BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RICKY RIZZIO,

Claimant,

vs.

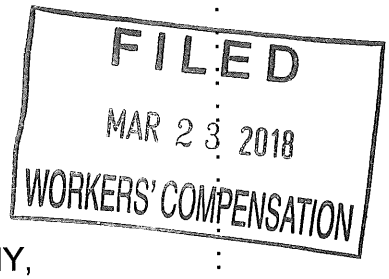
QUAKER OATS COMPANY,

Employer,

and

INDEMNITY INS. CO. OF N.A.,

Insurance Carrier,
Defendants.



File No. 5053022

RULING ON MOTION

FOR REHEARING

On January 18, 2018, I entered an arbitration decision which found that claimant's tinnitus injury under Chapter 85 was not "ripe for adjudication" because it was inextricably linked with his hearing loss.

On February 5, 2018, claimant filed for Rehearing pursuant to Rule 4.24. Claimant made a number of compelling arguments which were not considered at the time the arbitration decision was filed. Defendants resisted. On February 20, 2018, I granted the Motion for Rehearing to more fully consider all of claimant's arguments.

In the initial arbitration decision, I was attempting to solve a legal dilemma, which I still believe is a real dilemma for this agency as well as the parties. The dilemma is this: Noise-induced hearing loss claims are often very closely linked with tinnitus. Hearing loss claims are brought under Chapter 85B, while tinnitus is a condition evaluated as injury under Chapter 85. Chapter 85B prescribes specific technical methods for setting the date of injury for hearing loss claims which do not exist in Chapter 85. This allows -- and possibly requires -- injured workers to pursue their tinnitus injuries prior to the legal manifestation of their Chapter 85B hearing loss claims. The result of this, at minimum, is significant inefficiency for this agency and the parties. At worst, the result is the potential of double recovery for the injured worker. It also has the potential to create inefficient and unfair procedural traps for both parties. In my estimation, it would be much simpler if the claims were assessed together, particularly where, as a matter of fact, the issues are inextricably linked.

Claimant summarized his argument in paragraph 5 of his motion to reconsider as follows:

> 5. Applying Iowa Code section 85B to a tinnitus claims is contrary to established law. In Ehteshamfar v. UTA Engineering Systems Div., 555 N.W.2d 450 (1996), the Iowa Supreme Court found that tinnitus is a separate and distinct condition/injury. It falls outside the statutory definition of an occupational hearing loss and does not qualify under Code section 85B despite the fact that "[t]innitus and hearing loss frequently occur together. 555 N.W.2d at 453.

(Claimant's Motion to Reconsider, par. 5)

Claimant goes on to point out that there is significant agency precedent that even when the hearing loss and tinnitus develop from the exact same factors, the agency has a history of assessing the tinnitus injury separate from the hearing loss when the hearing loss is not ripe due to the technical limitations set forth in Section 85B.8. Claimant further cites John Deere Des Moines Works v. Galvan, 737 N.W.2d 325 (Iowa Ct. App. 2007), which held that the agency's finding that an injured worker's tinnitus manifested as of the date of his retirement was unsupported by substantial evidence. This case was not argued or cited in the original briefing by the parties.

In resisting the Motion to Reconsider, defendants argue that claimant had no industrial disability.

Upon further consideration, I have determined that my arbitration decision is, in fact, in error. As much as I am concerned about the legal dilemma created by Ehteshamfar, I am now convinced that my initial arbitration decision went too far. I therefore substitute and amend the initial decision with the following decision.

STATEMENT OF THE CASE

The claimant, Ricky Rizzio, filed a petition for arbitration and seeks workers' compensation benefits from Quaker Oats Company, employer, and Indemnity Insurance Company of North America, insurance carrier. The claimant was represented by Bob Rush. The defendants were represented by Timothy Wegman.

The matter came on for hearing on January 12, 2017, before Deputy Workers' Compensation Commissioner Joe Walsh in Cedar Rapids, Iowa. The record in the case consists of Claimant's Exhibits 1 through 8 and Defense Exhibits A through G. The claimant testified at hearing, in addition to his spouse, Tammy Rizzio. Amy Rose-Coenen was appointed the official reporter for these proceedings. The matter was fully submitted on February 15, 2017, after helpful briefing by the parties.

On February 24, 2017, defendants filed a Motion to Strike claimant's brief alleging claimant had never raised the issue of hearing loss until the brief. Claimant resisted this on March 3, 2017.

ISSUES

The parties submitted the following issues for determination:

1. Whether claimant sustained an injury (tinnitus) on January 30, 2015, which arose out of and in the course of his employment.

2. Whether claimant's claims are barred by Iowa Code section 85.23 and/or section 85.26.

3. Whether claimant has sustained any permanent partial disability, and, if so, the nature and extent of such disability.

4. Whether costs should be assessed.

STIPULATIONS

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship at the time of the alleged injury.

