

IN THE COURT OF APPEALS OF IOWA

No. 9-239 / 08-1536
Filed May 6, 2009

**INTERNATIONAL PAPER CO., INC.,
and OLD REPUBLIC INSURANCE,**
Petitioners-Appellants,

vs.

JOHN BUEKER,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Donna L. Paulsen,
Judge.

Employer and insurance carrier appeal the district court's ruling on petition
for judicial review affirming the commissioner's award of workers' compensation
benefits. **AFFIRMED.**

James M. Ballard and Rebecca M. Threlkeld of Cutler Law Firm, P.C.,
West Des Moines, for appellants.

Gregory A. Johnson of Johnson & Skewes, Fort Madison, for appellee.

Considered by Mahan, P.J., and Miller and Doyle, JJ.

MAHAN, P.J.

International Paper Company, Inc. and its insurer, Old Republic Insurance, (collectively “International Paper”) appeal the district court’s ruling on petition for judicial review affirming the workers’ compensation commission’s final agency decision awarding workers’ compensation benefits to John Bueker. We affirm.

I. Background Facts and Proceedings.

John Bueker was forty-eight years old at the time of the evidentiary hearing. Bueker was a high school graduate, but had no further education or training. The majority of his work history was in the paper mill industry.¹ Bueker began working as a broke beater operator at the International Paper plant in 1978. At that time, the plant was owned by Consolidated Packaging. In 1981 Bueker became a winder helper, and was then promoted to winder man. The plant closed during the flood of 1993. The plant reopened in January 1994 under the ownership of 4M. In 1997 the plant was sold to Box USA, and in 2004 the plant was again sold to International Paper. Throughout the changes in the plant’s ownership, Bueker’s employment was continuous, and he maintained his seniority and job position. He was promoted several times, and his last position at the plant was as machine tender, which he performed for thirteen years. He worked mostly eight- to twelve-hour shifts, with some sixteen-hour shifts. The International Paper plant was closed in August 2005 due to economic reasons.

Throughout his work at the plant, from 1978 to 2005, Bueker was exposed to loud noises from a machine that produced paper. Furthermore, Bueker

¹ Bueker’s only other work experience included working as a meat cutter in a grocery store in high school, and since September 2005, Bueker had worked as a quality control operator at the Iowa Ordnance plant.

testified he worked within twenty-five feet of an “extremely loud” siren that was needed to alert the machine tender over the noise of the machine when there had been a failure on the machine. The siren would sometimes go off for thirty minutes at a time. Bueker was also subject to a steam whistle located on top of the siren, which would go off when pressure built up in the machine. Although Bueker wore hearing protection throughout his employment, both the siren and the steam whistle could be heard approximately sixteen blocks from the plant and caused neighbors to complain about the noise.

The plant had conducted regular hearing tests since 1979. Bueker first noticed ringing in his ears, or tinnitus, in 1982. The tinnitus would be intermittent, however, and during the plant’s periodic hearing exams, Bueker did not always report that he had noises in his ears. Furthermore, Bueker reported that some of his hobbies (i.e., dirt bikes, loud music, and power tools) exposed him to loud noises.² Since Bueker first began experiencing tinnitus in 1982, his condition gradually worsened. In 1999 it was noted that Bueker had some mild hearing loss. However, according to Bueker, his hearing loss was not an issue until he failed a hearing test in November 2004. By that time, Bueker’s tinnitus had become constant. Currently, the constant ringing in Bueker’s ears makes it hard for him to sleep, which leaves him tired and feeling sick throughout the day. He also has difficulty concentrating and communicating with others.

After Bueker failed his hearing test in November 2004, International Paper sent him to be evaluated by an otolaryngologist, Dr. Dean Lyons. Dr. Lyons

² Bueker had owned a dirt bike in 1978, but he had not ridden it often. Bueker did not actually own his own power tools.

opined that Bueker sustained tinnitus caused by work-related noise exposure, and gave Bueker a four percent permanent impairment rating due to the tinnitus. Dr. Lyons further opined that two-and-a-half percent of Bueker's permanent impairment was attributable to his last years of employment at the International Paper plant. Bueker was also evaluated by an audiologist, Dr. Marvin Engelberg, who opined that Bueker's tinnitus produced no permanent impairment.

After the International Paper plant closed in August 2005, Bueker obtained employment at the Iowa Ordnance plant in a quality control position. He applied for a position with the Santa Fe Railroad, but was not hired due to "safety reasons," which he presumed was his hearing. Bueker has had to work hard to learn his current position at Iowa Ordnance, due to his difficulty concentrating and understanding training instructions. He has been pursuing another job opportunity at a different company.

