

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SCOTT MARSIGLIO,

Claimant,

vs.

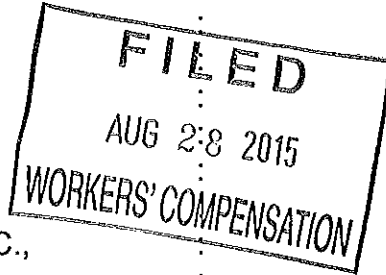
THE HON COMPANY, L.L.C.,

Employer,

and

TWIN CITY FIRE INSURANCE

Insurance Carrier,  
Defendants.



File No. 5048567

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Scott Marsiglio has filed a petition in arbitration and seeks workers' compensation benefits from The HON Company, L.L.C., employer and Twin City Fire Insurance, insurance carrier defendants.

This matter was heard by Deputy Workers' Compensation Commissioner Ron Pohlman on July 6, 2015 at Des Moines, Iowa. The record in the case consists of claimant's exhibits 1 through 30; defendants' exhibits A through Y, as well as the testimony of claimant, Joshua Arnold, Michelle Marsiglio and Charles Shelley.

ISSUES

The parties submitted the following issues for determination:

1. Whether the injury of September 22, 2012 was the cause of any disability;
2. Whether the claimant is entitled to temporary total disability/healing period from December 23, 2013 through February 24, 2015;
3. The nature and extent of claimant's entitlement to permanent partial disability benefits;
4. The commencement date for the payment of permanent partial disability benefits;

5. The claimant's weekly rate;
6. Whether the claim is barred by the statute of limitations in Iowa Code section 85.26;
7. Whether the claimant is entitled to payment of medical expenses pursuant to Iowa Code section 85.27; and
8. Whether the claimant is entitled to penalties pursuant to Iowa Code section 86.13.

#### FINDINGS OF FACT

The undersigned having considered all of the testimony and evidence in the record finds:

The claimant testified that he sustained an injury on September 22, 2012. This was a traumatic injury sustained when the claimant stepped backwards and fell between the dock and the dock plate at work. A coworker had to pull him out of this hole. The claimant had an abrasion from his knee up to his hip area. He received some first aid care at work. The claimant's wife was called, and he was picked up and taken home. The claimant was experiencing back pain and obtained a support belt the following day. The claimant continued to work for approximately 9-10 months after this accident. The claimant was terminated from his employment in July 2013 for attendance reasons.

The claimant filed a petition in arbitration in this matter on March 31, 2014 and at that time alleged an injury date of July 9, 2013. That injury date was an error and was amended on March 31, 2015. The claimant testified that the July 9, 2013 was chosen at the suggestion of an attorney in the office of claimant's counsel as this was claimant's last day of employment in order to pursue a cumulative injury theory claim. Claimant also gave the July 9, 2013 date to his doctors based upon his conversation with his attorneys. The claimant has known at all times material that his accident occurred on September 22, 2012.

There have been no weekly payments made on this claim.

#### REASONING AND CONCLUSIONS OF LAW

The issue that is dispositive in this case is the statute of limitations contained in Iowa Code section 85.26.

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., 11 Iowa Industrial Comm'r Rep. 99 (App. 1982).

The claimant has always known that he sustained a traumatic injury on September 22, 2012 and he knew the nature, seriousness and probable compensable nature of that injury. The petition filed on March 14, 2014 was based upon an entirely different type of claim and not even one that had any basis in fact. The claimant asserted an injury date that would have related to a cumulative injury theory that had no basis in what happened to the claimant. The amendment on March 31, 2015 to assert the true claim was six months past the expiration of the statute of limitations in this case. Although amendments must be granted freely in the interests of justice, that amendment "must not relate back to the date of the original pleading if it would offend the policies underlying the statute of limitations". Estate of Kuhns v. Marco, 620 N.W.2d 488, 491 (Iowa 2000). If claimant's actions in this case are condoned, by extension of the statute of limitations, the interests of justice would not be served.

Claimant presented much testimony about being discouraged from making a workers' compensation claim by his employer. However, his employment ended more than a year before the statute of limitations had expired and as such he cannot contend that any action by his employer could serve to have prevented him from filing this claim.

ORDER

THEREFORE, IT IS ORDERED:

That claimant shall take nothing from this file.

The costs of this action are taxed to the claimant pursuant to rule 876 IAC 4.33.

Signed and filed this 28<sup>th</sup> day of August, 2015.



RON POHLMAN  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

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RRP/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.