BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHAEL TAYLOR, Claimant, vs. QUAKER OATS COMPANY, Employer, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier, Defendants.	File No. 5067394 ARBITRATION DECISION Head Note Nos.: 1402.30, 2208, 2209, 2401, 2402, 2802, 2908

STATEMENT OF THE CASE

Michael Taylor, claimant, filed a petition for arbitration against Quaker Oats Company, as the employer and Indemnity Insurance Company of North America as the insurance carrier on February 6, 2019. This case came before the undersigned for an arbitration hearing on April 6, 2020. As a result of the current pandemic affecting the State of Iowa and pursuant to an order of the Iowa Workers' Compensation Commissioner, this case was tried via videoconferencing using CourtCall. Claimant, his wife, and his counsel appeared in claimant counsel's office. Defense counsel and the court reporter appeared from defense counsel's office.

The parties filed a hearing report at the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 6, Claimant's Exhibits 1 through 6, as well as 8 through 9, and Defendants' Exhibits A through D. All exhibits were offered and received without objection.

Claimant testified on his own behalf and called his wife, Tracey Taylor, to testify. Defendants did not call a witness to testify live. The evidentiary record closed at the end of the arbitration hearing.

However, counsel for the parties requested the opportunity to file post-hearing briefs. Their request was granted, and both parties filed briefs simultaneously on May 11, 2020. The case was considered fully submitted to the undersigned on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury, which arose out of and in the course of his employment with Quaker Oats Company, on April 1, 2015.

2. Whether the statute of limitations expired prior to claimant filing his original notice and petition such that his claim for worker's compensation benefits is barred.

3. Whether defendants proved claimant failed to give timely notice of his injury to the employer such that claimant is barred from recovery pursuant to Iowa Code section 85.23.

4. Whether the alleged injury caused permanent disability.

5. If the alleged injury caused permanent disability, the nature of that injury and whether the claim should be compensated as a scheduled member hearing loss claim, or involves unscheduled injuries that should be compensated with industrial disability benefits.

6. The extent of claimant's entitlement to permanent disability benefits, if any.

7. Whether claimant is entitled to an award of past medical expenses.

8. Whether claimant is entitled to reimbursement of his independent medical evaluation fees pursuant to Iowa Code section 85.39.

9. Whether claimant has proven entitlement to alternate medical care and specifically ongoing treatment of his tinnitus.

10. Whether either party is entitled to assessment of costs and, if so, the extent of such entitlement.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Michael Taylor, claimant, is a 67 year-old gentleman, who lives in Center Pointe, Iowa. He graduated from high school in 1972 and worked for Quaker Oats Company from July 1982 until his retirement in April 2015. In his employment with Quaker Oats, Mr. Taylor worked primarily as a forklift driver and in shipping. (Transcript, pages 20-27) In both of these positions, Mr. Taylor testified that he was exposed to significant noise. (Tr., pp. 26-40) During the early part of his career at Quaker, the company offered no hearing protection. In the latter part of his employment, Quaker offered hearing protection and upgraded the hearing protection program over time. (Tr., pp. 38-39)

In his positions at Quaker Oats, Mr. Taylor also testified that his work was physical and caused him low back symptoms. He testified about lifting items and his work as a fork truck driver causing significant jarring of his back as he drove. (Tr., pp. 35-36) Mr. Taylor now claims that he sustained a low back injury, hearing loss, and tinnitus as a result of his employment at Quaker Oats.

Quaker Oats denies that Mr. Taylor sustained work injuries. Quaker Oats also contends that claimant failed to provide timely notice of his injuries and that his claims are barred by the statute of limitations. Claimant concedes that he filed his original notice and petition approximately four years after he last worked for Quaker Oats but asserts that the discovery rule tolled the statute of limitations and notice requirements of the statutes.

