BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JIM THYGESEN, Claimant, vs. CITY OF HARLAN, Employer, and EMCASCO INSURANCE CO., Insurance Carrier, Defendants.	File No. 5057045 REMAND DECISION Head Note: 2402

STATEMENT OF THE CASE

This matter is before the Iowa Workers' Compensation Commissioner on remand from the Iowa Court of Appeals from a decision dated March 30, 2022.

This matter was initially heard on September 19, 2017. An arbitration decision was filed on January 8, 2018. At hearing, defendants raised the affirmative defense of failure to timely notify the employer of an injury, under Iowa Code section 85.23, and failure to timely file a claim under Iowa Code section 85.26(1). The deputy workers' compensation commissioner rejected both affirmative defenses and awarded claimant permanent partial disability benefits.

A July 3, 2019, intra-agency appeal decision affirmed that decision.

Defendants filed an application for judicial review. In the ruling on the petition for judicial review, the district court found claimant's claim was not timely filed. The district court reversed the commissioner's decision and remanded the matter back to the agency.

Claimant filed an appeal to the Iowa Court of Appeals. In a March 30, 2022, decision, the Iowa Court of Appeals affirmed the district court ruling and reversed the agency decision.

Claimant filed an application for further review with the Iowa Supreme Court. That application was denied by the court.

ISSUE

1. Whether claimant's claim for benefits is barred by failure to file a timely claim under Iowa Code section 85.26(1).

FINDINGS OF FACT

The findings of fact in the arbitration and appeal decisions adequately detail the record in this case. The findings of fact in this remand decision will only address facts relevant to the issue on remand.

Claimant began as an operator at the City of Harlan Wastewater Treatment Plant in 1981. (Arbitration Decision, page 2) In 1992, claimant was promoted to a mechanic operator position. (Arb. Dec., p. 3) Claimant was promoted to an assistant superintendent of the plant in 2010. (Arb. Dec., p. 2)

In his job with the wastewater treatment plant, claimant was responsible for making periodic inspections of equipment and machinery, operational adjustments and repairs to equipment and machinery, drawing sludge into holding tanks, collecting sewage samples and performing analysis to determine the efficiency and adequacy of the treatment process, performing television inspections of sewage lines, reading reports from other shifts to determine current plant conditions, maintaining records, preparing reports regarding plant operations, and performing the duties of superintendent when the superintendent is absent. (Joint Exhibit 7, page 67; Arb. Dec., p. 3)

Steve Kenkel was the superintendent of the wastewater treatment plant. (Tr., p. 9) Mr. Kenkel testified that the pumps at the plant were very noisy. He said he worked around the pumps 75 percent of his workday and spent the other 25 percent around other noisy equipment. (JE 11, pp. 8-10)

Claimant testified that beginning in 1981, he was exposed to noise in the buildings where he worked. (Tr., p. 12) The main building contained three large piston pumps and a heat exchanger with an air intake blower. All these machines were noisy. (Tr., pp. 12, 20; JE 7, p. 68) The maintenance shop at the plant had a generator that was noisy. (Tr., p. 12) A pump station at the facility had four pumps with air valves that were also noisy. (Tr., p. 12)

Claimant testified he first noticed hearing problems or tinnitus in his ears in approximately 2007. (Tr., pp. 32-33, 40; JE 13, deposition p. 20) He said he asked individuals to repeat what was said to him. (Tr., pp. 33, 40) He said his hearing problems and tinnitus became worse over time. (Tr., pp. 30, 40) Claimant testified at hearing he thought his hearing problems were related to work. (Tr., p. 40)

On July 6, 2012, claimant attended an appointment with his family practitioner and completed a health questionnaire. (Tr., p. 41; JE 16) On the health form, claimant indicated he was experiencing hearing loss. (Tr., pp. 41-42) Claimant testified that by July 6, 2012, he knew his hearing problems were serious enough that he should let his family doctor know of his condition. (Tr., pp. 20, 39-42)

Claimant had periodic hearing tests with the City of Harlan. (JE 1, pp. 1-3) He testified he was advised, at the time of his first test, he had hearing loss. (Tr., pp. 49-50) The first hearing test for claimant, in the record, is dated March 2, 1992. (JE 1, p. 1) Claimant testified his hearing problems have worsened over time. He said he always thought his hearing problems were caused by his work with the City of Harlan. (Tr., pp. 39-40, 49; JE 13, p. 11)

CONCLUSIONS OF LAW

The first issue to be determined is whether claimant's claim is barred as untimely under Iowa Code section 85.26(1).

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 defendants must prove by a preponderance of the evidence. DeLong v. Iowa State 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).

A worker has a duty to investigate the compensable nature of an injury when it is realized that there is a connection between hearing loss and his work environment. Chapa at 190. See also Martin v. City of Harlan, File No. 5057038 (Appeal Decision August 26, 2019)

Claimant worked at the wastewater treatment plant where loud noise was pervasive. (Tr., pp. 9, 12, 20; JE 7, p. 45; JE 10, p. 86; JE 11, pp. 8-10)

Claimant had periodic hearing tests with the City of Harlan. (JE 1, pp. 1-3) Claimant said he was advised, at his first test in 1992, that he had hearing loss. (Tr., pp. 49-50; JE 1, p. 1) At the time of hearing, claimant had known of his hearing problems for the last 10-15 years. (JE 13, p. 20; Tr., p. 40) Claimant attributed his hearing loss to his employment and believed his hearing had continued to worsen over time. (Tr., pp. 39-40) Claimant reported his hearing loss to a physician in 2012. (Tr., pp. 41-42; JE 16)

Claimant was aware his hearing loss was caused by his work. Claimant's hearing loss was serious enough that he discussed the loss with a physician. Claimant knew, or should have known, at least by July of 2012, that his condition was serious enough to have a permanent adverse effect on his employment. Claimant did not file his petition in this case until July 27, 2016. Given this record, it is found that defendants carried their burden of proof to establish that claimant's claim for benefits was filed in an untimely manner under Iowa Code section 85.26(1). As defendants have carried their burden of proof to establish claimant's claim for benefits was filed untimely under Iowa Code section 85.26(1), claimant's claim is barred by the statute of limitations.

ORDER

THEREFORE, IT IS ORDERED:

Claimant shall take nothing from these proceedings.

Both parties shall pay their own costs.

Signed and filed this 26th day of September, 2022.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served, as follows:

Jason Neifert (via WCES)

David Brian Scieszinski (via WCES)