BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TODD TRIMBLE,	:	
Claimant,	:	File Nos. 19700505.01 19700262.01
vs.	:	
PEPSI BEVERAGES CO.,	:	ARBITRATION DECISION
Employer,	:	
and	:	
INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,	:	Head Notes: 1108.50, 1402.20, 1402.40, 1402.50, 1803, 2208, 2401, 2501, 2907
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Todd Trimble, claimant, filed a petition in arbitration seeking workers' compensation benefits from Pepsi Beverages Company, employer, and Indemnity Insurance Company of North America, insurance carrier, as defendants. Hearing was held on November 4, 2020. This case was scheduled to be an in-person hearing occurring in Des Moines. However, due to the outbreak of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via video means, using CourtCall. Accordingly, this case proceeded to a live video hearing via CourtCall with all parties and the court reporter appearing remotely.

The parties filed a hearing report for each file at the commencement of the arbitration hearing. On the hearing reports, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

Todd Trimble and Scott Thornton were the only witnesses to testify live at trial. The evidentiary record also includes Joint Exhibits JE1-JE5, Claimant's Exhibits 1-5 and 7-11, and Defendants' Exhibits A-D and AA-DD. All exhibits were received without objection. The evidentiary record closed at the conclusion of the arbitration hearing.

The parties submitted post-hearing briefs on December 31, 2020, at which time the case was fully submitted to the undersigned.

ISSUES

File No: 19700262.01 (DOI: June 28, 2019)

The parties submitted the following issues for resolution:

1. Whether claimant sustained an injury which arose out of and in the course of employment on June 28, 2019.
2. Whether the alleged injury was the cause of permanent disability.
3. The appropriate commencement date for any permanent partial disability benefits.
4. Whether the claim is ripe under Iowa Code section 85B.8.
5. Whether claimant is entitled to reimbursement for an IME under Iowa Code section 85.39.
6. Whether claimant is entitled to alternate medical care.
7. Assessment of costs.

File No: 19700505.01 (DOI: April 16, 2019)

The parties submitted the following issues for resolution:

1. Whether claimant sustained an injury which arose out of and in the course of employment on April 16, 2019.
2. Whether the alleged injury was the cause of any temporary disability.
3. Whether claimant's claim is barred by operation of Iowa Code section 85.23, for lack of timely notice.
4. Whether claimant's claim is barred by operation of Iowa Code section 85.26.
5. Whether claimant is entitled to payment of past medical expenses.
6. Whether defendants are entitled to a credit under Iowa Code section 85.38(2).
8. Assessment of costs.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Mr. Trimble has filed two petitions against the defendants, Pepsi Beverages Company ("Pepsi"), employer and Indemnity Insurance Company of North America, insurance carrier. Mr. Trimble has alleged an injury to his left knee on April 16, 2019. He has also alleged that he has work-related hearing loss and tinnitus as the result of his employment with Pepsi.

At the time of the hearing, Mr. Trimble was 63 years old. He attended high school through the eleventh grade. He began working for Pepsi in Cedar Rapids, Iowa

in 1984. At that time, the Cedar Rapids operation was a production plant that included bottling soda. For approximately one month, he worked as a bottle sorter and then he moved to the production area and as a forklift driver. At some point in the 1990s, the plant changed ownership to General Bottlers and the production area of the facility was shut down; the plant was turned into a warehouse only. At that time, Mr. Trimble's work duties changed considerably. He went from working in the production area to a forklift driver. For approximately one and a half years, he was a load crew supervisor. In this position he drove a forklift and supervised nine employees. The remainder of the time, from the 1990s until the last day he worked at Pepsi (June 28, 2019), he was a forklift operator.

As a forklift operator, Mr. Trimble's duties included unloading and loading semis with a forklift. If product fell over, then he might have to pick up the product manually. He was also responsible for replenishing spots where pickers had come in and built their orders; this was also done with a forklift and periodically it was done manually. He estimates that he could manually move a couple hundred cases of product per shift. His duties included building loads, picking up spilled product, and doing inventory. Mr. Trimble estimates that he would spend maybe a fourth or a third of his shift moving product manually. This involved moving product that was a couple of pounds up to 50 or 60 pounds. He estimates that in order to do his job he would get on and off his forklift hundreds of times per shift. He estimated that approximately a third to a fourth of his shift involved manually moving product. Mr. Trimble felt the job description in evidence is generally accurate. However, he feels some of the lifting that is listed as occasional is actually done periodically or frequently. The job description states that the job requires sitting on a constant basis, with occasional standing, walking, climbing balancing, stooping, kneeling, and crouching/squatting. (Testimony; Cl. Ex. 1, pp. 1-2)

Approximately once per month, Mr. Trimble worked in the can-crushing room; he would fill in if somebody was not there or if they needed additional help. He would take bags of cans and throw them up on a crusher. Each bag weighed around five pounds. Mr. Trimble would move several hundred bags per shift. He was required to be on his feet the entire time for this job. (Testimony)

