BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
JAN 16 2018
WORKERS' COMPENSATION

MELVIN MARTIN, Claimant, vs. CITY OF HARLAN, Employer, and EMCASCO INSURANCE CO., Insurance Carrier, Defendants.	:	File No. 5057038 ARBITRATION DECISION Head Notes: 2400, 2401, 2208

STATEMENT OF THE CASE

Melvin Martin, claimant, filed a petition in arbitration seeking workers' compensation benefits against City of Harlan, employer, and EMCASCO Insurance Co., insurer, for a disputed work injury.

This case was heard on September 26, 2017, in Des Moines, Iowa. The case was considered fully submitted on October 27, 2017 upon the simultaneous filing of briefs.

The record consists of joint exhibits 1-14 and the testimony of the claimant.

ISSUES

1. Whether claimant has sustained a permanent injury arising out of and in the course of his employment;
2. Whether the hearing loss is industrial or scheduled;
3. Whether the claim is barred by untimely notice;
4. Whether the claim is barred by the statute of limitations;
5. What the appropriate rate is.

STIPULATIONS

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.

The parties agree that claimant was an employee at the time of the alleged injury. They stipulate that at all times material hereto, claimant was married and entitled to two exemptions. If the injury date is found to be January 29, 2010, the parties agree that his gross earnings were $1036.40 per week.

The appropriate commencement date for permanent partial disability benefits is the date of injury.

FINDINGS OF FACT

Claimant is a 69-year-old person. He graduated from high school in 1967. He took a few college courses in conjunction with his employment with the City of Harlan. He began working for the City of Harlan in 1970. He was a laborer at the waste water facility. He retired from that department on January 29, 2010.

In 1978, he was promoted to assistant superintendent and conducted lab work in the main building of a new facility. In the 1990s he was promoted to superintendent and he held that position until his retirement.

Claimant asserts he suffered hearing loss and tinnitus as a result of exposure to pumps, lifts, air compressors, heat exchanges, and generators.

At the time of his retirement, claimant's gross weekly wages was $1036.40 per week. At all material times, claimant was married and entitled to two exemptions. Based on the foregoing numbers, the weekly benefit rate for a date of injury of January 29, 2010, would be $661.02.

The claimant was not employed after January 29, 2010. Defendants assert that the lack of earnings result in the application of the minimum benefit rate.

The defendants do not challenge the causation arguments of the claimant. Instead, defendants focus on a set of affirmative defenses centered around the late filing of the tinnitus claim as well as the allegation that even if the claimant's petition was timely filed and notice was properly given, there is no permanent industrial disability flowing from the tinnitus.

Thus the summary of facts rest on primarily the timeline issues as well as the industrial disability factors.

Claimant worked for the City of Harlan for over forty years with most of that time spent in the wastewater treatment plant. There is little dispute that the treatment plant is a noisy environment. The main level of the plant holds a large heat exchanger. Directly underneath the main floor are three sludge pumps that can be viewed through a metal grate in the flooring between the main and lower levels.

No decibel testing was performed in the plant prior to November 2014, but the information provided by the manufacturer indicates that when all three pumps were operating, the noise level would be approximately 98 decibels. (JE 8:45) One of the pumps was replaced in 1998 and reduced the noise level by some degree.[1] (JE 8:45) Other machines, such as the shop generator were 100 decibels. (JE 8:46)

Claimant worked in and around these machines on a daily basis. When he was not in the main treatment center plant, he worked at a separate pump station that held four pumps in the lower level, also visible through a large metal grate. (JE 11:59-61) In the maintenance shop, a large and loud generator was present.

Claimant testified that he began noticing ringing in both ears at some point in the 1990s and that his hearing loss was such that he recognized he would need hearing aids prior to his retirement. He also testified that he knew the hearing problems were permanent. Claimant further testified that he believed the hearing loss and tinnitus were associated with his work environment. He did not change his work environment even after he noticed that he had ringing in his ears.

There was only sporadic hearing testing performed by defendant employer. Exhibit 1 shows tests in 1977, 2006, and 2008. (JE 1:2, 4) The 1977 hearing test showed no loss of hearing whereas the 2006 and 2008 tests demonstrated sensorineural hearing loss. (JE 3:24) He did not wear hearing protection while around the pumps, heat exchange or generators. There was hearing protection at the grinder and he always wore hearing protection with the chain saw. Prior to November 7, 2014, he did not recall talking to anyone about his hearing or hearing problems. The above mentioned test results were not provided to the claimant and he was not aware of the results until after November 2014 when he went to the City Clerk to request them. (JE 13)

Claimant requested these results after he heard that a co-worker was pursuing a workers' compensation claim in connection with hearing loss. On November 7, 2014, claimant obtained hearing aids. This was the first time that he had consulted with a healthcare professional regarding his hearing and it was the first time that he had been prescribed hearing aids due to his hearing loss.

