BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

STEPHEN CARTER, Claimant, vs. BRIDGESTONE AMERICAS, INC., Employer, and OLD REPUBLIC INSURANCE CO., Insurance Carrier, Defendants.	File No. 1649560.01 A P P E A L D E C I S I O N Head Notes: 1402.50; 1600; 2401; 2401; 2402; 2801; 2802; 2907

Claimant Stephen Carter appeals from an arbitration decision filed on March 3, 2021. Bridgestone Americas, Inc., employer, and its insurer, Old Republic Insurance Co., respond to the appeal. The case was heard on October 20, 2020, and it was considered fully submitted in front of the deputy workers' compensation commissioner on November 30, 2020.

In the arbitration decision, the deputy commissioner found claimant's claim was barred because claimant failed to provide timely notice of his injury to defendants under Iowa Code section 85.23, and because claimant failed to timely file his petition under Iowa Code section 85.26.

Claimant asserts on appeal that the deputy commissioner erred in finding defendants met their burden of proof to establish their affirmative notice defense and their statute of limitation defense. Claimant asserts he sustained compensable industrial disability as a result of his work-related tinnitus.

Defendants assert on appeal that the arbitration decision should be affirmed in its entirety.

Those portions of the proposed agency decisions pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 86.24 and 17A.15, the arbitration decision filed on March 3, 2021, is reversed in part and is affirmed in part with substituted findings, conclusions and analysis.

Defendants asserted both a notice defense under Iowa Code section 85.23 and a statute of limitations defense under Iowa Code section 85.26. Effective July 1, 2017, the Iowa Legislature amended both of these sections, and those amendments will be discussed in greater detail below. But regardless of whether the pre- or post-amendment version of the law is applied, both the notice and statute of limitations defenses run from "the date of the occurrence of an injury." More specifically, Iowa Code section 85.23 requires a claimant to provide notice of an injury within 90 days "of the occurrence of an injury," and section 85.26 requires a claimant to bring an action within two years "from the date of the occurrence of the injury" when no benefits have been paid.

In this case, defendants argued, and the deputy commissioner found, that claimant's tinnitus manifested, at the latest, on September 8, 2009. This finding was based on claimant's testimony that he first started noticing ringing in his ears in 2009 and always attributed the ringing to his work with defendant-employer.

Importantly, however, the parties stipulated in the hearing report that the date of injury was August 1, 2017. (Hearing Report, p. 1: "Claimant sustained an injury, which arose out of and in the course of employment, on the following date(s): 8/1/17.") The parties confirmed this date of injury on the record at hearing. (Hrg. Transcript, p. 5 ("It's been stipulated that there is the existence of an employer-employee relationship at the time of the alleged injury, which is alleged to be October [sic] 1, 2017. The parties stipulated that the Claimant sustained an injury on that date arising out of and in the course of his employment.") In other words, the parties stipulated that claimant's injury "occurred" as of August 1, 2017.

Given this stipulation, defendants cannot argue and a finding of fact cannot be made that the date of the occurrence of the injury in this case was before August 1, 2017. Thus, based on the parties' stipulation, I find claimant's tinnitus is deemed to have occurred as of August 1, 2017.

Claimant's petition was filed on August 1, 2019. Thus, with a stipulated date of injury of August 1, 2017, I find claimant commenced his proceeding within two years of the date of the occurrence of the injury. Defendants therefore failed to prove claimant's

claim is barred by the statute of limitations in Iowa Code section 85.26. The deputy commissioner's finding to the contrary is respectfully reversed.

Defendants, however, have also asserted a notice defense under Iowa Code section 85.23. With the following substituted findings, conclusions and analysis, I affirm the deputy commissioner's determination that claimant failed to timely provide notice of his claim.

Claimant did not report his tinnitus symptoms to anyone in a management or supervisory position at defendant-employer before he retired in August of 2017. (Tr., p. 21) To the contrary, claimant acknowledged the first notice he gave to defendant-employer of his tinnitus was in June of 2018. (Tr., p. 13) Thus, claimant did not give notice of his injury within 90 days of August 1, 2017.

