BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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

FILED
MAY 15 2019
WORKERS COMPENSATION

STATEMENT OF THE CASE

Myra Bradwell, claimant, filed a petition in arbitration seeking workers' compensation benefits from Quaker Oats Company (Quaker Oats) and its insurer, Indemnity Insurance Company of North America, as a result of an alleged injury sustained on July 12, 2017 that allegedly arose out of and in the course of his employment. This case was heard in Des Moines, Iowa and fully submitted on December 3, 2018. The evidence in this case consists of the testimony of claimant, Joint Exhibits 1 - 4, Defendants' Exhibit A and Claimant's Exhibits 1 – 5. Due to the late submission of a treating physician's report, defendants were permitted additional time to submit evidence. Defendants submitted Joint Exhibit 4, page 18— a letter of October 10, 2018 by Douglas Hoisington, D.O., FACS. This exhibit was admitted into the record and the record was closed. Both parties submitted briefs.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations. Defendants agreed to pay the cost of the independent medical examination of Richard Tyler, Ph.D. (Transcript, page 5)

ISSUES

Whether claimant sustained an injury on July 12, 2017 which arose out of and in the course of employment;

Whether the alleged injury is a cause of permanent disability and, if so;

The extent of claimant's disability;

Whether claimant's action is barred due to the statute of limitations; and,

Assessment of costs.

FINDINGS OF FACT

The deputy workers' compensation commissioner, having heard the testimony and considered the evidence in the record, finds that:

Myra Bradwell, claimant, was 61 years old at the time of the hearing. Claimant graduated from high school. Claimant was able to obtain short-term employment at Quaker Oats in 1975. In the first year he worked about five weeks and was laid off. He worked another year and then was laid off. (Tr. p. 13) Claimant said he has used hearing protection ever since he worked at Quaker Oats. (Tr. pp. 22, 41)

Claimant starting working at Quaker Oats in the ready-to-eat department. Claimant's job was as a puff gunner. He operated a "cannon" that would use steam to puff wheat. (Tr. p. 14) In 1979 claimant quit Quaker Oats and worked for FMC for six months. (Tr. p. 15) Claimant was laid-off from FMC. Claimant returned to Quaker Oats. Claimant passed two physical examinations for Quaker Oats. (Tr. p. 16; Joint Exhibit 1, pp. 5, 12) Claimant returned to the ready-to-eat department and operated the puffed wheat guns. (Tr. p. 16) Claimant worked that job for about a year and then worked as an extruder tender. (Tr. p. 16) Claimant testified that his work in the extruder position was noisy. (Tr. p. 17) Claimant's next position was in the chemical department. One job he had in that department was cob grinder and digester loader. (Tr. p. 17) Claimant said that the cob grinder used hammer mills. (Tr. p. 19) In 1989 claimant moved to the packaging department. Claimant testified that the packaging department was loud, but not as loud as the other departments he worked in. (Tr. p. 20) Claimant worked sanitation and would be in 17 other departments cleaning and performing other duties. (Tr. p. 23) Claimant moved into the oatmeal department from 2000 through 2017. Shortly before the hearing claimant switched to ready-to eat packaging. (Tr. p. 24) Claimant said that in this position he has to travel less in the plant and was not exposed to as much noise. Claimant said he took a pay cut in this position; he went from a level 4 to a level 3 pay grade. (Tr. p. 28) Claimant was employed at Quaker Oats at the time of the hearing. (Tr. p. 51) Claimant has been able to perform his work at Quaker Oats with his tinnitus. (Tr. p. 53) Claimant testified that he has had hip surgery recently and the transfer to his a new position at Quaker

Oats would allow him to walk less at work and reduce his noise exposure. (Tr. pp. 55, 56)

Claimant testified he would work overtime, sometimes 60 hours a week. (Tr. p. 30) At times, claimant would work 28 or more days in a row. (Tr. p. 30)

Claimant testified as to a number of noise exposure studies performed at Quaker Oats while he worked there. A study was performed in August 2012 that noted that claimant was specifically mentioned as an employee that needed dual hearing protection. Claimant testified that he was not made aware of this study at the time by Quaker Oats. (Tr. p. 44; Ex. 2, p. 136)

Claimant testified that the tinnitus did interfere with his sleeping. (Tr. p. 33) Claimant said that it also impacted his concentration. (Tr. pp. 33, 34)

