IN THE IOWA DISTRICT COURT FOR POLK COUNTY

QUAKER OATS COMPANY and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, **Petitioners/Defendants,** **v.** **MYRA BRADWELL f/k/a Gregory Hughes,** **Respondent/Claimant.**	**Case No. CVCV060534** **RULING ON PETITION FOR JUDICIAL REVIEW**

A Petition for Judicial Review came before the Court from a final decision of the Iowa Workers' Compensation Commission. The Court held a hearing on this matter on July 30, 2021. Petitioners, Quaker Oats Company and Indemnity Insurance Company of North America were represented by attorney Kent M. Smith. Andrew M. Giller appeared for Respondent Myra Bradwell.

The Respondent alleges he sustained tinnitus due to noise exposure in the course of his employment with Petitioners with an injury date of July 12, 2017. Petitioners denied compensability of this claim. Petitioners request that this Court reverse the final agency action of the Iowa Workers' Compensation Commissioner due to an alleged erroneous conclusion that the Respondent timely filed his claim and that he sustained a compensable injury entitling him to disability benefits. Having heard the arguments of counsel and reviewed the court file, including the briefs provided by the parties, the certified administrative record, and being otherwise fully advised in the premises, the Court now enters the following ruling.

I. INTRODUCTION

A. Factual Background

Respondent Myra Bradwell, formally known as Greg Hughes, is 64 years old and graduated

from high school in 1975. Respondent's Brief at 3; Hearing Transcript (Tr.) at 12. Bradwell started working for Quaker Oats Company (Quaker) in August 1975. Joint Exhibit (JE) 1 at 1. Bradwell worked for Reliable Machine & Manufacturing during the layoffs at Quaker and FMC for about six months before returning to Quaker. Defendants' Exhibit (DE) A at 3. He has been employed by Quaker since 1980, Bradwell has worked there for 45 years. *Id.*; *See* Tr. at 13. He continues to work there full time and has held many different jobs during his years at Quaker. Tr. 51-52; DE A at 3. He has worked: (1) in the ready-to-eat department; (2) as an extruder tender (3); the chemical department; (4) packaging department; (5) bulk products department; (6) oatmeal department; (7) the sanitation department; and (8) the utility department. Tr. at 14-27. A commonality in all of these jobs are the high noise levels. *Id.*

When Bradwell began his job at Quaker in 1975, he had to undergo a pre-employment physical. JE 1 at 1; Tr. at 14. He stated his hearing was good and had no hearing problems at that time. Tr. at 14, 16. Quaker requires annual hearing tests for their employees. *Id.* at 31. In 1988, Bradwell's hearing test indicated a "slight adverse change" from the prior test. JE 2 at 9. In 2005, the hearing test indicated a mild loss of hearing in the left ear. *Id.* at 15. In 2007, speech frequencies and high frequencies in both ears were normal. *Id.* at 18. In 2008, there was a change in the high frequency to mild in the left ear. *Id.* at 20. In 2010, the hearing test indicated moderate loss in hearing in the left ear and normal hearing in the right ear for high frequencies. *Id.* at 22. Bradwell was advised to see a hearing specialist. *Id.* In 2011, it changed to mild loss of hearing in the right ear for high frequencies. *Id.* at 24. Again, it was recommended to him by Quaker to see a hearing specialist. *Id.*

In 2012, the hearing test indicated mild hearing loss for high pitch sounds for both ears and normal hearing for both ears for speech frequencies. *Id.* at 34. The test in 2012 showed a

"recordable shift." *Id.* at 37. In 2014, the hearing test indicated mild hearing loss in the right ear and moderate hearing loss in the left ear for high frequencies and normal hearing in the speech frequencies for both ears. *Id.* at 41. During his annual hearing test on February 21, 2014, Bradwell also reported hearing loss. *Id.* at 40. In 2015, he reported hearing loss and "ringing or roaring" in his ears. *Id.* at 42. The hearing test in 2016 indicated moderate hearing loss in the right ear and moderate hearing loss in the left ear for high frequencies and slight hearing loss in the left ear and normal in the right ear for speech frequencies. *Id.* at 44. In 2017, Bradwell filled out an examinetics recordable shift questionnaire and stated he has "ringing or other noises in the ear" of both of his ears. *Id.* at 47

