BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BEN BURRIS, Claimant, vs. ANDERSEN CORPORATION, Employer, and OLD REPUBLIC INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5061159 APPEAL DECISION Head Note Nos: 1803, 2502

Claimant Ben Burris appeals from an arbitration decision filed on August 30, 2018. Defendants Andersen Corporation, employer, and Old Republic Insurance Company, insurance carrier, respond to the appeal. The case was heard on October 18, 2017, and it was considered fully submitted in front of the deputy workers' compensation commissioner on November 27, 2017.

In the arbitration decision, the deputy commissioner addressed both of the affirmative defenses raised by defendants. With respect to notice, the deputy commissioner found defendants had actual notice of the toxic compounds with which claimant was required to work, along with the toxicity of those compounds. However, the deputy commissioner determined claimant failed to timely file his claim. More specifically, the deputy commissioner found claimant discovered his injury no later than January of 2007, when he proceeded with a kidney transplant. Because claimant did not file his original notice and petition within two years of his kidney transplant, the deputy commissioner found claimant's petition was untimely and barred by the statute of limitations in Iowa Code section 85.26.

On appeal, claimant asserts the deputy commissioner used the wrong legal test in her statute of limitations analysis and claimant asserts he timely filed his claim. Claimant further asserts his exposure to toxic materials while employed by defendant-employer caused his kidney condition and that he provided sufficient notice to defendants.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 17A.5 and 86.24, those portions of the proposed arbitration decision filed on August 30, 2018, that relate to the issues properly raised on intra-agency appeal are reversed.

FINDINGS OF FACT

Claimant began working at Eagle Window and Door (hereinafter "Eagle Window") as a painter in July of 1983 and continued to do so through November 11, 2015. (Hearing Transcript, page 62) Over the course of claimant's more than 30-year employment at Eagle Window, Eagle Window has had several owners. From the date of claimant's hire through 1987, Eagle Window was owned by Lancer Corporation; Masco Corporation purchased Eagle Window in 1987 and were the owners until the company sold to American Architectural Products in 1995; from 1995 through 2000, Eagle Window was owned by American Architectural Products; from 2000 through 2004, Eagle Window was owned by Lensalata Business Investments; and finally, from roughly 2005 through claimant's last day of work, Eagle Window was owned by Andersen Corporation - the named defendant-employer in this case (hereinafter "Andersen"). (Tr., pp. 91-92)

While Eagle Window was owned by Lancer Corporation, Masco Corporation and American Architectural Products, claimant was stationed to work at a plant on East Ninth Street in Dubuque, Iowa. (Tr., p. 68) Claimant explained that in the plant's courtyard were barrels of hazardous waste stacked 10 to 12 barrels high from the plant's previous occupants. (Tr., p. 71) At some point in the 1980s, claimant showed up to work and the barrels had been dumped into a sewer that was "right outside the lunchroom." (Tr., p. 71) Claimant also testified there were puddles of hazardous waste in the courtyard that were four inches deep. (Tr., p. 71)

During claimant's direct exposure of these chemicals, he was not provided with any protective or safety equipment or clothing. (Tr., pp. 72-73) He was eventually given a respirator in 1987. (Tr., p. 73)

In the late-1980s or early-1990s, claimant and several of his co-workers were instructed by a supervisor to attend a physical due to suspected exposures to the improperly disposed chemicals and waste. (Exhibit B, pp. 11-13; [Deposition Tr., pp. 44-46, 51]; Tr., p. 99) The physician who performed the physical, Dr. Krish, discovered blood in claimant's urine. (Ex. B, p. 12 [Depo. Tr., pp. 46]) Claimant then transferred treatment for his kidney condition to his primary care provider, John Whalen, M.D. (Def. Ex. B, pp. 13-14 [Depo. Tr., pp. 50-53])

Claimant began feeling poorly due to his kidney condition in 1994 or 1995. (Ex. B, p. 12 [Depo. Tr., p. 47]) Claimant continued various forms of conservative treatment with Dr. Whalen through the remainder of the 1990s and into the early 2000s, but he eventually required a kidney transplant in 2007. (See Joint Exhibit 1, pp. 1-11; JE 3) After the transplant, claimant returned to work at Eagle Window and continued working through November 11, 2015.

