

IN THE COURT OF APPEALS OF IOWA

No. 2-692 / 12-0432
Filed October 3, 2012

TYSON FOODS, INC.,
Petitioner-Appellant,

vs.

MICHAEL J. SHAW,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Douglas F. Staskal,
Judge.

Tyson Foods challenges the award of workers' compensation benefits to
an employee who suffered a cumulative workplace injury. **AFFIRMED.**

Timothy A. Clausen of Klass Law Firm, L.L.P., Sioux City, for appellant.

Dennis M. McElwain of Smith & McElwain Law Office, Sioux City, for
appellee.

Considered by Eisenhauer, C.J., and Doyle and Tabor, JJ.

TABOR, J.

Tyson Foods challenges a decision of the workers' compensation commissioner to award Michael Shaw benefits for a cumulative workplace injury. The employer contends the commissioner applied an incorrect legal standard in determining the injury's manifestation date. The employer further argues when the correct legal standard is applied, Shaw is barred from receiving compensation by the ninety-day notice requirement in Iowa Code section 85.23 (2009).

After reviewing the commissioner's entire analysis, we conclude he followed the case law in determining a manifestation date. Because the manifestation of a cumulative injury is an inherently fact-based determination, we afford the commissioner substantial latitude and review to determine whether his finding is supported by substantial evidence. We also find no legal error in the commissioner's application of the discovery rule as a second option for determining when the notice period commenced. Accordingly, we affirm the judicial review ruling and the commissioner's decision.

I. Background Facts and Proceedings

Shaw filed two petitions with the commissioner, both alleging he sustained a bilateral cumulative trauma injury to his feet and legs. The first petition, filed in June 2008, claimed the injury occurred on August 30, 2007. The second petition, filed in May 2009, alleged the injury occurred on June 30, 2007. A deputy commissioner considered both petitions in a combined arbitration proceeding.

At the time of the arbitration hearing, Shaw was fifty-one years old with a history of type 2 diabetes mellitus. He has a high school degree and gained some college education before starting work at Tyson Foods on July 20, 1987.¹ Shaw received his diabetes diagnosis in 1993 and later developed peripheral neuropathy, which caused a loss of sensation in his feet.

Shaw worked on the production floor until 1998, when he transferred to the tannery department. Employed as a drum operator, Shaw's job required him to lift fifty-pound bags of chemicals used in the tanning process. He repeatedly climbed stairs to an overhead catwalk where he would manually push or pull pallets weighing hundreds of pounds. Tyson classified Shaw's position at a level of medium to heavy physical demand.

Tyson policy required drum operators to wear rubber pull-over boots. Shaw wears a size ten and one-half shoe, but the boots came only in full sizes. The size eleven boots Shaw wore provided no support and caused his feet to slip around.

Shaw began experiencing medical complications with his feet in 2004. During a week-long hospital stay in July 2004 to treat a left foot ulcer, Shaw told his physicians that both his feet developed calluses on the bottoms; his attempts to remove the calluses with a razor blade led to infection. Dr. Kahm Vay Ung, a podiatrist who specialized in treating diabetic patients, performed three irrigations and debridements of Shaw's foot. The doctor recommended Shaw wear orthotic

¹ What is now Tyson Foods was IBP, Inc. when Shaw was hired. For simplicity, we will refer to the company as Tyson throughout the opinion.

shoe inserts and specialized work boots designed to protect his feet. Shaw did not follow the doctor's suggestions.

X-rays taken of Shaw's feet in July 2004 showed "[m]oderate to advanced degenerative changes of the first tarsometatarsal joint on the left, and mild to moderate osteoarthritis of the first tarsometatarsal joint on the right. Small calcaneal spurs." The results noted "[n]o evidence of acute fracture, dislocation or malignant bony destruction."

In August 2004, Shaw's personal physician, Dr. R.J. Kipp, diagnosed his diabetes as uncontrolled. Three months after the diagnosis, Dr. Kipp noted Shaw's left foot was healing from the previous infection, but that both feet showed signs of diabetic neuropathies.

Upon Shaw's request, Tyson replaced his standard boots with leather steel-toed ankle boots. Because the chemical exposure caused the boots to crack, Tyson replaced them every three to four months. Despite Shaw's efforts to change socks throughout the day, he still experienced calluses and athlete's foot. He wore the leather boots from 2004 or 2005 until March 2007.