Bradwell testified that he has used hearing protection while working at Quaker. Tr. at 41-42. The hearing protection at Quaker has changed over time from rubber earplugs to now having custom-fitted dB Blockers. *Id.* In the 2017 questionnaire, Bradwell also checked the boxes that he currently used earmuffs, pre-molded earplugs, and dual (muffs & plugs). JE 2 at 45. He also checked no on the box that asked him if he ever took his earplugs or earmuffs off in noise at work. *Id.* In 2012, a noise assessment was completed at Quaker by Bureau Veritas. Claimant's Exhibit (CE) 2 at 127. The assessment concluded the hearing protection devices (HPDs) Quaker used only had a noise reduction ratio (NRR) of 24 and "do not provide adequate protection against the noise levels measured during this assessment." *Id.* at 136. Bradwell was noted on the assessment as one of the employees recommended to wear dual protection because of the inadequate protection against the noise levels. *Id.* He was also one of two employees on the report to have an asterisk by his name. *Id.* The asterisk signified employees where "further engineering controls should also be implemented." *Id.* Bradwell testified that he was never made aware of this 2012 study or that further engineering controls should have been implemented for him. Tr. at 44-45.

Bradwell testified that the ringing in his ears did not happen overnight but he noticed it the greatest when it became bothersome and intolerable about four years before his deposition, which would be in 2013 or 2014. Tr. 31, 32, 57; CE 1-4 at 12. In his deposition, he described the noise as an "out-of-balance fan" that became "intolerable" and "disturbing." CE 1-4 at 12. It keeps him from sleeping through the night and it is hard for him to hear people at work when it is noisy. CE 1-4 at 12; CE 1-5 at 13. Bradwell testified that the ringing in his ears has worsened and it is harder for him to hear higher-pitched sounds now than it was ten years ago. Tr. at 31. It is also makes it hard for him to relax, impacts his concentration, and causes him fatigue. Tr. 33, 35-36.

On June 30, 2017, Bradwell was interviewed over the phone by Richard Tyler, Ph.D. JE 3 at 12. A written report was provided by Dr. Tyler on July 12, 2017, based on his interviews with Bradwell and the records he reviewed. *Id.* Dr. Tyler concluded that based on Bradwell's audiogram from August 8, 2015, most of Bradwell's hearing loss is mostly in higher frequencies and gave him a high-frequency binaural hearing loss of 15.4%. *Id.* at 15-16. Dr. Tyler also concluded Bradwell had tinnitus and assigned a severity rating of 28.75 out of 100 for Bradwell's tinnitus. *Id.* at 17. He concluded that Bradwell's reported tinnitus or sensorineural hearing loss was "most probably a result of his work at Quaker Oats." *Id.* at 22. Bradwell had a familial history of hearing loss and tinnitus, however, Dr. Tyler stated it was unlikely that Bradwell's tinnitus was due to age or was hereditary. *Id.* at 15-14. Dr. Tyler concluded Bradwell's condition is unlikely to improve. *Id.* at 22.

To calculate the permanent impairment, Dr. Tyler used his own method and calculated that Bradwell sustained a 17.4% whole body impairment. *Id.* at 20. Dr. Tyler restricted Bradwell from (1) working around loud noise, (2) working in situations where the noise levels are unpredictable, (3) working in dangerous situations where accurate concentration is required, and (4) working in

situations that are stressful. *Id.* at 22. Dr. Tyler recommended hearing aids because of the noise-induced hearing loss. *Id.* at 21. He also recommended short-electrode cochlear implant due to his severe high-frequency hearing loss. *Id.* Dr. Tyler also stated Bradwell would benefit from counseling and sound therapy, and tinnitus maskers for his tinnitus. *Id.* Bradwell has met with Dr. Tyler for group counseling and was counseled on using relaxation techniques to deal with his tinnitus. Tr. at 32, 34.