On that date, claimant's condition deteriorated to the point that he was unable to work due to excessive swelling. (Tr., p. 82) Claimant's wife transported him to the hospital, where claimant was immediately started on dialysis. (Tr., p. 83) Claimant did not return to work, and at the time of the hearing, he remained on dialysis for nine hours a day, seven days a week. (Tr., p. 86) As a result, I find November 11, 2015, was the day claimant became actually incapacitated from performing his job.

In his deposition, claimant testified he believed it was the dumping of hazardous materials from 1983 through 1987 and his continued exposure through the year 2000 at the East Ninth Street plant that caused his kidney disease. (Ex. B, p. 8 [Depo. Tr., pp. 30, 32]; Tr., p. 89) Claimant specifically denied being exposed to any sort of toxic waste or material after 2000 when Eagle Window moved to a new location on Kerper Boulevard in Dubuque after being purchased by American Architectural Products. (Ex. B, p. 8 [Depo. Tr., p. 30]

Consistent with claimant's deposition testimony is the opinion of Gregory Peterson, D.O., who was asked by claimant's attorney to address the causal relationship between claimant's work-related exposures and his kidney condition. Dr. Peterson, after evaluating claimant, reviewing his medical records, and reviewing a 1992 environmental and industrial investigation report, opined that claimant's kidney condition was the result of exposure "to the myriad of toxic substances at the work site" in the 1980s and 1990s.[1] (JE 4, pp. 2-3) Dr. Peterson reaffirmed his opinion at hearing, explaining that claimant during this time was exposed to "quite significant" levels of industrial solvents, toxic substances, and volatile organic compounds, which are known to cause kidney disease. (Tr., pp. 13-14)

Like Dr. Peterson, claimant's kidney physician of more than two decades, John Whalen, M.D., also opined it was "highly likely" that claimant's membranous glomerulonephritis was secondary to his exposure to various carbons and toxic chemicals while working at Eagle Window. (JE 6)

Defendants obtained the opinion of Peter Matos, D.O. (JE 5) Dr. Matos was asked by defendants to address whether claimant's exposures from 1983-2000 to EYYC Benzene Tolvel Xlol toxic waste played any causal relationship in the development of his kidney disease. (JE 5, p. 4) Contrary to the opinions of Dr. Peterson and Dr. Whalen, Dr. Matos opined that he did not believe claimant's alleged exposures between 1983 and 2000 played any causal relationship in the development of his kidney disease. (JE 5, p. 5)

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[1] In his report, Dr. Peterson erroneously attributes this work site to Anderson when, in fact, Eagle Window was owned by Lancer Corporation during this time. (See JE 4, p. 3) Dr. Peterson acknowledged on cross-examination that he was unaware of the timeline of various owners of Eagle Window. (Tr., p. 40)

Ultimately, with respect to claimant's exposure from his date of hire through 2000, I find the causation opinions of Dr. Peterson and Dr. Whalen to be more persuasive than those of Dr. Matos. The opinions of Dr. Peterson and Dr. Whalen more closely align with the timeline and progression of claimant's exposures and the development of his kidney condition. Dr. Whalen also had the benefit of treating claimant from the onset of his kidney disease in the early 1990s through his kidney transplant and dialysis.

At hearing, claimant's testimony broadened the timeframe during which he alleged he was injuriously exposed to harmful chemicals. More specifically, he testified he had continued exposure to toxic chemicals after 2000 when Eagle Window moved to a new location on Kerper Boulevard in Dubuque after being purchased by American Architectural Products. (Tr., p. 75) Claimant testified his exposure to toxic chemicals after 2000 occurred during his "field work," when he painted in confined areas and maintained chemicals and compounds in his non-ventilated work van. (Tr., pp. 75-81) Claimant last performed field work in 2014. (Tr., p. 69)

Claimant addressed the discrepancy between his deposition and hearing testimony when confronted by defendants' counsel on cross-examination:

> Q. . . . And in fact, when I asked you at your deposition, sir, if you felt you had any toxic exposure after 2000 when you moved from the East Ninth Street address to the Kerper address, whether you had any toxic exposure after that, your answer was "No." Do you remember telling me that?
>
> A. <u>Toxic exposure when you asked me that question meant to me were you walking in it and eating it like we used to do in the old building, but I was exposed to it and was working with toxic chemicals after that</u>, but I was not rubbing on my shoes or getting it off my shoes every day like we were in the old building and wiping it off my skin and eating probably six feet away from some of the most toxic chemicals known to man, so yea, that's - - that was the main exposure, but I continued to be exposed or working with toxic chemicals so there's documents purporting - - showing you that.

