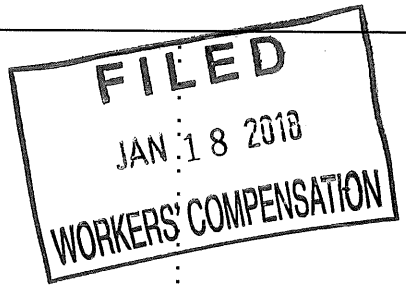
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



RICKY J. RIZZIO,

Claimant,

vs.

QUAKER OATS COMPANY,

Employer,

and

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

Insurance Carrier,
Defendants.

File No. 5053022

A R B I T R A T I O N

D E C I S I O N

Head Note: 2208

STATEMENT OF THE CASE

The claimant, Ricky J. 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's brief should be struck.

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

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

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

5. 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, 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 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 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 his 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).

At the outset, it is noted that claimant has pursued this case much like a standard hearing loss case. This is because the claimant's tinnitus is highly connected to his hearing loss. In fact, in reviewing the reports of the two experts herein, I find that the claimant's tinnitus is inextricably linked to his hearing loss. It is impossible for me to disentangle or meaningfully separate claimant's tinnitus from his hearing loss.

Following briefing, defendants filed an objection to claimant's brief and asked that it be struck because he argued in his hearing loss in his brief.

> 3. On page 18 of his Post-Hearing Brief, Claimant cites Ament v. Quaker Oats, WCC Nos. 5044298, 5044299 (App. Dec. 03/17/16) and Kriz v. Quaker Oats, WCC No. 5030408 (App. Dec. 10/31/11). He cites these cases for the proposition that a hearing loss claim with the same injury date is subsumed into a tinnitus condition for assessment of industrial disability. Neither of these decisions supports Claimant's argument that he can recover on a hearing loss claim where only a tinnitus claim was asserted at the hearing. In Kriz, it was stipulated that Claimant had occupational hearing loss and tinnitus. The sole issue was the extent of his industrial disability. Commissioner Godfrey explained that compensation for occupational hearing loss, when combined with a compensable tinnitus claim, is compensated as a body as a whole industrial loss pursuant to Iowa Code §85.34(2). In other words, a scheduled loss combined with a non-scheduled loss is compensated as an injury to the body as a whole. Similarly, in Ament, a scheduled injury and unscheduled injury are compensated as a body as a whole injury with an assessment of industrial disability. Nothing in these cases allows a claimant to pursue recovery for a condition which was not included as an issue at the hearing.

(Def. Motion to Strike, p. 2, par. 3)

The claimant's hearing loss claim is ripe under Iowa Code section 85B.8 (2013). Section 85B.8 states the following:

1. A claim for occupational hearing loss due to excessive noise exposure may be filed beginning one month after separation from the employment in which the employee was subjected to excessive noise exposure. The date of the injury shall be the date of occurrence of any one of the following events:

   a. Transfer from excessive noise exposure employment by an employer.

   b. Retirement.

   c. Termination of the employer-employee relationship.

Iowa Code section 85B.8 (2013).

The diagnosis of tinnitus is a condition which is a body as a whole condition. It is therefore evaluated as an industrial disability. Ehteshamfar v. UTA Engineered Sys. Div., 555 N.W.2d 450, 454 (Iowa 1996). The Iowa Supreme Court has distinguished between "deafness" or hearing loss and tinnitus as follows:

> Besides deafness, the other major hearing disorder disease of the cochlea and the eight cranial nerve is tinnitus, a very common symptoms thought to be experienced by more than 37 million Americans. The term tinnitus denotes sounds originating in the ear (rather than in the external world) that may be ringing, buzzing, humming, whistling, roaring, hissing, clicking or chirping in character.
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> Rosco N. Gray& Louise J. Gordy, Attorneys' Textbook of Medicine section 84.63 (3d ed. 1996) (citation omitted).
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> Hearing loss, on the other hand, involves the loss of sensation of sound. "Occupational hearing loss" under the Iowa Code is defined as 'permanent sensorineural loss of hearing in one or both ears in excess of twenty-five decibels.' Iowa Code section 85.B.4(1) Tinnitus thus falls outside the statutory definition of an occupational hearing loss. It is not a sensorineural loss of hearing in one or both ears because tinnitus does not cause a person to be unable to hear; instead tinnitus causes a person to perceive sounds that do not exist. For the same reason tinnitus does not qualify for compensation under Iowa Code section 85.34(2)(r) (loss of hearing other than occupational).
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> . . .
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> Because tinnitus does not qualify under Code section 85B.4 (occupational hearing loss) nor Code section 85.34(2)(r) (scheduled hearing loss), it should be compensated under Code section 85.34(2)(u), the section for all other cases of permanent partial disability.