Dr. Tyler asked Bradwell to assign a rating (1-100) as to the severity of his symptoms regarding (1) concentration, (2) emotional well-being, (3) hearing, and (4) sleep. JE 3 at 17-18. For concentration, Bradwell stated it sounds like "wo-wo-wo" in his ear that disrupts his quiet times including trying to read. *Id.* at 18. Bradwell assigned 25 to concentration and Dr. Tyler assigned 30. *Id.* For emotional well-being, he stated it is disruptive and is hard for him to relax. *Id.* He assigned 25 and Dr. Tyler assigned 20. *Id.* For hearing, Bradwell stated his tinnitus makes it hard for him to focus on a conversation. *Id*. Bradwell assigned 50 and Dr. Tyler assigned 25. *Id.* For sleeping, he stated it wakes him at night and it interferes with his sleep seven nights a week. *Id.* He assigned 50 and Dr. Tyler assigned 40. *Id.* The average score given by Dr. Tyler was 28.75.

Quaker retained Dr. Hoisington to review the records on June 15, 2018. JE 4 at 1. Dr. Hoisington issued his report to Petitioners' attorney regarding Bradwell on July 2, 2018. *Id.* at 8. He stated, "according to the Iowa Code he has no apportionment of percent hearing loss for age according to the audiogram dated 28 August 2017." *Id.* at 9. Under the Iowa Code, he has no apportionment of percent hearing loss because he does not meet the threshold. *Id.* Dr. Hoisington concluded Bradwell had hearing loss but does not have a percentage of age corrected binaural hearing loss under the Iowa Code. *Id.* Therefore, he determined that no percentage of his hearing loss was related to his work environment. *Id.*

Dr. Hoisington stated Bradwell would be a good candidate for hearing aids. *Id.* Dr. Hoisington also stated it is hard to determine whether he has tinnitus because it cannot be determined by objective means. *Id.* There is no double-blind controlled study to accurately measure whether a patient has tinnitus. *Id.* Dr. Hoisington also concluded it would be incorrect to give any percentage for Bradwell's tinnitus under the AMA Guides to Permanent Impairment Fifth Edition. *Id.* This conclusion is due to there being no apportionment of hearing loss for Bradwell. *Id.* He restricted Bradwell to wearing hearing protection when he is exposed to any loud noise or if he is in an environment where loud noise is present. *Id*. He did not recommend any further treatment or therapy at this time. *Id.*

Dr. Tyler in his September 2018 report, reviewed Dr. Hoisington's report from July 2018. CE 4 at 1. Dr. Tyler made the following comments regarding Dr. Hoisington's report: (1) Dr. Hosington did not examine or discuss with Bradwell any of his symptoms; (2) Dr. Hoisington noted Bradwell had no age-related hearing loss; (3) Dr. Hoisington suggested he was a good candidate for hearing aids; (4) he says there are no double-blind studies, however, Dr. Hoisington might be unaware of several publications showing tinnitus can be quantified accurately; (5) Dr. Hoisington might have come to a different conclusion regarding whether Bradwell suffers from specific impairment from his tinnitus if he interviewed him or used one of Dr. Tyler's published questionnaires; (6) Dr. Tyler finds the AMA guides to be inadequate and the AMA guides allow for compensation for emotional, sleep and concentration problems in other chapters; and (6) Dr. Hoisington recommends no further treatment but this appears to be at odds with his recommendation Bradwell needs hearing aids for both ears. *Id.* at 1-2.

Quaker asked Dr. Hoisington to review Dr. Tyler's September 2018 report to Claimant's attorney. JE 4 at 18. Dr. Hoisington reviewed Dr. Tyler's report and his own report from July 2018.

He stands by the statements he made in his report in his July 2018. JE 4 at 18. He reiterated the AMA Guides to Permanent Impairment Fifth Edition is the only way for evaluating permanent impairment for tinnitus. *Id.* Tinnitus impairment ratings are no longer recognized by the American Academy of otolaryngology because there are no double-blinded controlled studies. *Id.*

Bradwell currently still works at Quaker and a few months before the agency Arbitration hearing he changed positions. Tr. at 25, 51. He went back to the ready-to-eat packaging which requires less traveling through the plant and a reduced noise level. *Id.* at 28, 54. He took a cut in pay from a Level 4 job to a Level 3 job. *Id.* at 28, 54.