During a July 2006 appointment, Dr. Kipp observed obvious pes planus on both of Shaw's feet; the condition was more severe on the right foot. Dr. Kipp also noted foot collapse, and suggested Shaw ask a podiatrist for recommendations on orthotics to improve his standard footwear. Shaw did not follow the advice.

Around February 2007, Shaw's foot condition again began to impact his work. After returning from vacation on January 8, 2007, Shaw experienced a

sensation that felt like having a rock in his boot, which continued as he worked through the month. Tyson's work log shows Shaw missed work on January 21 and 22 because of personal illness, but continued to work until February 9, 2007, when he returned to the hospital for an infection in his left foot. Dr. Ung again tended to Shaw, and after debriding and irrigating the affected parts of his feet, diagnosed Shaw with:

1. Abscess and cellulitis of the left foot with ascending lymphangitis and deep space tracking
2. CMS stage III full-thickness, communicating ulcer from the plantar aspect of the fourth metatarsal phalangeal joint, and dorsally and distally into the third interdigital space.
3. Diabetes mellitus, type 2 with diabetic neuropathy and Charcot foot deformity.

On March 20, 2007, Dr. Ung observed ulcers on Shaw's foot and took three x-rays of his left foot, which revealed Charcot deformity. Charcot deformity is a gradual process in which a joint collapses, with inflammation caused by fragmentation of cartilage. The pieces of cartilage grind away at the joint, weakening the structures and ligaments holding the joint together, which results in the collapse of the arch of the foot and bone protrusions. The doctor performed a surgical procedure on Shaw's left foot to relieve the pressure caused by the Charcot neuropathy.

Dr. Ung told Shaw if he continued standing on improper shoes in his current job, "he will only make things worse." The doctor ordered customized functional orthotics for Shaw and authorized him to return to Tyson on April 29, 2007.

Shaw noted two weeks later his feet had improved by fifty percent, but in mid-May 2007 he developed a blister on his right foot. Podiatrist Jeffrey Marzian drained the blister and noted Shaw's feet showed degenerative joint changes, mid-foot collapse bilaterally and arthritis. Shaw returned to Dr. Marzian a week later for an ulceration on his right foot. Shaw did not work during the week of May 26, 2007, and returned to Dr. Marzian on June 1 because of an ulceration plantar on his right foot caused from blistering. Shaw returned to Tyson the next day and worked without restriction until June 30, 2007.

On June 30, 2007, Dr. Ung diagnosed Shaw with "progressive destructive Charcot foot deformity with advanced degenerative joint changes and mid-foot collapse, with rockerbottom foot, secondary to patient continuing to ambulate on his foot and prolonged standing without adequate support." He told Shaw standing as he does will only worsen his condition, and recommended he wear a "total contact cast" to relieve the foot of the additional pressure. Concerned that it would inhibit his work, Shaw refused the cast. Dr. Ung testified that June 30, 2007, was the first time he told Shaw the bilateral Charcot foot deformity was being accelerated by his continued work: "Now we had noticed that . . . both feet are breaking down and he no longer can do this type of [work] activity." After a week off, Shaw returned to work at Tyson.

In August 2007, Dr. Ung twice irrigated and debrided Shaw's right foot and applied skin grafts. On August 30, 2007, Shaw received emergency treatment for an ulcer on his right foot, as well as pain and swelling to his left foot. That same day he had a conversation with his daughter, who suggested he report his

foot injuries to his supervisor as work-related conditions. Shaw followed her advice and reported the work injury to Tyson on August 30, 2007.

In the months that followed, Shaw underwent multiple skin grafts of his right foot, as well an irrigation and debridement with wound border reconstruction on his left foot. When Shaw eventually returned to work, Tyson modified his responsibilities. His daily routine included paperwork, engraving buttons, and other tasks that he could do while sitting.² Shaw continued in his new capacity until foot ulcers forced him to leave work on May 2, 2009. Dr. Ung still treats Shaw and, as of the date of deposition, was waiting for a final ulcer to heal before returning Shaw to work.

On May 29, 2009, the deputy workers' compensation commissioner held a hearing on Shaw's petitions; the parties submitted final briefing on June 19, 2009. The deputy issued an arbitration decision on April 29, 2010, concluding Shaw failed to provide Tyson with timely notice of his work-related injuries. In denying Shaw compensation, the deputy wrote:

Claimant argued he did not discover the seriousness of his condition until his appointment with Dr. Ung on June 30, 2007. However, foot collapse was diagnosed in both feet in July 2006. Additionally, left foot Charcot arthropathy was diagnosed in February 2007. . . . Claimant even underwent surgery to help correct his foot collapse in March 2007. . . . In May 2007, the podiatrist informed claimant he would have continued problems so long as he remained in the same position. A bone scan that was taken on June 25, 2007 showed Charcot joints of both mid-feet. . . . Nevertheless, claimant did not tender notice of an alleged work injury.