Mr. Trimble is not certain when he first began having issues with his left knee. He had issues periodically off and on for a while. He fell onto a cement floor doing inventory in September 2018; he landed on his knees. He reported this injury to Scott Thornton. Mr. Trimble went to the doctor for some stitches and went back to work to finish his shift. He returned to work, full duty. (Testimony; JE1, pp. 1-3)

After the September 2018 fall, Mr. Trimble had some soreness in both knees. The soreness got worse, and when he was getting ready to retire, he went to his family doctor, Jessica E. Konarske, D.O., to make sure everything was good. He saw Dr. Konarske on April 16, 2019. He reported knee pain for over a year and his knees locked up, left worse than right. The notes indicate that he never fell and has not seen anyone for his knees. There is no mention of work activities bothering his knees. There

is mention that he had an injury years ago with a motorcycle but did not break or tear anything in his knees. He reported to Dr. Konarske that he was getting ready to retire. She ordered x-rays of his knees because she suspected some arthritis. She felt an MRI would likely be needed on the left due to his symptoms. The x-ray demonstrated moderate osteoarthritis of the left knee. An MRI was ordered. (JE2, pp. 1-3; JE3, pp. 1-3)

The MRI was performed on May 1, 2019. The impression from the report includes: medial meniscal tear, tricompartment chondrosis, small Baker's cyst, small ganglion adjacent to the popliteus, and trace joint effusion. (JE3, pp. 4-5; Testimony)

Dr. Konarske referred Mr. Trimble to James M. Pape, M.D. Mr. Trimble saw Dr. Pape on May 22, 2019, for ongoing left knee discomfort. He reported no specific injury, but some increasing discomfort in his left knee with significant catching and locking with pain. He has discomfort with kneeling, twisting, and squatting. He has noted increasing difficulty over the last number of months. Dr. Pape advised Mr. Trimble that he had a torn meniscus, bone spurs, and two cysts. Dr. Pape's impression was that Mr. Trimble's left knee complaints are consistent with a significant mechanical source of pain and a medical meniscal tear. Dr. Pape recommended a scope of his left knee which he performed on Monday, July 1, 2019. (Testimony; JE4, pp. 1-3)

The last day that Mr. Trimble physically worked at Pepsi was Friday, June 28, 2019. On that Friday, he informed his supervisor, Scott Thornton, that he was having surgery on his knee and that he would be off of work. He did not state that his knee problems were related to his employment. (Testimony of Mr. Trimble; Testimony of Mr. Thornton)

On July 1, 2019, Dr. Pape performed a left knee arthroscopy with partial medial meniscectomy. The postoperative diagnoses were: left knee posterior horn complex medial meniscal tear; grade II to IV chondral fragmentation of left knee medial, lateral, and patellofemoral compartments with chondral loose bodies. (JE3, pp. 6-7)

Mr. Trimble continued to follow-up with Dr. Pape. He continued to have difficulty with his left knee. Mr. Trimble requested knee arthroplasty, but Dr. Pape wanted him to maximize conservative management. (JE4, pp. 4-11)

By September 2019, Dr. Pape felt it was appropriate to proceed with left total knee arthroplasty. He was assessed with unilateral primary osteoarthritis of the left knee. (JE4, pp. 12-16)

The scope performed on Mr. Trimble's left knee did not provide much relief to Mr. Trimble. Dr. Pape eventually recommended a total knee replacement; he performed this in November of 2019. This surgery was helpful. Mr. Trimble underwent physical therapy after the surgery and continued to follow-up with Dr. Pape. (Testimony)

In December of 2019, Mr. Trimble fell while feeding his chickens at his home. The fall opened his surgical wound. He went to the emergency room at Mercy Hospital and Dr. Pape took him to the operating room and sewed his wound back up. Dr. Pape did not think the fall caused any other damage. (JE4, pp. 27-32; JE5, pp. 13-19).

By May 12, 2020, Mr. Trimble was 6 months out from his total knee replacement. He was still in therapy and using a brace to help with trying to achieve full extension. Dr. Pape felt Mr. Trimble's left knee continued to improve. Mr. Trimble was to remain off work because he was not able to proceed with his regular work duties. He was to follow-up in three months' time. (JE4, pp. 36-38)

Mr. Trimble testified about his activities outside of work. He rode motorcycles, did lawn work, took care of chickens, fed his dogs, and other basic stuff around the house. He had a riding lawn mower. Feeding his chickens involved walking to the back part of his yard to feed and water them. He brought the feed out with a four-wheeler. He also enjoyed bike riding. He does not recall having knee pain while riding his bike. (Testimony)

At the time of the hearing, Mr. Trimble was still off of work due to his knee. During his time off of work Mr. Trimble and been collecting short-term (STD) and long-term disability (LTD) since the last day he worked in August 2020. He is also on Social Security Disability (SSD). Since he started receiving his SSD benefits, his LTD payments have decreased in amount. (Testimony)