B. Procedural History

Bradwell filed for workers' compensation benefits on October 3, 2017, for occupation noise exposure with an alleged injury date of July 12, 2017. Petitioners' (Pet.) Brief at 2. On September 19, 2018, a hearing was held before Deputy Commissioner James Elliot and on May 15, 2019, an Arbitration Decision was filed. *Id.* The Deputy found that (1) Claimant established he sustained permanent disability as a result of work-related tinnitus with a 5% whole body impairment, (2) Claimant knew or should have known, the nature seriousness and probable compensable nature of the tinnitus on or before December 13, 2013, (3) Defendants proved their two-year statute of limitation defense pursuant to Iowa Code section 85.26(1), (4) Claimant is awarded no benefits and his claim is barred, (5) Defendants were to reimburse claimant for the expense of Dr. Tyler's IME, and (6) the parties were to pay their own costs of the arbitration proceeding. Arb. Dec. at 6, 7.

On May 22, 2019, Claimant filed an application for Rehearing of the Arbitration Decision, which was denied by Deputy Elliot on June 4, 2019. Pet. Brief at 2. On June 14, 2019, Claimant filed an appeal to the Workers' Compensation Commissioner. *Id.* On May 28, 2020, the

Commissioner affirmed in its entirety the Deputy's Arbitration Decision filed on May 15, 2019, and the Ruling on Application for Rehearing filed on June 4, 2019. Appeal Decision at 3. On June 12, 2020, claimant filed an Application for Reconsideration. Pet. Brief at 2. On July 15, 2020, the Commissioner issued a Ruling Decision on the Application.

In his decision the Commissioner found: (1) there is nothing in the record that Claimant knew his hearing problems were caused by work and adversely affected his employment until Dr. Tyler's July 12, 2017, report, (2) Defendants failed to carry their burden of proof to establish Bradwell's claim is barred by Iowa Code section 85.26(1), and (3) affirmed the finding in the arbitration decision that Claimant has 5% permanent impairment due to his tinnitus. Rehearing Decision at 5. The Commissioner ordered Defendants to pay costs and to pay Claimant 25 weeks of permanent partial disability benefits at the rate of $1037.20 per week commencing on July 12, 2017. *Id.* at 5-6. Defendants were also ordered to pay interest on unpaid weekly benefits awarded as set forth in Iowa Code section 85.30. *Id.* at 5.

Petitioners Quaker Oats Company and Indemnity Insurance Co. of North Americas filed for judicial review on August 4, 2020. Petitioners claim (1) the Commissioner's finding that Claimant timely filed his claim under Iowa Code section 85.26 is not supported by substantial evidence, and (2) the Agency's decision regarding the extent of impairment is irrational, illogical, or wholly unjustifiable. Pet. Brief at 1.

II. STANDARD OF REVIEW

The Iowa Administrative Procedure Act, Iowa Code chapter 17A, governs the scope of the Court's review in workers' compensation cases. Iowa Code § 86.26 (2019); *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006). "Under the Act, we may only interfere with the commissioner's decision if it is erroneous under one of the grounds enumerated in the statute, and a party's

substantial rights have been prejudiced." *Meyer*, 710 N.W.2d at 218. A party challenging agency action bears the burden of demonstrating the action's invalidity and resulting prejudice. Iowa Code § 17A.19(8)(a). This can be shown in a number of ways, including proof the action was ultra vires; legally erroneous; unsupported by substantial evidence in the record when that record is viewed as a whole; or otherwise unreasonable, arbitrary, capricious, or an abuse of discretion. *See id*. § 17A.19(10). The district court acts in an appellate capacity to correct errors of law on the part of the agency. *Grundmeyer v. Weyerhaeuser Co*., 649 N.W.2d 744, 748 (Iowa 2002).

"If the claim of error lies with the agency's findings of fact, the proper question on review is whether substantial evidence supports those findings of fact" when the record is viewed as a whole. *Meyer*, 710 N.W.2d at 219. Factual findings regarding the award of workers' compensation benefits are within the commissioner's discretion, so the Court is bound by the commissioner's findings of fact if they are supported by substantial evidence. *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 464-65 (Iowa 2004). Substantial evidence is defined as evidence of the quality and quantity "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." Iowa Code § 17A.19(10)(f)(1); *Mycogen*, 686 N.W.2d at 464. "When reviewing a finding of fact for substantial evidence, we judge the finding 'in light of all the relevant evidence in the record cited by any party that detracts from that finding as well as all of the relevant evidence in the record cited by any party that supports it.'" *Cedar Rapids Cmty. Sch. Dist. v. Pease*, 807 N.W.2d 839, 845 (Iowa 2011) (quoting Iowa Code § 17A.19(10)(f)(3)). "Evidence is not insubstantial merely because different conclusions may be drawn from the evidence." *Pease*, 807 N.W.2d at 845. "To that end, evidence may be substantial even though we may have drawn a different conclusion as fact finder." *Id.* "Judicial review of a decision of the

[Commission] is not de novo, and the commissioner's findings have the force of a jury verdict." *Holmes v. Bruce Motor Freight*, 215 N.W.2d 296, 297-98 (Iowa 1974).