² In November, Dr. Ung restricted him to sit fifteen minutes every hour.

Shaw appealed the arbitration decision to the commissioner. The commissioner³ embraced the opinions of Dr. Ung and orthopedic specialist Timothy Fitzgibbons. Those doctors agreed Shaw's work at Tyson accelerated the progression of his Charcot condition. Dr. Ung testified Shaw's 2004 foot ulcers were not caused by Charcot, and the condition did not develop until March 2007. Dr. Ung also explained diabetes was not a precursor to Charcot, as a relatively low number of diabetics experience Charcot. Dr. Ung concluded Shaw's Charcot was caused by the microtraumas he sustained over the course of working at Tyson. Dr. Fitzgibbons agreed with Dr. Ung's theory, and opined that Shaw sustained permanent partial impairment in both feet. Dr. Mark Carlson agreed with Dr. Fitzgibbons's opinion that Shaw's work at Tyson aggravated his Charcot condition.

The commissioner offered the following analysis:

Possibly, the date of injury should be when Charcot was first diagnosed in March 2007. However, I believe the best approach when attempting to pinpoint when an injury is manifest is to choose the time when the injury most impacted Michael's employment. Michael fully healed and returned to full duty work after the 2004 incident. He healed and returned to full duty after the February 2007 incident. However, after he left work to treat his ulcers on August 30, 2007, he only returned to his job for one day on June 2, 2008. After he left again on June 3, he never returned to full duty.

Because the commissioner found the Charcot did not manifest until August 30, 2007, he decided "the issue of notice is rendered moot." The commissioner alternatively suggested if Shaw first became aware on June 30, 2007, that his Charcot condition prevented him from continuing his work, the

³ Deputy Commissioner Larry Walshire decided the agency appeal by designation of the commissioner. We will refer to him as "commissioner" throughout the opinion.

August 30, 2007 notice to Tyson fell within the statutory ninety-day deadline. The commissioner reversed the deputy's decision that Shaw's claim was time-barred, and ordered Tyson to pay compensation. On judicial review, the district court affirmed the commissioner. Tyson now appeals from the district court.

II. Standard of Review

The parties disagree somewhat on our standard of review. Both agree the different standards appear in chapter 17A of the Iowa Code and vary depending on the type of error alleged of the commissioner. See *Jacobson Transp. Co. v. Harris*, 778 N.W.2d 192, 196 (Iowa 2010). But because Tyson asserts the commissioner applied the wrong legal standard, it asks us to substitute our judgment for that of the agency. See Iowa Code § 17A.19(10)(c). Tyson further contends that once we apply the correct legal standard, we should only disturb the agency decision if it is based on an irrational, illogical, or wholly unjustifiable application of the law to the facts. See Iowa Code § 17A.19(10)(m).

Shaw argues the proper standard of review is the substantial evidence test described in section 17A.19(10)(f)(1). If the alleged error is one of fact, so long as the agency's findings are supported by substantial evidence, we will affirm its decision. See *Eyecare v. Dep't of Human Servs.*, 770 N.W.2d 832, 835 (Iowa 2009). The administrative procedure act defines "substantial evidence" as "the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance." Iowa Code § 17A.19(10)(f)(1). We decide the

substantial evidence question after viewing the record as a whole. See *id.* § 17A.19(10)(f)(3).

Because we find the commissioner applied the correct legal test for determining the date of Shaw's injury, we abide by the substantial evidence standard. That assessment focuses not on whether the evidence would support a different finding than reached by the commissioner, but whether the evidence supports the findings actually made. *Schutjer v. Algona Manor Care Center*, 780 N.W.2d 549, 557–58 (Iowa 2010). Weighing the evidence is the job of the commissioner; our role is to liberally and broadly construe the findings in deciding whether to uphold that decision. *Id.* at 558. We also defer to the commissioner's discretion to accept or reject testimony based on his assessment of witness credibility. *Id.*

III. Analysis

A. Did the Commissioner Apply the Wrong Legal Standard When Determining the Manifestation Date of Shaw's Injury?

Tyson contends the commissioner applied the wrong legal standard in finding Shaw's injury date was August 30, 2007. The employer claims the commissioner's decision "eviscerates" the workers' compensation notice requirements at Iowa Code section 85.23 because Shaw knew for years that his ongoing foot problems were connected to his work, but did not notify his employer. Tyson trains on the following sentence in the commissioner's decision: "I believe the best approach when attempting to pinpoint when an injury is manifest is to choose the time when the injury most impacted Michael's

employment.” Tyson argues the offending sentence conflates the test for determining when a cumulative injury manifests itself and the related, but distinct discovery rule.

