BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CHARLES AHN, Claimant, vs. KEY CITY TRANSPORT, INC., Employer, and NEW HAMPSHIRE INSURANCE COMPANY, Insurance Carrier, Defendants.	FILED OCT 8 2015 WORKERS' COMPENSATION File No. 5042640 APPEAL DECISION Head Note No.: 2401

Claimant Charles Ahn appeals from an arbitration decision filed September 24, 2014. The case was heard on June 6, 2014, and it was considered fully submitted on August 6, 2014, in front of the deputy workers' compensation commissioner.

The deputy commissioner determined that claimant's claim is barred by the two-year statute of limitations under Iowa Code section 85.26(1) and claimant was awarded nothing.

Claimant asserts on appeal that the deputy commissioner erred in finding that his claim is barred by the two-year statute of limitations. Defendants assert that the findings of the deputy commissioner should be affirmed on appeal.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, I reach the same analysis, findings and conclusions as those reached by the deputy commissioner.

Pursuant to Iowa Code Sections 86.24 and 17A.5, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on September 24, 2014, that relate to issues properly raised on intra-agency appeal with the following additional analysis:

ISSUES

1. Whether claimant sustained a work injury on or about August 31, 2010, which arose out of and in the course of his employment with defendant-employer.

2. If claimant sustained a work injury on or about August 31, 2010, is claimant's claim for benefits barred by the two-year statute of limitations under Iowa Code section 85.26(1)?

3. Does the Section 85.35(3) compromise settlement between claimant and Second Injury Fund of Iowa in File No. 5038569, which covered claimant's left leg condition, the same condition which is the subject of this case, deprive this agency of jurisdiction to re-litigate the left leg claim against the defendants in this case?

4. If claimant sustained a work injury on or about August 31, 2010, is claimant's claim for benefits barred by Iowa Code section 85.23 for failure by claimant to provide notice of the injury to defendants within 90 days of the occurrence of the injury?

5. If claimant sustained a work injury on or about August 31, 2010, is claimant's claim for benefits barred by judicial estoppel?

6. If claimant sustained a work injury on or about August 31, 2010, is claimant's claim for benefits barred by claim preclusion?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant was hired by defendant-employer on July 1, 1995. Claimant was an over-the-road truck driver whose routes included runs to the west coast. Claimant worked 40-70 hours per week and liked his job. (Transcript pages 19-20)

In 2004 or 2005, claimant first noticed problems with his left leg including burning, itching, throbbing and discoloration in the area of his calf muscle. (Tr. p. 21) He admitted at hearing that he believed his condition was work-related at that time. (Tr. p. 60) The first medical treatment claimant received for his left leg was in 2005. (Tr. pp. 21-22) By November 16, 2009, the symptoms in claimant's left leg and foot included falling asleep, throbbing and swelling. (Exhibit G, p. 2)

On October 25, 2010, claimant sustained a work-related injury to his left eye, which was the subject of a prior claim in File No. 5038569. (Ex. A) In File No. 5038569 claimant brought simultaneous workers' compensation claims against defendant-employer for the left eye injury and the Second Injury Fund of Iowa (SIF) for industrial disability benefits for the combined disability caused by the October 25, 2010, left eye injury and the same left leg condition involved in this case. (Ex. B) Claimant admits,

and there is no dispute, that the same injury alleged against defendant-employer in this case is the left leg claim brought against SIF in File No. 5038569. (Tr. p. 53) However, in File No. 5038569, claimant alleged the injury date for his left leg was "2009." In this case, claimant alleges the left leg injury date is August 31, 2010.

In File No. 5038569, claimant and defendant-employer entered into an Iowa Code section 85.35(2) agreement for settlement for the left eye claim and claimant and SIF entered into an Iowa Code section 85.35(3) compromise settlement for the combined disability of the left leg and the left eye injury. (Ex. A and B) Claimant was paid $130,000.00 pursuant to the compromise settlement with SIF in File No. 5038569. Claimant settled with defendant-employer and with SIF in File No.5038569 in December 2012.

Only after claimant settled with SIF in File No. 5038569 did claimant first raise the allegation against defendant-employer that the left leg condition was work-related by filing a new arbitration petition in this case, File No. 5042640, on January 17, 2013, alleging an injury date of August 31, 2010, for the left leg condition.