The application of the law to the facts is also an enterprise vested in the commissioner. *Mycogen*, 686 N.W.2d at 465. Accordingly, the Court will reverse only if the commissioner's application was "irrational, illogical, or wholly unjustifiable." *Id*.; Iowa Code § 17A.19(10)(l). "A decision is "irrational" when it is not governed by or according to reason." *Christensen v. Iowa Dep't. of Revenue*, 944 N.W.2d 895 at 905 (Iowa 2020). A decision is "illogical" when it is "contrary to or devoid of logic." *Id*. "A decision is "unjustifiable" when it has no foundation in fact or reason" or is "lacking in justice." *Id*. This standard requires the Court to allocate some deference to the commissioner's application of law to the facts, but less than it gives to the agency's findings of fact. *Larson Mfg. Co. v. Thorson*, 763 N.W.2d 842, 850 (Iowa 2009).

III. MERITS

A. Whether the Commission's finding that Respondent timely filed his claim under Iowa Code section 85.26 is supported by substantial evidence.

The first issue for consideration is whether the Commissioner correctly interpreted section 85.26(1) and whether it was supported by substantial evidence in the record. Petitioners argue the July 12, 2017, date found by the Commissioner under the discovery rule is incorrect and there is not substantial evidence to support this finding. Petitioners claim the Deputy Commissioner instead correctly determined the date under the discovery rule of December 13, 2013. Petitioners argue Bradwell's claims are untimely and barred under section 85.26. Iowa Code section 85.26 states that

> [a]n original proceeding for benefits under [chapter 85] or chapter 85A, 85B, or 86, shall not be maintained unless the proceeding is *commenced within two years from the date of the occurrence of the injury* for which benefits are claimed or, if weekly compensation benefits are paid under section 86.13, within three years from the date of the last payment of weekly compensation benefits. 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 § 85.26(1)(emphasis added). Under section 85.26(3), the commencement of an action occurs upon the filing of an Original Notice and Petition with the Workers' Compensation Commissioner. Here, the Original Notice and Petition was filed on October 3, 2017. Pet. Brief at 2. The Commissioner found the date of injury to be July 12, 2017. Rehearing Dec. at 5. Under those dates the filing of the Petition would be timely under the statute. Therefore, the Commissioner determined Petitioners failed to carry their burden of proof that Bradwell is barred by the application of Iowa Code section 85.26(1). *Id.* The question is whether substantial evidence supports the Commissioner's determination that this action was timely filed.

When an injury develops gradually over time, the cumulative injury rule applies. *McKeever Custom Cabinets v. Smith*, 379 N.W.2d 368, 373 (Iowa 1985). The date of injury will be when the disability manifests. *Oscar Meyer Foods Corp., v. Tasler*, 483 N.W.2d 824, 829 (Iowa 1992). The two elements of the cumulative injury rule/manifestation rule are 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." *Herrera v. IBP, Inc.*, 633 N.W.2d 284, 288 (Iowa 2001). However, section 85.26(1) has been interpreted to mean the injury occurs when it is discovered. *Swartzendruber v. Schimmel*, 613 N.W.2d 646, 649 (Iowa 2000). The statute of limitations under the discovery rule "will not begin to run until the employee also knows that the physical condition is serious enough to have a permanent adverse impact on the claimant's employability, i.e., the claimant knows or should know the 'nature, seriousness, and probable compensable character' of his injury or condition.'" *Herrera*, 633 N.W.2d 288 (quoting *Orr v. Lewis Central School Dist.*, 298 N.W.2d 256, 257 (Iowa 1980)). The cumulative injury rule and the discovery rule are closely related but are not the same rule. *McKeever*, 379 N.W.2d at 372-