Mr. Trimble does not believe he could physically perform his job at Pepsi due to his knee. He testified that he is confined to a little box on the forklift, sitting in a seat, without much leg room. He believes riding the forklift for two hours or more a day would cause his knee to be stiff and sore. Also, he would have difficulty moving the fork up and down because it requires considerable pressure from his left leg. He also does not think he could get down on his hands and knees to pick up spilled product. (Testimony)

While Mr. Trimble was still physically working at Pepsi (before June 28, 2019) he never reported to his supervisor or anyone in management at Pepsi that he was claiming a work-related injury to his left knee. The first notice Pepsi had of any alleged work-related left knee injury was when claimant's attorney at that time, Mr. Rush, sent a letter to Dr. Pape in October 2019. Mr. Trimble was aware from prior work injuries that if a worker is claiming a work injury, the worker is supposed to report the injury immediately. (Testimony; JE4, pp. 49-50)

Scott Thornton, a product availability manager at Pepsi, also testified at the hearing. He supervised Mr. Trimble and saw him on a daily basis. Mr. Thornton is someone Mr. Trimble should report a work injury to. Mr. Thornton does not recall Mr. Trimble complaining about any ongoing complaints about his knees. He recalls Mr. Trimble stating that he was going to have surgery on his knee and that he would not be back to work within the next month or so. Prior to the surgery, Mr. Trimble never reported his left knee complaints as a work injury. (Testimony)

At the time of the hearing Mr. Trimble was still employed by Pepsi. He is still covered by their health insurance. The last day he physically worked for Pepsi was June 28, 2019. At that time he was not on any restrictions because of any alleged hearing loss or tinnitus. During his employment with Pepsi, Mr. Trimble never missed any work because of hearing loss or tinnitus. No doctor has issued a report stating that Mr. Trimble needed to be restricted due to his alleged hearing loss or tinnitus. Mr. Trimble testified that if he did not have problems with his left knee, he could still perform his forklift job at Pepsi. While Mr. Trimble was still physically working at Pepsi (before June 28, 2019) he never reported to his supervisor or anyone in management at Pepsi that he was claiming work-related hearing loss or tinnitus. The first notice Pepsi had of any alleged work-related injury to his left knee was the letter from Mr. Rush in October 2019. Mr. Trimble was aware from prior work injuries that if a worker is claiming a work injury, the worker is supposed to report the injury immediately. (Testimony; JE4, pp. 49-50)

The first issue that must be determined is whether Mr. Trimble sustained an injury to his left knee which arose out of and in the course of employment on April 16, 2019. There are several physicians who have rendered their opinion on this issue.

On August 30, 2019, Dr. Konarske, claimant's family physician, completed and signed a letter authored by Mr. Trimble's attorney. (JE2, pp. 4-5) Dr. Konarske indicated that she agreed with the following statement:

> Todd's many years of performing physically demanding work have been a material aggravating or accelerating factor in his left knee problems. You understand his work has included a lot of up and down off the forklift and into trucks. His work has included manually unloading pallets when necessary. Much of his work over the years has been on cement floors.

(JE2, p. 4)

Dr. Pape, the orthopaedic surgeon in this matter, has rendered several opinions regarding causation. On October 15, 2019, Dr. Pape signed a letter authored by claimant's attorney. His signature indicated that he agreed with the statements in the letter. Dr. Pape does not believe that Mr. Trimble's underlying arthritis was caused by the work activities. He does believe that his work activities increased the load in his left knee. He also agreed that the work activities had been a material aggravating factor in his arthritis resulting in need for surgery. (JE4, pp. 49-50)

On September 22, 2020, Dr. Pape signed a letter authored by defendants' attorney. His signature indicated that he agreed with the statements in the letter. Mr. Trimble did not provide any specific work injury regarding his left knee. Dr. Pape believes that any weight bearing activity may be an aggravating factor in his left knee arthritic condition. Without a specific work injury, Dr. Pape agreed that both work-related and non-work-related weight bearing activities would aggravate the underlying condition. Because there was no specific work injury, Dr. Pape could not causally relate

the need for Mr. Trimble's total knee replacement to any work-related activity or incident. Dr. Pape felt that Mr. Trimble's underlying arthritis of the left knee was not anything that was specifically caused by a work injury or work activities. Mr. Trimble's arthritic condition was the primary cause of the need for his total knee replacement surgery. (JE4, pp. 51-52)

On October 1, 2020, claimant's attorney wrote another letter to Dr. Pape and asked him to sign the letter if he agreed with the statements set forth by the attorney. In that letter claimant's counsel asked Dr. Pape to confirm that he still held the opinions he held in October 2019; Dr. Pape did not sign the letter. Dr. Pape did not confirm that he still held the opinions he held in October 2019. Instead, he handwrote and signed the following:

> As per paragraph "3" on letter of 9/17/20 as well as my conversation with Mr. Rush, it would suggest that pt's weight bearing activities both at work and outside of work were aggravating factors ~~into~~ of his underlying knee arthritis. The extent and magnitude of each, I am not able to specifically quantify.

