

IN THE COURT OF APPEALS OF IOWA

FILED

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CLERK SUPREME COURT

JOHN DEERE DUBUQUE WORKS OF)
DEERE & COMPANY, Employer,)
Self-Insured,)

Petitioner-Appellant,)

vs)

THOMAS MEYERS,)

Respondent-Appellee.)

Filed March 31, 1987

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6-490
86-385

Appeal from the Iowa District Court for Dubuque County (No. 45398)

- Thomas H. Nelson, Judge.

Petitioner appeals the district court's affirmance of the industrial commissioner's determination that respondent has a 12.2% permanent partial hearing loss as a result of his exposure to excessive noise at work. **AFFIRMED.**

Leo A. McCarthy and John J. Wertzberger of Reynolds & Kenline, Dubuque, for petitioner-appellant.

Michael J. Coyle of Fuerste, Carew, Coyle, Juergens & Sudmeier, Dubuque, for respondent-appellee.

Heard by Schlegel, P.J., and Hayden and Sackett, JJ.

SCHLEGEL, P.J.

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Petitioner appeals the district court's affirmance of the industrial commissioner's determination that respondent has a 12.2% permanent partial hearing loss as a result of his exposure to excessive noise at work.

Respondent, Thomas Meyers, began working for petitioner, John Deere Dubuque Works, in April 1964. During his employment, Meyers was exposed to high levels of noise. In March 1982, Meyers was examined by an otolaryngologist who diagnosed high-frequency sensorineural hearing loss related to noise exposure.

After being laid off from work in November 1981, Meyers was recalled in June 1982 and transferred to a quieter area of the plant. On March 7, 1984, Meyers filed a petition for arbitration with the industrial commissioner, seeking relief under Iowa Code chapters 85 and 85B relating to workers' compensation and occupational hearing loss.

After a hearing, the deputy industrial commissioner found that Meyers sustained a 15% permanent partial hearing loss as a result of his exposure to excessive noise at work. Based on his finding, the deputy awarded Meyers 28 weeks of permanent partial disability compensation.

On appeal, the industrial commissioner found that Meyers sustained only a 12.2% permanent partial hearing loss. Based on his finding, the commissioner modified the deputy's decision by reducing Meyers' award to 21.35 weeks of permanent partial disability compensation. The commissioner determined that the applicable two-year statute of limitations under Iowa Code section 85.25(1) began to run in March 1982 when Meyers discovered his hearing loss injury and that Meyers' March 1984 claim was timely filed.

On judicial review, petitioner asserted, in part, that: (1) the commissioner's decision violated the statute of limitations under section 85.25(1) because, accord-

ing to petitioner, Meyers' hearing loss injury occurred in 1981, more than two years prior to the date he filed his 1984 claim; (2) the commissioner failed to properly apply Iowa Code section 85B.8 defining the date of occurrence of an occupational hearing loss injury; and (3) the commissioner's decision was contrary to law and unsupported by substantial evidence.

The district court affirmed the decision of the industrial commissioner after concluding that the commissioner was right for the wrong reason. The court ruled that the commissioner erred in applying the discovery rule to Iowa Code section 85B.8, but that Meyers' March 1984 claim was timely filed since it was filed within two years of June 1982, the date Meyers was transferred by Deere from an excessively noisy work area to one with a lower noise level. Under section 85B.8, the date of such transfer is one of three events which can constitute the "date of injury" from which the two-year statute of limitations begins to run. The court found support in the record for the commissioner's conclusion that Meyers suffered a permanent partial hearing loss of 12.2%.

The standard of review which we employ in cases governed by the Iowa Administrative Procedure Act is limited by Iowa Code section 17A.20 to the correction of errors at law. Caylor v. Employers Mutual Casualty Co., 337 N.W.2d 890, 893 (Iowa Ct. App. 1983). We review the district court's decision on appeal from the commissioner's determination for errors of law and reapply the standards embodied in section 17A.19(8) in order to determine whether our conclusions are the same as those of the district court. Doerfer Division of CCA v. Nicol, 359 N.W.2d 428, 432 (Iowa 1984). If the facts are in dispute, we will adopt the findings made by the industrial commissioner if they are supported by substantial record evidence. Caylor, 337 N.W.2d at 893. Moreover, the commissioner's findings are accorded the same weight as a jury verdict and are applied broadly and liberally to uphold rather than to defeat the commis-

sioner's decision. Armstrong v. State of Iowa Buildings and Grounds, 382 N.W.2d 161, 165 (Iowa 1986); Nicol, 359 N.W.2d at 432.