Having considered all of the evidence, I find that Mr. Taylor proved that his low back injuries, as well as his hearing loss and tinnitus, were all caused by his employment activities and environment at Quaker Oats. While still employed, Mr. Taylor sought chiropractic care to continue working. In fact, the evidence demonstrates that claimant sought chiropractic care relatively consistently for his low back from 2005 through the date of his retirement. (Claimant's Exhibit. 1, p. 2; Transcript, p. 86) Mr. Taylor testified that he worked through pain because he did not want to take time off work to get treatment for his back. (Tr., pp. 79-80) During his employment, chiropractic care was sufficient to maintain his symptoms so he could continue to work for Quaker Oats. Therefore, claimant admits that he waited to get further medical care until after he retired. (Tr., p. 63)

Ultimately, the chiropractic care was not sufficient to maintain or resolve Mr. Taylor's symptoms. He sought treatment with a personal physician. (Joint Ex. 2, pp. 65-67) By May 2015, Mr. Taylor reported that he had shooting pain that radiated down is right leg. (Joint Ex. 2, p. 65) In June 2015, he reported that he has experienced back pain off and on for a number of years. However, by June 2015, he was reporting 9 out of 10 pain on a 10-point scale. (Joint Ex. 2, p. 69) His personal physician referred him to a pain specialist.

Mr. Taylor submitted to several epidural steroid injections in his lower back. (Joint Ex. 2, pp. 72, 74-77, 82-83, 86-90; Tr., pp. 63-66) He testified that the initial injections provided good symptomatic relief for months. (Tr., p. 66) However, by the time he received his fourth epidural steroid injection in December 2016, it did not provide relief beyond a couple of days. (Joint Ex. 2, p. 84; Joint Ex. 4, p. 143; Claimant's testimony)

On referral from his personal physician, Mr. Taylor sought evaluation with a neurosurgeon, Loren J. Mouw, M.D. (Joint Ex. 4) Initially, Dr. Mouw recommended conservative care. (Joint Ex. 4, p. 136) In October 2016, Dr. Mouw discussed surgery as a possible treatment option for Mr. Taylor's back. (Joint Ex. 4, p. 141) Dr. Mouw's medical record dated October 27, 2016, indicates that claimant was to call back to Dr. Mouw's office if he desired to pursue surgery. (Joint Ex. 4, p. 141) In January 2017, claimant returned to his personal physician, reporting that Dr. Mouw recommended surgical intervention for claimant's low back symptoms and that he was seeking a second opinion to be performed by Dr. Eck. (Joint Ex. 2, p. 84) Dr. Eck also suggested that surgery was a reasonable option. (Claimant's Ex. 1, p. 3)

By April 2017, Mr. Taylor reported a 10 out of 10 pain level upon his return to Dr. Mouw. (Joint Ex. 4, p. 143) At this appointment, Mr. Taylor requested that Dr. Mouw proceed with surgical intervention. (Joint Ex. 4, p. 145) Mr. Mouw took claimant to surgery for his low back on May 10, 2017. (Joint Ex. 2, pp. 91-93; Tr., p. 65)

Mr. Taylor testified that he experienced a good result from Dr. Mouw's surgery. He conceded that Dr. Mouw's surgery worked really well and significantly reduced his symptoms. (Tr., p. 67) This is corroborated by his personal physician's medical record dated February 14, 2018, which indicates that claimant reported his low back symptoms were "completely resolved." (Joint Ex. 2, p. 97)

Unfortunately, by September 2018, Mr. Taylor was again experiencing back pain. While his initial symptoms after retiring from Quaker Oats were radiating down his left leg, by September 2018, Mr. Taylor reported symptoms radiating into his right leg. (Joint Ex. 4, p. 157) There is some debate in the evidence about whether the back and right leg symptoms in September 2018 were the result of a motor vehicle accident, it is apparent that an intervening event or cause occurred. Mr. Taylor did not prove that any low back or leg symptoms occurring after February 14, 2018 are causally related to his employment activities at Quaker Oats. Ultimately, Mr. Taylor required a second surgery, performed by Chad D. Abernathey, M.D., on October 18, 2019, to address the low back and left leg symptoms. (Joint Ex. 4, p. 157; Claimant's Ex. 1, p. 4)

Claimant obtained an independent medical evaluation performed by Farid Manshadi, M.D., on February 20, 2020. (Claimant's Ex. 1) Dr. Manshadi opined that claimant's work activities at Quaker Oats caused his low back symptoms and the need for his surgery with Dr. Mouw. (Claimant's Ex. 1, p. 5) Dr. Manshadi noted:

> I believe that Mr. Taylor's back problems are as a result of his work activities and employment at Quaker Oats. It is well documented that his job required quite a bit of bending, stooping, and lifting when he worked in the shipping department. Further, he had a significant amount of jarring of his low back from use of a forklift. It is also well documented, as indicated above earlier, that his low back pain came on gradually and he started going to a chiropractor in June of 2005, which has been ongoing throughout the years that he worked at Quaker Oats. He denies performing any other strenuous activities outside of his work.
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> Further, it is well documented that Dr. Mouw performed a partial laminectomy at L4-L5 for removal of a cyst at L4-L5. Usually it is not unusual that those cysts are as a result of repetitious bending and stooping at the waist along the facet joints.

(Claimant's Ex. 1, p. 5)

Defendants sent correspondence to Dr. Abernathey requesting clarification of whether the first surgery performed by Dr. Mouw was causally related to claimant's work activities at Quaker Oats. Dr. Abernathey responded confirming that defense counsel accurately stated his medical opinions. Specifically, Dr. Abernathey opined, "Mr. Taylor had undergone a low back surgery to remove a cyst with Dr. Mouw in 2017. The removal of this cyst was not in any aspect related to any work related activity or injury." (Defendants' Ex. A, p. 1)

Review of the concurrent medical records suggest that each of the medical providers rendering treatment through February 2018 seem to believe or assume that claimant's low back and right leg symptoms are causally related to his work at Quaker Oats. No other explanation for his symptoms is present in this evidentiary record. While Dr. Abernathey opines that the first surgery is not causally related to claimant's work activities at Quaker Oats, he provides no alternative explanation for claimant's symptoms and treatment. Ultimately, I find the opinions of Dr. Manshadi more convincing on the causation issue and find that claimant proved his low back symptoms and resulting chiropractic care, pain management care, personal physician treatment, and surgical management by Dr. Mouw, were all causally related to and arose out of and in the course of Mr. Taylor's employment with Quaker Oats.

With respect to defendants' statute of limitations defense, I find that Mr. Taylor knew he had a low back injury and that he also believed the low back condition was caused by his employment activities at Quaker Oats by at least the date of his retirement, April 1, 2015. (Tr., pp. 83-84; Defendants' Ex. D, p. 4) In fact, Mr. Taylor conceded that he believed his work caused his low back injury while he was still employed. (Tr., pp. 84-85, 99; Defendants' Ex. D, p. 12) He testified that he knew co-workers that sustained low back injuries and made workers' compensation claims. Mr. Taylor simply did not want to take time off work to obtain medical care before his retirement. (Tr., pp. 79-80) Therefore, I find that Mr. Taylor knew he had a low back

injury and that the low back injury was caused by his work at Quaker Oats by at least April 1, 2015, his retirement date.

Mr. Taylor contends that the discovery rule tolls the statute of limitations. Mr. Taylor contends that he did not know he had a compensable claim for a low back injury until he spoke with his attorneys and certainly not until sometime in 2018. I do not find Mr. Taylor's contentions credible in this respect.

Objectively, Mr. Taylor knew or should have known that he had a serious low back condition long before 2018. By May 2015, Mr. Taylor experienced shooting pain from his low back down to his right knee. (Joint Ex. 2, p. 65) He sought medical treatment due to this condition. Arguably, these symptoms should have alerted Mr. Taylor to the seriousness of his condition.

However, Mr. Taylor did have extensive chiropractic care that was capable of maintaining his symptoms and allowing him to continue working. Objectively, a person that continues to have symptomatic relief from treatment could believe that his or her condition is not that serious. Unfortunately for Mr. Taylor, he testified to the contrary. On cross-examination, claimant testified that he knew his back injury was serious while he was still working because he had significant difficulties standing or walking by the end of a shift at Quaker Oats. (Tr., p. 87) In addition to knowing that the injury could be compensable based on co-workers experiences, Mr. Taylor conceded on cross-examination that he figured his back was probably "serious enough" that he had a back claim against Quaker Oats while he was still employed. (Tr., p. 80)