(Tr., pp. 89-90) (emphasis added).

Claimant's hearing testimony regarding his continued exposure after 2000 was consistent with Dr. Peterson's testimony at hearing.[2] Dr. Petersen explained he reviewed the material safety data (MSD) sheets of the compounds that were kept in claimant's work van during his field work. (Tr., pp. 15, 17-20; Exhibit 4) The compounds, according to Dr. Peterson, could get into claimant's body through inhalation or skin given the confined space of claimant's van. (Tr., p. 22) As a result, Dr. Peterson opined that claimant's kidney failure was "the result of his exposure to a number of

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[2] Dr. Peterson's hearing testimony regarding exposures after 2000 was allowed over defendants' objections. Defendants did not raise the admissibility of Dr. Peterson's testimony on cross-appeal.

these industrial solvents and toxins." (Tr., p. 23) More specifically, he agreed it was claimant's exposure through roughly 2015 that caused his condition. (Tr., p. 25)

Dr. Peterson's hearing testimony regarding claimant's exposures after 2000 was unrebutted[3] and was consistent with claimant's hearing testimony. I therefore adopt Dr. Peterson's causation opinions and find claimant's exposures during his field work from 2000 through roughly 2014 also contributed to his kidney condition. Because he stopped doing field work in roughly 2014, I find 2014 was the last time when claimant was exposed to toxic and disease-causing substances.

As mentioned, Dr. Peterson indicated claimant's exposure after the dumping in the 1980s was "quite significant," and he testified he was amazed and startled by the way in which claimant was carrying compounds in his van, which he considered a confined space. (Tr., pp. 13-14, 21-22) I therefore find claimant's exposures were more prevalent in the employment concerned than in everyday life or in other occupations.

In his hearing testimony, Dr. Peterson noted claimant's exposure in the van was not singular, but occurred "at different times of the day" and even when he was not directly working with the substances due to the particles that "went home" with him on his clothing or Thermos. (Tr., pp. 54, 58) I therefore find claimant's kidney disease was caused by a prolonged and passive exposure as opposed to one traumatic exposure or a sudden, specific incident of exposure.

With respect to claimant's understanding of his employment relationship with Eagle Window's corporate owners, claimant testified he always considered Eagle Window to be his employer. (Tr., p. 65) This understanding likely arose out of the continuity experienced by claimant while working at Eagle Window despite several different owners. Claimant testified "every product [he] ever touched during [his] employment for 32 ½ years was with an Eagle Window & Door product in an Eagle Window & Door facility." (Tr., p. 66) His duties over his more than 30-year tenure at Eagle Window also remained the same through the various owners, as did his seniority. (Tr., pp. 64, 67) There is no evidence in the record that claimant ever had to re-apply for his job when ownership changed hands. Ultimately, there is no evidence that claimant's work conditions or nature of his employment changed despite the change in corporate ownership.

Complicating matters, however, is the fact that in his original notice and petition, claimant listed Andersen—not Eagle Window—as the employer. Defendants acknowledge in their brief that Andersen eventually became claimant's employer, but not until it purchased Eagle Window in 2004 or 2005. (See Def. Appeal Brief, p. 21)

Had Eagle Window been the named-defendant-employer instead of its corporate owner, there would be little question regarding whether its representatives were alerted to the possibility of a potential work-related injury or disease. As discussed, claimant

[3] Dr. Matos' report only references exposures through the year 2000.

was directed in the late-1980s or early-1990s by a supervisor to attend a physical due to the concern that employees were exposed to toxic waste and chemicals. This employer-directed physical revealed blood in claimant's urine. But Andersen was not the corporate owner at the time.

By the time Andersen acquired Eagle Window in roughly 2005, and became claimant's employer, claimant's kidney condition had progressed to the point that Dr. Whalen was discussing a kidney transplant. (See JE 1, p. 7) That transplant eventually occurred in 2007, during Andersen's period of ownership.