Richard Tyler, Ph.D. issued a report noting that in 1977 claimant had zero hearing loss in both ears. (JE 1, p. 2) Dr. Tyler, using his own non-peer reviewed

---

[1] Two pumps generated 89 decibels of noise during the workday. The new pump installed in 2014 apparently had an 81 decibel rating. (JE 8:45)

methodology, suggests a whole body impairment of 13 percent based on the tinnitus. (JE 2:10) Dr. Tyler also identified work environments that claimant should avoid such as places with loud noises or unpredictable noise levels. (JE 2:12)

At the request of the employer, claimant was evaluated by Mark Zlab, M.D. Dr. Zlab is an ENT. (JE 3:24) On August 22, 2017, Dr. Zlab examined claimant and conducted an audiogram. Based on the audiogram, Dr. Zlab concluded claimant had sustained a 26.77 percent loss of hearing as well as tinnitus; both conditions are permanent. (JE 3:25) Dr. Zlab notes that there is no treatment for tinnitus.

Out of work noise exposures include hunting, and use of a gas-powered chain saw approximately 28 hours per year. (JE 2:7)

He currently visits his doctor every three months or so for adjustments to his hearing aids. Claimant has not looked for work since he retired and has no desire to return to employment.

On September 11, 2015, the claimant's attorney wrote to the city clerk and informed the city of the claimant's potential hearing loss claim. (JE 4:28) This claim was ultimately denied on February 10, 2016, on the basis that they could not "determine an injury arose out of and in the course of ... employment." (JE 4:30)

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

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).

Claimant was constantly in and around noisy machinery for at least forty years while work for defendant employer. Despite this, hearing tests were not conducted routinely. When claimant retired, he learned that a co-worker was bringing a hearing loss and/or tinnitus claim against the defendant employer. Up until that time, claimant was unaware that he could be compensated for such a loss.

After reporting his injury to his employer around November 2014, claimant began undergoing treatment. Both Dr. Zlab, claimant's treating physician and evaluator hired by the defendants, as well as claimant's expert, Dr. Tyler, opined that claimant sustained hearing loss and tinnitus as a result of exposure to noise levels at claimant's workplace. They both agreed that the hearing loss and tinnitus were permanent.

There is no contrary evidence presented. Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994). Therefore, it is found that claimant sustained permanent hearing loss and tinnitus as a result of long-term exposure to noise in the workplace and therefore claimant has suffered an industrial loss.

Defendants argue that the claim for hearing loss is barred for lack of timely notice or failing to file before the statute of limitations expired. The first step in evaluating these defenses is to determine the claimant's injury date.

According to the Iowa Supreme Court, a cumulative trauma injury date is fixed "as of the time the disability manifests itself." Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824, 829 (Iowa 1992) The manifestation date is a fact based determination. Tyson Foods v. Shaw, Iowa Ct. App., File No. 12-0432 (October 3, 2012).

The Supreme Court of Iowa concluded the limitations period does not commence "until the employee ... knows that the physical condition is serious enough to have a permanent adverse impact on the claimant's employment or employability." Herrera v.

IBP, Inc., 633 N.W.2d 284, 288 (Iowa 2001). In Larson, the Supreme Court further elucidated that "permanent adverse impact" provides an abbreviated or alternative characterization of the three elements of the discovery rule test: nature, seriousness, and probable compensable character of the injury. Larson Mfg. Co. v. Thorson, 763 N.W.2d 842, 854-55 (Iowa 2009).

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 DeLong v. Iowa State Highway Comm'n, 229 Iowa 700, 703, 295 N.W. 91, 92 (1940), the court held the claim of lack of notice is an affirmative defense and the burden of proof would be on the party asserting it.

Iowa Code section 85.23 provides:

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

Claimant first gave notice to defendants that he was concerned about his hearing loss in November 2014. He received his first set of hearing aids in November 2014. The petition was filed July 27, 2016. Claimant did not realize that his hearing loss was a compensable claim until a co-worker contacted claimant about the issue. Despite noting ringing in his ears, claimant did not seek medical attention or modify the way he performed his job.

Therefore, it is determined that claimant did not have an understanding of the nature, seriousness and compensable character of his injury. While he knew he had hearing loss and ringing in his ears that he attributed to his work environment, he was unaware that it was a compensable injury until November 2014.

Defendants argue that this case is on all fours with Chapa v. John Deere Ottumwa Works, 652 N.W.2d 187, 189 (Iowa 2002) wherein the injured worker's tinnitus claim was found to be time barred.