I.

Petitioner-employer first contends that the district court erred in determining the date of occurrence of the hearing loss injury pursuant to Iowa Code section 85B.8 (1985) and in determining that respondent-employee's claim was not barred by the statute of limitations under Iowa Code section 85.26(1) (1985).

Iowa Code section 85B.8 (1985) provides:

A claim for occupational hearing loss due to excessive noise levels may be filed six months after separation from the employment in which the employee was exposed to excessive noise levels. The date of the injury shall be the date of occurrence of any one of the following events:

1. Transfer from excessive noise level employment by an employer.
2. Retirement.
3. Termination of the employer-employee relationship.

The date of injury for a layoff which continues for a period longer than one year shall be six months after the date of the layoff. However, the date of the injury for any loss of hearing occurred prior to January 1, 1981 shall not be earlier than the occurrence of any one of the above events.

Iowa Code section 85.26(1) (1985) provides:

An original proceeding for benefits under this chapter or chapter 85A, 85B, or 86, shall not be maintained in any contested case unless the proceeding is commenced within two years from the date of the occurrence of the injury for which benefits are claimed

Under these provisions, an employee cannot make a claim under 85B until six months after separation from the exposure. The employee then must begin an original proceeding for benefits within two years of the date of occurrence of the injury. The employee here was not terminated nor did he retire. The

date of occurrence, therefore, was the date on which the employee was transferred from excessive noise level employment by his employer.

The deputy industrial commissioner found that the employee was informed of his hearing loss in 1982, that he filed a claim in the matter in March 1984, and therefore the employee was within the two-year filing requirement which the discovery rule imposes on workers' compensation cases in Iowa. The industrial commissioner said that the employer had shown, by a preponderance of the evidence, that the statute of limitations had run against the employee. The commissioner went on to conclude, however, that the discovery rule exception to statutes of limitations applied in this instance. The discovery rule delays the commencement of a limitation, for bringing a cause of action or for giving notice, until the injured person has discovered the injury or should have discovered, by exercise of reasonable diligence the probable compensable character of the injury. Orr v. Lewis Central School District, 298 N.W.2d 256, 261 (Iowa 1980); Robinson v. Department of Transportation, 296 N.W.2d 809, 811 (Iowa 1980). The application of the discovery rule in this case would allow the employee two years from the date of discovery of the hearing loss to file the claim. Since it was the hearing test of March 18, 1982, that provided claimant with the knowledge of the hearing loss and which then enabled him to infer he had sustained a compensable injury, the commissioner found the employee's petition to be timely.

The district court did not agree with the industrial commissioner and the deputy industrial commissioner. The district court found the discovery rule did not apply to Iowa Code section 85B. The court relied on an application of 85B to establish the date of occurrence in this case as being the date of transfer of the employee to his new job. The court then went on to say that since the employee was not transferred to an area with a lower noise level until his

return from layoff in June 1982, the employee's claim was not barred by the statute of limitations in section 85.26(1).

We cannot agree with the district court's application of the law in this case. Unlike the district court, we do think that the discovery rule applies to Chapter 85B claims. The policy underlying our conclusion is drawn from the supreme court's application of the discovery rule to workers' compensation statutes. In Orr v. Lewis Central School District, 298 N.W.2d at 261, the supreme court said:

We must apply the workers' compensation statute broadly and liberally in furtherance of its humanitarian objective. See Halstead v. Johnson's Texaco, 264 N.W.2d 757, 759 (Iowa 1978). Courts do not favor statutes of limitations. When two interpretations of a limitations statute are possible, the one giving the longer period to a litigant seeking relief is to be preferred and applied. Sprung v. Rasmussen, 180 N.W.2d 430, 433 (Iowa 1970).

Under the discovery rule, the period of limitations does not begin to run until the claimant knows of his injury and its probable compensable nature.

We do not believe the legislature intended to eliminate the discovery rule as applies to occupational hearing loss cases. Rather, the statute reveals a legislative attempt to help determine a particular date of occurrence for an injury for which a specific date of origin is often difficult to specify. It is inconceivable that the legislature would want to consider hearing loss as less worthy of full protection by our legal rules than other disabilities covered by sections 85.26 and 85.23. The refusal to permit application of the discovery rule to hearing loss disabilities would be in direct opposition to our courts' express goal of applying the workers' compensation statute broadly and liberally in furtherance of its humane objective.

