BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MYRA BRADWELL (f/k/a GREGORY HUGHES), Claimant, vs. QUAKER OATS COMPANY, Employer, and INDEMNITY INSURANCE CO. OF NORTH AMERICA, Insurance Carrier, Defendants.	File No. 5059782 REHEARING DECISION Head Notes: 1403.30, 1803, 2402

STATEMENT OF THE CASE

On June 12, 2020, claimant filed an application for rehearing (application). On June 29, 2020, the application was accepted with a decision on the merits to follow. This rehearing decision is the decision on the merits.

The May 15, 2019, arbitration decision for this case found claimant carried his burden of proof to establish he sustained a permanent disability as a result of work-related tinnitus. Claimant pled a date of injury of July 12, 2017, for his tinnitus. Claimant's date of injury was based on a July 12, 2017, report from Richard Tyler, Ph.D. In that report, Dr. Tyler opined, in part, that claimant's work at Quaker Oats (Quaker) caused claimant's tinnitus. (Joint Exhibit 3, page 22)

The deputy workers' compensation commissioner found December 31, 2013, as the correct date of injury, finding that claimant knew or should have known the nature, seriousness and probable compensable nature of the tinnitus on or before December 31, 2013. Because claimant did not file his petition, in this case, until October 6, 2017, the deputy commissioner found defendants carried their burden of proof to establish that the two-year statute of limitations, under Iowa Code section 85.26(1), applied, thus barring claimant from recovery.

Claimant appealed that decision. A May 28, 2020, appeal decision affirmed the arbitration decision in its entirety. On June 12, 2020, claimant filed his application for rehearing. Defendants have not responded to the application.

ISSUES

The appeal decision affirmed the arbitration decision in its entirety. The only issues discussed in this rehearing decision are:

Whether claimant's claim is barred by application of the statute of limitations under Iowa Code section 85.26(1); and, if so;

The extent of claimant's entitlement to permanent partial disability benefits.

FINDINGS OF FACT

The appeal decision in this matter affirmed the arbitration decision in its entirety. The deputy workers' compensation commissioner in this matter did a good job of detailing the findings of fact for this case. Given this record, the findings of fact, detailed in the arbitration decision, shall be the findings of fact for this rehearing decision.

CONCLUSIONS OF LAW

The first issue to be determined is whether defendants carried their burden of proof to establish that claimant's claim is barred under Iowa Code section 85.26(1).

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 Rule of Appellate Procedure 6.14(6).

Iowa Code section 85.26(1) requires an employee to bring an original proceeding for benefits within two years from the date of the occurrence of the injury if the employer has paid the employee no weekly indemnity benefits for the claimed injury. If the employer has paid the employee weekly benefits on account of the claimed injury, however, the employee must bring an original proceeding within three years from the date of last payment of weekly compensation benefits.

Failure to timely commence an action under the limitation statute is an affirmative defense which defendant must prove by a preponderance of the evidence. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940); Venenga v. John Deere Component Works, 498 N.W.2d 422 (Iowa Ct. App. 1993).

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be

plainly apparent to a reasonable person. The date of manifestation inherently is a fact-based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. 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. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

An original proceeding for benefits must be commenced within two years from the date of the occurrence of the injury for which benefits are claimed or within three years from the date of the last payment of weekly compensation benefits if benefits have been paid under Iowa Code section 86.13. Iowa Code section 85.26(1). Under the rule, the time during which a proceeding may be commenced does not begin to run until the claimant, as a reasonable person, should recognize the nature, seriousness and probable compensable character of the condition. Failure to timely commence an action under the limitations statute is an affirmative defense, which defendants must prove by a preponderance of the evidence. Venenga v. John Deere Component Works, 498 N.W.2d 422 (Iowa Ct. App. 1993).