73. The statute of limitations begins to run when Claimant has "actual or imputed knowledge of all three characteristics of the injury or disease." *Swartzendruber*, 613 N.W.2d at 650. With the three characteristics of the injury being the (1) nature, (2) seriousness, and (3) probable compensable character. *Id.*

As to the nature, Deputy Elliot and the Commissioner agreed Bradwell knew he had hearing problems for more than two years before he filed his petition. Arb. Dec. at 3; Rehearing Dec. at 4. In 2010, Bradwell had a hearing test that showed he had moderate hearing loss in his left ear. JE 2 at 22. He was advised to see a hearing specialist. *Id.* Additionally, during his annual hearing test in 2014, Bradwell reported hearing loss. *Id.* at 40. In 2015, he reported hearing loss and "ringing or roaring" in his ears. *Id.* at 42. This Court agrees there is substantial evidence to support the Commissioner's finding that Bradwell as a reasonable person knew the nature of his injury. Claimant had reported noise exposure throughout his career and was given a major clue when his employer told him to see a hearing specialist starting in 2010 and 2011.

As to the seriousness, it is a fact-specific question on whether an employee recognizes or should have recognized the seriousness of his injury. *Swartzendruber*, 613 N.W.2d at 651. The facts must satisfy the test of reasonableness. *Id.* This seriousness component of the rule does not initiate the statute of limitations for "every minor ache, pain or symptom." *Id.* The degree of knowledge regarding the seriousness is based on possibility, not probability. *Id.* at 650-51. There is no one specific event that establishes the seriousness of the injury, all facts and circumstances will be considered. *Id.* at 651. Both the Deputy and the Commissioner agreed Bradwell knew the seriousness of his condition. Arb. Dec. at 3; Rehearing Dec. at 4. Specifically, because Bradwell in his deposition testified that his hearing problems were intolerable. CE 1-4 at 12. During his deposition in 2018, Bradwell stated, "I can't give you an exact date. I think about four years ago

is when I noticed it was just getting intolerable." *Id.* Therefore, the Court agrees there is substantial evidence to support the Commissioner's finding that Bradwell as a reasonable person knew or should have known the seriousness of his injury by at least 2014. "Intolerable" is a strong word meaning something is unable to be endured and that clearly indicates a serious condition.

As to the probable compensable character, the Commissioner found "there is nothing in the record that claimant knew his hearing problems were caused by work and adversely affected his employment until Dr. Tyler's July 12, 2017, report." Rehearing Dec. at 5. The Commissioner stated:

> Claimant filed his petition for benefits in this matter on October 6, 2017. The record indicates claimant was not aware his hearing problems were caused by work and adversely affected his employment at Quaker until July 12, 2017. Given this record, defendants have failed to carry their burden of proof to establish claimant's claim is barred by application of Iowa Code section 85.26(1).

Rehearing Dec. at 5. Petitioners had the burden to prove Bradwell's claim was barred by application of Iowa Code section 85.26(1) and they failed to carry their burden. *Id.* The probable compensable character of the injury is the causation requirement of the discovery rule. *Ranney v. Parawax Co., Inc.*, 582 N.W.2d 152, 155 (Iowa 1998). Knowledge will be imputed when a claimant gains information sufficient to alert a reasonable person of the need to investigate. *Id.* The knowledge imputed to the claimant regarding the injury must include the nature, seriousness, and probable compensable character. *Id.* As of that date, a claimant has two years to gather the facts and file a petition. *Id.* at 157.

Petitioners claim there is ample evidence in the record supporting that Bradwell knew the nature of his injury and argue there is no evidence in the record, much less substantial evidence, to support the Commissioner's finding. Pet. Brief at 16. Petitioners cites a list of facts from the record for the Court to consider including the following: (1) Claimant believing his 2013/2014

tinnitus condition was caused by noise exposure during his employment at Quaker; (2) Claimant's pre-employment hearing tests and annual tests during his employment; (3) Claimant knowing it was "very noisy" and "very loud" in all of his positions at Quaker; and (4) Claimant's considerable knowledge about workers' compensation claims. *Id.* at 16-17. However, the standard on judicial review is "not whether the evidence supports a different finding than the finding made by the commissioner, but whether the evidence 'supports the findings actually made.'" *Meyer*, 710 N.W.2d at 218 (citation omitted).