(JE4, pp. 53-55)

When Dr. Pape's opinions are considered as a whole, I find that he ultimately opined that weight-bearing activities both at work and outside of work were aggravating factors in Mr. Trimble's arthritis. However, he is not able to specifically quantify the extent and magnitude of each. I further find that in October 2020, Dr. Pape did not confirm that he held the same opinions he did in October 2019 when he indicated the work activities were a material aggravating factor in Mr. Trimble's arthritis resulting in need for surgery.

At the request of the defendants, on September 10, 2020, Peter G. Matos, D.O., who is a Board-Certified Occupational Medicine physician, performed an independent medical evaluation. With regard to causation, he stated:

> Based on the medical records provided and IME, I do not find any evidence that Mr. Trimble sustained a work-related injury to his left knee. MDGUIDLINES [*sic*] states, "Job physical factors have not been studied in a quality epidemiological study reported to date. The proper study designs have yet to be reported, particularly either cohort studies or at least a well done case-control study with measured job physical factors and adjustments for the non-occupational factors". Established risk factors include age, sex, and genetic predisposition. MDGUIDELINES additionally states, "A registry study from Sweden has suggested increased risk among farmers, construction workers, and firefighters, while risks were not elevated among numerous other occupational group. [*sic*] Others have suggested no increased risk of knee OA among farmers."

(Def. Ex, DD, p. 5)

It should be noted that Mr. Trimble recalls receiving a letter in October of 2019 wherein Dr. Pape indicated that his work activities were a material aggravating factor in his arthritis resulting in the need for surgery. (JE4, pp. 49-50) Mr. Trimble testified that prior to this letter, he did not know what was causing the issues with his left knee. It was sometime after receiving this October 2019 letter that Mr. Trimble first notified Pepsi that he thought his knee problems were related to his job. In light of the fact that Dr. Konarske responded to a letter from claimant's attorney in August 2019 and causally connected his left knee problems to his work activities, I find Mr. Trimble's testimony to be perplexing. (Testimony)

In this case, with regard to causation, I find the opinions of an orthopaedic surgeon and an occupational medicine doctor carry greater weight than that of a family physician. Thus, I find claimant failed to carry his burden of proof to show that he sustained an injury to his left knee which arose out of and in the course of his employment.

Because claimant failed to prove he sustained an injury to his left knee which arose out of and in the course of his employment on June 28, 2019, I find all other issues with regard to agency file number 19700505.01 are rendered moot.

HEARING CLAIM

Mr. Trimble is also making a claim for occupational hearing loss and tinnitus. He has alleged June 28, 2019 as the date of injury; this was the last day that he physically worked at Pepsi.

Mr. Trimble alleges that he was exposed to significant noise while working at Pepsi. He testified that the forklifts he drove had very loud beepers when moving in reverse. The beepers were so loud that he and his coworkers would periodically place stickers and other things over the beepers. However, there was one guy who would always remove the stickers because they were a safety hazard. Mr. Trimble testified that the can-crushing room was also loud. When cans were dumped, the aluminum would cling. The cans and plastic bottles were loud while being compressed. The motor of the can compressing machine made a humming noise which he said was not real loud. The cans running up the conveyor belt and falling back on top of each other is where the noise came from. Mr. Trimble recalls being in the can-crushing room and seeing noise measurements being taken. After that testing, the persons running the compression machine were required to wear hearing protection. (Testimony)

When Mr. Trimble first started at Pepsi, he was required to wear hearing protection. However, once the production portion was shut down, hearing protection was no longer required or provided. Since the mid-1990s Mr. Trimble has not worn hearing protection at Pepsi, except for the one day a month when he spent all day in the

can-crushing room. He worked an average of 45 hours per week. Mr. Trimble did have hearing tests done for Pepsi through St. Luke's. (Testimony)

In August 1997, Mr. Trimble underwent an audiogram in both ears. The testing showed normal hearing in both ears. An audiogram from August 2020 demonstrated severe hearing loss in both ears. (Cl. Ex. 2, p. 19)

Mr. Trimble noticed problems with hearing loss shortly after June 28, 2019, when he was not around the work noise any longer. He also noticed hearing loss before June 28, 2019. For example, when he talked to certain coworkers at Pepsi, they would tell him to turn his hearing aids up. For the past five or ten years his wife noticed his hearing problems. (Testimony)

A few years ago Mr. Trimble noticed a ringing or buzzing in his ears, which would occur periodically. Initially, he was not sure what was causing it. The ringing and buzzing got worse over the years. He took these symptoms more seriously after June 28, 2019, because the buzzing never went away. (Testimony)