Therefore, we affirm the district court's conclusion, but cannot agree with its rationale. First, the discovery rule, as we have said, does apply to

Chapter 85B. Second, the date of transfer in this case for purposes of 85B could not have been June 1, 1982. It is true that the employee began his quieter job on June 1, 1982; however, he was laid off as of November 29, 1981. He had been transferred to a less noisy job as of September 1981, although the noise level of the new job was disputed. He was therefore completely separated from the employment in which he was exposed to excessive noise levels as of November 29, 1981. There is little reason to think the statute contemplates the date of occurrence is the date a new, quieter job starts, regardless of the time an employee leaves the noisier job. The date of occurrence, under 85B.8, is a "transfer from" the excessive noise level. In the instant case, a layoff must be considered a type of "transfer from" or separation as contemplated by 85B.8. If the discovery rule did not apply, the employee would surely be barred by the two-year statute of limitations. However, the record reveals that it was only as of March 18, 1972, that the employee learned there in fact was injury to his hearing and what the cause of that injury was. We therefore hold that since the discovery rule does apply to cases arising under Iowa Code section 85B and since the employee did not know of his injury and its probable compensable nature until March 18, 1982, his claim was timely filed on March 7, 1984.

II.

The employee has the burden of proving by a preponderance of the evidence that he suffers from an occupational hearing loss which arose out of or in the course of his employment. See McDowell v. Town of Clarksville, 241 N.W.2d 904, 908 (Iowa 1976). The industrial commissioner concluded, and the trial court agreed, that there was substantial evidence to support the employee's claim. On appeal, the employer contends that there was not substantial evidence in the record to support the employee's claim that his hearing loss arose out of and in the course of his employment.

Evidence is substantial to support an agency decision if a reasonable person would find it adequate to reach the given conclusion. Meads v. Iowa Department of Social Services, 366 N.W.2d 555, 558 (Iowa 1985). The possibility of drawing two inconsistent conclusions from the record does not prevent the agency's finding from being supported by substantial evidence. Billingsley v. Iowa Department of Job Service, 338 N.W.2d 538, 540 (Iowa Ct. App. 1983).

We believe there is substantial evidence in the record to support the industrial commissioner's finding that the employee met his burden of proof on this issue. The commissioner considered evidence of the employee's nonjob-related exposure to noise; he considered the use of hearing protection by the employee; he examined the employee's entire course of employment at John Deere; he examined the report of the employer's medical department. From this evidence, the commissioner concluded that the employee's hearing loss arose out of and in the course of his employment. Though another conclusion may have been drawn from this evidence, it was certainly adequate to reach the given conclusion.

III.

The employer finally contends that the finding of a causal connection between respondent's hearing loss and his present hearing disability is not supported by substantial evidence. The employee has the burden of proving by a preponderance of the evidence that his hearing loss was causally related to the disability on which he based his claim. Holmes v. Bruce Motor Freight, Inc., 215 N.W.2d 296, 297 (Iowa 1974). A possibility is insufficient; a probability is necessary. Id. The incident need not be the sole proximate cause if the injury is directly traceable to it. Id. Determining causal connection is essentially within the domain of expert medical testimony. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 185 (Iowa 1980); Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 383, 101 N.W.2d 167, 171 (1960). Such expert medical testimony,

however, must be considered with all the other evidence introduced bearing on the causal connection. Anderson v. Oscar Meyer & Co., 217 N.W.2d 531, 536 (Iowa 1974). The weight to be given such evidence is for the finder of fact. Musselman v. Central Telephone Co., 261 Iowa 352, 360, 154 N.W.2d 128, 132 (1967).

We believe there is substantial evidence in the record to support the industrial commissioner's finding of a causal connection. The record reveals that the commissioner considered expert medical opinion from Dr. Aschwendtner; he considered prior noise exposure for the employee; he considered the lack of requirements concerning the use of hearing protection in the employee's department; he considered testimony relating to the high noise levels in the employee's department; he considered the audiograms performed on the employee; he considered the progression of hearing loss as indicated in the occupational hearing loss worksheet. The commissioner concluded that the employee carried his burden in showing a causal connection existed between his hearing loss and his present hearing disability. There is substantial evidence in the record to support such a conclusion.