Ehteshamfar, 455 N.W.2d at 453-54.

While the claimant has not technically or legally made any claim for hearing loss under Chapter 85B, he is, in fact, asking that the hearing loss be considered in the assessment of claimant's industrial disability. As mentioned above, in many ways, this case has been presented as a classic, hearing loss claim. That is to say, all of the evidence I would expect to see in a standard 85B claim is present in this record. Defendants essentially contend claimant is attempting to have the best of both worlds. If I assess claimant's industrial disability, including his hearing loss, at this time, the claimant would be free to come back when the conditions set forth in Section 85B.8, are met and pursue a scheduled hearing loss claim. Or even if it was determined he was barred from bringing such a claim, at a minimum, this would create a loophole which essentially allowed claimant to bring his hearing loss claim before allowed under Section 85B.8.

After reviewing the entire record and applying the appropriate law, I conclude that, in this case, it is impossible for me to assess the claimant's tinnitus claim without also addressing the claimant's hearing loss. The evidence overlaps in a manner which makes the two claims inextricably linked. I am compelled to conclude that either both conditions have manifested as of January 30, 2015, or neither of them have manifested. Section 85B.8 provides a technical, bright line test for setting the date of injury in hearing loss claims. Based upon the facts presented in this case, I hold that Section 85B.8 also applies to the finding of an injury date for claimant's tinnitus claim. As such, I find that the claimant's tinnitus injury has not yet manifested. His claim for benefits is not ripe.

In this decision, I recognize that the claimant is not the only party seeking to have the best of both worlds. The defendants contend that claimant has known about his tinnitus for a long period of time and that he slept on his claim. They have asserted affirmative defenses of statute of limitations under Section 85.26 and notice under Section 85.23. These defenses are necessarily rejected as well. To hold otherwise would create a procedural trap for injured workers, which is contrary to the purpose of the statute.

The fundamental reason for the enactment of [the workers' compensation act] is to avoid litigation, lessen the expense incident thereto, minimize appeals, and afford an efficient and speedy tribunal to determine and award compensation under the terms of this act.

> 'It was the purpose of the legislature to create a tribunal to do rough justice — speedy, summary, informal, untechnical. With this scheme of the legislature we must not interfere; for, if we trench in the slightest degree upon the prerogatives of the commission, one encroachment will breed another, until finally simplicity will give way to complexity, and informality to technicality.'

Zomer v. West River Farms, Inc., 666 N.W.2d 130, 133 (Iowa 2003) (quoting Flint v. City of Eldon, 191 Iowa 845, 847, 183 N.W. 344, 345 (1921)).

In this case, I reached the following specific factual findings.

1. The claimant has continued to work in the noisy environment up through the date of hearing.

2. The claimant's hearing loss claim is inextricably intertwined with his tinnitus claim as a matter of fact.

3. The claimant's hearing loss claim is not ripe under Section 85B.8.

Based upon these findings, I conclude as a matter of law that the claimant's tinnitus claim is not ripe until his hearing loss claim is. This necessarily means that his tinnitus claim has not manifested as a matter of law which thereby eliminates any technical defenses such as the statute of limitations and notice, unless claimant fails to provide

notice or file his claim pursuant to the legal manifestation date.

I have carefully considered the potential broader implications of this decision. While I do not confine my legal conclusions to this case, it is acknowledged that it is possible that there could be a case where an individual's tinnitus injury is not inextricably intertwined with his or her hearing loss claim. While I acknowledge this possibility, I admit, I do find it hard to imagine precisely what that would look like.

ORDER

THEREFORE IT IS ORDERED:

Claimant shall take nothing from these proceedings.

Costs are taxed to defendants.

Signed and filed this 18th day of January, 2018.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JLW/sam

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.