At the request of the defendants, Mr. Trimble went to see Tim Simplot, M.D., at the Iowa ENT Center in West Des Moines. Dr. Simplot removed some wax from his ears and then did a hearing test and consultation. The audiometric testing done in his office demonstrated moderate sloping to moderately severe bilateral nerve hearing loss, which is more than he would expect based on Mr. Trimble's age. Dr. Simplot felt it was reasonable to assume that the noise exposure at Mr. Trimble's work environment contributed to this process over his long employment with Pepsi. Dr. Simplot informed Mr. Trimble that he had significant hearing loss due to his work at Pepsi. The doctor also informed him that he had tinnitus, which is a ringing in his ears and that it would probably never go away. Dr. Simplot said the hearing loss was due to the work at Pepsi. Dr. Simplot did not address causation with regard to the tinnitus. Prior to this appointment, Mr. Trimble thought the ringing would go away. (Testimony; Cl. Ex. 3)

In the August 20, 2020 report, Dr. Simplot addressed the issue of permanency for hearing loss and tinnitus separately. He found Mr. Trimble had sustained 23.25 percent binaural hearing loss calculated pursuant to Iowa Code section 85B.9(3). With regard to the tinnitus, Dr. Simplot utilized The AMA Guides to the Evaluation of Permanent Impairment, 5th Edition, to assign 2.5 percent permanent impairment. The doctor advised Mr. Trimble that his tinnitus will never go away. Dr. Simplot opined Mr. Trimble has no permanent work restrictions related to alleged tinnitus or hearing loss other than noise protection in loud environments. (Cl. Ex. 3, p. 2; Testimony)

Mr. Trimble also had a phone interview with Richard Tyler, Ph.D. They talked for about an hour via telephone. Dr. Tyler noted that Mr. Trimble was not required to and did not wear hearing protection while operating the forklift at Pepsi. He did wear hearing protection in the can-crushing room after hearing noise measurement were taken. Dr. Tyler's report references Dr. Simplot's report. Dr. Tyler then offered his opinions regarding permanent impairment. Unfortunately, Dr. Tyler does not utilize the

Iowa Code or The AMA Guides; instead he has developed his own methodology. (Testimony; Cl. Ex. 2)

Mr. Trimble does own guns. He goes deer hunting about once a year. Periodically he does target practicing. He wears hearing protection while target practicing. (Testimony)

Mr. Trimble owns a Honda Gold Wing motorcycle, which he describes as a very quiet touring bike. According to Mr. Trimble, if you put his motorcycle in the can-crushing room at Pepsi, you would not be able to hear it. Previously he owned a Harley-Davidson motorcycle that came with stock pipes. He owned this bike for approximately two years, before he bought his current bike. He wore a helmet that covered his ears when he rode this bike. Approximately 20 years before he owned that Harley, Mr. Trimble owned a Yamaha Virago, a quiet street bike. During those 20 years he did not own a motorcycle. Mr. Trimble currently owns an ATV, that he testified is not loud. He uses the ATV for snow removal and deer hunting. (Testimony)

Mr. Trimble does own a chainsaw that he uses periodically, but he does not run it very often. He wears his earmuffs while running the saw. Usually his kids come over and cut the firewood. He also owns a table saw that he uses for cutting a board here or there. He wears hearing protection while running the saw. (Testimony)

From approximately 2003 through 2011, Mr. Trimble owned a lawn mowing business. He used a riding lawn mower and wore hearing protection which he described as earmuffs. He worked around four hours a day, five or six days a week. (Testimony)

Mr. Trimble has difficulty because of his hearing and ringing and buzzing in his ears. When he lays down to sleep it is the worst. He might lay awake an hour or so trying to sleep. He has a fan in his room for the noise because the ringing in his ears creates a locust sound and makes it very difficult to fall asleep. If he wakes up during the night, then he might as well get out of bed because it will be another hour or so before he is able to get back to sleep. He averages probably four hours of sleep per night. His hearing loss also affects him because he has difficulty hearing others speak, especially on the phone or in a roomful of people. While watching television his wife often times has to ask him to turn the volume down. The ringing in his ears and hearing loss also affects his concentration. (Testimony)

Mr. Trimble is still an employee of Pepsi. He is still on their health insurance and has personal items in his work locker. He has not received a termination letter and he has not completed any paperwork for retirement. As of June 28, 2019, his last day at work, Mr. Trimble was not on any restrictions because of any alleged hearing loss or tinnitus. He has not missed any work at Pepsi due to hearing loss or tinnitus. Mr. Trimble believes that if his left knee was not injured, he could still perform his job at Pepsi. (Testimony)

Mr. Thornton does not recall Mr. Trimble ever having any work restrictions due to his hearing or tinnitus. He does not recall Mr. Trimble ever saying he had difficulty hearing or that he had ringing in his ears. He also does not recall Mr. Trimble ever saying that he was having difficulty performing his job duties due to his hearing. Mr. Thornton testified that Mr. Trimble is still an employee at Pepsi; he still has a locker at Pepsi with personal items in it. (Testimony)

I find that Mr. Trimble is still an employee of Pepsi. Mr. Trimble has not retired from Pepsi and he has not been terminated by Pepsi. There is no evidence that he has been transferred from his regular job. At the time of the hearing, Mr. Trimble was off work to recover from his knee surgery; there has not been a termination of the employer-employee relationship. I find that there has not been a separation from his employment at Pepsi. Thus, I find his hearing loss claim is not ripe.