By June 2015, Mr. Taylor was submitting to treatment with a pain specialist and epidural injections. Arguably, the fact that the initial injections provided symptomatic relief could give a claimant the belief that their injury was not serious. Again, claimant's testimony is to the contrary. Mr. Taylor testified that he did not feel that the epidural injections he was receiving in his back was fixing the problem in his back. Instead, he knew those injections were simply "masking the problem." (Tr., p. 66) Instead, Mr. Taylor was hesitant to have surgery on his low back because, "you always hear people say once you get your back operated on it's never the same." (Tr., p. 66) In other words, claimant knew that his back was severely injured, but he did not want surgery because he assumed his back would never be back to "normal" after a surgery.

Dr. Mouw recommended surgery for claimant's low back on January 25, 2017. (Joint Ex. 2, p. 84) Accordingly, by at least January 25, 2017, Mr. Taylor was aware his low back condition was serious, that surgery had been recommended for his low back, and he believed that his back would never be normal again if he proceeded with the recommended surgery. Certainly, by January 25, 2017, Mr. Taylor knew he had a back injury, believed it was caused by his employment, knew that he had a potential claim against Quaker Oats, and believed that the condition was serious enough that his back would never be normal if he submitted to the recommended surgery. By this date, Mr. Taylor was at least on inquiry notice to investigate his low back injury.

Certainly, by the time Dr. Mouw was recommending surgery in January 2017, claimant should have been seriously pondering whether he had a serious condition in low back. He subsequently requested a second surgical opinion. The fact that claimant requested a second opinion also suggests he knew the significance of his injury and the surgical recommendation in January 2017. Claimant's actions in requesting and submitting to a second surgical opinion suggest he not only objectively, but actually knew his low back condition was serious. By April 2017, Mr. Taylor is reporting 10 out of 10 pain levels to Dr. Mouw and requesting surgery. Most people do not submit to surgical intervention lightly. Mr. Taylor certainly did not. All signs leading up to January 2017 pointed to a serious and compensable low back injury. The events after January 2017 did not do anything to persuade or suggest otherwise.

Perhaps most damaging to his current argument, Mr. Taylor testified on direct examination that he sought to be disqualified from his packaging position at Quaker Oats because the job duties of that position hurt his back. (Tr., p. 49) In fact, Mr. Taylor testified, "My back was hurting so bad I couldn't—I couldn't pick those boxes up like that, so I went to the manager, because I knew on other guy that I started with that got disqualified off the palletizers, so I thought maybe I could." (Tr., p. 49) Mr. Taylor clearly demonstrated that he understood the seriousness of his low back injury and its effect on his employment by then testifying, "I would have worked a couple more years if I could have got off of them." (Tr., p. 49) I find that Mr. Taylor knew more than two years before the filing of his original notice and petition on February 6, 2019, that he had a back injury, that it was caused by work, and that it was potentially compensable, and that the condition was serious.

Mr. Taylor also conceded during trial that he did not give notice to the employer about his low back, hearing loss, or tinnitus. (Tr., p. 101) With respect to the low back condition, I find that claimant knew at the very latest that he had an injury, that it was work related, and serious by the date surgery was recommended. Claimant did not give notice to the employer of his low back injury or claim within 90 days of the January 2017 recommendation for surgery.

Mr. Taylor also asserts claims for hearing loss and tinnitus, resulting from his noise exposure at Quaker Oats. Defendants challenge whether the hearing loss and/or tinnitus arose out of and in the course of claimant's employment at Quaker Oats. Realistically, however, all experts addressing the issue opine that both claimant's hearing loss and tinnitus resulted from his noise exposure at Quaker Oats. (Claimant's Ex. 2, p. 29; Defendants' Ex. B, p. 3) I find that claimant developed high frequency hearing loss and tinnitus as a result of excessive noise exposure at Quaker Oats.