For a cumulative injury, the beginning of that period may not begin, under the discovery rule, until the worker knows the nature of the disability, the seriousness of the disability, and the probable compensable nature of the disability. Chapa v. John Deere Ottumwa Works, 652 N.W.2d 187 (Iowa 2002). See also Larson Mfg. Co. v. Thorson, 763 N.W.2d 842, 854–55 (Iowa 2009); Midwest Ambulance Serv. v. Ruud, 754 N.W.2d 860, 865 (Iowa 2008); Swartzendruber v Schimmel, 613 N.W.2d 646 (Iowa 2000).

In this case, defendants have the burden of proof to show claimant knew the nature of his injury, the seriousness of the disability, and the probable compensable nature of the disability.

Regarding the nature of the disability, a 2010 hearing test showed claimant had moderate hearing loss on the left. Claimant was advised at that time to see a hearing specialist. (JE 2, p. 22) A 2011 hearing test found claimant had moderate hearing loss on the left and mild loss on the right. Claimant was again recommended to see a hearing specialist. (JE 2, p. 24)

In 2014, claimant indicated he noticed ringing in his ears. (JE 2, p. 40) A 2014 hearing test showed mild loss on the right and moderate loss on the left. (JE 2, p. 41) In 2015, claimant reported ringing in both ears. (JE 2, p. 42)

Given these facts, it is found that claimant knew of the nature of his injury.

Regarding the seriousness of the disability, in his deposition, claimant testified:

Q. When did you first start noticing these symptoms?

A. You know, I think when it got the greatest is probably when I – maybe about four years ago.

Q. Any particular incident or occurrence four years ago that you noticed the out-of-balance fan in the ears?

A. No, not really.

Q. It was just present?

A. Yes.

Q. Did you notify anyone approximately four years ago about that?

A. I don't remember bringing it up until it got to the point that it was so disturbing that, you know, it caused me, you know, discomfort.

Q. And when was that?

A. I can't give you an exact date. I think about four years ago is when I noticed it was just getting intolerable.

Q. So approximately four years ago it became uncomfortable or intolerable?

A. Yes.

(Ex. 1, p. 4)

The determination of whether an employee recognizes or should have recognized the seriousness of his injury is a fact-specific question. Swartzendruber, 613 N.W.2d at 651.

Claimant testified that in approximately 2013 or 2014, his hearing problems were intolerable. Given this record, it is found that claimant knew or should have known of the seriousness of his hearing condition, at least by 2014.

Defendants also must carry the burden of proof to show that claimant knew of the probable compensability of his hearing problems.

The record does reflect that claimant knew he was having hearing problems. (JE 2, pp. 22, 24, 40-42; Tr. pp. 31-32, 57) Claimant did testify his mother and oldest two brothers worked at Quaker Oats and had hearing problems. (Tr. p. 50)

However, other than these two facts, 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.

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).

As defendants have failed to carry their burden of proof that claimant's claim is barred by application of Iowa Code section 85.26(1), the next issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

The arbitration decision found that claimant had a five percent permanent impairment due to his tinnitus. At the time of hearing, claimant was still employed by Quaker. Claimant still continued to perform the duties of his posted position. Claimant lost no time due to his hearing problems. Claimant has not been prescribed medication. Claimant has no limitations regarding his hearing loss which are applied to his work at Quaker. Claimant does not wear hearing aids. Given this record, I affirm the finding in the arbitration decision that claimant has a five percent permanent impairment due to his tinnitus.

ORDER

THEREFORE, IT IS ORDERED:

The application for rehearing on the merits is granted.

Defendants shall pay claimant twenty-five (25) weeks of permanent partial disability benefits at the rate of one thousand thirty-seven and 20/100 dollars ($1,037.20) per week commencing on July 12, 2017.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30. Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Defendants shall pay costs.

Defendants shall file subsequent reports of injury as required by this agency under rule 876 IAC 3.1(2).

Signed and filed on this 15th day of July, 2020.

Joseph S. Cortese II

JOSEPH S. CORTESE, II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served, as follows:

Bob Rush (via WCES)

Andrew M. Giller (via WCES)

Kent M. Smith (via WCES)