When the donor kidney failed over the course of the next several years, claimant underwent nearly a year of "antirejection therapy"—which claimant refers to as "chemotherapy"—that nearly "killed him." (Tr., pp. 56-57) This treatment occurred in roughly 2014, and while claimant was able to continue working at Eagle Window, the treatment rendered him incapable of continuing his field work. (Tr., p. 69) By November 11, 2015, after more than 30 years at Eagle Window, claimant's condition deteriorated to the point that he was unable to return to work in any capacity. In other words, although claimant had an established kidney condition when Andersen took over ownership of Eagle Window, claimant's condition deteriorated rapidly and severely during Andersen's ownership.

Claimant testified his field work supervisors were aware he was sick in the summer of 2015 after his antirejection therapy. (Tr., pp. 84-85) This testimony was unrebutted. With this evidence in mind, I find claimant's supervisors were aware after Andersen acquired ownership of Eagle Window that claimant was suffering from kidney disease.

With respect to whether there was sufficient information to make Andersen aware that claimant's disease might be work related, the deputy commissioner found as follows:

> Defendants had actual notice of the toxic compounds claimant was required to work with or the ones he was around over the course of his 32 ½ years of employment at Eagle Window and Door/Andersen Corporation. Exhibit 4 details some but not all of the toxic compounds to which claimant was exposed. Exhibit 4 also contains a section which discusses "effects of overexposure." The prolonged exposure effects are established in the material safety data sheets. The knowledge of the toxicity of those compounds are imputed to the employer.

(Arbitration Decision, p. 18) Importantly, defendants did not cross-appeal this finding. It is therefore adopted herein.

Claimant's Exhibit 4, which was referenced by the deputy commissioner, contains MSD sheets for many of the chemicals and compounds claimant kept in his van during his field work, which he performed during Andersen's ownership. (See Tr.,

pp. 76-79). The "effects of overexposure" in these MSD sheets include several references to the potential of kidney damage. (Ex. 4, pp. 11, 17, 40, 47)

Again, defendants did not appeal the deputy commissioner's finding that they had knowledge of the toxicity of the compounds to which claimant was exposed. I find this knowledge, coupled with claimant's rapid decline after Andersen acquired ownership of Eagle Window, was information that would have alerted a reasonably conscientious manager that claimant's kidney disease may be work related.

As mentioned, claimant is now on dialysis for nine hours a day, seven days a week. Dr. Peterson opined claimant, who was in his 60s at the time of the hearing and whose work life was spent primarily at Eagle Window, would be "unable to work at any job" due to the dialysis and his muscle wasting. Dr. Peterson also found claimant sustained an 85 to 90 percent impairment to his body as a whole. (JE 4, p. 1, 3) I find Dr. Peterson's opinion convincing. I therefore find claimant's kidney disease has rendered him wholly incapable of returning to work for which he was suited.

CONCLUSIONS OF LAW

Injury or Occupational Disease

The first issue to be decided is whether claimant's condition should be considered as an injury under Iowa Code chapter 85 or an occupational disease under Iowa Code chapter 85A.

Iowa workers' compensation law distinguishes occupational diseases from work injuries. Iowa Code sections 85.61(4)(b), 85A.8, 85A.14.

As explained by the Iowa Supreme Court in IBP, Inc. v. Burress:

> In order to qualify for workers' compensation benefits under chapter 85, the employee must demonstrate "(1) the claimant suffered a 'personal injury,' (2) the claimant and the respondent had an employer-employee relationship, (3) the injury arose out of the employment, and (4) the injury arose in the course of the employment." *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 220 (Iowa 2006). Comparatively, to recover under chapter 85A, "the disease must be causally related to the exposure to harmful conditions of the field of employment," and "those harmful conditions must be more prevalent in the employment concerned than in everyday life or in other occupations." *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181, 190 (Iowa 1980).

779 N.W.2d 210, 214 (Iowa 2010).

Thus, only two basic requirements must be met to prove causation of an occupational disease. See Iowa Code section 85A.8; McSpadden, 288 N.W.2d at 190.