Before the Legislature's 2017 amendments to Iowa Code sections 85.23 and 85.26, failure to give notice within 90 days of the occurrence of the injury or failure to commence an action within two years of the occurrence of the injury was not necessarily fatal to a claimant's claim. Instead, the analysis continued with a second step: "to examine whether the statutory period commenced on [the date the injury is deemed to have occurred] or whether it commenced upon a later dated based upon application of the discovery rule." Herrera v. IBP, Inc., 633 N.W.2d 284, 288 (Iowa 2001); Dillinger v. City of Sioux City, 368 N.W.2d 176, 180 (Iowa 1985) (noting the "discovery rule has been applied to section 85.23 [in addition to section 85.26] for the employee's benefit to satisfy the purposes of the workers' compensation law")

In this case, however, claimant's tinnitus occurred, per the parties' stipulation, on August 1, 2017—after the Legislature's amendments became effective. Thus, the question in this case is whether the Legislature's amendments to this section abrogate application of the discovery rule.[1]

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[1] I recognize the Iowa Supreme Court has repeatedly stated this agency lacks the legislature's expressly vested authority to interpret workers' compensation statutes. See, e.g., Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 770 (Iowa 2016), reh'g denied (May 27, 2016). Practically speaking, however, this agency acts as the front-line authority in interpreting statutory workers' compensation provisions, particularly when statutory amendments are enacted. Thus, while the appellate courts may have the final say, statutory interpretation by this agency is a necessary inevitability in cases like the one at hand.

Prior to July 1, 2017, Iowa Code section 85.23 stated, in its entirety:

> Unless the employer or the employer's representative shall have actual knowledge of the occurrence of an injury received within ninety days from the date of the occurrence of the injury, or unless the employee or someone on the employee's behalf or a dependent or someone on the dependent's behalf shall give notice thereof to the employer within ninety days from the date of the occurrence of the injury, no compensation shall be allowed.

Iowa Code section 85.26 stated, in its entirety:

> An original proceeding for benefits under this chapter or chapter 85A, 85B, or 86, shall not be maintained in any contested case 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.

Effective July 1, 2017, the Legislature added the following sentence to each section: "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."

Well before the Legislature's changes to Iowa Code section 85.23, the Iowa Supreme Court in Herrera v. IBP set forth the interplay between the cumulative injury rule/manifestation test for injuries that develop over time, like claimant's tinnitus in this case, and the discovery rule.

> Although the date of injury is relevant to notice and statute-of-limitations issues, the cumulative injury rule is not to be applied in lieu of the discovery rule. *See McKeever,* 379 N.W.2d at 372–73. As we said in *McKeever,* although "[t]hese two rules are closely related, ... they are not the same." *Id.* Thus, although an injury may have occurred, the statute of limitations period does not commence until the employee, acting as a reasonable person, recognizes its "nature, seriousness and probable compensable character." *Orr v. Lewis Cent. Sch. Dist.,* 298 N.W.2d 256, 257 (Iowa 1980) (applying discovery rule to workers' compensation actions).

Herrera, 633 N.W.2d at 287.

The court went on to clarify that the cumulative injury rule for determining when an injury occurs has "only two elements—knowledge of injury and its causal relationship

to employment." Id. at 288. The related, yet separate discovery rule then introduces a third element.

> To summarize, 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 also 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. (citation omitted).

Notably, the Legislature's amendments to Iowa Code sections 85.23 and 85.26 closely align with the court's longstanding definition and application of the manifestation test. Under the court's manifestation test, an injury is deemed to occur when a claimant is plainly aware that he has an injury and that it is work-related, and under the Legislature's amendments, the date of the occurrence of the injury is the date that the employee knew or should have known that his injury was work-related. It appears, therefore, that the Legislature's amendments essentially codified the cumulative injury rule/manifestation test.

