BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JIM THYGESEN, Claimant, vs. CITY OF HARLAN, Employer, and EMCASCO INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5057045 A R B I T R A T I O N D E C I S I O N Headnotes: 1402.30, 1402.40, 1402.60, 2208, 2209, 2401, 2402, 2501

Claimant Jim Thygesen filed a petition in arbitration on July 27, 2016, alleging he sustained hearing loss and tinnitus while working for the defendant, City of Harlan, on December 17, 2014 and February 4, 2015. The City of Harlan and its insurer, the defendant, EMCASCO Insurance Company ("EMC"), filed an answer on August 23, 2016, denying Thygesen sustained a work injury.

An arbitration hearing was held on September 19, 2017, at the Division of Workers' Compensation, in Des Moines, Iowa. Attorney Jason Neifert represented Thygesen. Thygesen appeared and testified. Attorney D. Brian Scieszinski represented the City of Harlan. Joint Exhibits ("JE") 1 through 16 were admitted into the record. The record was held open through November 3, 2017, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

Before the hearing the parties prepared a hearing report listing stipulations and issues to be decided. The City of Harlan raised affirmative defenses under Iowa Code sections 85.23 and 85.26, and waived all other affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed between Thygesen at the time of the alleged injury.

2. Temporary benefits are no longer in dispute.

3. If the injury is found to be the cause of permanent disability, the disability is an industrial disability.

4. If the injury is found to be the cause of permanent disability, the commencement date for permanent partial disability benefits, if any are awarded, is either December 17, 2014, or February 4, 2015.

5. If the date of injury is December 17, 2014, at the time of the alleged injury Thygesen's gross earnings were $1,031.60 per week, he was married and entitled to two exemptions, and the parties believe his weekly rate is $651.27.

6. If the date of injury is February 4, 2015, at the time of the alleged injury Thygesen's gross earnings were $1,037.29 per week, he was married and entitled to two exemptions, and the parties believe his weekly rate is $654.10.

7. Costs have been paid.

ISSUES

1. Did Thygesen sustain an injury on December 17, 2014, or February 4, 2015, which arose out of and in the course of his employment with the City?

2. Is the alleged injury a cause of a temporary disability during a period of recovery?

3. Is the alleged injury a cause of permanent disability?

4. If the alleged injury is a cause of permanent disability, what is the extent of disability?

5. Is Thygesen entitled to recover payment of medical expenses?

6. Should costs be assessed against either party?

FINDINGS OF FACT

Thygesen is married and lives in Harlan, Iowa. (Transcript, pages 6-7) Thygesen graduated from high school and obtained an associate of applied science degree in horticulture from Kirkwood Community College in 1979. (JE 7, p. 66; Ex. 13, p. 6; Tr., pp. 7-8) In 1997, Thygesen completed a state of Iowa Wastewater Certificate, Grade III. (JE 7, p. 66) At the time of the hearing Thygesen was sixty. (Tr., p. 6)

After graduating from Kirkwood Community College Thygesen worked as a City of Irwin Town Superintendent. (Ex. 14, p. 96) In 1981, the City of Harlan ("City") hired him as an operator in the wastewater treatment plant. (JE 7, p. 67; Ex. 13, pp. 5, 7; Tr., pp. 8-9) Thygesen performed maintenance and cleaning on the pumps. (Tr., pp. 8-9)

In 1992, the City promoted Thygesen to a mechanic operator position. (Tr., p. 9; Ex. 13, p. 7) Thygesen worked under Steve Kenkel, the assistant superintendent, and Melvin Martin, the superintendent. When Martin retired in 2010, the City promoted Kenkel to superintendent and Thygesen to assistant superintendent. (Tr., p. 9; Ex. 13, pp. 7-8; JE 7, p. 67) Thygesen is responsible for making periodic inspections of equipment and machinery, operational adjustments and repairs to equipment and machinery, drawing sludge into holding tanks, collecting sewage samples and performing analysis to determine the efficiency and adequacy of the treatment process, performing television inspection of sewage lines, reading reports from other shifts to determine current plant conditions, maintaining records, preparing reports regarding plant operations, and performing the duties of superintendent when the superintendent is absent. (JE 7, p. 67)

The City conducted yearly hearing tests of Thygesen's hearing from 1992 through 2003, in 2009 and 2010, and from 2012 through 2015. (JE 1, pp. 1-3) Thygesen testified the City did not provide him with a copy of the results of the hearing tests until he asked for them in 2015. (Tr., p. 29)

Thygesen testified starting in 1981, he was exposed to noise in the various buildings where he worked. (Tr., p. 12) The main building contained three large piston sludge pumps and a heat exchanger with an air intake blower that were all noisy. (Tr., p. 12) The maintenance shop or garage also had a generator inside of it that was noisy. (Tr., p. 12) The pump station building contains four pumps with air valves that also make a lot of noise when they open up and close. (Tr., p. 12) Thygesen reported he spent seventy to eighty percent of his time in the main building. (Tr., p. 13; Ex. 13, p. 8) Thygesen estimated he worked in the pump building between twenty to thirty percent of the time. (Tr., p. 24)