The petition in this case was filed on January 17, 2013, which was more than two years after the alleged injury date of August 31, 2010. There is no dispute that benefits were never paid by defendants for claimant's left leg condition, so the two-year statute of limitations under Iowa Code section 85.26(1) applies. However, claimant asserts that the "discovery rule" applies in this case to toll the two-year statute of limitations until he underwent an IME with Robin Epp, M.D. (n/k/a Sassman) on October 12, 2012, because claimant alleges that was the first time any physician told him his left leg condition was work-related and that was when claimant first comprehended the seriousness of his condition. Defendants assert claimant knew, or should have known, on or before August 31, 2010, that his left leg condition was work-related. Defendants also assert because claimant had surgery on his left leg on September 14, 2010, he either knew, or should have known, by that date at the latest, that the condition could have a significant impact on his employability. Defendants therefore assert that the discovery rule does not toll the two-year statute of limitations after August 31, 2010, and this matter is time-barred.

At his deposition and at hearing, claimant admitted he believed his left leg condition was work-related in 2008 or 2009, and even as early at 2004 or 2005. (Tr. p. 60; Ex. D, p.16) If the correct injury date for claimant's left leg condition is determined to be September 14, 2010, the date he had surgery, or some date before September 14, 2010, the petition in this case was filed well over two years later when it was filed on January 17, 2013.

The question is, therefore, does the discovery rule toll the commencement of the statute of limitations? The discovery rule tolls the statute of limitations until the claimant "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." Larson Mfg. Co, Inc. v. Thorson, 763 N.W. 2d 842, 855 (Iowa 2009) (citing Herrera v. IBP, Inc., 633 N.W. 2d 284, 287 (Iowa 2001) quoting Orr v. Lewis Cent. Sch. Dist., 298 N.W. 2d 256, 257 (Iowa 1980)). Neither "exact knowledge of the seriousness of the injury" nor expert medical opinion is needed "to establish knowledge of the characteristics of the injury." "Under this standard, the degree of knowledge is based upon a possibility, not a probability. Thus, if it is reasonably possible an injury is serious enough to be compensable as a disability, the seriousness component of the test is satisfied." Swartzendruber v. Schimmel, 613 N.W. 2d 646, 650-651 (Iowa 2000) (internal citation omitted)

Claimant's "knowledge of these three triggering factors may be actual or imputed from the record." Id. (citing Ranney v. Parawax Co., Inc., 582 N.W.2d 152, 154-155 (Iowa 1998)

> Knowledge is imputed to a claimant when he gains information sufficient to alert a reasonable person of the need to investigate. *See Estate of Montag,* 509 N.W. 2d at 470; *Franzen,* 377 N.W.2d at 662. As of that date he is on inquiry notice of all facts that would have been disclosed by a reasonably diligent investigation. *See Franzen,* 377 N.W. 2d at 662. We reject Ranney's assertion that inquiry notice does not apply here because he suffered from a latent injury. When Ranney was diagnosed with Hodgkin's disease in 1985, his condition was no longer latent; it was then known. At that point Ranney was subject to the same duty to investigate as is any other plaintiff who knows he has sustained an injury.
>
> . . .
>
> We think that once a claimant knows or should know that his condition is possibly compensable, he has the duty to investigate. *See Roth v. G.D. Searle Co.,* 27 F.3d 1303, 1307 (8th Cir. 1994) (holding that inquiry notice began when the plaintiff "knew or should have known of her injuries and their *possible* connection to IUD") (emphasis added) (applying Iowa law); *Jones v. Maine Cent. R.R.,* 690 F.Supp. 73, 75-77 (D.Me. 1988) (holding, as a matter of law, the statute of limitations commenced when plaintiffs were diagnosed with hearing loss and "thought," "suspected," or "presumed" it resulted from workplace noise.). The purpose of the investigation is to ascertain whether the known condition is probably, as opposed to merely possibly, compensable.

Ranney, 582 N.W. 2d at 155

Claimant admitted he knew in 2008 or 2009 that his left leg condition was caused by his employment with defendant-employer. In fact, claimant conceded he believed as early as 2004 or 2005 that his condition was caused by his employment. (Tr. p. 60; Ex.

D, p.16) Therefore, the argument can be made under the imputed knowledge prong of the discovery rule that the two-year statute of limitations should commence as early as 2004 or 2005. However, if we give claimant the benefit of the doubt and assume he did not know the seriousness of his condition in 2004, 2005, 2008 or 2009, at the very latest claimant either knew, or should have known, by September 14, 2010, when he had surgery, that the condition was work-related and that it was serious enough to warrant further investigation as to compensability under workers' compensation.