Absent from the Legislature's amendment to this section is any mention - let alone an abrogation - of the discovery rule, either by name or its language. Nor did the Legislature include a statement of legislative intent to clarify the intended effect of the amendments as it has in the past. For example, when adopting amendments to Iowa Code section 85.34 in 2004, the Legislature provided a statement of legislative intent to specifically modify "rules of law announced by the Iowa [S]upreme [C]ourt in a series of judicial precedent." 2004 Iowa Acts 1st Extraordinary Sess. ch. 1001, § 11; see Roberts Dairy v. Billick, 861 N.W.2d 814, 819 (Iowa 2015) (discussing the effect of the Legislature's statement of intent). The Legislature's 2017 amendments, however, contained no such language regarding its objective as it pertained to the discovery rule.

When reviewing legislative changes, it is presumed that the Legislature is familiar with existing case law. Roberts Dairy, 861 N.W.2d at 821. Thus, it is presumed the general assembly knew the preexisting law pertaining to the discovery rule when it drafted and passed the 2017 amendments. See id. ("Thus, we presume the general assembly knew the preexisting law pertaining to the fresh-start and full-responsibility rules developed in *Nelson, Celotex Corp.,* and *Venegas* when it drafted and passed the 2004 amendments.").

More specifically, it is presumed the Legislature was aware that "the cumulative injury rule is not to be applied in lieu of the discovery rule." Herrera, 633 N.W.2d at 287 (citation omitted). In other words, it is presumed the Legislature was aware that the determination of whether a claimant's claim was barred by either Iowa Code section 85.23 or section 85.26 did not stop after an analysis of when the injury occurred and instead continued with an examination of "whether the statutory period commenced on that date or whether it commenced upon a later date based upon application of the discovery rule." Herrera, 633 N.W.2d at 288.

Again, with this presumption in mind, the Legislature provided no statement of legislative intent regarding the discovery rule, nor did the legislature add a sentence to Iowa Code section 85.23 or 85.26 prohibiting its application. To the contrary, the Legislature only added a sentence codifying the elements of the court's longstanding cumulative injury rule/manifestation test. Thus, by saying nothing about the discovery rule, it is presumed the legislature intended to maintain the status quo as developed by years of judicial precedent. See Marcus v. Young, 538 N.W.2d 285, 289 (Iowa 1995) (holding the Legislature expresses its intent through omission as well as inclusion).

One could speculate, given the political climate and makeup of the Legislature, that the Legislature's objective when amending Iowa Code sections 85.23 and 85.26 was to eliminate application of the discovery rule. However, as noted by the Iowa Supreme Court, I must "follow what the legislature actually drafted . . ., not what it might have wanted to draft." JBS Swift & Co. v. Ochoa, 888 N.W.2d 887, 899 (2016); Zimmer v. Vander Waal, 780 N.W.2d 730, 735 (Iowa 2010) ("Moreover, we ascertain legislative intent from the words the Legislature used, rather than from what one could argue it meant to say.")

Thus, I conclude the Legislature's amendments to Iowa Code sections 85.23 and 85.26 codified the judicial precedent establishing the cumulative injury rule/manifestation test but did not abrogate the discovery rule.

In this case, the parties stipulated claimant's tinnitus was deemed to have occurred as of August 1, 2017 and claimant testified he did not provide notice until June of 2018. However, applying the discovery rule, I must now examine whether claimant's 90-day notice window commenced later than August 1, 2017. See Herrera, 633 N.W.2d at 287-88. Again, under the discovery rule, the 90-day notice window "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 employment or employability, i.e., the claimant knows or should know the 'nature, seriousness, and probable compensable character' of his injury or condition." Id. at 288 (citation omitted).

