BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MELVIN MARTIN, Claimant, vs. CITY OF HARLAN, Employer, and EMCASCO INSURANCE CO., Insurance Carrier, Defendants.	File No. 5057038 A P P E AL D E C I S I O N Head Notes: 1402.40; 1402.50; 2208; 2401; 2402 2501; 2907

Defendants City of Harlan, employer, and EMCASCO, insurer, appeal from an arbitration decision filed on January 16, 2018. Claimant Melvin Martin responds to the appeal. The case was heard on September 26, 2017, and it was considered fully submitted in front of the deputy workers' compensation commissioner on October 27, 2017.

In the arbitration decision, the deputy commissioner found the manifestation date for claimant's work-related hearing loss and tinnitus was November 7, 2014. Because claimant provided notice to defendants of his claim in November 2014, which clearly is less than 90 days after the manifestation date found by the deputy commissioner for the work injury, the deputy commissioner found defendants failed to prove their Iowa Code section 85.23 90-day notice defense. Because claimant filed his petition on July 27, 2016, which is less than two years after the manifestation date found by the deputy commissioner for the work injury, the deputy commissioner found defendants failed to prove their Iowa Code section 85.26(1) two-year statute of limitations defense. The deputy commissioner found claimant sustained five percent industrial disability as a result of the work injury, which entitles claimant to receive 25 weeks of permanent partial disability benefits commencing on November 7, 2014. The deputy commissioner found claimant's gross average weekly wage for the work injury is $275.00, and the deputy commissioner found claimant's weekly benefit rate for the work injury, classification married with two exemptions, is $199.72. The deputy commissioner found claimant is entitled to payment by defendants for the requested past medical expenses totaling $7,564.00 listed in claimant's itemization of medical expenses attached to the

hearing report. The deputy commissioner ordered defendants to pay claimant's costs of the arbitration proceeding in the amount of $165.58.

Defendants assert on appeal that the deputy commissioner erred in finding the manifestation date for claimant's work injury was November 7, 2014. Defendants assert the deputy commissioner erred in failing to find the correct manifestation date for the work injury is January 29, 2010, the date claimant retired from working for defendant-employer, or earlier. Defendants assert the deputy commissioner erred in finding defendants failed to prove their 90-day notice defense. Defendants assert the deputy commissioner erred in finding defendants failed to prove their two-year statute of limitations defense. Defendants assert the deputy commissioner erred in finding claimant sustained five percent industrial disability as a result of the work injury. Defendants assert the award for industrial disability should either be reversed entirely or reduced substantially. Defendants assert the deputy commissioner erred in finding claimant is entitled to payment by defendants for the requested past medical expenses.

Claimant asserts on cross-appeal that the deputy commissioner erred in finding claimant's gross average weekly wage for the work injury is $275.00, and claimant asserts the deputy commissioner erred in finding claimant's weekly benefit rate for the work injury, classification married with two exemptions, is $199.72. Claimant asserts it should be found on cross-appeal that claimant's gross average weekly wage for the work injury is $1,036.40, and claimant asserts it should be found that claimant's correct weekly benefit rate for the work injury is $661.02.

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, the proposed arbitration decision filed on January 16, 2018, is reversed. I find the manifestation date for claimant's work-related hearing loss and tinnitus is January 10, 2010. I find defendants have carried their burden of proof with regard to their Section 85.23 90-day notice defense and I find defendants have carried their burden of proof with regard to their Iowa Code section 85.26(1) two-year statute of limitations defense. I find claimant is entitled to recover nothing in this matter. I provide the following analysis for my decision:

FINDINGS OF FACT

Claimant was 69 years old at the time of the arbitration hearing. (Hearing Transcript, page 10) He graduated from high school in 1967. He began working for defendant-employer in 1970. He took a few college courses in conjunction with his employment with defendant-employer. (Tr. pp. 10-11)

When claimant began his employment with defendant-employer, he was a laborer at the waste water facility. (Tr. p. 12) In 1978, he was promoted to assistant

superintendent and conducted lab work. (Id.: Joint Exhibit 12, deposition p. 7) In 1990, he was promoted to superintendent and he held that position until he retired on January 29, 2010. (JE 12, depo pp. 7-8) Claimant has not worked since his retirement. (Tr. p. 49)

Defendants do not challenge claimant's causation arguments. Instead, defendants assert the 90-day notice defense under Iowa Code section 85.23, and the two-year statute of limitations defense under Iowa Code section 85.26(1). Defendants also assert that even if it is found claimant's petition was timely filed and notice was properly given, there is no permanent industrial disability resulting from the work injury.

