BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RICKY J. RIZZIO, Claimant, vs. QUAKER OATS COMPANY, Employer, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier, Defendants.	File No. 5053022 A P P E A L D E C I S I O N Head Notes: 1402.40; 1600; 1803; 2208; 2800

Defendants Quaker Oats Company, employer, and Indemnity Insurance Company of North America, insurance carrier, appeal from a rehearing decision filed on March 23, 2018. Claimant Ricky J. Rizzio cross-appeals.

In the rehearing decision, the deputy commissioner found claimant sustained noise-induced tinnitus which resulted from his exposure to a noisy work environment. The deputy commissioner determined claimant's tinnitus did not manifest until January 30, 2015, which was within 90 days of the filing of claimant's petition. Lastly, the deputy commissioner found claimant sustained five percent industrial disability as a result of his work-related tinnitus.

On appeal, defendants argue the deputy commissioner erred in his determination that claimant's tinnitus arose out of and in the course of his employment. Defendants alternatively argue the deputy commissioner erred by adopting a January 30, 2015, manifestation date and in determining that the claim was not barred by a notice and/or statute of limitations defense.

On cross-appeal, claimant argues the deputy commissioner erred by limiting claimant's industrial disability award to five percent. Claimant additionally argues the deputy commissioner erred in failing to consider claimant's hearing loss as a factor in his industrial disability.

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

Pursuant to Iowa Code sections 17A.5 and 86.24, the proposed rehearing decision filed on March 23, 2018, is affirmed in its entirety with the following additional analysis pertaining to the manifestation date of claimant's injury.

I affirm the deputy commissioner's finding that claimant's exposure to defendant-employer's noisy work environment substantially contributed to the development of claimant's noise-induced tinnitus. I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to this issue in its entirety.

With respect to the manifestation date of claimant's injury, the deputy commissioner adopted January 30, 2015. Claimant, however, testified he began noticing a "locusts" sound in his ears roughly ten years prior. (Hearing Transcript, pp. 44, 63) I therefore find claimant was aware he suffered from a condition as early as the mid-2000s. Claimant also testified he always believed the "locusts" sound was due to his work with defendant-employer. (Tr., pp. 64-65) I therefore find claimant was aware this condition was caused by his employment with defendant-employer in the mid-2000s as well.

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. 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).

As discussed above, I found claimant was aware in the mid-2000s that he suffered from a condition and he was aware the condition was caused by his employment. I therefore conclude the injury manifested and is deemed to have occurred in the mid-2000s—and not January 30, 2015, as found by the deputy commissioner.

Claimant, however, was not aware the "locusts" sound was serious enough to have an adverse impact on his employment or employability until much later. Under the discovery rule, the 90-day notice period and statute of limitations do not begin to run until the employee, as a reasonable person, knows or should know the cumulative injury condition is serious enough to have a permanent adverse impact on his or her employment. See Herrera, 633 N.W.2d at 288. More specifically,

> a condition is implied in limitations provisions of most workers' compensation statutes that "(t)he time period for notice or claim does not begin to run until the claimant, as a reasonable man, should recognize the nature, seriousness and probable compensable character of his injury or disease." 3 A. Larson Workmen's Compensation § 78.41 at 15-65 to 15-66 (1976). This rule is applicable to the notice of claim provision in section 85.23 of our workers' compensation statute. *Robinson v. Department of Transportation*, 296 N.W.2d 809, 812 (Iowa 1980).

Orr v. Lewis Cent. Sch. Dist., 298 N.W.2d 256, 257 (Iowa 1980).

In this case, the first time claimant marked "yes" regarding "ringing or roaring" in his ears during his hearing test with defendant-employer was in 2014. (Exhibit 2, p. 35; see Tr., p. 46) He testified this was the first time he recognized that the "locusts" sound he heard might be what others referred to as "ringing." (Tr., p. 46-47) Still, however, claimant continued to work his regular job without medical treatment, work restrictions, or absences related to the locust sound. It was not until the January 28, 2015, report of Richard Tyler, Ph.D., that any doctor or hearing professional told claimant he had work-related tinnitus from which he may have sustained a permanent impairment or for which he may require work restrictions. (Tr., pp. 47-48) I find the receipt of Dr. Tyler's report was the first date upon which claimant should have known the nature, seriousness, or probable compensable nature of his tinnitus. As such, I conclude claimant's notice requirement and statute of limitations began to run on January 28, 2015.

Turning first to the statute of limitations defense, 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, or within three years from the date of last payment of weekly compensation benefits if indemnity benefits were paid.

That the employee failed to bring a proceeding within the required time period is an affirmative defense that 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).

With respect to the notice defense, Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information that makes the employer aware that the injury occurred and that it

may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

In this case, claimant served his petition on April 2, 2015, and filed his petition on April 3, 2015, less than 90 days after claimant's notice and statute of limitations clocks began to run. I therefore conclude claimant provided timely notice to defendant-employer under Iowa Code section 85.23 and timely filed his petition under Iowa Code section 85.26. Thus, despite modifying the deputy commissioner's manifestation date, I conclude defendants' affirmative notice and statute of limitations defenses still fail.

Regarding claimant's industrial disability, I affirm the deputy commissioner's finding that claimant sustained five percent industrial disability as a result of his work-related tinnitus. I also affirm the deputy commissioner's finding that claimant's hearing loss should not be considered. I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to these issues in their entirety.

ORDER

IT IS THEREFORE ORDERED that the rehearing decision filed on March 23, 2018, is affirmed in part and modified in part.

Defendants shall pay claimant twenty-five (25) weeks of permanent partial disability benefits at the stipulated weekly rate of nine hundred sixty-one and 40/100 ($961.40) from the stipulated commencement date of January 31, 2015.

Defendants 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, defendants shall pay claimant's costs of the arbitration proceeding, and the parties shall split the cost 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 12th day of September, 2019.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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