This knowledge is deemed imputed "when a claimant gains information sufficient to alert a reasonable person of the need to investigate." Swartzendruber v. Schimmel, 613 N.W.2d 646, 650 (Iowa 2000) (citing Ranney v. Parawax Co., 582 N.W.2d 152, 154 (Iowa 1998)). More specifically:

> a claimant's knowledge is judged under the test of reasonableness. The need to investigate arises when a reasonable person has knowledge of the *possible* compensability of the condition. *Id.* This knowledge must include all three characteristics of the condition. As of that date, the duty to investigate begins and the claimant has imputed knowledge of all the facts that would have been disclosed by a reasonable diligent investigation. *Id.*

Id.

Claimant in this case makes no assertion that defendants had actual knowledge of the reasonable possibility of a claim before claimant reported it in June of 2018. Claimant instead argues only that he did not discover the possible compensability of his tinnitus until he was alerted by a former co-worker in June of 2018 that he could make a claim for his tinnitus. See Dillinger, 368 N.W.2d at 180-81 (noting "section 85.23 does not require notice be given if the employer has actual 'knowledge of the occurrence of an injury' and holding "the actual knowledge notice provision of section 85.23 also includes any actual knowledge an employer has of the reasonable possibility of a claim before the date of discovery"). Claimant asserts "he had no idea that hearing loss and tinnitus were covered under workers' compensation until a fellow who had also retired told him to seek legal advice." (Claimant's Appeal Brief, p. 4) Unfortunately, ignorance of the law and available causes of action are different from whether claimant was aware of the "probable compensable character" of his claim.

"Probable compensable character" refers to whether claimant's injury was work-related and arose out of and in the course of his employment. As noted by the Iowa Court of Appeals in a decision that was later affirmed by the Iowa Supreme Court, "this prong of the discovery rule test is essentially a causation requirement." Perkins v. HEA of Iowa, Inc., 651 N.W.2d 40 (Iowa Ct. App. 2002) (unpublished), aff'd, 651 N.W.2d 40 (Iowa 2002) (citing Ranney, 582 N.W.2d at 154).

Claimant testified at hearing that he was aware of the ringing in his ears in 2009 and believed at that time that it was caused solely by his work with defendant-employer. (Tr., pp. 21, 28) Thus, claimant was aware of the nature and probable compensable character of his injury long before June of 2018.

In terms of the seriousness of his injury, claimant testified his tinnitus did not get worse after he retired:

> Q. The tinnitus complaints that you've had since you've retired, have those gotten worse?
>
> A. No.

Q. Have they stayed the same?

A. They're the same.

Q. Okay. So my point being that when you retired from Firestone in August of 2017, you're working a Banbury cleaning job on a full-time basis without restriction, and those symptoms have stayed the same even to today.

A. They've stayed the same since I've retired.

(Tr., pp. 23-24)

Claimant stipulated his tinnitus occurred as of August 1, 2017, upon his retirement. By his own testimony, claimant's tinnitus has remained stable since that date. There was nothing in June of 2018 or leading up to June of 2018 to suggest his tinnitus has become more severe, disabling, or serious. In other words, the seriousness of claimant's tinnitus, including its impact on claimant's employment and its permanency, were the same in June of 2018 as they were on August 1, 2017. Thus, I find insufficient evidence that claimant was not aware of the seriousness of his condition until after its occurrence. I therefore find the discovery rule did not toll claimants' 90-day notice period in this case.

Because claimant did not provide notice to defendants until June of 2018, I likewise find claimant failed to provide defendants with timely notice as required in Iowa Code section 85.23. I find his claim is barred. With these substituted findings, conclusions and analysis, the deputy commissioner's finding that claimant failed to give timely notice is affirmed.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed in this matter on March 3, 2021, is reversed in part and is affirmed in part with the above substituted findings, conclusions and analysis.

Claimant shall take nothing from these proceedings.

Pursuant to rule 876 IAC 4.33, the parties shall pay their own costs of the arbitration proceeding, and claimant shall bear the cost of the appeal, including the cost of the hearing transcript.

Pursuant to rule 876 IAC 3.1(2), defendants shall file subsequent reports of injury as required by this agency.

Signed and filed on this 8th day of July, 2021.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Jerry Jackson (via WCES)

Timothy W. Wegman (via WCES)