Claimant testified that he was advised by Richard Tyler, Ph.D., in a University of Iowa Tinnitus Clinic group meeting and in a private meeting, to use relaxation techniques to live with tinnitus. (Tr. pp. 32, 34) Claimant testified he wore hearing protection at home when he used equipment like a mower, chain saw or when he was exposed to loud noise. (Tr. p. 49) Claimant testified that he would like the University of Iowa to provide future treatment for any hearing problems or his local "Miracle-Ear" facility. (Tr. pp. 63, 64)

Claimant testified that he first noticed ringing in his ears about four years before his deposition, which would be in 2013. (Tr. pp. 31, 32, 57) Claimant said the noise from the tinnitus was intolerable at that time. (Ex. 1, p. 4; Tr. p. 61) I find that by the end of 2013 claimant, as a reasonable person, knew or should have known the compensable nature of his injury. Therefore, I find that claimant knew or should have known by December 31, 2013, the nature, seriousness and probable compensability of his injury. Claimant filed his original notice and petition on October 6, 2017.

On July 12, 2017, Dr. Tyler issued a report concerning claimant. Dr. Tyler was provided records of noise studies at Quaker Oats, a questionnaire, and had a phone interview with claimant. (JE 3, pp. 12 – 33) Dr. Tyler noted claimant was exposed to impulsive noise when he worked as a puff gunner. (JE 3, p. 12) Dr. Tyler reviewed noise surveys from 1997, 2000, 2006, 2009, 2010 and 2012. He noted the documented noise levels were capable of producing noise-induced hearing loss and tinnitus. (JE 3, p. 13) Dr. Tyler noted that claimant worked more than 40 hours per week and at one time 28 days consecutively. Dr. Tyler commented that hearing loss guidelines are grossly inadequate for exposure of more than 40 hours. (JE 3, p. 14) Dr. Tyler noted claimant was exposed to chemicals at Quaker Oats which was not considered by Quaker Oats. (JE 3, p. 14)

Dr. Tyler noted that an audiogram of August 6, 2015 showed a bilateral noise-induced hearing loss. Dr. Tyler wrote that claimant's hearing loss is mostly in higher frequencies. Dr. Tyler used his own calculation to assess the high frequency binaural hearing loss as a 15.4 percent loss. (JE 3, p. 16) Dr. Tyler also performed his

own calculation of the extent of disability due to tinnitus. Dr. Tyler provided a 17.4 percent whole body impairment rating. (JE 3, p. 20) Dr. Tyler recommended the following medical treatment,

- He requires hearing aids because of his noise induced hearing loss. These will have to be replaced every 4-5 years.
- He will benefit from counseling and sound therapy, and tinnitus maskers for his tinnitus.
- Because of his severe high-frequency hearing loss, he is a candidate for a short-electrode cochlear implant.

(JE 3, p. 21) Dr. Tyler concluded that the work at Quaker Oats caused claimant's tinnitus and hearing loss. (JE 3, p. 22) On September 8, 2018, Dr. Tyler wrote to claimant's attorney. After reviewing Dr. Hoisington's July 2, 2018 report, Dr. Tyler stated that tinnitus can be measured and quantified accurately. (Ex. 4, p. 1) Dr. Tyler is critical of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition as to how it relates to hearing loss and tinnitus. (Ex. 4, p. 3)

On July 2, 2018, Dr. Hoisington responded to a letter regarding claimant's hearing. Dr. Hoisington was provided records to review concerning claimant's work at Quaker Oats as well as hearing tests of the claimant. Dr. Hoisington stated that claimant does not have an age corrected hearing loss under the Iowa Code. While finding no hearing loss under Iowa Code, Chapter 85.B, he did note that claimant would be a good candidate for hearing aids.

Regarding tinnitus, Dr. Hoisington stated there were no objective means to test for this condition. Dr. Hoisington wrote,

> He does not relate any specific impairment from the tinnitus he is able to function and do activities of daily living and actually do his job according to his deposition. Since there is no apportionment of hearing loss there can be no apportionment for disability for tinnitus as according to the AMA Guides to Permanent Impairment fifth edition the percentage for tinnitus is based on the percentage of the hearing loss and since there is no hearing loss calculated there can be no percentage for the tinnitus.
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> My restrictions for him would be that he continue to wear hearing protection when he is exposed to any loud noise or would be placed in an environment where loud noise is present.
>
> I would not recommend any further treatment or therapy at this time.