In practice, "an occupational disease is generally acquired from repeated exposure to a toxin in the workplace." Burress, 779 N.W.2d at 216 (citing Doerfer Div. of CCA v. Nicol, 359 N.W.2d 428, 432 (Iowa 1984)). "The term 'exposure' indicates a passive relationship between the worker and his work environment rather than an event or occurrence or series of occurrences, which constitute injury under the Workers' Compensation Act." Noble v. Lamoni Prods., 512 N.W.2d 290, 295 (Iowa 1994). In other words, unlike occupational diseases, "'an injury has its origin in a specific identifiable trauma or physical occurrence or, in the case of repetitive trauma, a series of such occurrences.'" Id. at 295. (quoting Luttrell v. Indus. Comm'n, 507 N.E.2d 533, 541–42 (1987)).

In Perkins v. HEA of Iowa, Inc., the court determined the claimant's hepatitis C was an injury and not an occupational disease because "infection was linked to a sudden, specific incident of exposure." 651 N.W.2d 40, 43 (Iowa 2002) In Burress, the court similarly decided the claimant's brucellosis was an injury and not an occupational disease because it was not contracted "through prolonged or passive exposure; it only took one traumatic exposure." 779 N.W.2d at 217.

In this case, I found claimant's kidney disease was caused by a prolonged and passive exposure to chemicals and toxins from the dumping in the 1980s through his field work that ended in 2014. Unlike in Burress and Perkins, claimant's disease developed over time and was not linked to one traumatic exposure or a sudden, specific incident of exposure. Burress, 779 N.W.2d at 217; Perkins, 651 N.W.2d at 43. I therefore conclude claimant's kidney disease should be treated as an occupational disease under Iowa Code chapter 85A.

As mentioned, a claimant need meet only two basic requirements to prove causation of an occupational disease: "the disease must be causally related to the exposure to harmful conditions of the field of employment," and "those harmful conditions must be more prevalent in the employment concerned than in everyday life or in other occupations." McSpadden, 288 N.W.2d at 190; see Iowa Code section 85A.8.

Relying on the opinions of Dr. Peterson, I found claimant's kidney condition was casually related to his exposures both from the dumping of hazardous waste at his work site and from the compounds he carried in his work van during his field work. I also found these conditions and claimant's exposures were more prevalent in claimant's employment than in everyday life or other jobs. I therefore conclude claimant satisfied his burden to prove work-related causation of his kidney disease.

Which Employer Liable

Having determined claimant sustained a work-related occupational disease, the next issue to be decided is which employer is liable given the numerous owners of Eagle Window over claimant's more than 30-year career.

Iowa Code section 85A.10 provides, "If compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of the disease, is liable for the compensation."

The Iowa Supreme Court has adopted the position that section 85A.10 "does not require a claimant to prove causation by any particular employer, or that the last 'injurious exposure' in fact be the cause of the disease." Doerfer Div. of CCA v. Nicol, 359 N.W.2d 428, 432–33 (Iowa 1984) (citing McSpadden, 288 N.W.2d at 188-91) Instead, "it is sufficient that claimant prove certain hazardous conditions induced his disease and that these conditions existed at the last place he was employed in a concentration sufficient to cause the disease." Id. (citing McSpadden, 288 N.W.2d at 188-89).

Ultimately, application of Iowa Code section 85A.10 requires identification of the timing of the "last injurious exposure." To do so, the court in Doerfer Division of CCA v. Nicol adopted the "date of disability test":

> In the search for an identifiable instant in time which can be used to determine ... who is the last employer for purposes of the last injurious exposure rule, the date of disability is frequently chosen. Once the date of disability is determined, the determination of which insurer is liable is accomplished by simply searching backwards to find the last time when claimant was exposed to the disease-causing substance, subject, of course to the jurisdiction's rules on the degree of exposure required.

359 N.W.2d at 433-34 (quoting 4 A. Larson, The Law of Workmen's Compensation § 95.25(a) (emphasis added)).

"Put another way, the date of the last injurious exposure can never come after the date of the disability." Vokes v. Am. Home Prod., 672 N.W.2d 333, 2003 WL 22346662 at *3 (Iowa Ct. App. 2003).

Under Iowa Code chapter 85A, the date of disability is "the event or condition where an employee becomes actually incapacitated from performing the employee's work or from earning equal wages in other suitable employment because of an occupational disease." Iowa Code section 85A.4.