Some of the facts given by Petitioners explain the knowledge Bradwell had about his tinnitus and why this may support a finding of an earlier discovery date. However, when analyzing the probable compensability, knowledge of the permanent injury is not enough. *Herrera*, 633 N.W.2d at 287. It is also important the employee realized "the causal impact that injury would have on his job." *Id.* Probable compensability is also concerned with the date that the employee learned "that *he would not recover* from the cumulative injury" and "that *permanent* restrictions on his work activities would be required." *Id.* at 288 (emphasis added).

Although the record could support a finding of an earlier discovery date, the finding made by the Commissioner is supported by substantial evidence on the record and his determination is not irrational, illogical, or wholly unjustifiable. Specifically, there is evidence to support the Commissioner's finding Bradwell did not know his hearing problems or tinnitus adversely affected his employment. At the time of the Arbitration hearing, Bradwell continued to work at Quaker Oats. Tr. at 51. Similar to the claimant in *Larson Mfg. Co., v. Thorson*, Bradwell did not have any permanent work restrictions nor a permanent physical impairment rating before he filed his petition that would have supported a finding that he knew the probable compensability of his hearing problems. *See* 763 N.W.2d at 855. It was not until Dr. Tyler issued his report stating Bradwell's

tinnitus adversely affected his job at Quaker and that he should be restricted to less noisy environments. JE 3 at 22. A few months before the Arbitration hearing, Bradwell changed his position to be in a job where the noise level would be reduced. Tr. at 28. From Dr. Tyler's report on July 12, 2017, Bradwell had knowledge of his injury's permanent impact on his employment and understood the probable compensable character of his tinnitus. *See Larson*, 763 N.W.2d at 849, 855. An additional fact that was available to the Commissioner is the timing an audiologist's report for Quaker relating Claimant's hearing problems to Quaker noise exposure and the filing of the Claimant's Petition. Therefore, the Court affirms the Commissioner's determination Petitioners failed to carry their burden of proof in establishing Bradwell's claim was barred by application of Iowa Code section 85.26(1).

B. Whether the Commission's decision regarding the extent of impairment is irrational, illogical, or wholly unjustifiable.

Finally, Petitioners argue the Commissioner's determination that Bradwell sustained 5% whole body impairment due to tinnitus is irrational, illogical, or wholly unjustifiable. Pet. Brief at 19. The diagnosis of tinnitus is a condition that falls outside the statutory definition of occupational hearing loss. *Ehteshamfar v. UTA Engineered Sys. Div.*, 555 N.W.2d 450, 453 (Iowa 1996). "Tinnitus causes a person to perceive sounds that do not exist" but does not cause a person to be unable to hear, therefore, it is not a "sensorineural loss of hearing in one or both ears" under Iowa Code section 85B.4(1). *Id.* It also does not qualify as scheduled hearing loss under section 85.34(2)(r). *Id.* As a result, tinnitus should be compensated under Iowa Code section 85.34(2)(v), the section for all other cases of permanent partial disability. *Id.*

Permanent partial disabilities are classified as either scheduled or unscheduled. *Simbro v. Delong's Sportswear*, 332 N.W.2d 886, 887 (Iowa 1983). When it is classified as a scheduled disability it is evaluated by the functional method but if it is an unscheduled disability then it is the

industrial method. *Id.* The classification of whether a permanent partial disability is either scheduled or unscheduled is from section 85.34(2). *Id.* The scheduled disabilities are listed out in (a)-(u) and the unscheduled disabilities are all the other permanent partial disabilities under (v). *Id.* Functional disability and industrial disability are dissimilar because functional is assessed only by "determining the impairment of the body function of the employee," whereas industrial disability is "gauged by determining the loss to the employee's earning capacity." *Id.* Usually, tinnitus is an industrial disability due to it being unscheduled under section 85.34(2)(v). However,

> [i]f an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity.