TINNITUS

We now turn to Mr. Trimble's claim of tinnitus. Dr. Tyler causally connects his tinnitus to his work at Pepsi. Dr. Simplot does not address the issue of causation regarding tinnitus. I find that he has sustained noise-induced tinnitus which resulted from his exposure to loud noises at Pepsi. This injury arose out of and in the course of his employment and resulted from several years of exposure to a noisy environment. Based upon the claimant's testimony and the expert opinion of Dr. Taylor, I find that claimant has sustained his burden of proof that he suffered a cumulative injury from exposure to noise at work. His exposure to the noisy environment during his years of work history for the employer has substantially contributed to his development of noise-induced tinnitus.

Both Dr. Simplot and Dr. Tyler provide their opinion regarding permanent impairment. On this point, I find the opinions of Dr. Simplot compelling. Based on the above findings of fact, I conclude Dr. Simplot utilized The AMA Guides to the Evaluation of Permanent Impairment, 5th Edition, to assign 2.5 percent permanent impairment due to tinnitus. Thus, Mr. Trimble has demonstrated entitlement to 12.5 weeks of permanent partial disability. Mr. Trimble has not lost any time from work due to the tinnitus. I conclude his benefits should commence on the date of the injury, June 28, 2019. (Cl. Ex. 3, p. 2)

With respect to the notice and statute of limitations defense raised by the defendants, I find June 28, 2019 is the appropriate manifestation date for Mr. Trimble's tinnitus. A review of the agency file demonstrates that Mr. Trimble filed his original notice and petition on August 28, 2019. Thus, I find defendants have failed to prove notice or statute of limitations as a defense.

CONCLUSIONS OF LAW

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.

Based on the above findings of fact, I conclude the opinions of an orthopaedic surgeon and an occupational medicine doctor carry greater weight than that of a family physician. Thus, I conclude claimant failed to carry his burden of proof to show that he sustained an injury to his left knee which arose out of and in the course of his employment.

Claimant is seeking an assessment of costs in connection with his left knee claim. Costs are to be assessed at the discretion of the Iowa Workers' Compensation Commissioner or at the discretion of the deputy hearing the case. I find that the claimant was not successful in his case. I exercise my discretion to not assess costs in this matter. Each party shall bear their own costs.

Because clamant failed to carry his burden of proof to demonstrate that he sustained a work-related injury on April 16, 2019, all other issues in agency file number 19700505.01 are rendered moot.

We now turn to agency file number 19700262.01.

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.

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).

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).

Under Iowa Code section 85B.4(3), "occupational hearing loss" is defined as that portion of permanent sensorineural loss that exceeds an average hearing level of 25 decibels at the frequencies of 500, 1000, 2000 and 3000 Hz when "arising out of and in the course of employment caused by excessive noise exposure," but does not include loss attributable to age or any other condition or exposure that is not job related. "Excessive noise exposure" is exposure to sound capable of producing occupational hearing loss. Iowa Code section 85B.4(1)

Section 85B.5 provides a table establishing presumptive "excessive noise exposure" at various decibel levels tied to duration of exposure; for example, 8 hours per day at 90 dBA. There is no presumptive excessive noise exposure at levels below 90 dBA. The table in section 85B.5 then, is not the minimum standard defining an excessive noise level in section 85B.4(2). The table in section 85B.5 lists noise level times and intensities which, if met, will be presumptively excessive noise levels of which the employer must inform the employee. See Muscatine County v. Morrison, 409 N.W.2d 685 (Iowa 1987).

With regard to Mr. Trimble's hearing loss claim, the first issue that must be addressed is whether the hearing loss claim is ripe. Iowa Code section 85B.8(1) states:

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.
2. 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 incurred prior to January 1, 1981, shall not be earlier than the occurrence of any one of the above events.

Based on the above findings of fact, I conclude that Mr. Trimble is still an employee of Pepsi. Mr. Trimble has not retired from Pepsi and he has not been

terminated by Pepsi. At the time of the hearing, Mr. Trimble was off work to recover from his knee surgery. There has not been a termination of the employer-employee relationship. I conclude that there has not been a separation from employment as required by Iowa Code section 85B.8. Thus, I conclude claimant's hearing loss claim is not ripe under Iowa Code section 85B.8.

Next, we turn to the tinnitus claim. Because tinnitus does not qualify under Code section 85B.4 (occupational hearing loss) nor Code section 85.34(2)(s) (scheduled hearing loss), it should be compensated under Code section 85.34(2)(v), the section for all other cases of permanent partial disability. Tinnitus is an unscheduled injury that is considered as a personal injury under Chapter 85 of the Iowa Code and is compensated industrially, if it causes permanent disability. Ehteshamfar v. UTA Engineered Systems Div., 555 N.W. 2d 450 (Iowa 1996).