In this case, I found claimant became actually incapacitated from performing his work on November 11, 2015 - when he became permanently unable to return to work. I therefore conclude claimant's date of disability is November 11, 2015.

I acknowledge symptoms of claimant's kidney disease manifested long before November 11, 2015. In fact, claimant had a kidney transplant in 2007. However, "it does not detract from the operation of this rule to show that the disease existed under a prior employer or carrier, or had become actually apparent, or had received medical treatment . . . so long as it had not resulted in disability." Doerfer, 359 N.W.2d at 433-34 (quoting 4 A. Larson, The Law of Workmen's Compensation § 95.25(a)). Again, it was

not until November 11, 2015, the date on which claimant was rendered unable to work, that his disablement occurred under chapter 85A. See Vokes, 672 N.W.2d 333, 2003 WL 22346662 at *2 (affirming commissioner's denial of indemnity benefits for claimant's asbestos exposure when claimant continued to work without restriction or reduction in earnings).

As instructed by Doerfer, I searched backwards from November 11, 2015, and found 2014, when claimant last did field work, was the last time when claimant was exposed to the disease causing substances. 359 N.W.2d at 433-34; see Vokes, 672 N.W.2d 333, 2003 WL 22346662 at *4 ("Application of the last injurious exposure rule does not require [claimant] to give a specific month and date.") I therefore conclude claimant's last injurious exposure occurred in 2014. Because Eagle Window was owned by Andersen in 2014 when claimant sustained his last injurious exposure, I conclude Andersen would be the corporation liable for claimant's compensation pursuant to Iowa Code section 85A.10 (so long as defendants do not prevail on their affirmative defenses, which will be addressed below).

I recognize defendants may be frustrated by this outcome, as Anderson Corporation is being held accountable for a kidney condition that was put into motion long before their ownership commenced in the mid-2000s. The court, however, addressed this perceived unfairness in Doerfer:

> The last injurious exposure rule codified in Iowa Code section 85A.10, coupled with the time of disability test, contains an acknowledged element of arbitrariness. As we wrote in *McSpadden,* 288 N.W.2d at 188, chapter 85A "identifies the employer who shall be held accountable." In the long view, there is merit in not consigning a diseased employee's claim to the sidelines while two employers stage a lengthy fight over apportionment, or responsibility, or inject the problems of out-of-state employers and statutes of limitations. *See* 4 A. Larson § 95.12. Although the result sometimes may seem harsh on the employer charged with the liability under our interpretation of Iowa Code section 85A.10, "there will be a spreading of the risk when the total picture of [such] litigation is considered and this rule is applied on a nationwide basis." *Osteen,* 209 Neb. at 291, 307 N.W.2d at 520. *See In re Compensation of Bracke,* 293 Or. 239, 248, 646 P.2d 1330, 1336 (1982) ("The reason for the [last injurious exposure] rules lies not in their achievement of individualized justice, but rather in their utility in spreading liability fairly among employers by the law of averages and in reducing litigation.").

Doerfer, 359 N.W.2d at 434–35.

Affirmative Defenses - Statute of Limitations[4]

I now turn to the affirmative defenses raised by defendants. 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 85.26(1), which is expressly applicable to claims under Iowa Code chapter 85A, 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.

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).

As discussed, I concluded claimant's disablement occurred on November 11, 2015. Claimant's original notice and petition was filed on June 6, 2016, well within two years of the occurrence of his disability. Thus, I conclude defendants failed to prove their statute of limitation defense. The deputy commissioner's finding that claimant's claim is barred by Iowa Code section 85.26 is therefore reversed.

Affirmative Defenses - Notice

Iowa Code section 85A.10, the section regarding liability for the last injurious exposure, states that "notice shall be given and made to the employer as required under this chapter." Iowa Code section 85A.18 provides additional specifics:

> Except as herein otherwise provided, procedure with respect to notice of disability or death, as to the filing of claims and determination of claims shall be the same as in cases of injury or death arising out of and in the course of employment under the workers' compensation law. Written notice shall be given to the employer of an occupational disease by the employee within ninety days after the first distinct manifestation thereof . . .

In other words, a claimant with an occupational disease must either provide written notice of his disease within 90 days of its first distinct manifestation or follow the notice provisions of Iowa Code chapter 85.23, which is the notice provision for cases of injury arising out of and in the course of employment. See Iowa Code section 85A.18.