Thus the summary of facts rest primarily on the timeline issues as well as on the industrial disability factors.

Claimant worked for defendant-employer for slightly less than forty years with most of that time spent in the wastewater treatment plant. There really is no dispute that the treatment plant is a noisy environment. The main level of the plant holds a large heat exchanger. (Tr. pp. 17-18) Directly underneath the main floor are three sludge pumps that can be viewed through a metal grate in the flooring between the main level and the lower level. (Tr. pp. 19-20)

No decibel testing was performed in the plant prior to November 2014, but the information provided by the manufacturer indicates that when all three pumps were operating, the noise level would be approximately 98 decibels. (JE 8, p. 45) One of the pumps was replaced in 1998, which reduced the noise level by some degree.[1] (Id.) Other machines, such as the shop generator, were 100 decibels. (JE 8, p. 46)

Claimant worked in and around those machines on a daily basis. When he was not in the main treatment plant, he worked at a separate pump station that held four pumps in the lower level, also visible through a large metal grate. (JE 11, pp. 59-61) In the maintenance shop, a large and loud generator was present. (Tr. pp. 13-14)

Claimant testified he did not have any problems with his hearing before he began working for defendant-employer (Tr. pp. 34-35) Claimant stated he began noticing ringing in his ears sometime in the 1990s. (Tr. p. 35) He testified he knew the ringing in his ears was a serious problem from the time it started. (Tr. p. 36)

Claimant also stated that before he retired, he knew he would eventually need hearing aids. (Tr. p. 38) Claimant admitted that when he retired, he knew his hearing problems were not going to go away. (Id.)

Claimant admitted he always knew his hearing problems were work-related. (Tr. pp. 45-46) However, he did not provide actual notice of his claim to defendant-

[1] Two pumps generated 89 decibels of noise during the workday. The new pump installed in 2014 apparently had an 81 decibel rating. (JE 8:45)

employer until November 2014, which was nearly five years after he retired, when he requested the results of his hearing tests from defendant-employer. (Tr. p. 27)

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

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.

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).

There is no dispute claimant constantly worked around noisy machinery throughout the nearly forty years he work for defendant-employer. Despite this, hearing tests were not conducted routinely.

After reporting his injury to defendant-employer around November 2014, claimant began undergoing treatment. Both Mark Zlab, M.D., claimant's treating physician and evaluator hired by the defendants, as well as claimant's expert, Richard Tyler, Ph.D., opined claimant sustained hearing loss and tinnitus as a result of exposure to noise levels at claimant's workplace. They both agreed that the hearing loss and tinnitus were permanent. (Ex. 2; Ex. 3)

There is no contrary evidence presented. Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994). Also as stated above, defendants do not dispute the work-relatedness of claimant's hearing loss and tinnitus. Therefore, I affirm the deputy commissioner's finding that claimant sustained permanent hearing loss and tinnitus as a result of long-term exposures to noise in the workplace and therefore claimant has suffered an industrial loss.

Defendants argue that claimant's claim in this matter is barred (1) for lack of timely notice under Iowa Code section 85.23 and (2) under Iowa Code section 85.26 for failing to file before the two-year statute of limitations expired. The first step in evaluating these defenses is to determine claimant's injury date.

According to the Iowa Supreme Court, a cumulative trauma injury date is fixed "as of the time the disability manifests itself." Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824, 829 (Iowa 1992) The manifestation date is a fact-based determination. Tyson Foods v. Shaw, Iowa Ct. App., File No. 12-0432 (October 3, 2012).

The time period both for giving notice and for filing a claim does not begin to run until the claimant, as a reasonable person, should recognize the nature, seriousness, and probable compensable character of the injury. Herrera v. IBP, Inc., 633 N.W.2d 284, 287 (Iowa 2001). Orr v. Lewis Cent. Sch. Dist., 298 N.W.2d 256, 257 (Iowa 1980). The reasonableness of claimant's conduct is to be judged in light of claimant's education and intelligence.

Under the discovery rule, the time period to provide notice of a cumulative work injury is when the injured worker knows, or should have known, that the injury is "both serious and work connected." Robinson v. Department of Transp., 296 N.W.2d 809, 812 (Iowa 1980).