(JE 4, p. 9) On October 10, 2018, Dr. Hoisington reviewed Dr. Tyler's September 8, 2018 letter to claimant's attorney. Dr. Hoisington stood by his prior opinions. (JE 4, p.

18) Dr. Hoisington stated there were no objective measurements for tinnitus and the AMA Guides are the only means there are to rate a tinnitus claim. (JE 4, p. 18)

CONCLUSIONS OF LAW

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).

The diagnosis of tinnitus is a condition which is a body as a whole condition. It is therefore evaluated as an industrial disability. Ehteshamfar v. UTA Engineered Sys. Div., 555 N.W.2d 450, 454 (Iowa 1996). The Iowa Supreme Court has distinguished between "deafness" or hearing loss and tinnitus as follows:

> Besides deafness, the other major hearing disorder disease of the cochlea and the eighth cranial nerve is tinnitus, a very common symptom thought to be experienced by more than 37 million Americans. The term tinnitus denotes sounds originating in the ear (rather than in the external world) that may be ringing, buzzing, humming, whistling, roaring, hissing, clicking or chirping in character.
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> Rosco N. Gray & Louise J. Gordy, Attorneys' Textbook of Medicine § 84.63 (3d ed. 1996) (citation omitted).
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> Hearing loss, on the other hand, involves the loss of the sensation of sound. "Occupational hearing loss" under the Iowa Code is defined as 'permanent sensorineural loss of hearing in one or both ears in excess of twenty-five decibels.' Iowa Code section 85.B.4(1). Tinnitus thus falls outside the statutory definition of an occupational hearing loss. It is *not* a

> "sensorineural loss of hearing in one or both ears" because tinnitus does *not* cause a person to be unable to hear; instead tinnitus causes a person to perceive sounds that do not exist. For the same reason tinnitus does not qualify for compensation under Iowa Code section 85.34(2)(r) (loss of hearing other than occupational).
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> . . . .
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> Because tinnitus does not qualify under Code section 85B.4 (occupational hearing loss) nor Code section 85.34(2)(r) (scheduled hearing loss), it should be compensated under Code section 85.34(2)(u), the section for all other cases of permanent partial disability.

Ehteshamfar, 555 N.W.2d at 453-54.

I find the opinions of Dr. Tyler more convincing than Dr. Hoisington as to claimant having tinnitus which has caused a permanent injury. Tinnitus has been recognized as an industrial loss by this agency and the courts, regardless of whether there is or is not an objective test for tinnitus. Claimant credibly testified to tinnitus symptoms and sought treatment. The tinnitus has impacted his work and home life to a degree. I find that claimant has proven by a preponderance of the evidence a five percent whole body impairment.

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.

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

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. 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. Claimant's realization that the injurious condition will have a permanent adverse impact on employability is sufficient to meet the serious requirement. Positive medical information is unnecessary if information from any source gives notice of the condition's probable compensability. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Orr v. Lewis Cent. Sch. Dist., 298 N.W.2d 256 (Iowa 1980); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

The Iowa Supreme Court has clarified that the discovery rule applies "[w]hether a work-related injury arises because of a single event or develops cumulatively over time." Baker v. Bridgestone/Firestone, 872 N.W.2d 672, 684 (Iowa 2015).

In this instance, the employer did not pay weekly workers' compensation benefits to claimant. Therefore, claimant was obligated to file his claim with this agency within two years from the date of the occurrence of the injury. However, the statute of limitations is tolled until claimant knew or should have known the nature, seriousness, and probable compensable character of his injury. Id. at 685.

Having found that claimant knew or should have known the nature, seriousness, and probable compensable character of his injury on or before December 31, 2013, I conclude that defendants have successfully proven their statute of limitations defense. I conclude that, although claimant sustained a compensable tinnitus injury as a result of his exposures at work, he failed to timely assert those rights and his claim is now barred by Iowa Code section 85.26(1).

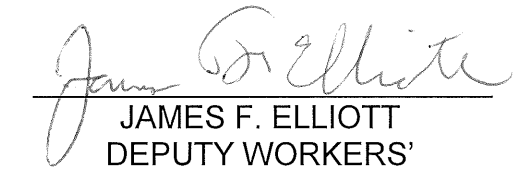
ORDER

Claimant shall take nothing further in this case.

Defendants shall pay the costs of Dr. Tyler's independent medical examination.

Each party shall be responsible for their own costs.

Signed and filed this 15th day of May, 2019.



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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 in writing and received by the commissioner's office 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 a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.