IN THE IOWA DISTRICT COURT FOR POLK COUNTY

GEORGE TYLER, **Petitioner**, **vs.** **TYSON FRESH MEATS, INC.,** **Respondent**.	**Case No. CVCV064040** **RULING ON PETITION FOR JUDICIAL REVIEW**

Petitioner George Tyler's Petition for Judicial Review came before the Court on December 8, 2022. Petitioner was represented by Benjamin Roth. Respondent, Tyson Fresh Meats, Inc., appeared through Dillon Carpenter. After hearing the parties' arguments and reviewing the court file, including the briefs filed by both parties and the Certified Administrative Record, the Court now enters the following ruling.

I. BACKGROUND FACTS AND PRIOR PROCEEDINGS.

Petitioner is 65 years of age and worked for Respondent's Waterloo plant for 25 years before retiring on October 31, 2018. He claims he sustained a cumulative low back injury as a result of his work duties at Respondent. His injury and treatment history at Respondent is extensive, including over 100 pages of medical records introduced at the Agency by the parties. Joint Exhibit (JE) 1. Low back complaints were documented by at least 2006 with a fall on the snow. JE 1, p. 69. Among the most significant of his other work-related injures was a 2017 injury resulting in hernia surgery on June 30, 2017. Petitioner returned to full duty without restrictions on July 24, 2017. *Id.* at 7. He filed a workers' compensation claim for this and ultimately settled that claim with Respondent on August 22, 2017. *Id.* at 6. Petitioner contends he continued to have symptoms after his hernia surgery, despite settling the claim, including lower abdominal pain and tingling,

and left leg and groin pain. JE 4, pp. 165-68; JE 1, pp. 82, 87. He also alleges he slipped and fell while at work on September 10, 2018, and sustained an acute low back injury in this fall.[1]

Petitioner testified at the Agency hearing that his work duties over time caused or materially aggravated his low back and leg conditions causing a cumulative injury. He asserts his low back condition worsened over time with work and eventually resulted in him determining he could not continue work due to the symptoms and forcing him to retire on October 31, 2018. Hear. Tran. 33:17-20.

Petitioner saw his primary care physician Dr. Pratiba Dua, on April 10, 2019, with complaints about left leg pain accompanied by numbness and tingling. JE 2, p. 122. Dr. Dua documented "no pinpoint tenderness in the spine" and recommended referral to physical therapy with a diagnosis that included "pain of left lower extremity." *Id.* He was first seen at physical therapy on April 18, 2019, at which time he complained of pain in his groin that he described as "tingling" radiating to his inner knee and sometimes his outer hip. JE 7, p. 183. He further reported that "his pain doesn't really start in the back, but he is having more pain in his groin, and feels that this is due more to a prior inguinal hernia surgery of the Lt groin 2 years ago." *Id*. The therapist documented normal dorsiflexion strength of the left foot. *Id.* at 184.

Petitioner followed up with Dr. Dua on June 10, 2019, complaining of left lower quadrant pain radiating to his left thigh, which he again indicated had been present since his hernia surgery. JE 2, p. 127; JE 7, p. 206. He denied that he was experiencing any

[1] The Court notes Petitioner alleged an acute injury on September 10, 2018, at the Agency hearing. The Deputy Commissioner concluded that Petitioner failed to prove the alleged September 10, 2018 acute injury. He did not appeal this to the Commissioner and this issue is not before this Court on Judicial Review.

back pain at that time. JE 2, p. 127. Dr. Dua referred Petitioner to general surgery to determine whether his symptoms were caused by the hernia and indicated that she would evaluate further if general surgery determined the symptoms were "not related to the mesh." JE 2, p. 127. Dr. Dua cancelled a lumbar MRI order that she had previously entered. JE 2, p. 129.