2. The claimant has filed no claim for hearing loss benefits under Chapter 85B. (See Petition; Hearing Report and Order; see also Hearing Transcript, pages 4 and 6)

3. Temporary disability/healing period and medical benefits are no longer in dispute.

4. The weekly rate of compensation is $961.40, based upon gross weekly earnings of $1,569.00, married with three exemptions.

5. Other than notice (85.23) and statute of limitations (85.26), all other affirmative defenses have been waived.

6. The appropriate commencement date for any benefits owed is January 31, 2015.

FINDINGS OF FACT

Claimant, Ricky J. Rizzio is a 58-year-old married father of two who lives in Brooklyn, Iowa. (Transcript, pages 9-10) He and his wife, Tammy have been married since 1987. Mr. Rizzio did not complete high school and has not received a GED. Mr. Rizzio started with Quaker Oats in 1977. He served his country in the United States Marine Corps from 1979 to 1982. Since then he has worked at Quaker Oats for his entire work life. (Tr., p. 11) In 1982, upon returning from military service, Mr. Rizzio's was hearing was fine.

Mr. Rizzio testified live and under oath at hearing. I find him to be a highly credible witness. His testimony was straight-forward and easily understood. He did not embellish. His testimony was consistent with the medical reports and the lay testimony in the record. There was nothing about his demeanor which caused me any concern about his truthfulness.

Claimant's wife, Tammy Rizzio, also testified live at hearing. Her testimony was equally credible.

At Quaker, Mr. Rizzio has worked in numerous different positions. Since 2005, he has worked in the Instant Oats Department. (Tr., p. 24) This was undoubtedly a noisy environment. (Claimant's Exhibit 3; see also Tr., pp. 29-35) From 1993 to 2005, he worked in maintenance, where he was required to work in all areas of the plant. Virtually all of the areas claimant has worked in the plant are noisy. Quaker Oats conducted noise studies in 1997, 2000, 2010 and 2012. (Cl. Ex. 3) Mr. Rizzio has regularly and continuously worked significant overtime during his tenure at Quaker Oats. Based upon the entire record before me, it is evident that Mr. Rizzio has been constantly exposed to unsafe levels of noise while working at Quaker. Moreover, he has continued to be so exposed through the date of hearing.

The employer has a hearing conservation program which requires employees to wear hearing protection. Mr. Rizzio has generally complied with the employer's rules. He did testify that he removes his hearing protection on a daily basis to converse with co-workers. (Tr., p. 49; Cl. Ex. 1, p. 9)

Mr. Rizzio has undergone annual hearing tests at Quaker. He began to experience a mild hearing loss in approximately 1999. (Cl. Ex. 2, p. 8) By 2007, he had moderate hearing loss in both ears. (Cl. Ex. 2, p. 26) This was consistent with his most recent tests prior to hearing. (Cl. Ex. 2, pp. 28-43) He testified that he first began noticing a buzzing sound in his ears approximately 10 years ago. (Tr., p. 44)

Mr. Rizzio has also been exposed to recreational noise over the years. He has engaged in some hunting, which he described in detail at hearing. (Tr., pp. 37-39) He also used to ride a motorcycle and use power tools, such as a chainsaw. (Tr., pp. 35-42) He has been diagnosed with diabetes. (Tr., p. 43)

Mr. Rizzio was first diagnosed with tinnitus by Richard Tyler, Ph.D., in January 2015. (Cl. Ex. 1, p. 8) His attorney arranged the evaluation. (Cl. Ex. 1, pp. 1-2) Dr. Tyler is a highly qualified audiologist. He is the Director of Audiology at the University of Iowa Hospitals and Clinics (UIHC) and has vast expertise in hearing loss and tinnitus. (Cl. Ex. 1, pp. 43-80)

Dr. Tyler interviewed the claimant and had the entire relevant record before him when performing his evaluation. (Cl. Ex. 1, pp. 1, 8) He diagnosed Mr. Rizzio with both hearing loss and tinnitus. "Based on the information available to me, I conclude that the sensorineural hearing loss and tinnitus experienced by Mr. Rizzio was probably a result

of his work at PepsiCo." (Cl. Ex. 1, p. 20) He provided impairment ratings and restrictions for both conditions. (Cl. Ex. 1, p. 20)

The defendants had Mr. Rizzio evaluated by Bruce Plakke, Ph.D., on March 27, 2015. (Def. Ex. A, p. 3) Dr. Plakke also reviewed a number of records and interviewed Mr. Rizzio. While he concluded he does have hearing loss and tinnitus, he opined these conditions were caused by "a combination of his shooting without hearing protection and diabetes." (Def. Ex. A, p. 6) Dr. Plakke also thoroughly reviewed and critiqued the opinions of Dr. Tyler. (Def. Ex. A, pp. 6-7) Ultimately, the two exchanged critical reports of the other's conclusions. (Cl. Ex. 1, pp. 35-42; Def. Ex. A, pp. 19-24)

CONCLUSIONS OF LAW

Numerous issues are submitted for determination. The first issue is whether the claimant sustained an injury which arose out of and in the course of his employment which manifested on or about January 30, 2015. Claimant has alleged that he developed the diagnosis of tinnitus as a result of his exposure to excessive noise working for the employer since 1977. He contends the condition manifested on January 30, 2015, when he was diagnosed with the condition by Dr. Tyler. Defendants do not seriously dispute that the claimant has suffered tinnitus. They assert that the development of his condition is due to unrelated noisy activities and medical conditions.

