. I was on - - went to a different line, and I just hurt. It was getting worse so I just decided to go to Dr. Jackson.

(Tr. p. 30)

Later during the hearing, claimant testified as follows:

Q. Have you ever had injuries in other jobs before?

A. Yes, I did.

Q. And you understand the need to report the injury and not just say you're hurting; correct?

A. Yes.

(Tr. p. 45)

When claimant was evaluated by Stefani Hagglund, PA, at Great River Orthopedic Specialists on March 1, 2013, in follow-up after receiving the injection from Dr. Jackson on January 11, 2013, the following was noted, in pertinent part:

> Hazel returns for follow up on her right shoulder. She is a 66-year-old right hand dominant woman. She says that she had pain in the right shoulder after lifting boxes at work. She was lifting a 64-pound box. It started to fall, she tried to catch it out in front of her body and that is when her shoulder really got worse. She had an injection performed by Dr. Jackson on 1/11/13 which really did help for a couple of week, but then it wore off and her pain is back to baseline.
>
> . . .
>
> **Plan**
> The case was discussed with Dr. Jackson. At this point we are going to get an MRI to confirm the presence of a rotator cuff tear. After that is complete, she will come back in and sit down with Dr. Jackson to review the MRI and discuss future treatment plans. She does not really want to have surgery right now. She would like to hold off until later this fall. I advised her that this may not be the best plan to wait that long to fix the rotator cuff. Since her injury did happen at work, she is also considering filing this under worker's comp. She is going to get this MRI done and then she is going to follow up with Dr. Jackson for MRI review.

(Ex. B, pp. 3-4)

The record in this case establishes that claimant spoke to her supervisor about the injury on the day it occurred, November 1, 2012. The record also establishes that when claimant spoke to her supervisor about her injury on November 1, 2012, she failed to tell her supervisor the condition was work-related. The record also establishes that claimant did not report the injury as work-related until March 14, 2013, 134 days after

the injury occurred. Based on the evidence, I find that the discovery rule does not apply to toll the 90-day notice requirement for reporting the injury because, as a responsible person, claimant should have recognized the nature, seriousness, and probable compensable character of the condition as of November 1, 2012, the day the incident occurred, and claimant should have told her supervisor it was work-related.

I find that the 90-day notice requirement was not tolled because claimant actually did feel compelled to tell her supervisor about the incident so she could receive help with her job duties, which clearly indicates claimant should have understood the seriousness of the problem. Unfortunately, for whatever reason, when claimant reported her condition, she failed to tell her supervisor it was work-related.

I also find that the 90-day notice requirement was not tolled because claimant testified during her deposition that during the first two months after the injury occurred, she found it necessary to take a lot of ibuprofen and use medication patches, (Ex. H, p. 5, deposition pp. 20) and because she testified at the hearing that during the first two months after the injury she "kept working, but it hurt really bad." (Tr. p.30)

On one hand, claimant testified she did not believe she was "hurt that bad," but on the other hand, she testified that during the first two months after the injury occurred, "it hurt really bad." Claimant cannot have it both ways and she contradicts herself, a pattern which has occurred throughout this matter, which is why I find that claimant's testimony at hearing is not credible.

Claimant makes an interesting alternative argument. At hearing, she testified she specifically told her supervisor she injured herself at work on the day the injury occurred. In the alternative, claimant contends, in essence, if it is found her testimony in that regard is not believable, it does not matter anyway because we should then believe her testimony that she did not know her injury was serious when it occurred. Because claimant is found not to be credible based on her conflicting testimony, both prongs of her alternative argument must be disregarded.

The final issue in this appeal is whether the deputy commissioner erred in not ruling on the motion for order nunc pro tunc filed by claimant on September 26, 2014, two days after the arbitration decision was filed. The deputy commissioner stated in the arbitration decision that claimant was evaluated on January 1, 2013. The correct date of the evaluation was January 11, 2013. The failure of the deputy commissioner to rule on the motion for order nunc pro tunc is inconsequential because stating the correct date of Dr. Jackson's evaluation would not change the arbitration decision, it would not change the outcome of this appeal, and because claimant failed to establish a compensable claim regardless of when claimant was first evaluated by Dr. Jackson.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of September 23, 2014, is affirmed in its entirety:

Claimant shall take nothing in this matter.

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

Signed and filed this 4th day of November, 2015.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

Copies to:

Nicholas G. Pothitakis
Attorney at Law
PO Box 337
Burlington, IA 52601-0337
niko@pothitakislaw.com

Jean Z. Dickson
Attorney at Law
111 E. Third St., Ste. 600
Davenport, IA 52801-1596
jzd@bettylawfirm.com