Once again, Quaker Oats asserts an affirmative defense that claimant did not timely file his claim and is barred by the statute of limitations. In this respect, I find that Mr. Taylor knew he had both high frequency hearing loss and tinnitus by the time he quit working at Quaker Oats in February 2015. In fact, Mr. Taylor conceded this point at the time of trial. (Tr., pp. 55-56, 58, 93)

Therefore, Mr. Taylor is relying upon the discovery rule and asserts that he did not know the seriousness of his conditions until less than two years before he filed his original notice and petition in February 2019. Mr. Taylor argues he did not know the seriousness of his tinnitus condition or that it was treatable until Dr. Krivit evaluated him. Claimant contends that the plant nurse told him that everyone had tinnitus at the plant and it is no big deal. (Tr., p. 58) Certainly, this lends some credence to claimant's contention that he did not know the seriousness of his tinnitus condition at the time he left his employment at Quaker Oats. Nevertheless, I find claimant's assertion to be not credible and reject it.

Instead, I find that Mr. Taylor realized within a few weeks of stopping work that his tinnitus was much worse than he previously anticipated. He conceded as much during his testimony. (Tr., pp. 57, 93) In fact, Mr. Taylor knew prior to retiring that his tinnitus worsened when he was away from work. (Tr., p. 93) He also conceded on cross-examination that his tinnitus worsened within a few weeks of leaving the plant and that the tinnitus was "significant." (Tr., p. 93) Although he did not know there was a treatment available for the condition, he certainly was experiencing significant increases in his tinnitus symptoms and it became bothersome within a few weeks of leaving his employment. Mr. Taylor last worked in February 2015 and formally retired in April 2015. At the very latest, he realized by May 2015 that his tinnitus was worsening and significant. By May 2015, as a reasonable person, Mr. Taylor should have understood that he had ringing in his ears, that it was caused by noise exposure at Quaker Oats and that the condition was significant and worsening away from work.

With respect to his high frequency hearing loss, Mr. Taylor submitted to annual hearing tests and knew by the time he retired that he had a permanent, high frequency hearing loss and that it was the result of noise exposure at Quaker Oats. (Joint Ex. 1) By this date, he was at least on notice of his potential claim and that his hearing loss was permanent in nature. I find that Quaker Oats did not pay Mr. Taylor any worker's compensation weekly benefits for his low back, hearing loss, or tinnitus conditions. (Tr., p. 90)

CONCLUSIONS OF LAW

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when

performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

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).

In this case, I found that Mr. Taylor proved his low back condition and his tinnitus are causally related to his work at Quaker Oats. Both injuries are cumulative in nature. Therefore, I must address the proper injury date for both the low back condition and the tinnitus.

As noted above, the manifestation date for a cumulative injury is the date upon which the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. In this situation, claimant acknowledged during his testimony that he was aware of both his tinnitus and his low back conditions and that he believed both were caused by his work at Quaker Oats by the date he retired. By this date, claimant experienced difficulties standing and walking at the end of a shift. By the date of his retirement in April 2015, Mr. Taylor knew of other co-workers that had similar injuries and had filed worker's compensation claims. By the date of his retirement, Mr. Taylor believed his low back condition was related to work and he sought to be disqualified from a position at Quaker Oats due to his low back condition. I conclude that the date of injury for claimant's low back condition is the date of his retirement in April 2015 at the latest.

Similarly, claimant knew he had ringing in his ears, or tinnitus, by the date of his retirement. He testified that he believed it was related to his work by the date of his retirement. Therefore, I similarly conclude that the latest possible date of manifestation for claimant's tinnitus was his April 2015 retirement. Claimant was not exposed to additional work environmental factors at Quaker after his retirement. Logically, the date of injury cannot be after he retired from Quaker.

The more difficult question in this case is whether the discovery rule tolled claimant's statute of limitations beyond the date of his retirement. The Iowa Workers' Compensation Act imposes time limits on injured employees both as to when they must notify their employers of injuries and as to when injury claims must be filed.

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).

Iowa Code 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. Iowa Code § 85.26(1) (2016). 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. Id.

That the employee failed to bring a proceeding within the required time period is an affirmative defense which the employer must plead and prove by a preponderance of the evidence. See Dart v. Sheller-Globe Corp., II Iowa Industrial Comm'r Rep. 99 (App. 1982).

