IN THE IOWA DISTRICT COURT FOR POLK COUNTY

TERRY TILTON, Petitioner-Claimant, vs. HEINZ, Employer, LIBERTY MUTUAL INSURANCE, Insurance Carrier, Respondents-Defendants.	)	Case No.: CVCV 056224 **ORDER ON JUDICIAL REVIEW REMANDING THIS CASE TO THE WORKERS' COMPENSATION COMMISSIONER**

Petitioner Terry Tilton (Terry) filed the instant petition for judicial review of final agency action in a contested case on April 26, 2018. Oral argument was held on June 26, 2018. Representing Terry was attorney Thomas M. Wertz. Representing Respondent Heinz was attorney Nathan McConkey. The proceeding was not reported.

After consideration of oral argument and upon review of the parties' briefs and the certified agency record in light of the relevant law, the court finds the following facts, reaches the following conclusions and enters the following Order remanding this matter to the workers' compensation commissioner for further proceedings consistent with this Order for the following reasons.

BACKGROUND FACTS AND PROCEEDINGS

Terry filed an arbitration petition with the workers' compensation commissioner on March 27, 2015, alleging a cumulative trauma injury manifesting on or about April 15, 2013—the last date she worked for Heinz. Heinz contends that Terry knew of her injury in September 2010 and failed to notify Heinz within ninety days from the date of the occurrence of the injury as required by Iowa

Code section 85.23. Heinz argues that the court on judicial review should affirm the workers' compensation commissioner's final agency order coming to the same conclusion.

SCOPE OF REVIEW/RELEVANT LAW

Iowa Code chapter 17A governs the scope of judicial review in workers' compensation cases. Iowa Code § 86.26 (2017). Terry alleges that the commissioner erred because his decision was based upon (1) a determination of fact not supported by substantial evidence under section 17A.19(10)(*f*); and (2) an irrational, illogical and wholly unjustifiable application of law to fact under section 17A.19(10)(*m*).

Factual determinations in workers' compensation cases are "clearly vested by a provision of law in the discretion of the agency." *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 465 (Iowa 2004) (citation omitted). The court on judicial review must defer to the commissioner's findings of fact if they are based upon "substantial evidence in the record before the court when that record is viewed as a whole." Iowa Code § 17A.19(10)(*f*). Substantial evidence is

> the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance.

Iowa Code § 17A.19(10)(*f*)(1).

The question to be determined on judicial review is not whether the evidence supports findings different from those made by the commissioner, but whether the evidence supports the findings the commissioner actually made. *St. Luke's Hosp. v. Gray*, 604 N.W.2d 646, 649 (Iowa 2000) (citation omitted). In deciding whether the commissioner's application of law to the facts was irrational, illogical or wholly unjustifiable, the reviewing court accords some deference to the

commissioner's ultimate decision, but less than the deference accorded to the commissioner's findings of fact. *Larson Mfg. Co. v. Thorson*, 763 N.W.2d 842, 850 (Iowa 2009).

Establishing a date of injury is a fact finding decision made by the commissioner. *McKeever Custom Cabinets v. Smith*, 379 N.W.2d 386, 374 (Iowa 1985) (finding gradual onset and ultimate date of disability are factual determinations).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Iowa Code section 85.23 relevantly provides that

> [u]nless the employer . . . 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 . . . shall give notice thereof to the employer within ninety days from the date of the occurrence of the injury, no compensation shall be allowed.

Iowa Code § 85.23. For a cumulative trauma injury like Terry's, the date of occurrence is the date when the injury manifests itself. *Oscar Meyer Foods Corp. v. Tasler*, 483 N.W.2d 824, 829 (Iowa 1992). The commissioner determined Terry's cumulative trauma injury date was September 8, 2010, finding this was the date that Terry "knew or should have known her physical condition was serious enough to have a permanent adverse impact on her employment." (07/02/18 Certified Agency Record, 04/05/18 App. Dec. at p. 8, ¶ 5). Terry did not give notice of her injury until May 3, 2013. (07/02/18 Certified Agency Record, 04/05/18 App. Dec. at p. 9, ¶ 1).

The seminal case regarding how the commissioner determines when a cumulative trauma injury "manifests" is *Herrera v. IBP, Incorporated*, 633 N.W.2d 284, 288 (Iowa 2001):

> [A] cumulative injury is manifested when the claimant, as a reasonable person, would be plainly aware (1) that he or she suffers from a condition or injury, and (2) that this condition or injury was caused by the claimant's employment. Upon the occurrence of these two circumstances, the injury is deemed to have occurred.

Id. (citation omitted). The *Herrera* case further established that a separate and independent analysis is required for determining the applicability of the discovery rule to deadlines in cases such as the instant matter:

> Nevertheless, by virtue of the discovery rule, the statute of limitations will not begin to run until the employee also 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.

Herrera, 633 N.W.2d at 288 (quoting *Orr v. Lewis Ctnr. Sch. Dist.*, 298 N.W.2d 256, 257 (Iowa 1980)).

A. <u>Substantial evidence</u>. The agency failed to apply the appropriate legal standard regarding cumulative trauma injuries set forth in *Herrera*. As quoted above, the Iowa Supreme Court (the Court) in *Herrera* clearly spelled out the proper analysis of how the agency must determine the date when a cumulative trauma injury occurs or "manifests," and separately determine when the claimant's ninety-day notice and statute of limitations runs. *Herrera*, 633 N.W.2d at 288 (citing *Orr v. Lewis Cntr. Sch. Dist.*, 298 N.W.2d 256, 257 (Iowa 1980)). The Court went on to explain that there is another and separate level of analysis when determining the applicability of the discovery rule to deadlines (notice and statute of limitations) in cumulative injury cases:

> Nonetheless, by virtue of the discovery rule, the statute of limitations will not begin to run until the employee also 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.