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.

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's

Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

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. 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).

Because a cumulative injury has been alleged, the issue of medical causation is significantly linked to the issue of whether he suffered an injury which arose out of and in the course of his employment.

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).

I find that the claimant has sustained noise-induced tinnitus which resulted from his exposure to loud noises. This injury arose out of and in the course of his employment and resulted from several years of exposure to a noisy environment. On this point, I find the opinions of Dr. Tyler compelling. (Cl. Ex. 1, pp. 15-18) Dr. Tyler's credentials are well-established and he had the more accurate history of the claimant's exposure to the noisy work environment. In particular, Dr. Plakke had a misconception about the amount of time claimant spent firing a gun for hunting purposes, as well as a misunderstanding that claimant wore ear protection 100 percent of the time. Based upon the claimant's testimony and the expert opinion of Dr. Tyler, I find that claimant has sustained his burden of proof that he suffered a cumulative injury from exposure to noise at work. His exposure to the noisy environment over his 37 year work history for the employer, has substantially contributed to his development of noise-induced tinnitus.

The next issue is the timeliness of claimant's claim. This requires the determination of the precise manifestation date.

A cumulative injury manifests when the injured worker "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." Herrera v. IBP, Inc., 633 N.W.2d 284, 288 (Iowa 2001). "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. (Quoting Orr, 298 N.W.2d at 257 (Iowa 1980)). Ordinarily, the date of manifestation is associated with the first date the injured worker, because of pain or physical inability, can no longer work. McKeever Custom Cabinets v. Smith, 378 N.W.2d 368, 374 (Iowa 1974). In some cases, it may be the date the claimant receives medical treatment for a condition or the date a specific diagnosis is made. "The Commissioner is entitled to a substantial amount of latitude in making a determination regarding the date of manifestation since this is an inherently fact-based determination." Tasler v. Oscar Mayer Foods, 483 N.W.2d 824, 829 (Iowa 1992), (quoting from Mercy Health Ctr. v. State Health Facilities, 360 N.W.2d 808, 809 (Iowa 1985).

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 85.23 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 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).

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).

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 claimant has never missed work for his tinnitus. He has continued to work, at all relevant times, in spite of the development of buzzing in his ears. I find that the claimant's tinnitus manifested when he was evaluated by Dr. Tyler in January 2015. At that time, he first became aware that he suffered from the condition of tinnitus that was directly related to his employment. Prior to that, Mr. Rizzio had never really received any treatment for his condition. He had never received any specific diagnosis which resulted from his hearing tests at work.

Since the injury did not manifest until January 30, 2015, the defendants' affirmative defenses of notice and statute of limitations fail.

The final issue for determination is the extent of claimant's industrial 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.

Considering all of the relevant factors of industrial disability, I find that the claimant has suffered a 5 percent loss of earning capacity as a result of his work-related tinnitus. While this condition has undoubtedly caused claimant some permanent functional impairment, it has not caused him to lose any work in his 37 year work history. The claimant is quite motivated to keep working for the employer in this case. It is undoubtedly a good job with good benefits. His ability to continue working in the noisy environment, however, causes his claim for a more substantial finding of industrial disability to fail. While Dr. Tyler has recommended permanent restrictions of no work around loud noises, I reject this restriction since the claimant has refused or failed to follow it.

In this decision, I do not consider any additional impact that claimant's hearing loss has on his industrial disability. Claimant has stipulated that he is not making a hearing loss claim in this decision. To this end, the portions of claimant's brief which contend that his hearing loss must be considered in his assessment of industrial disability are struck in accordance with the Post-Hearing Motion by defendants.

On the other hand, I also reject the defendants' claim that Mr. Rizzio has suffered no industrial disability. He has undoubtedly suffered a permanent functional impairment which does interfere with his activities of daily living. This fact is verified by his wife, who was credible. (Tr., pp. 73-76) I have no doubt that his job is more stressful because of his tinnitus. He testified he has difficulty communicating with co-workers as well as difficulty diagnosing problems with machinery. (Tr., pp. 50-51)

When considering all of the factors of industrial disability, I find that the claimant has suffered a 5 percent loss of earning capacity. Since the claimant has suffered a 5 percent loss of earning capacity, I find he is entitled to 25 weeks of compensation at the stipulated rate.

ORDER

THEREFORE IT IS ORDERED

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

Defendants shall pay accrued weekly benefits in a lump sum.

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

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

Costs are taxed to defendants.

Signed and filed this 23rd day of March, 2018.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JLW/kjw

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.