Claimant stated he began noticing ringing in his ears sometime in the 1990s. (Tr. p. 35) He testified he knew the ringing in his ears was a serious problem from the time it started. (Tr. p. 36) Furthermore claimant was aware his hearing problems were not going to resolve. (Tr. pp. 36-38) He admitted he always knew his hearing problems were work-related. (Tr. pp. 45-46)

In DeLong v. Iowa State Highway Commission, 229 Iowa 700, 703, 295 N.W. 91, 92 (1940), the Iowa supreme court held the claim of lack of notice is an affirmative defense and the burden of proof would be on the party asserting it.

Iowa Code section 85.23 provides:

> Unless the employer or the employer's representative 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 or a dependent or someone on the dependent'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.

Claimant first gave notice to defendants in November 2014 that he was concerned about his hearing loss. (Tr. p. 27) He received his first set of hearing aids in November 2014. (Id.) The petition was filed on July 27, 2016. Claimant did not realize he could file a claim for his hearing loss and tinnitus until a co-worker contacted claimant about the issue in November 2014. (Id.) Despite noting ringing in his ears in the 1990s, claimant never sought medical attention nor did he ever modify the way he performed his job before he retired in January 2010. (Tr. pp. 29, 48)

I find claimant did have a clear understanding of the nature and seriousness of his injury before he retired. However, while he knew he had hearing loss and ringing in his ears that he attributed to his work environment, he was unaware he could make a claim for his condition until November 2014.

I find claimant in this matter, as a reasonable person, should have known the probable compensable nature of his hearing loss and tinnitus sometime in the 1990s, when he first noticed the condition, but certainly no later than January 29, 2010, when he retired from his employment with defendant-employer. I find the fact that claimant did not actually know until November 2014 that he could make a claim makes no difference. I find that because claimant recognized the nature, the seriousness and the work-relatedness of his hearing loss and tinnitus, that realization should have prompted claimant long before November 2014 to investigate whether he had a compensable workers' compensation claim.

Defendants argue that this case is on point with Chapa v. John Deere Ottumwa Works, 652 N.W.2d 187 (Iowa 2002) wherein the injured worker's tinnitus claim was found to be time-barred. I agree with defendants' argument in this regard.

In Chapa, the Iowa Supreme Court was faced with the application of the discovery rule in a claim involving work-related tinnitus. The injured worker had been exposed to a noisy environment at work. He began to notice ringing in his ears in 1983. Chapa, 652 N.W.2d at 189. The injured worker in Chapa retired in December 1995, but was not formally diagnosed with tinnitus until 1997. Chapa, 652 N.W.2d at 188. He filed a petition for a cumulative work-related injury on December 24, 1997. Id. The agency found Chapa's claim was barred by the statute of limitations. Id. The Iowa Supreme Court affirmed, determining that although Chapa was not formally diagnosed with tinnitus until 1997, he recognized the nature and seriousness of his tinnitus in 1983 and

he should have known the compensable nature of his injury well before 1997. Chapa, 652 N.W.2d at 189-190. The supreme court in Chapa reiterated the longstanding rule that a worker has a duty to investigate whether an injury – even a latent one – is work-related and potentially compensable. Chapa, 652 N.W.2d at 190. See also Ranney v. Parawax Co., 582 N.W.2d 152 at 155.

In this case, I therefore find that under the discovery rule the latest date that can be considered the manifestation date for claimant's work-related hearing loss and tinnitus is the date claimant retired from his employment with defendant-employer, which is January 29, 2010. Because the record in this case establishes claimant did not report his injury to defendant-employer until November 2014, I find defendants have proven their Iowa Code section 85.23 90-day notice defense. Because the record in this case establishes claimant's petition for this claim was not filed until July 27, 2016, I find defendants have proven their Iowa Code Section 85.26(1) two-year statute of limitations defense.

Because I find this claim to be time-barred, I reverse the deputy commissioner's award of five percent industrial disability. I find claimant is entitled to receive nothing in the way of weekly benefits. I also find claimant is not entitled to payment by defendants of the requested past medical expenses totaling $7,564.00. I also find claimant is not entitled to payment by defendants of claimant's costs of the arbitration proceeding in the amount of $165.58.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on January 16, 2018, is reversed.

Claimant shall take nothing from these proceedings.

Pursuant to rule 876 IAC 4.33, each party shall pay their own costs of the arbitration proceeding, and claimant 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 26th day of August, 2019.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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