Iowa Code section 85.34(2)(v) provides:

> In all cases of permanent partial disability other than those hereinabove described or referred to in paragraphs 'a' through 't' hereof, the compensation shall be paid during the number of weeks in relation to five hundred weeks as the reduction in the employee's earning capacity caused by the disability bears in relation to the earning capacity that the employee possessed when the injury occurred. A determination of the reduction in the employee's earning capacity caused by the disability shall take into account the permanent partial disability of the employee and the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury. If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity.

Iowa Code section 85.34(2)(v).

I conclude that the claimant has sustained noise-induced tinnitus which resulted from his exposure to loud noises at Pepsi. This injury arose out of and in the course of his employment and resulted from several years of exposure to a noisy environment. Dr. Simplot did not address causation with regard to tinnitus. Dr. Tyler causally connected the tinnitus to the noise exposure at Pepsi. With regard to permanent impairment, I find the opinions of Dr. Simplot compelling. I find that claimant has sustained his burden of proof that he suffered a cumulative injury from exposure to noise at work. His exposure to the noisy environment during his years of work history for the employer has substantially contributed to his development of noise-induced tinnitus.

Mr. Trimble is still an employee at Pepsi. Both Mr. Trimble and Mr. Thornton testified that, but for Mr. Trimble's left knee injury, he would be able to perform his regular duties at Pepsi. I conclude Mr. Trimble is still an employee at Pepsi and but for his non-work-related left knee injury, he would be offered work at Pepsi for which he would receive the same or greater wages he received at the time of his injury. Thus, Mr. Trimble shall be compensated based only upon his functional impairment resulting from the injury.

Based on the above findings of fact, I conclude Dr. Simplot utilized The AMA Guides to the Evaluation of Permanent Impairment, 5th Edition, to assign 2.5 percent permanent impairment due to tinnitus. Thus, Mr. Trimble has demonstrated entitlement to 12.5 weeks of permanent partial disability. Mr. Trimble has not lost any time from work due to the tinnitus. I conclude his benefits should commence on the date of the injury, June 28, 2019.

With respect to the tinnitus claim, defendants asserted two affirmative defenses. First, Pepsi asserted that claimant failed to give timely notice of his tinnitus. The Iowa Workers' Compilation Act imposes time limits on injured employees both as to when they must notify their employers of injuries and as to when the injury claims must be filed.

Iowa Code section 85.23 requires an employee give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Iowa State Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

The time period both for giving notice and filing a claim does not begin to run until the claimant as a reasonable person, should recognize the nature, seriousness, and probable compensable character of the injury. The reasonableness of claimant's conduct is to be judged in light of claimant's education and intelligence. Claimant must know enough about the condition or incident to realize that it is work connected and serious. Claimant's realization that the injurious condition will have a permanent adverse impact on employability is sufficient to meet the serious requirement. Positive medical information is unnecessary if information from any source gives notice of the

condition's probable compensability. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Orr v. Lewis Cent. Sch. Dist., 298 N.W.2d 256 (Iowa 1980); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Although claimant noticed ringing in his ears several years prior to his discussion with Mr. Tyler on September 30, 2020, he did not know what was causing the ringing. Additionally, he did not understand the seriousness of the ringing until he was off work for his knee and the ringing did not go away and/or until Dr. Simplot advised him that the tinnitus would never go away. I find the manifestation date for Mr. Trimble's tinnitus is June 28, 2019. Mr. Trimble filed his petition for tinnitus on August 27, 2019. I conclude the defendants have failed to prove that Mr. Trimble failed to give notice of his injury within 90 days of the injury.

Defendants also asserted a statute of limitations defense pursuant to Iowa Code section 85.26. Iowa Code section 85.26(1) requires an employee to bring an original proceeding for benefits within two years from the date of the occurrence of the injury if the employer has paid the employee no weekly indemnity benefits for the claimed injury. If the employer has paid the employee weekly benefits on account of the claimed injury, however, the employee must bring an original proceeding within three years from the date of last payment of weekly compensation benefits.

That the employee failed to bring a proceeding within the required time period is an affirmative defense which the employer must plead and prove by a preponderance of the evidence. See Dart v. Sheller-Globe Corp., II Iowa Industrial Comm'r Rep. 99 (App. 1982).

The statute of limitations runs from the occurrence of the injury. McKeever, 379 N.W.2d at 375. However, the statute of limitations defense requires that defendant establish the claimant knew or should have known that the cumulative injury (tinnitus in this case) was serious enough to have a permanent, adverse impact on his employment. Chapa v. John Deere Ottumwa Works, 652 N.W.2d 187, 189 (Iowa 2002); Tasler, 483 N.W.2d at 829-830; McKeever, 379 N.W.2d at 374. The statute of limitations is tolled until claimant knew or should have known that the tinnitus was serious enough to have a permanent adverse impact on his employment.