Petitioner saw a general surgeon, Dr. Paul Burgett, on June 19, 2019, complaining of left groin pain radiating into his left leg, which he initially stated had been present since his hernia repair, but later indicated had been present prior to the hernia repair. JE 8, p. 233. He also reported that the pain radiated around to his left buttock. *Id.* On exam, Dr. Burgett noted mild tenderness at the left inguinal canal. *Id.* at 234. Dr. Burgett opined that "[t]his could be a prolonged post-hernia pain," but also noted that the left buttock pain was inconsistent with a hernia etiology and that "[h]e may have something in his back." *Id.* Dr. Burgett therefore recommended that Petitioner see neurologist, Dr. Ivo Bekavac, to determine "whether or not this could be coming from his back" before pursuing intervention for the hernia. *Id.*

On July 15, 2019, Petitioner saw Dr. Bekavac, complaining of pain in his gluteal region radiating to his left foot since hernia repair in 2017. JE 9, p. 236. Dr. Bekavac noted "no evidence of lumbosacral motor radiculopathy" and recommended nerve testing of the left leg and MRI of the lumbar spine in an attempt to confirm a diagnosis. JE 9, p. 236. On July 29, 2019, Dr. Bekavac noted a mild bulging disc at L1-L2 and a more pronounced one at L5-S1 causing only mild to moderate left sided neuroforaminal stenosis. JE 9, p. 243. He discussed these findings with Petitioner. The radiologist's reading of the lumbar MRI, however, showed "severe" left foraminal stenosis secondary

to a left-sided disc bulge with a small left foraminal protrusion at L5-S1. JE 10, p. 245. The radiologist recommended that these findings be correlated for left L5 radiculopathy. *Id*. The record does not reflect whether the radiologist's official reading was ever conveyed to Petitioner. Dr. Bekavac referred Petitioner to Dr. Ashar Afzal. Hear. Tran. p. 38:14.

Dr. Ashar Afzal, a pain clinician, saw Petitioner on September 4, 2019, for low back pain radiating into his left hip, buttock, and leg. JE 12, p. 249. Petitioner checked a box indicating that his condition was work related on Dr. Afzal's intake questionnaire. *Id.* at 257. Dr. Afzal documented weakness of left foot dorsiflexion, for which he recommended expedited referral to a neurosurgeon. *Id.* at 249. This examination finding had not previously been documented by any other provider. Dr. Afzal's impression was left L5 radiculopathy. *Id.* Dr. Afzal performed a left L5-S1 epidural injection. Petitioner testified that he continued to believe his symptoms, including the left leg pain, were caused by the hernia until he saw Dr. Afzal. Hear. Tran. p. 31:8–12, 35:16–36:1, 38:19–24. He provided notice of his alleged cumulative back injury to Respondent on October 22, 2019. Dr. Nikolay Martirosyan performed surgical decompression of the L5 nerve root on Petitioner on September 30, 2019. JE 13, p. 271, 274.

Petitioner also relies on the opinion of David Segal, M.D. to support his claim of cumulative injury claim. Dr. Segal opined,

> [W]hen applying the legal and medical standard of causation to [Petitioner] and his 25-year history of repeated heavy manual labor, within a reasonable degree of medical certainty, [Petitioner's] work activities were a material factor causing [Petitioner's] lumbar condition of cumulative work injury.

Pet. Ex. 12, pp. 172-73. Petitioner admitted he did not cite his pain as the reason for his retirement in his exit paperwork because he had reported the pain to Respondent before.

Hear. Tran., pp. 34:14-20, 52:10-12. Petitioner stated after he retired his symptoms worsened to the point he sought medical care about six months after he retired. He waited so long because he does not like going to the doctor. *Id.* at 34-35. Petitioner's retirement paperwork states the reason for retirement was "because I've worked 43 years 25 here at [Respondent]." Def. Ex. F., p. 3. He continued working full-duty without restrictions until his retirement, and did not mention any injury or symptoms forcing him to retire on October 31, 2018.

Respondent provided the opinion of Charles Mooney, M.D., to refute Petitioner's cumulative injury claim. Dr. Mooney opined that "the medical literature does not support that 'cumulative trauma' (i.e., work activities) consistently cause degenerative disc or degenerative facet disease of the lumbar spine." Resp. Ex. B, p. 3. He further stated, "any assumption of 'cumulative trauma' causing degenerative conditions, specifically disregards known causal factors including aging and genetic influences." *Id.*

A hearing was held before a Deputy Commissioner on July 27, 2021. The Deputy issued his Arbitration Decision on January 21, 2022. He concluded, in relevant part, that Dr. Mooney's opinions were inconsistent with existing and long-standing Iowa law and he rejected his causation opinions as they pertained to the cumulative injury claim. Arb. Dec. p. 10-11. The Deputy also found Dr. Segal's opinions to have some concerning issues as well. Namely that they assumed a September 10, 2018 acute injury occurred and the Deputy found that had not been proven. *Id.* at 11. Therefore, the history and assumptions relied upon by Dr. Segal were not necessarily accurate. However, having rejected Dr. Mooney's opinion, Dr. Segal offered the only other opinion and he provided a comprehensive explanation of how the cumulative injury occurred. Thus, the

Deputy found Dr. Segal's opinion regarding the cumulative injury to be "the most credible and convincing opinion in this evidentiary record" and concluded Petitioner proved he sustained a cumulative injury as a result of his work at Respondent.