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).

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[4] The statute of repose in Iowa Code section 85A.12 was not raised by defendants on appeal.

In at least one case, the Iowa Court of Appeals has held that the "first distinct manifestation" for purposes of the 90-day notice provision of Iowa Code section 85A.18 occurs "when the disease progresses to the point that the employee because of pain or physical inability is no longer able to work." Croft v. John Morrell & Co., 451 N.W.2d 501, 503 (Iowa Ct. App. 1989) In this case, I found claimant was no longer able to work after November 11, 2015. There is no evidence in the record that claimant provided written notice of his injury to anyone at Eagle Window Andersen within 90 days of November 11, 2015.

The question then becomes whether claimant provided notice as in cases of work-related injuries. See Iowa Code section 85A.18 (noting "procedure with respect to notice . . . shall be the same as in cases of injury or death arising out of and in the course of employment"). Like Iowa Code section 85A.18, 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 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).

Based on the MSD sheets regarding some of the compounds to which claimant was exposed, the deputy commissioner found defendants had actual notice of the toxicity of these compounds—a finding that was not appealed by defendants. Many of these compounds were contained in claimant's van during his field work, which he performed during Andersen's ownership of Eagle Window. Based on these facts, I found Andersen was in possession of information that should put a reasonably conscientious manager on alert that claimant's kidney disease may be work related. I therefore conclude defendants had actual knowledge of claimant's occupational disease as of, or before, November 11, 2015, which was the date he actually became incapacitated from performing his work. See Dillinger v. City of Sioux City, 368 N.W.2d 176, 181 (Iowa 1985) (holding defendants can have actual knowledge of the reasonable possibility of a claim before the date of discovery).

This outcome is consistent with the court's holding in Doerfer, when the court affirmed the commissioner's finding that defendants had actual notice of claimant's occupational disease:

> The record reveals substantial evidence that Nicol's dermatitis was apparent when he commenced working for Doerfer. He explained his allergy to a supervisor. There is further evidence his supervisors knew his condition worsened while employed by Doerfer and, more significantly, they suspected a claim for benefits might be filed against Doerfer. From

> Nicol's severe and rapid decline while working in the Doerfer environment, the commissioner could have inferred this employer had actual knowledge that Nicol's illness was work connected. We find no ground to reverse the decision of the commissioner or the court on this ground.

Doerfer, 359 N.W.2d at 435.

In this case, like in Doerfer, claimant's kidney disease was readily apparent when Andersen acquired ownership of Eagle Window. Further, based on claimant's kidney transplant, anti-rejection therapy, and ultimate inability to return to work, his supervisors knew or should have known his condition worsened while under Andersen's ownership. Relying on claimant's "severe and rapid decline" while working for Eagle Window under Andersen's ownership, coupled with defendants' knowledge of the toxicity of the compounds to which claimant was exposed, I conclude Andersen possessed sufficient information to alert them that claimant's illness may "be work connected or might give rise to a claim for benefits." Id.

For these reasons, I conclude the actual knowledge alternative to written notice occurred as of, or before, November 11, 2015. Defendants therefore failed to satisfy their burden to prove that claimant's claim should be barred for failure to give timely notice.

Extent of Claimant's Disability

Because claimant's occupational disease is an injury 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).

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

Claimant, due to his kidney disease, is now on dialysis for nine hours a day, seven days a week. I adopted Dr. Peterson's opinion that this renders claimant unable to work at any job, and I found claimant is wholly disabled from returning to work for which he was previously suited. I therefore conclude claimant is permanently and totally disabled.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on August 30, 2018, is reversed.

Defendants shall pay claimant permanent total disability benefits at the stipulated weekly rate of five hundred sixty-eight and 78/100 ($568.78) commencing November 12, 2015, and continuing during the period of claimant's permanent total disability.

Defendant shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Pursuant to rule 876 IAC 4.33, the parties shall pay their own costs of the arbitration proceeding, and defendants shall pay the costs of the appeal, including the cost of the hearing transcript.

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

Signed and filed on this 23rd day of January, 2020.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Christopher D. Spaulding Via WCES

Timothy W. Wegman Via WCES