Therefore, I found Mr. Trimble did not know and reasonably should not have known prior to June 28, 2019 that the ringing in his ears was permanent or that it would not subside even after he has been away from the work noise for an extended period of time. In other words, I found that Mr. Trimble did not know until June 28, 2019 when his tinnitus did not improve, that it was a serious condition and that it would have a permanent adverse impact on his employment or future employability.

Having reached this finding of fact, I conclude that defendants failed to establish that claimant knew that the tinnitus was a serious condition that would have a permanent adverse impact on his employment before June 28, 2019. As a result, I

conclude that the defendants failed to prove its statute of limitations defense. Defendants' statute of limitations defense fails.

Claimant is seeking reimbursement pursuant to Iowa Code section 85.39 for the IME with Dr. Tyler. (Hearing Report; Cl. Ex. 10, p. 1) Section 85.39 states that if an evaluation of permanent disability has been made by a physician of the defendants' choosing and the employee believes the evaluation to be too low, then the employee shall be reimbursed the reasonable fee for a subsequent examination by a physician of the employee's own choosing. However, an employer is not liable for the cost of such an examination if the injury is found to be not compensable. See Iowa Code section 85.39.

Claimant is seeking reimbursement for the IME of Dr. Tyler in the amount of $2,320.00. Dr. Tyler charged $425.00 for the telephone interview of Mr. Trimble and an additional $1895.00 for his written report. As noted above, the occupational hearing loss claim is not ripe for determination. Dr. Tyler's interview and report addressed both the hearing loss and tinnitus claim. There is no indication what portion of each charge is for the hearing loss claim versus the tinnitus claim. I conclude claimant has failed to demonstrate the cost of the examination for the tinnitus. Therefore, claimant's request for reimbursement for the IME is denied.

The hearing report indicates claimant is seeking alternate medical care. Based on the post-hearing brief, it is not entirely clear if he is actually seeking ongoing medical care, or alternate medical care. Claimant seeks "to receive medical care for these injuries including hearing aids recommended by Dr. Simplot and Dr. Tyler and counseling and sound therapy devices recommended by Dr. Tyler." (Claimant's brief, p. 25) In his request claimant lumps the tinnitus and hearing loss claims together.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Mr. Trimble has demonstrated that his tinnitus is work-related. I conclude that defendants are responsible for any reasonable and necessary medical care and supplies for his tinnitus. The defendants have the right to choose the provider of care.

Finally, claimant is seeking an assessment of penalty benefits. Claimant contends defendants lacked a reasonable basis for denying liability on Mr. Trimble's tinnitus claims.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

I conclude claimant's claim for tinnitus was fairly debatable. Further, Dr. Tyler is the physician who causally relates Mr. Trimble's tinnitus to his work for Pepsi. Even before Dr. Tyler's opinion, defendants had issued a written denial letter to the claimant advising the basis for their denial of his claim, including the affirmative defenses of notice and statute of limitations. (Cl. Ex. 7, p. 7) I find claimant has failed to establish that defendants' denial of benefits for the tinnitus claim was unreasonable. As such, I conclude that penalty benefits are not appropriate in this case.

Claimant is seeking an assessment of costs as set forth in Claimant's Exhibit 10. Costs are to be assessed at the discretion of the Iowa Workers' Compensation Commissioner or at the discretion of the deputy hearing the case. I find that the claimant did not prevail on most issues in this file and was generally not successful in his case. I exercise my discretion to not assess costs in this matter. Each party shall bear their own costs.

ORDER

THEREFORE, IT IS ORDERED:

File No: 19700505.01 (DOI: April 16, 2019)

Claimant shall take nothing from these proceedings.

Each party shall bear their own costs.

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1 (2) and 876 IAC 11.7.

File No: 19700262.01 (DOI: June 28, 2019)

All weekly benefits shall be paid at the stipulated rate of six hundred forty-eight and 51/100 dollars ($648.51).

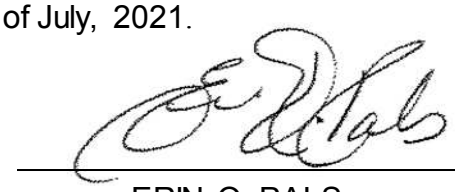
Defendants shall pay twelve point five (12.5) weeks of permanent partial disability benefits commencing on the stipulated commencement date of June 28, 2019.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Deciga-Sanchez v. Tyson Fresh Meats, Inc., File No. 5052008 (App. Apr. 23, 2018) (Ruling on Defendants' Motion to Enlarge, Reconsider or Amend Appeal Decision re: Interest Rate Issue).

Each party shall bear their own costs.

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1 (2) and 876 IAC 11.7.

Signed and filed this ___13th_____ day of July, 2021.



ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Bob Rush (via WCES)

Andrew Giller (via WCES)

Timothy Wegman (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.