Claimant argues that the statute of limitations was tolled until his IME with Dr. Epp on October 12, 2012, more than two years after he had surgery, because no doctor had previously told him his condition was work-related. This argument was rejected by the Iowa Supreme Court in Ranney, supra. In Ranney, the claimant became ill in 1985 and was diagnosed with Hodgkin's disease. Ranney suspected from the beginning that his condition might be causally related to his work with toxic chemicals. Various physicians he consulted would not commit themselves one way or the other regarding a possible connection between Ranney's work with chemicals and his disease. It was not until 1991 that a new treating physician confirmed Ranney's theory of causation.

Ranney filed a workers' compensation lawsuit in 1992 against his former employer and its workers' compensation carrier. Ranney relied on the discovery rule to extend the two-year statute of limitations. The industrial commissioner granted a motion for summary judgment filed by the insurance carrier, ruling that the limitations period expired before Ranney filed his petition for benefits. The commissioner's ruling was affirmed on judicial review by the district court and Ranney appealed to the Iowa Supreme Court. Ranney argued on appeal that the principle of inquiry does not apply in latent injury cases. Alternatively, he argued that inquiry notice was not triggered until he knew facts showing the probable compensable character of his disease. Ranney claimed he did not have such facts until 1991 when he obtained an expert medical opinion linking his disease to his chemical exposure. In rejecting the argument that inquiry notice was not triggered until 1991 when Ranney received the expert opinion regarding causation, the Supreme Court stated:

> If we adopted Ranney's interpretation of when inquiry notice is triggered, the beginning of the limitations period would be postponed until the *successful completion* of the plaintiff's investigation. Such an application of the discovery rule would be contrary to our holdings in *Estate of Montag* and *Franzen.* As we stated in *Franzen,* "[t]he period of limitations is the outer time limit for making the investigation and bringing the action. The period *begins* at the time the person is on inquiry notice. *Franzen,* 377 N.W.2d at 662 (emphasis added); accord *Estate of Montag,* 509 N.W. 2d at 470.
>
> We agree with the industrial commissioner that by 1987 or 1988, at the latest, Ranney had enough information to trigger his duty to investigate. (citation omitted)

. . .

> "It is well settled that the statute of limitations is not tolled by mistake or misunderstanding. Also a diligent investigation may require one to seek further medical examination as well as competent legal representation." (citations omitted) By 1998 at the latest, Ranney knew of the possible connection between his disease and his employment; he had two years from that date to complete his investigation and file suit. His inability to find expert support for his theory of causation within that time does not prevent the limitations period from running
>
> We conclude the commissioner did not err in ruling as a matter of law that Ranney's workers' compensation claim was barred by the statute of limitations. Although this conclusion has the effect of barring a possibly meritorious claim, that is the unfortunate result of any statute of limitations. There must come a time when the interest in preventing stale claims takes precedence over the policy of deciding cases on their merits. That time has arrived in this case

Ranney, 582 N.W. 2d at 156-157

In arguing that the statute of limitations was tolled until his IME with Dr. Epp on October 12, 2012, claimant relies on Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001). However, the facts of Herrera are distinguishable from this case and Herrera is not on point because it involved a unique set of circumstances.

Herrera had a prior history of the same problem which slowly resolved with conservative treatment. When her symptoms recurred, Herrera had only conservative treatment from the time her symptoms began until she was terminated in January 1995. Id. at 285-286. Herrera never had surgery or missed work to recover from surgery. When the condition recurred, Herrera's treating physician did not believe she had a permanent injury. Therefore, the court concluded a reasonable person in Herrera's position would not have understood the seriousness or the permanency of her condition immediately when the condition recurred. Id. at 286-289.

Other cases have held that the discovery rule commenced before, or as of, the date of surgery in latent or cumulative injury claims. See, e.g., Swartzendruber v. Schimmel, 613 N.W.2d 646 (Iowa 2000), wherein it was held the discovery rule commenced upon referral to an orthopedic surgeon; Rowe v. J.C. Penney Co., File No. 5039636 (App. December 27, 2013), wherein it was held the claimant should have recognized the seriousness and probably compensable character of her injury on the date she underwent a Topaz procedure.

Because claimant in this case knew, or should have known, of the seriousness and possible compensability of his left leg condition as of September 14, 2010, at the

very latest, the date he had surgery, and because no benefits were ever paid by defendants at any time for the condition, I find that the two-year statute of limitations which applies in this case expired on or before September 14, 2012, which was more than four months before claimant filed his petition on January 17, 2013. For this reason, I find that claimant's petition should be dismissed.

Defendants also assert that the Section 85.35(3) compromise settlement between claimant and SIF in File No. 5038569, which covered claimant's left leg condition, the same condition which is the subject of this case, deprives this agency of jurisdiction for claimant to re-litigate the left leg claim against the defendants in this case.