Therefore, we conclude that the commissioner's findings were supported by substantial evidence and that the district court did not err in approving the industrial commissioner's decision. We have also held, however, that the discovery rule does apply to Iowa Code section 85B (1985).

AFFIRMED.

Hayden, J., concurs; Sackett, J., specially concurs.

I concur with the result reached by the majority, but determine the majority should have reached this result via a different route. It is not necessary to this appeal to bring in the thorny issue of interpreting Iowa Code §85B.8 (1985). Interpreting §85B.8 is an issue of first impression which rightly belongs with the Iowa Supreme Court. However, the majority has permitted appellant John Deere, through strategic casting of the issues on appeal, to force the majority to play its hand on §85B.8.

With regard to the issue of timeliness of Meyers' action, the only question which absolutely requires addressing is whether the discovery rule applies to Iowa Code Chapter 85B. I agree with the majority that the discovery rule does apply.

In Orr v. Lewis Central School District, 298 N.W.2d 256, 262 (Iowa 1980), the Iowa Supreme Court held the common law discovery rule is available in actions filed under Iowa's workers' compensation statute, Iowa Code §85.26 (1975). The Orr opinion was filed on November 12, 1980. Id. at 256. At that time chapter 85 covered claims for occupational hearing loss. Iowa Code Chapter 85B was enacted to specially incorporate accepted standards of percentage of hearing loss into the workers' compensation law. S.F. 359, 68th G.A., 1st Reg. Sess., 1979 Iowa. Chapter 85B did not take effect until January 1, 1981. Id. The purpose of Chapter 85B is not to supplant all other requirements for workers' compensation action but rather 85B statutorily specifies the measurement of hearing loss, the methods for measuring loss, the limitation on employer liability and the minimum and maximum limits of compensation for hearing loss. S.F. 359, 68th G.A., 1st Reg. Sess., 1979 Iowa.

There is no indication that the legislature did not intend the discovery rule to apply to occupational hearing loss. Moreover, workers' compensation law is for the working person's benefit and should be liberally construed. See

Doerfer Division of CCA v. Nicol, 359 N.W.2d 428, 432 (Iowa 1984); Dickenson v. John Deere Products Engineering, 395 N.W.2d 644, 648 (Iowa App. 1986). The beneficial purpose of the workers' compensation law is not to be defeated by reading something into it which is not there, or by a strained and narrow construction. Thomas v. William Knudson & Sons, 349 N.W.2d 124, 126 (Iowa App. 1984).

Applying the discovery rule to an action for occupational hearing loss, a claimant must commence an action within two years of the date on which the injury was diagnosed. Iowa Code §85.26(1) (1985). In the instant case, Meyers claimed and the industrial commissioner determined, Meyers' hearing loss was diagnosed in a hearing test on March 18, 1982. Meyers filed his claim for hearing loss on March 7, 1984, within the two-year limit.

In its appeal of the industrial commissioner's award of benefits, John Deere challenged the timeliness of Meyers' claim. The district court and this court, both sitting in appellate review of agency action, have the duty under Iowa Code §17A.19(8)(f) (1985) to determine whether there is substantial evidence supporting the industrial commissioner's determination Meyers' claim was timely. Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 734 (Iowa App. 1986). We do not make an independent determination concerning the preponderance of the evidence. Budding v. Iowa Department of Job Service, 337 N.W.2d 219, 221 (Iowa App. 1983). The question is not whether the evidence might support a different finding but whether the evidence supports the findings actually made. Boyd v. Iowa Department of Job Service, 377 N.W.2d 1, 2 (Iowa App. 1985).

Viewing as a whole the record made before the agency, I agree with the district court that there is substantial evidence supporting the industrial commissioner's determination the March 18, 1982 medical diagnosis of hearing

loss constitutes the date of injury under the discovery rule for the purposes of Meyers' claim for workers' compensation. He filed within two years of that diagnosis and thus his claim was timely.

This is the end of the inquiry which the majority should have made regarding the timeliness issue. I think the majority exceeded the necessary scope of the critical issues on appeal. In addition, I would determine that to the extent that the district court's findings, conclusions of law and rationale disagree with this court and to the degree the scope of the district court's opinion exceeds the *judicial restraint this court should impose upon itself*, the district court should be overruled.