Shaw responds that when read as a whole, the commissioner’s decision followed the governing legal principles for determining the date of injury when the hurt is cumulative. Shaw contends substantial evidence in the record supports either a discovery date of June 30, 2007, or a manifestation date of August 30, 2007. In either instance, Shaw argues he did not miss the notice deadline in section 85.23.

In deciding between the positions presented by Tyson and Shaw, it is helpful to review the case law on the cumulative injury rule. In *McKeever Custom Cabinets v. Smith*, 379 N.W.2d 368, 373 (Iowa 1985), our supreme court contemplated whether to adopt the cumulative injury rule for measuring the date of a gradual injury comprised of a “series of hurts.” By approving the commissioner’s use of the rule, the court held a cumulative injury date is the point “when pain prevents the employee from continuing to work.” *McKeever*, 379 N.W.2d at 374. This concept is closely related to the discovery rule, but the two are not the same:

The discovery rule may apply where a compensable injury occurs at one time but the employee, acting as a reasonable person, does not recognize its nature, seriousness and probable compensable character until later. The cumulative injury rule, however . . . may apply when the disability develops over a period of time; then the compensable injury itself is held to occur at the later time.

Id. at 373 (internal quotations omitted).

In *Oscar Mayer Foods Corp. v. Tasler*, our supreme court articulated the manifestation test to pinpoint the date of injury. 483 N.W.2d 824, 829 (Iowa 1992). *Tasler* held an injury manifests itself on the date when it would have become “plainly apparent to a reasonable person” both that (1) the claimant had suffered an injury and (2) the injury was caused by the claimant’s employment. *Id.* The commissioner is afforded “a substantial amount of latitude” in determining the date of manifestation because it is “an inherently fact-based determination.” *Id.* Moreover, the commissioner is free to consider a multitude of factors, such as the point when the claimant receives medical care, is absent from work based on an inability to perform, or others; no single factor is necessarily dispositive. *Id.*

The analytical interplay between the cumulative injury rule and the discovery rule was clarified in *Herrera v. IBP, Inc.*:

The preferred analysis is to first determine the date the injury is deemed to have occurred under the *Tasler* test, 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.

To summarize, 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.

633 N.W.2d 284, 288 (Iowa 2001).

The parties agree these three decisions govern the instant question. And as the district court observed, the commissioner cited the same propositions as the relevant controlling authority. The fighting issue is whether the commissioner detoured from the controlling authority and forged his own approach to indentifying the manifestation or discovery date.

We don't believe the commissioner took such a detour. Relying on the opinions of Dr. Ung and Dr. Fitzgibbons, the commissioner confirmed that Shaw's foot condition, diagnosed as Charcot, was a work-related injury. The commissioner acknowledged the sticky nature of isolating a triggering date for the notice requirement: "As this is a gradual or cumulative injury process, the date of injury is troublesome because we have many possible injury dates with many incidents resulting in treatment and time off work." The commissioner's references to "time off work" and "treatment" echo the *Tasler* factors described as "absence from work because of inability to perform" and "the point at which medical care is received." See *Tasler*, 483 N.W.2d at 830; see also *Weishaar v. Snap-On Tools Corp.*, 582 N.W.2d 177, 179 (Iowa 1998) (determining manifestation date by first required treatment). The agency determination that Charcot manifested on August 30, 2007, "when the injury most impacted Michael's employment" was nothing more than the commissioner identifying one of the "multitude of factors" contemplated by the *Tasler* decision.⁴

⁴ The commissioner's choice to forgo the March 2007 diagnosis date and to instead use the date Shaw's employment was impacted suggests the commissioner bypassed the "treatment date" factor in favor of a "time-off-work" factor.