Id. (citing *Orr v. Lewis Cntr. Sch. Dist.*, 298 N.W.2d 256, 257 (Iowa 1980)).

In the instant matter the commissioner concluded on interagency appeal:

> By September 8, 2010 . . . claimant knew or should have known her physical condition was serious enough to have a permanent adverse impact on her employment. Based on this record, it is found the manifestation date of claimant's injury was September 8, 2010.

(07/02/18 Certified Agency Record, 04/05/18 App. Dec. at p. 8, ¶ 5).

This is an incorrect statement of the analysis the commisssioner was required to perform pursuant to *Herrera.* The commissioner blurred the concept of when the injury is said to occur, or manifests, with the separate analysis under the discovery rule. This is contrary to the court's directions in *Herrera.* The commissioner relied upon the February 4, 2010, record from Dr. Bradley to conclude that Terry knew her condition was permanent at that point: "On February 4, 2010 . . . Dr. Bradley noted claimant's condition was permanent and would cause her to continue to miss work in the future. (07/02/18 Certified Agency Record, 04/05/18 App. Dec. at p. 3, ¶ 6; Ex. J at pp. 43-44). A closer look at Dr. Bradley's report shows that while he opined Terry would have some future temporary flare-ups of between 1-3 days per episode, it was impossible to estimate how often and how long her future "flare-ups" would last. (07/02/18 Certified Agency Record, Ex. J at pp. 43-44). More importantly, Dr. Bradley clearly opined that Terry's condition had not left her unable to perform any of her job functions. (*Id.*, Ex. J at p. 44).

The commissioner next improperly focused on the fact Terry was off work from July 7, 2010, until September 8, 2010. In doing so the commissioner failed to mention and properly evaluate Dr. Mathew's August 10, 2010, note which said:

> She today describes no pain. She had an epidural steroid injection 2 weeks ago. She says she has been pain-free for the last 2 weeks and would like to do 2 weeks of physical therapy before returning to work. Again, today she denies any pain in her low back or hips.

(07/02/18 Certified Agency Record, Ex. 1 at p. 19). A similar report was made at Terry's September 1, 2010, appointment—only a week before the commissioner found Terry should have reasonably known of her condition's seriousness and permanent impact on her employment:

> She is doing very well . . . She feels very good. She denies minimal pain, 1/10. Denies any pain radiating into her legs, localized to her back . . . the combination (of the gel and medication) has been covering her pain very well. She is . . . independent with all activities of daily living.

(*Id.*, Ex. 1 at p. 21). Terry exhibited "full and pain-free" range of motion. (*Id.*). After experiencing no or minimal pain for a month, Terry returned to her regular work with no restrictions.

In light of all of these facts, the commissioner erroneously determined that as of September 8, 2010—the date Terry returned to work pain-free and without restrictions—Terry or any reasonable person in her position should have known she suffered from a serious work injury having a serious adverse impact on her employability. (07/02/18 Certified Agency Record, 04/05/18 App. Dec. at p. 8). The commissioner failed to address how it was that Terry should have known she had sustained a permanent industrial disability, or permanent loss of earning capacity, and her condition was therefore "probably compensable." (*Id.*)

Heinz focuses on Terry's physical impairment, but Terry's claim was for a back injury. A back injury is an unscheduled injury under Iowa Code section 85.34(2). Unscheduled permanent injuries are evaluated by determining the worker's loss of earning capacity. *Mortimen v. Freuhauf Corp.*, 502 N.W. 2d 12, 14 (Iowa 1993). There is no evidence that Terry had a compensable permanent loss of earning capacity on September 8, 2010. More critically, there is specific evidence in the record that her treating physician, Dr. Mathew, found she had full and pain-free range of motion. (07/02/18 Certified Agency Record, Ex. 1 at pp. 19-21). Terry had needed no

surgery. She had returned to the same job for the same employer making the same (or likely more) money. She had no permanent restrictions.

On September 8, 2010, Terry did not have a permanent probable compensable claim for industrial disability. Terry knew she was pain free. Terry knew she had been returned to work with no restrictions, at her full-duty job, and at her normal wages. Even if she knew she may, based on Dr. Bradley's February 2010 report, have some temporary flare-ups *in the future*, this only put her on notice of possible future claims for temporary benefits for temporary disability.

Under these facts it would be unreasonable to conclude that Terry should have been aware that she was suffering a loss of earning capacity as early as September 2010 (the very month she was released to return to full work duties without restrictions). For the statute of limitations to run on Terry's claim, she needed to be reasonably aware that she had suffered a loss of earning capacity due to her condition. Under this record, she was not and could not have been reasonably aware until 2013.

Because Terry had no claim for permanent loss of her earning capacity on September 8, 2010, she was under no obligation to give Heinz notice at that time. The court finds and concludes that substantial evidence does not support the commissioner's order.

B. Irrational, illogical and wholly unjustifiable. Because the commissioner's final order was not supported by substantial evidence, the same reasons that support a finding and conclusion of no substantial evidence for the commissioner's decision also support a finding and conclusion that the order is irrational, illogical and wholly unjustifiable.

CONCLUSION

The court must remand this case to the workers' compensation commissioner for the proper application of the discovery rule announced in *Herrera* and consistent with the following facts

established by the record presented: On September 8, 2010, Terry (1) had returned to work with no permanent restrictions; (2) was performing the same job at the same rate of compensation; and (3) continued to perform that same work until on or about April 15, 2013.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this matter is **REMANDED** to the workers' compensation commissioner for further proceedings consistent with this Order.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
CVCV056224	TERRY TILTON VS HEINZ ET AL

So Ordered

Jeanie Vaudt, District Court Judge,
Fifth Judicial District of Iowa