The time period both for giving notice and filing a claim does not begin to run until the claimant as a reasonable person, should recognize the nature, seriousness, and probable compensable character of the injury. Herrera v. IBP, Inc., 633 N.W.2d 284, 287 (Iowa 2001). Orr v. Lewis Cent. Sch. Dist., 298 N.W.2d 256, 257 (Iowa 1980). The reasonableness of claimant's conduct is to be judged in light of claimant's education and intelligence. Claimant must know enough about the condition or incident to realize that it is work connected and serious. Robinson v. Department of Transp., 296 N.W.2d 809, 811 (Iowa 1980). Claimant's realization that the injurious condition will have a permanent adverse impact on employability is sufficient to meet the serious requirement. Herrera, 633 N.W.2d at 287. Positive medical information is unnecessary if information from any source gives notice of the condition's probable compensability; Robinson, 296 N.W.2d at 811.

With respect to Mr. Taylor's low back condition, I found that Mr. Taylor should have known that his low back condition was serious enough to have a permanent, adverse impact on his employment by the date he retired and certainly no later than the date surgery was recommended by Dr. Mouw, or January 25, 2017. Mr. Taylor acknowledged that he knew co-workers with back injuries that filed worker's compensation claims against Quaker Oats. Therefore, he was aware prior to his retirement that his low back condition could be a compensable work injury.

By the date of his retirement, Mr. Taylor knew that he struggled to stand and walk after a shift at Quaker Oats. By his retirement, claimant had sought to be disqualified from one of his positions and job duties with the employer. In fact, Mr. Taylor testified that he would have worked another couple of years if he could have been removed from certain job duties. Therefore, at the time he retired, Mr. Taylor had actually made reasonable observations and decisions about the impact of his low back on his ability to work. By the date of his retirement, Mr. Taylor knew he could not continue performing all of his typical job duties given the condition of his low back. By his retirement, Mr. Taylor knew or should have known that his low back condition was serious, had a permanent, adverse impact on his employment, and was potentially compensable as a work injury.

After he retired, Mr. Taylor sought additional treatment for his low back. He was referred to pain specialists and received an MRI of his low back and epidural injections into his low back. Ultimately, those injections lost effectiveness. Mr. Taylor conceded at trial that he did not expect chiropractic care or the epidural injections to heal his back. Certainly, by the time he was referred to a neurosurgeon and Dr. Mouw recommended surgery on claimant's low back, he should have known that his low back condition was serious and posed a permanent, adverse impact on employment. I conclude that claimant's statute of limitation for his low back certainly began to run by at least January 25, 2017, when Dr. Mouw recommended surgery.

Mr. Taylor did not file his original notice and petition until February 6, 2019, more than two years after the last possible date the statute of limitations began to run. Claimant conceded that no weekly benefits were paid to him. Therefore, I conclude that the statute of limitations expired before claimant filed his petition and that his claim for the low back injury is barred. Iowa Code section 85.26(1).

With respect to claimant's tinnitus claim, he again asserts that the discovery rule tolls the statute of limitations. However, on cross-examination at trial, Mr. Taylor conceded that he knew his tinnitus was significant within a few weeks of his last date worked (February 2015) that his tinnitus was significant because the symptoms increased significantly when claimant was away from the noise at Quaker Oats. Although Mr. Taylor claims he did not know he had a claim for tinnitus until he met with an attorney, I found that he knew or should have known that the tinnitus was serious within a few weeks of leaving Quaker Oats, probably by March 2015 and certainly within a few weeks after he retired in April 2015. At the very least, Mr. Taylor was on inquiry notice to investigate his injury and claim. Again, he did not file his original notice and petition until February 2019. I conclude that the statute of limitations began running on his tinnitus claim by at least May 2015 and expired long before his petition was filed. Therefore, I conclude that Iowa Code section 85.26(1) bars the tinnitus claim.

Defendants also asserted a notice defense for the low back and tinnitus claims pursuant to Iowa Code section 85.23. 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).

With respect to the low back claim, I found that Mr. Taylor did not give notice of his injury prior to his retirement. There is no evidence in the record suggesting that notice was provided to the employer prior to the filing of the original notice and petition. I conclude that claimant failed to give timely notice of his low back injury and that Iowa Code section 85.23 bars his claim for a low back injury.