Iowa Code sections 85.35(3) and 85.35(9) state:

> 3. The parties may enter into a compromise settlement of the employee's claim to benefits as a full and final disposition of the claim.
>
> . . .
>
> 9. Approval of a settlement by the workers' compensation commissioner is binding on the parties and shall not be construed as an original proceeding. Notwithstanding any provisions of this chapters and chapters 85A, 85B, 86 and 87, an approved compromise settlement shall constitute a final bar to any rights arising under this chapter and chapters 85A, 85B, 86 and 87 regarding the subject matter of the compromise and a payment made pursuant to a compromise settlement agreement shall not be construed as the payment of weekly compensation.

The Iowa Supreme Court interpreted the statutory language, "final bar to any further rights," broadly in United Fire v. St. Paul Fire & Marine, 677 N.W. 2d 755 (Iowa 2004) The Court concluded that "a compromise special case settlement under section 85.33 bars an employer's or it insurer's statutory right to indemnification and contribution under section 85.21(3)." Id. at p. 761. Had the Court interpreted this statutory language narrowly, perhaps it would have found a difference between the subject matter of the compromise and the third-party claim. The Supreme Court's broad interpretation of the legislative intent to terminate the commissioner's jurisdiction of a compromised claim indicates claimant's approved compromise settlement with SIF in File No. 5038569 bars his claim in this case against defendants. If an employer or its insurer cannot sue a third party for an injury resolved by way of a compromise settlement, it only stands to reason that a claimant cannot sue his employer and its insurer for the same injury previously resolved with the Second Injury Fund by way of compromise settlement.

The settlement documents in claimant's compromise settlement with SIF in File No. 5038569 states the following, in pertinent part, in Paragraph E on the second page:

> . . . I am aware that if the Workers' Compensation Commissioner approves this compromise settlement and the Second Injury Fund pays me the agreed sum, then I am barred from future claims or benefits under the Iowa Workers' Compensation Law for the injury(ies) . . .

(Ex. B, p. 2)

That language of the compromise settlement documents in File No. 5038569, which is form language formulated by this agency, supports defendants' argument that approval of the compromise settlement operates as a matter of law to bar the present claim against defendants for the same injury claimant previously settled with SIF. If the legal effect of the settlement was to foreclose only future claims against the parties to the settlement itself, the language would contain the following: ". . . then I am barred from future claims or benefits *against the Second Injury Fund only* under the Iowa Workers' Compensation Law for the injury(ies)."

Analogous to this issue is the controlling law that a claimant cannot maintain a claim against SIF if a qualifying injury has previously been the subject of an approved compromise settlement. Ulrick v. Garner Printing and Second Injury Fund, File No. 949030 (App. April 29, 1994). In Brislawn v. Chapman, File No. 1073973 (Arb. Dec. September 23, 1999), this agency held that a prior special case settlement (n/k/a compromise settlement) between the claimant and the employer and its insurer constituted a final bar of the claimant's rights under the Iowa Workers' Compensation Act, even as against SIF, which was explicitly noted not to be a released party to the settlement contract. Id., at p.2. The deputy commissioner in Brislawn stated:

> Pursuant to the special case settlement statute, it is found claimant's settlement constitutes a final bar to any further rights under Iowa Code chapter 85 including Second Injury Fund benefits under Iowa Code Section 85.64. Based on a review of the file, including official notice taken under Iowa Code Section 17A.14(4), it is found the Second Injury Fund's affirmative defense has been established by a preponderance of the evidence, and claimant is barred from recovery against the Second Injury Fund as a matter of law. Ulrick v. Garner Printing and Second Injury Fund, File No. 949030 App. April 29, 1994); Hilpipre v. Care Initiatives, File No. 1057894 (App. September 27, 1997). See also Lambert v. Second Injury Fund, File No. 716025 (App. September 30, 1983).

Therefore, I find that the compromise settlement between claimant and SIF in File No. 5038569 operates as a matter of law to deprive this agency of jurisdiction for claimant to re-litigate the left leg claim against the defendants in this case. That settlement serves as the second basis for dismissing claimant's Petition in this matter.

All other issues raised on appeal in this matter are moot.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of September 24, 2014, is AFFIRMED in its entirety.

Claimant's arbitration petition is dismissed.

Claimant takes nothing.

Claimant shall pay the costs of the appeal, including the preparation of the hearing transcript.

Signed and filed this 8th day of October, 2015.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

Copies to:

Mark Sullivan
Attorney at Law
PO Box 239
Dubuque, IA 52004-0239
sullivan@rkenline.com

Jordan A. Kaplan
Attorney at Law
1900 E. 54th St.
Davenport, IA 52807
jak@bettylawfirm.com