Bueker sought workers' compensation benefits. His stated injury date was August 29, 2005, his last day of employment with International Paper. The deputy workers' compensation commissioner heard Bueker's claim for workers' compensation benefits against International Paper on February 22, 2007. The deputy concluded Bueker's tinnitus arose out of and in the course of his employment with International Paper. The deputy further concluded that as a result of his tinnitus, Bueker sustained a permanent impairment and suffered a fifteen percent loss of earning capacity. International Paper appealed, and the second deputy acting as the workers' compensation commissioner affirmed.³

³ For simplicity's sake, the second deputy acting as the workers' compensation commissioner will hereinafter be referred to as the "commissioner."

Thereafter, International Paper filed a petition for judicial review. On judicial review, the district court found the commissioner's decision was supported by substantial evidence. International Paper appeals.

II. Scope and Standard of Review.

Iowa Code chapter 17A governs our review of the decisions of the workers' compensation commissioner. Iowa Code § 86.26 (2007); *Midwest Ambulance Serv. v. Ruud*, 754 N.W.2d 860, 864 (Iowa 2008). The factual findings of the commissioner are reversed only if they are not supported by substantial evidence. Iowa Code § 17A.19(10)(f), *Midwest*, 754 N.W.2d at 864. Evidence is substantial if a reasonable mind would accept it as adequate to reach a conclusion. *Heartland Specialty Foods v. Johnson*, 731 N.W.2d 397, 400 (Iowa App. 2007). We will reverse the agency's application of the law to the facts if we determine its application was "irrational, illogical, or wholly unjustifiable." *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006). In reviewing the district court's decision, we apply the standards of chapter 17A to determine whether our conclusions are the same as those reached by the district court. *Clark v. Vicorp Rests., Inc.*, 696 N.W.2d 596, 603 (Iowa 2005).

III. Issues on Appeal.

A. The Sustained Injury.

Bueker's claim for workers' compensation benefits for his tinnitus arises under Iowa Code chapter 85. The statute of limitations for such claims is "two years from the date of the occurrence of the injury for which benefits are claimed" Iowa Code § 85.26(1). In cases such as this, where the injury

complained of is cumulative, not traumatic, the worker is entitled to the benefit of the discovery rule. See, e.g., *McKeever Custom Cabinets v. Smith*, 379 N.W.2d 368, 373 (Iowa 1985) (finding that cumulative injuries are those that develop over time and eventually result in a compensable disability); *Chapa v. John Deere Ottumwa Works*, 652 N.W.2d 187, 189 (Iowa 2002) (stating that tinnitus is a cumulative injury subject to the discovery rule). Under the discovery rule, the statute of limitations does not begin to run until the worker recognizes, or should recognize, the “nature, seriousness and probable compensable character” of the injury. *Chapa*, 652 N.W.2d at 189. “A worker’s knowledge of the three triggering factors may be actual or imputed from the record.” *Id.*

International Paper argues the workers’ compensation commissioner erred in finding Bueker sustained an injury that arose out of and in the course of his employment at International Paper. International Paper contends that if Bueker sustained a tinnitus injury, his date of injury was in 1982, when he first experienced ringing in his ears—more than twenty years before his employment with International Paper began. International Paper claims that, following the supreme court’s decision in *Chapa*, 652 N.W.2d at 189-90, the decision of the workers’ compensation commissioner in this case is “[b]ased upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency.” Iowa Code § 17A.19(10)(c).

International Paper contends Bueker's injury is analogous to the worker's injury in *Chapa*.⁴ International Paper claims that although Bueker was not formally diagnosed with tinnitus until 2004, he recognized the nature of his tinnitus in 1982, and should have recognized the seriousness of his tinnitus in 1982 or within a few years thereafter. International Paper further argues that Bueker should have known the probable compensable nature of his tinnitus well before 2004, and even if he did not, he had more than enough information to trigger a duty to investigate whether the tinnitus was work-related. See *Ranney v. Parawax Co.*, 582 N.W.2d 152, 155-156 (Iowa 1998).

Although we agree the facts of *Chapa* are similar to the facts before us (as most workers' compensation cases involving tinnitus likely are), we find section 17A.19(10)(c) does not apply in this case. Whether a worker knew or should have known of the nature, seriousness, or compensable nature of an injury is a question of fact to be determined by the commissioner. *Midwest*, 754 N.W.2d at 865. Such factual findings of the commissioner are reversed only if they are not supported by substantial evidence, or upon a showing that the commissioner's

⁴ In *Chapa*, the supreme court evaluated a worker's claim for tinnitus. *Chapa*, 652 N.W.2d at 188-90. The worker first noticed a "very strange" ringing in his ears in 1983, when the ringing awakened him from sleep and affected his concentration and communication at work. *Id.* at 189. The worker retired in 1995, but was not formally diagnosed with tinnitus until 1997. *Id.* He thereafter sought workers' compensation benefits. *Id.* The workers' compensation commission determined the worker's claim was time barred under section 85.26(1), and the deputy commissioner noted that the limitations period on his claim may have begun running as early as 1983. *Id.* On judicial review, the district court affirmed the commission's decision. *Id.*