The commissioner's application of the cumulative error rule was consistent with established precedent. See, e.g., *George A. Hormel & Co. v. Jordan*, 569 N.W.2d 148, 152 (Iowa 1997) (affirming commissioner's determination that cumulative injury manifested itself when employee, after three years of treatment for condition, was informed by his doctor that he could not recover from the injury); *Thilges v. Snap-On Tools Corp.*, 528 N.W.2d 614, 618 (Iowa 1995) (finding cumulative injury date when employee was forced to leave work for carpal tunnel surgery); *McKeever*, 379 N.W.2d at 374 (holding injury occurred when employee was forced to quit because of injury and finding in such case the injury occurs when "because of pain or physical inability, [the employee] can no longer work"); *Venenga v. John Deere Component Works*, 498 N.W.2d 422, 425 (Iowa Ct. App. 1993) (determining manifestation of injury, despite previous hospitalization for injury, occurred when employee was unable to continue working).

The commissioner did not reinvent the standard for determining when an injury manifests itself, but considered the factor which on this record best demonstrated the date of manifestation. Because the commissioner enjoys substantial latitude in this determination, we may reverse the decision only if it is not supported by substantial evidence. See *Tasler*, 483 N.W.2d at 829 (citing precedent for the cardinal rule of administrative law "that judgment calls are [the] province of administrative tribunal, not the court's," and recognizing an agency's considerable discretion to take into account "a multitude of factors" including absence from work, receipt of medical care, "or others").

In addition, we find no legal error in the commissioner's application of the discovery rule as a second option for determining when the ninety-day notice period commenced. Our supreme court has explained: "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." *Herrera*, 633 N.W.2d at 288 (citation omitted). As an alternative to finding manifestation of the Charcot injury on August 30, 2007, the commissioner offered: "it was not until Dr. Ung's discussion with Michael on June 30, 2007, that Michael became aware that his condition progressed to the point that continuing in his heavy job at Tyson was [no] longer sustainable." The commissioner appropriately invoked the discovery rule as an alternative starting date.

B. Does Substantial Evidence Support the Commissioner's Decision?

Tyson asserts the commissioner should have determined that Shaw's injury manifested on any number of dates before August 30, 2007.⁵ Among those dates, Tyson includes the March 2007 appointment when Dr. Ung first diagnosed Shaw with Charcot.

Even if substantial evidence supported Tyson's proposed injury date, we are not required to reverse the commissioner's decision. The question is

⁵ The employer quotes Shaw's testimony he knew long before June 30, 2007, that his injuries were caused by his employment.

whether evidence is substantial to support August 30, 2007, as the date of manifestation. See *Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 527 (Iowa 2012); see *Terwilliger v. Snap-On Tools Corp.*, 529 N.W.2d 267, 271 (Iowa 1995) (“The mere fact that we could draw inconsistent conclusions from the same evidence does not mean that substantial evidence does not support the commissioner’s determinations.”). We are bound by the commissioner’s findings, not those another fact finder could have made. *Gates v. John Deere Ottumwa Works*, 587 N.W.2d 471, 476 (Iowa 1998).

Our court held manifestation could not occur until a claimant, despite being aware of his injury, was unable to work because of that injury. See *Venenga*, 498 N.W.2d at 425. The employee in *Venenga* suspected his lower back injury had existed for years and was caused by his employment. *Id.* at 423. The claimant went to physical therapy for his back and was hospitalized, but did not miss work. *Id.* He then underwent back surgery, missing a year of work and returning with restrictions. *Id.* He alleged his cumulative injury date was about one month before his surgery because his back pain left him unable to continue his work. *Id.* Our court concluded the cumulative injury date could be no earlier than the date that the claimant’s injury caused him to stop working because it was not until then the claimant realized his injury would have an impact on employment. See *id.* at 425 (“[W]e find more is required than knowledge of an injury or receipt of medical care.”).

Similar to the *Venenga* reasoning, the commissioner identified August 30, 2007, as the point when Shaw both knew of his Charcot diagnosis and knew the

condition would cause him to stop working in the tannery. Dr. Ung's testimony—which the commissioner found convincing—is consistent with that manifestation date. The commissioner's decision is supported by substantial evidence.

We also find substantial evidence to support the commissioner's alternative finding that Shaw discovered his injury on June 30, 2007. Despite receiving the Charcot diagnosis in March 2007, it was Dr. Ung's June 30 discussion with Shaw that alerted the claimant to the reality that "the physical condition [was] serious enough to have a permanent adverse impact on the claimant's employment." See *Herrera*, 633 N.W.2d at 288. The commissioner noted "always before that time, [Shaw] was able to heal and return to work." The record confirms the commissioner's conclusion that a reasonable person in Shaw's position would not have been aware of the serious nature of the Charcot condition and its impact on his continued employment before that conversation with Dr. Ung.

AFFIRMED.