The injured worker had been exposed to a noisy environment at work. He retired on December 31, 1995, and filed a petition on December 24, 1997. The appellate court

found that claimant understood the nature of his injury (the ringing in his ears) and the seriousness because it affected his sleep, he had problems concentrating, and he was forced to talk louder, affecting his communications with co-workers. Chapa, 652 N.W.2d at 190.

The court went on to find that the claimant knew, or through reasonable inquiry, should have known of the probable compensable nature of the injury from conversations with the company audiologist and co-workers. Chapa, 652 N.W.2d at 190.

This is the distinguishing factual difference between Chapa and the present case. In the present case, claimant had no contact with either co-workers or a company audiologist about his hearing loss or tinnitus. While the employees did have to yell to speak to one another that is not the same as understanding that the hearing loss or ringing in the ears was compensable. Once claimant learned of his co-worker's claim and obtained hearing aids, the manifestation date became fixed.

Therefore, the fixed injury date for this cumulative injury is found to be November 7, 2014.

He informed the defendants of his concern over his hearing loss in November 2014 when he approached the city clerk for documentation of audiology tests conducted while claimant was still employed. Therefore, proper notice was provided within 90 days of the injury. Further, the petition was timely filed within two years of the injury date of November 7, 2014.

The next issue is the extent of claimant's disability.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Claimant retired at the age of 62, two years prior to his discovery of hearing loss and tinnitus attributable to exposure to excessive noise levels at his workplace. He has not looked for employment since his retirement nor is he desirous of returning to the workplace.

He admitted that if he had perfect hearing he would not have held differing jobs or sought accommodations. Dr. Taylor set claimant's whole body loss at 13 percent. Dr. Zlab did not offer an impairment rating based on tinnitus, but measured the hearing loss at 26.77 percent.

Had claimant not retired, he would likely be doing the same work today as he did before, regardless of the tinnitus. Further, if he had perfect hearing, he would not have changed his employment from what he had done prior to his retirement.

Dr. Tyler recommended that claimant avoid certain work environments such as places with loud noise, unpredictable noise levels, places that require accurate concentration, places that are stressful and where auditory localization skills are required.

Based on the foregoing, it is determined that claimant's industrial disability due to his hearing loss and tinnitus is 5 percent of the whole body.

The final issue is one of rate. Defendants argue that any injury date following claimant's retirement would need to be calculated at the minimum wage rate. Claimant did not brief the issue or provide an alternate wage calculation other than the stipulated rate upon claimant's retirement in 2010.

The statute calculates benefit rate based on the 13 calendar weeks immediately preceding the injury. Iowa Code § 85.36. When there are not sufficient weeks worked prior to the injury, the agency is allowed to review the records of similarly situated employees. In this case, there is no such evidence regarding similarly situated employees. Claimant did not have wages preceding the injury date and therefore, the benefits are calculated according to Iowa Code § 85.36(9). Claimant was not employed in the twelve months immediately preceding the injury. The rate is therefore based on the minimum, which is the lesser of 35 percent of the statewide average weekly wage or the spendable weekly earnings of the employee. Iowa Code § 85.37, 85.34. There is no evidence as to the spendable weekly earnings of the employee in this case. On November 7, 2014 the statewide average weekly wage was $786.23. The appropriate rate is thus $199.72.

Claimant also seeks reimbursement of medical expenses. The medical expenses are related to claimant's hearing aids and therefore the responsibility of the defendants.

Claimant seeks assessment of costs. Included in claimant's assessment is the cost of Dr. Tyler's report. Dr. Tyler is an expert providing an independent medical examination. Pursuant to DART v. Young, an examination that is subject to Iowa Code § 85.39 cannot be assessed as a cost. DART v. Young, 867 N.W.2d 839, 846 (2015).

ORDER

THEREFORE IT IS ORDERED:

That defendants are to pay unto claimant twenty-five (25) weeks of permanent partial disability benefits at the rate of one hundred ninety-nine and 72/100 dollars ($199.72) per week from November 7, 2014.

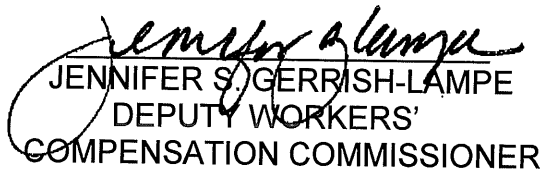
That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

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

That defendants shall pay the costs of this matter pursuant to rule 876 IAC 4.33 excluding the report of Richard Tyler, Ph.D.

Signed and filed this 16th day of January, 2018.



JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Jason Neifert
Attorney at Law
1441 – 29th St., Ste. 111
West Des Moines, IA 50266
jneifert@nbolawfirm.com

D. Brian Scieszinski
Attorney at Law
801 Grand Ave., Ste. 3700
Des Moines, IA 50309-2727
Scieszinski.brian@bradshawlaw.com

JGL/sam

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.