I conclude that Iowa Code section 85.23 does not bar the tinnitus claim, however. Quaker Oats required claimant to submit to annual hearing tests. As part of that testing, the employer inquired whether claimant had ringing in his ears. Claimant disclosed at various points of his employment, during the hearing testing, that he had ringing in his ears. Similarly, he testified without contradiction that he spoke with the company nurse about the ringing in his ears. Claimant's disclosures on the hearing testing forms and to the company nurse are both sufficient notice to the employer pursuant to Iowa Code section 85.23. Therefore, I conclude the employer's notice defense would fail as to the tinnitus claim.

Mr. Taylor also asserts a claim for hearing loss. The employer was clearly aware of claimant's high frequency hearing loss, as the employer required his participation in a hearing testing program on an annual basis. Those hearing tests disclosed the hearing loss prior to claimant's retirement. Therefore, the employer was on proper notice of the hearing loss.

Under Iowa Code section 85B.4(3), "occupational hearing loss" is defined as that portion of permanent sensorineural loss that exceeds an average hearing level of 25 decibels at the frequencies of 500, 1000, 2000 and 3000 Hz when "arising out of and in

the course of employment caused by excessive noise exposure," but does not include loss attributable to age or any other condition or exposure that is not job related. "Excessive noise exposure" is exposure to sound capable of producing occupational hearing loss. Iowa Code section 85B.4(1).

Section 85B.5 provides a table establishing presumptive "excessive noise exposure" at various decibel levels tied to duration of exposure; for example 8 hours per day at 90 dBA. There is no presumptive excessive noise exposure at levels below 90 dBA. The table in section 85B.5 then, is not the minimum standard defining an excessive noise level in section 85B.4(2). The table in section 85B.5 lists noise level times and intensities which, if met, will be presumptively excessive noise levels of which the employer must inform the employee. See Muscatine County v. Morrison, 409 N.W.2d 685 (Iowa 1987).

Neither of the parties introduced evidence establishing the specific levels of the noise exposure to which claimant was exposed. However, all experts concur that claimant's high frequency hearing loss is causally related to his noise exposure at Quaker Oats. Excessive noise exposure is defined as exposure that is "capable of producing occupational hearing loss." Iowa Code section 85B.4(1). Since all experts concur that claimant's noise exposure at Quaker Oats did produce his hearing loss, I conclude that claimant has proven he sustained permanent high frequency hearing loss as a result of excessive noise exposure at Quaker Oats.

Pursuant to Iowa Code section 85B.8(c), the proper date of injury for the hearing loss claim was claimant's retirement date. He could not file a claim for occupational hearing loss until one month after his retirement. Iowa Code section 85B.8(1). Claimant participated in the company's annual hearing testing and clearly knew by the time of his retirement that he had permanent high-frequency hearing loss as a result of his occupational noise exposure at Quaker Oats. Claimant did not file his original notice and petition for nearly four years after his retirement. Claimant conceded that no weekly benefits were paid by the employer for his occupational hearing loss. Therefore, I conclude that his occupational hearing loss claim is barred by Iowa Code section 85.26(1). Having concluded that the low back, tinnitus, and hearing loss claims are barred by the statute of limitations, I conclude that claimant fails to prove entitlement to any weekly benefits, medical benefits, or an independent medical evaluation pursuant to Iowa Code section 85.39.

Finally, claimant seeks the award of his costs associated with this case. (Claimant's Exhibit 8) Costs are assessed at the discretion of the agency. Iowa Code section 86.40. Claimant failed to carry his burden of proof or to recover an award of benefits. Therefore, exercising agency discretion, I conclude that it would not be appropriate to assess claimant's costs.

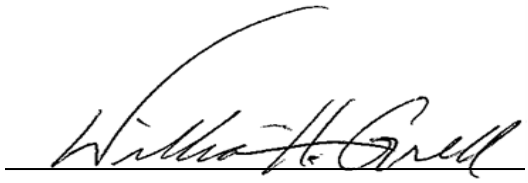
ORDER

THEREFORE, IT IS ORDERED:

Claimant takes nothing.

All parties bear their own costs.

Signed and filed this __1st__ day of June, 2020.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Bob Rush (via WCES)

Casey Steadman (via WCES)

Timothy Wegman (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.