On appeal, the supreme court affirmed, determining that although the worker was not formally diagnosed for tinnitus until 1997, the worker realized the nature and seriousness of his tinnitus in 1983, and knew or should have known the compensable nature of his injury well before 1997. *Id.* at 189-190. The court reiterated the well-defined rule that "a worker has a duty to investigate whether an injury—even a latent one—is work-related and, hence, potentially compensable." *Id.* at 190.

application of law to the facts is “irrational, illogical, or wholly unjustifiable.” *Id.*

As the supreme court recently stated:

In determining whether the statute of limitations began to run, the commissioner used the correct legal standard, namely, whether [the worker] acting as a reasonable person knew or should have known that her physical condition was serious enough “to have a permanent adverse impact on the claimant’s employment or employability” As a result, the provisions of Iowa Code section 17A.19(10)(c), which vest authority in this court to reverse an agency determination based upon an erroneous interpretation of law not vested in the agency’s discretion, has no application.

Instead, this court can reverse the decision only if the commissioner’s factual determinations are not supported by substantial evidence as provided in Iowa Code section 17A.19(10)(f) or upon a showing that the commissioner’s application of law to the facts of this case meets the demanding “irrational, illogical, or wholly unjustifiable” standard of section 17A.19(10)(m).

Id.

Furthermore, in this case Bueker first noticed ringing in his ears in 1982. Unlike *Chapa*, however, the ringing was not constant and did not affect his employment. As the district court noted, “Until the paper mill closed in 2005, the Respondent’s tinnitus had been a mere distraction and had never actually interfered with his job performance.” We agree. Upon our review, we find International Paper has failed to sustain its burden to show the commissioner’s factual determinations with regard to when Bueker discovered his tinnitus are lacking in substantial evidence. Iowa Code § 17A.19(10)(f). We further find the commissioner’s application of the law to the facts is not irrational, illogical, and wholly unjustifiable. *Id.* § 17A.19(10)(m).

B. Industrial Disability.

Industrial disability measures the injured worker's lost earning capacity. *Larson Mfg. Co., Inc. v. Thorson*, ___ N.W.2d ___, ___ (Iowa 2009). It is based on a number of factors, including: the worker's functional impairment, age, education, qualifications, and ability to engage in similar employment. *Id.* Proof of an actual reduction in the worker's earnings is not essential to establish a loss of earning capacity. *Id.* The commissioner's determination of industrial disability is a mixed question of law and fact, "as the determination of industrial disability required the commissioner to apply established law (the factors considered in determining whether an industrial disability occurred) to the facts." *Id.* We therefore review this issue under the "irrational, illogical, or wholly unjustifiable" standard. *Id.*; see also Iowa Code § 17A.19(10)(m).

International Paper challenges the sufficiency of the evidence supporting the commissioner's findings that Bueker sustained a fifteen percent industrial disability. Specifically, International Paper contends (1) Bueker has demonstrated that he retains the ability to be gainfully employed, (2) the agency's justifications for its conclusions are not supported by objective medical evidence, and (3) the medical expert relied upon for the functional impairment rating considered inappropriate factors.

With regard to Bueker's claimed industrial loss, the deputy noted Bueker's age, education, qualifications, work experience, his efforts to obtain new employment, and his struggles to learn new positions. As the deputy stated:

The claimant has significant problems in concentrating and learning as a result of the tinnitus condition. He has been able to overcome

these problems to learn a new career but this has been difficult and has not been without incident. The claimant also has trouble sleeping. Considering all factors of industrial disability it is concluded that the claimant has sustained a 15 percent loss of earning capacity entitling him to 75 weeks of permanent partial disability pursuant to Iowa Code section 85.34(2)(u).

On intra-agency appeal, the commissioner adopted the deputy's findings and further noted that the medical assessment of Dr. Lyons was credible and reliable:

Given his superior qualifications, the credibility of the views of Dr. Lyons turns on his understanding of the claimant's past noise exposure. The hearing deputy felt he possessed sufficient knowledge to render a sound opinion and I must agree. Much of what defense counsel claims was outside of the knowledge of Dr. Lyons, were exposures only the defense counsel felt significant. Also, whether or not claimant suffered other significant noise exposure, the fact remains that the work exposure was significant, if not the most significant causative factor.

Although Bueker was able to find a job quickly after his employment with International Paper ended, his transition was challenging, and he continues to seek other employment. We find the arguments raised by International Paper to be without merit. Substantial evidence in the record supports the determination made by the commissioner in this case. A reasonable person would find the evidence adequate to reach the same conclusion. We cannot therefore say the commissioner's decision was irrational, illogical, or wholly unjustifiable, and we affirm on this issue.

IV. Conclusion.

We affirm the decision of the district court and the workers' compensation commissioner.

AFFIRMED.