The Deputy further concluded that Petitioner's cumulative injury manifested on October 31, 2018, the date he retired from Respondent. Arb. Dec. p. 11. Respondent claimed that Petitioner failed to give it timely notice of the cumulative injury and thus the claim should be time barred. Iowa Code section 85.23 requires the employee give the employer notice of occurrence of an injury within 90 days from the date of occurrence, unless an employer has actual knowledge of the injury. Petitioner did not give Respondent notice until October 22, 2019, almost a year after of the manifestation of his cumulative injury on October 31, 2018, and thus well beyond the 90-day limit et in section 85.23. However, Petitioner argued that the period for giving notice was tolled by the discovery rule. The Deputy concluded that Petitioner testified his symptoms were the reason he retired, and that he knew his symptoms were serious enough he could not continue working due to them and needed to retire. *Id.* at 13. Petitioner testified his symptoms continued to worsen after he retired, and he sought medical treatment for them in April 2019. Thus, the Deputy concluded that by April 2019 he knew that his cumulative work injury and symptoms that caused his retirement continued to worsen to the point they required medical treatment. *Id.* The Deputy therefore concluded that Petitioner knew of the seriousness of his injury by October 31, 2018, and certainly no later than April 2019. Even if April 2019 were the date used as to when he discovered the seriousness of the injury, he still did not give Respondent notice of such within 90 days of this date, as notice was not until October 2019. Accordingly, the Deputy concluded Respondent

proved its notice defense, Petitioner's October 31, 2018 cumulative trauma injury was statutorily barred, and this rendered all other issues moot for the October 31 cumulative injury. *Id.*

Petitioner appealed the Arbitration Decision to the Workers' Compensation Commissioner. He alleged the Deputy erred in concluding he knew or should have known of the nature and seriousness of the injury as early as October 31, 2018, and certainly no later than April 2019. Petitioner asserted instead that he did not know of the nature of the injury until September 2019, and thus his October 22, 2019 notice to Respondent was within the 90-days and timely. App. Dec., p. 2. The Commissioner issued his Appeal Decision on June 30, 2022. He concluded the Deputy provided well-reasoned analysis of all the issues and, upon his de novo review, he reached the same analysis, findings, and conclusion as the Deputy. Therefore, the Commissioner affirmed the Deputy's findings of fact and conclusions of law in toto on all issues, agreeing Petitioner's cumulative injury claim was statutorily barred by Iowa Code section 85.23. *Id.* at 3.

Petitioner filed the present Petition for Judicial Review with this Court on July 19, 2022. He contends the Commissioner erred as a matter of law in applying the discovery rule. More specifically, he alleges the Commissioner "conflated" the nature element of the discovery rule with the seriousness and compensable character elements, and as a result failed to consider and make findings as to when Petitioner knew of the nature of this cumulative injury. Petitioner filed a Brief in support of his Petition on October 7, 2022, and Respondent filed its Brief in resistance on November 16, 2022.

II. SCOPE AND STANDARD OF REVIEW.

The Iowa Administrative Procedure Act, Iowa Code chapter 17A, governs the

scope of the Court's review in workers' compensation cases. Iowa Code § 86.26 (2019); *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006). "Under the Act, we may only interfere with the commissioner's decision if it is erroneous under one of the grounds enumerated in the statute, and a party's substantial rights have been prejudiced." *Meyer*, 710 N.W.2d at 218. A party challenging agency action bears the burden of demonstrating the action's invalidity and resulting prejudice. Iowa Code § 17A.19(8)(a). This can be shown in a number of ways, including proof the action was ultra vires; legally erroneous; unsupported by substantial evidence in the record when that record is viewed as a whole; or otherwise unreasonable, arbitrary, capricious, or an abuse of discretion. *See id*. § 17A.19(10) (a-n). The district court acts in an appellate capacity to correct errors of law on the part of the agency. *Grundmeyer v. Weyerhaeuser Co.*, 649 N.W.2d 744, 748 (Iowa 2002).