Iowa Code § 85.34(2)(v). Here, Petitioners argue Bradwell is only entitled to functional impairment under section 85.34(2)(v) because he continues to work at Quaker full-time. Pet. Brief at 19; Tr. 51-52. Any switch in his job is due to his other health conditions and not because of his tinnitus. Pet. Brief at 19; Tr. at 29. The Commissioner found Bradwell also switched to the new position at Quaker to reduce his exposure to noise. Arb. Dec. at 2-3; Tr. at 55. Bradwell stated he took a pay cut when he switched positions and went from a Level 4 to a Level 3 pay grade. Arb. Dec. at 2; Tr. at 28. The Court finds there is substantial evidence to support the Commissioner's finding of facts that Bradwell did not return to the same position that he did before his injury and part of the reason he changed positions was to reduce noise exposure. Arb. Dec. at 6. The Court also finds there is substantial evidence to support the finding he had a reduction in wages from this change in his position. *Id.* As a result, Bradwell's tinnitus is an industrial disability.

A challenge to the Commissioner's industrial disability determination is a mixed question of law and fact because the determination of industrial disability requires the Commissioner to

apply established law to the facts. *Larson*, 763 N.W.2d at 856. Specifically, the Commissioner will have to apply several factors in determining whether an industrial disability occurred and whether the factors bear on the claimant's actual employability. *Id.* at 857. Some of the factors the Commissioner can consider are (1) the worker's functional impairment, (2) age, (3) education, (4) qualifications, (5) ability to engage in similar employment, and (6) loss of earnings. *Id.* It will be reviewed under the irrational, illogical, or wholly unjustifiable standard because a challenge to the agency's industrial disability determination is a challenge to the Commissioner's application of law to the facts. *Id. at 856-57.*

Petitioners challenge the 5% permanent impairment because they contend (1) Bradwell continues to work full-time at Quaker, (2) the Commissioner relied upon Dr. Tyler opinion, (3) Dr. Tyler uses his own methods for calculating permanent impairment and his impairment rating is not based upon or supported by the 5th edition AMA Guides of Permanent Impairment, and (4) Dr. Hoisington's opinion is the only opinion in this case based on the 5th edition of the AMA Guides of Permanent Impairment and supported by Bradwell's testimony. Pet. Brief at 19-21.

In arriving at the industrial disability determination, the Commissioner considered Dr. Tyler and Dr. Hoisington's reports, as well as other relevant factors. He found Dr. Tyler's opinion more convincing than Dr. Hoisington's as to Bradwell having tinnitus that caused a permanent injury. Arb. Dec. at 6. Here, the Commissioner found Bradwell credibly testified to his tinnitus symptoms and the treatment he has sought. *Id.* The Commissioner considered the impact on Bradwell's work and home life. *Id.* Bradwell testified that his tinnitus impacted his work and home life to a degree. *Id.* Specifically, Bradwell testified that the tinnitus interfered with his sleeping and has impacted his concentration. Tr. at 33-34. Bradwell has also stated that it made it difficult for him to hear conversations. JE 3 at 18. It has been recommended by Dr. Tyler, Dr. Hoisington, and

Miracle Ear that Bradwell get hearing aids. JE 3 at 21; JE 4 at 9; CE 1-6 at 20. As to functional impairment, Dr. Tyler also recommended restrictions of not working around loud noises or where noise levels are unpredictable. JE 3 at 22. Bradwell changed positions and took a pay cut in order to be in an area of Quaker with less noise. Tr. at 28. Many of the jobs at Quaker require working around loud noises. *See* Tr. at 14-27. The Court finds the factors considered by the Commissioner support the industrial disability determination. The Court, therefore, cannot say the Commissioner's application of facts to the law was irrational, illogical, or wholly unjustifiable when he found a 5% permanent impairment due to his tinnitus.

IV. CONCLUSIONS AND DISPOSITIONS

For all the reasons set forth above, the Court concludes the Commission's findings that (1) Petitioners failed to carry their burden of proof that Bradwell's claim is barred by application of 85.26(1), and (2) Bradwell sustained a 5% permanent impairment due to his tinnitus were supported by substantial evidence and were not irrational, illogical, or wholly unjustifiable.

IT IS THE ORDER OF THE COURT that the Iowa Workers' Compensation Commission's decision is **AFFIRMED**.

Costs are assessed in full to Petitioners.

State of Iowa Courts

Case Number	**Case Title**
CVCV060534	QUAKER OATS COMPANY ET AL VS MYRA BRADWELL
Type:	ORDER FOR JUDGMENT

So Ordered

William P. Kelly, District Court Judge,
Fifth Judicial District of Iowa

Electronically signed on 2021-09-22 10:10:17