Petitioner contends the Commissioner committed an error of law in his interpretation and application of the discovery rule.[2] The "discovery rule question here does not really involve the agency's interpretation of the statute; instead, the question is whether the agency *correctly applied* the 'judicial interpretation that the date of injury referred to in the statute is the time when the employee discovers the injury and its probable compensable nature.'" *Baker v. Bridgestone/Firestone*, 872 N.W.2d 672, 675–76 (Iowa 2015) (quoting *Bergen v. Iowa Veterans Home,* 577 N.W.2d 629, 630 (Iowa 1998)). Therefore, our review is for errors at law. *Id.* The Court is "not . . . bound by an agency's legal conclusions, but may correct misapplications of the law." *Sallis v. Emp't*

[2] The Court notes that in the Petition for Judicial Review, Petitioner alleged several other ways in which he was detrimentally affected by the Agency's decision. However, he only provides substantive legal argument on one, that the Commissioner erred as a matter of law by incorrectly interpreting and applying the discovery rule. As such, this is the only issue the Court will address here.

Appeal Bd., 437 N.W.2d 895, 896 (Iowa 1989). The district court gives careful consideration of the Commissioner's conclusions of law, but is not bound by them. *Briar Cliff College v. Campolo,* 360 N.W.2d 91, 93 (Iowa 1984). The district court must reverse, modify, or grant other appropriate relief from agency action affected by errors of law. *Vosberg v. A.Y. McDonald Mfg. Co.,* 519 N.W.2d 405, 407 (Iowa Ct. App. 1994).

III. MERITS.

> [T]he discovery rule delays the accrual of a cause of action until the injured person has in fact discovered his injury or by exercise of reasonable diligence should have discovered it. More specifically, a condition is implied in limitations provisions of most workers' compensation statutes that "(t)he time period for notice or claim does not begin to run until the claimant, as a reasonable man, should recognize the nature, seriousness and probable compensable character of his injury or disease." 3 A. Larson Workmen's Compensation s 78.41 at 15-65 to 15-66 (1976). This rule is applicable to the notice of claim provision in section 85.23 of our workers' compensation statute.

Orr v. Lewis Cent. Sch. Dist., 298 N.W.2d 256, 257 (Iowa 1980). The employee's "knowledge of these three triggering factors may be actual or imputed from the record." *See Larson Mfg. Co. v. Thorson,* 763 N.W.2d 842, 854 (Iowa 2009). The proper analysis is to first determine the manifestation date of the cumulative injury, and "then to examine whether the statutory period commenced on that date or whether it commenced upon a later date based upon application of the discovery rule." *Herrera v. IBP, Inc.*, 633 N.W.2d 284, 288 (Iowa 2001). "Although the date of injury is relevant to notice . . . issues, the cumulative injury rule is not to be applied in lieu of the discovery rule . . . . Although '[t]hese two rules are closely related, . . . [but] they are not the same.'" *Id.* at 287 (quoting *McKeever Custom Cabinets v. Smith,* 378 N.W.2d 368, 372-73 (Iowa 1985)). Therefore,

> 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. 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. at 288 (quoting *Orr,* 298 N.W.2d at 257).

Petitioner does not dispute that the manifestation date of his cumulative back injury was the date he retired, October 31, 2018. Thus, he concedes as of that date he was aware he (1) suffered from an injury and (2) such injury was caused by his employment. *See id.* The second inquiry and the only issue for this Court, is whether the Commissioner erred in applying the discovery rule and concluding Petitioner knew or should have known the cumulative injury was "serious enough to have a permanent adverse impact on [his] employment or employability," *in other words* the "nature, seriousness, and probable compensable character of the injury" as of October 31, 2018. *Id.* Petitioner contends the Commissioner erred because he "conflated" the nature element with the seriousness and compensable character elements, and as a result failed to make any factual finds or legal concludes regarding the nature element.

As set forth above, under the discovery rule the period for notice does not begin until the employee "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 (internal citation and quotations omitted). The abbreviation "i.e." stands for the Latin *id est*, which means "that is" or "in other words." *I.E., Black's Law Dictionary* (11th ed. 2019); *see also Merriam-*

Webster Dictionary, available at https://www.merriam-webster.com/dictionary/i.e. Use of "i.e." simply clarifies, defines, or provides more precise information about the same terms or phrase. *See e.g., SkinMedica, Inc. v. Histogen Inc.,* 727 F.3d 1187, 1200 (Fed. Cir. 2013) (finding in a specification, a patentee's "use of *'i.e.'* signals an intent to define the word to which it refers." (quoting *Edwards Lifesciences LLC v. Cook Inc.,* 582 F.3d 1322, 1334 (Fed. Cir. 2009))). Thus, with the use of "i.e." our supreme court has *equated* an employee's knowledge that the condition is serious enough to have a permanent impact on their employment or employability *with* their knowledge of the nature, seriousness, and probable compensable character of the injury. *Herrera,* 633 N.W.2d at 288. In other words, when the Commissioner made findings and conclusions that Petitioner knew his cumulative back injury was serious enough to have a permanent impact on his employment, he was in fact also finding and concluding Petitioner knew the nature, seriousness, and probable compensability of the injury.

The Commissioner, in affirming and adopting in whole the Deputy's Decision, concluded

> I find that [Petitioner] was plainly aware of the ongoing and worsening symptoms and aware that the injury and symptoms were related to his employment by the time he retired, October 31, 2018. [Petitioner] may not have yet understood his diagnosis of a low back injury or the specific cause of his symptoms, but he believed the injury and symptoms to be related to work and clearly knew the symptoms were present. Therefore, I find by October 31, 2018, [Petitioner] knew the nature and work-relatedness of his injury and symptoms.

Arb. Dec., p. 8.

> In this case, I found that [Petitioner] knew or should have known the seriousness of his injury by October 31, 2018 and certainly no later than April 2019. [Petitioner] testified . . . that his symptoms were the reason he retired. . . . [Petitioner] knew or should have known on his date of retirement that his symptoms were serious enough that he could not continue working

> and needed to retire. [Petitioner] was required to give notice within 90-days of this occurrence. Iowa Code section 85.23. He did not give notice of the cumulative injury within the required 90-day period, and his claim for the October 31, 2018 cumulative injury is barred.
>
> Moreover, [Petitioner] testified that his symptoms continued to worsen after his retirement. Therefore, [Petitioner] knew that his symptoms were sufficient to cause him to retire. He knew that his symptoms continued to worsen for months after his retirement. He then sought medical treatment for these symptoms in April 2019. Certainly, by April 2019, [Petitioner] knew the work injury and symptoms caused his retirement, continued to worsen, and required medical attention.

Id. at 12-13. Accordingly, the Court concludes the Commissioner did make findings and conclusions regarding the nature element of Petitioner's injury when it determined Petitioner was aware his cumulative back injury was serious enough to affect his employment because he specifically testified it caused him to retire.

The Court notes Petitioner cites to two Agency decisions, *Kittleston v. Henkel Constr. Co.*, File No. 1133867 (App. 4/22/99), and *Anderson v. Maytag Co.*, File No. 926111, 974256 (Arb. 12/7/94) in support of his position. However, having reviewed these cases the Court concludes they are distinguishable because the prior misdiagnoses were non-work-related and in *Anderson* it was an employer doctor who misdiagnosed. Here, Petitioner concedes he believed his symptoms were caused by his prior work-related hernia and no Respondent doctor made any misdiagnosis. In addition, prior Agency decisions are not controlling or precedential on this Court. "The controlling legal standards are those set out in the workers' compensation statutes and in [the Iowa Supreme Court's] opinions, not in prior agency decisions." *Finch v. Schneider Specialized Carriers, Inc.*, 700 N.W.2d 328, 332 (Iowa 2005). This Court follows the decisions of our supreme court quoted above, not prior agency decision.

IV. CONCLUSION AND DISPOSITION.

For all of the reasons set forth above, the Court concludes the Commissioner did not err in applying the discovery rule when he concluded Petitioner knew or should have known his cumulative injury was serious enough to have a permanent adverse impact on his employment and thus also knew the nature, seriousness, and probable compensable character of the injury as of October 31, 2018. In doing so, the Commissioner properly considered and made findings as to the nature element and when Petitioner discovered the nature of his cumulative injury. Accordingly, the Court concludes the Commissioner did not commit an error of law here and affirms the Appeal Decision. Petitioner's Petition for Judicial Review is **DENIED.**

Costs are assessed to Petitioner.

State of Iowa Courts

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CVCV064040	GEORGE TYLER VS TYSON FRESH MEATS INC
Type:	ORDER FOR JUDGMENT

So Ordered

Celene Gogerty, District Judge
Fifth Judicial District of Iowa

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