The office or lab room is located in the main building. (Tr., p. 16) The office is located near a grate that opens down to the three pumps. (Tr., pp. 16-18) Before Thygesen's alleged injury, the employees did not close the office door. (Tr., pp. 16-17) Now, the employees keep the office door shut. (Tr., p. 17)

Thygesen testified pump number one runs eighty to ninety percent of the day, pump number two runs between sixty and seventy percent of the day, and pump number three's use varies. (Tr., p. 21) In 1998 pump number one wore out and the City replaced it. (Ex. 11, pp. 13-14) The City replaced pump number two in 2014. (Tr., pp. 19-20; Ex. 11, p. 15) Pump number three has not been replaced, but it was rebuilt in 2015 or 2016. (Ex. 11, pp. 14-15) Pump number three is quieter since it was rebuilt. (Ex. 11, p. 15) The City also replaced an old boiler in the main building with a quieter boiler in 2017. (Tr., pp. 14-15) Thygesen estimated the boiler runs between sixty and seventy percent of the time he is working. (Tr., p. 15)

The generator in the maintenance garage runs the plant in the event the electricity goes out. (Tr., p. 24) Thygesen testified the generator runs on a regular

basis. (Tr., p. 24) In 2016 the City moved the generator outside of the maintenance garage. (Tr., p. 25)

Kenkel testified the sludge pumps were very noisy. (Ex. 11, p. 8) Kenkel and Martin reported they worked near the sludge pumps seventy-five percent of the time because the office was in the same building as the pumps. (Ex. 11, pp. 8-9; 12, p. 12) Kenkel reported during the remaining twenty-five percent of his time at work, he worked around other noisy equipment, including the pump station. (Ex. 11, pp. 9-10)

Thygesen testified he first noticed he was experiencing hearing problems and humming, or tinnitus, in his ears, approximately ten years ago. (Tr., pp. 32-33, 40) Thygesen reported he had to ask individuals to repeat what they had said to him. (Tr., pp. 33, 40) Thygesen testified his hearing problems and the humming or tinnitus have become worse over time. (Tr., pp. 33, 40) Thygesen admitted he thought his hearing problems were related to his work, but testified "I didn't really know until I seen some of the numbers and stuff. I really didn't – I didn't know then what the severity was." (Tr., p. 40) Thygesen testified he did not have any hearing problems before he worked for the City. (Ex. 13, p. 10)

Kenkel reported he first started noticing he had to ask people to repeat statements to him ten to twelve years ago. (Ex. 11, pp. 13, 16) Martin testified he first started noticing problems with ringing in his ears in the early 1990s. (Ex. 12, p. 13)

On June 2, 2012, Thygesen attended an appointment with his family practitioner and completed a health questionnaire. (Tr., p. 41; JE 16) The questionnaire asked whether Thygesen had "recently experienced or are now experiencing . . . 5. Ears: Pain, ringing, muffled hearing, discharge, hearing loss?" (JE 16, p. 2) Thygesen responded he was experiencing one or more of those issues on the form. (Tr., p. 42) Thygesen testified his family physician never made any comments to him about the questionnaire. (Tr., p. 48)

Thygesen testified he and Kenkel were experiencing hearing problems. (Tr., p. 28) Thygesen testified he discussed filing a workers' compensation claim with Kenkel, and Terry Cox, the City Administrator, six months before he filed his injury report in February 2015. (Tr., pp. 29, 45) Thygesen relayed he thought his hearing loss was work-related when he discussed his claim with Kenkel and Cox. (Tr., p. 49) Kenkel initiated a workers' compensation claim in 2014. (Tr., p. 29)

Roger Bissen works in the safety department for the City. (Tr., p. 27) On November 4, 2014, Bissen prepared a report documenting decibel readings in the wastewater treatment department. (Tr., p. 27) Bissen documented decibel levels of eighty-one for boiler room pump number three, ninety for the shop air compressor, and 104 for the shop generator. (JE 8, p. 72) Bissen documented decibel levels for a number of other items. (JE 8, p. 72)

On February 4, 2015, Thygesen completed an employee work injury report, alleging he had sustained hearing loss in his right and left ears while working for the City. (JE 5, p. 43) This was the first written notice Thygesen provided to the City that he was experiencing a hearing problem. (Tr., p. 43) Kenkel and the workers' compensation coordinator completed an investigation report. (JE 5, p. 44) The report notes the accident occurred in the central building and pump station from 1981 through 2015. (JE 5, p. 44) The report noted two of the three piston pumps have been replaced, which has reduced the noise level. (JE 5, p. 44)

Thygesen asked the City for his hearing testing results. (Tr., p. 29) Thygesen testified he saw the testing results in 2014. (Tr., pp. 46-47) Thygesen signed the results on September 22, 2015. (JE 1, p. 8)

On March 4, 2015, the City and EMC requested an opinion from Abby Couse, M.S., CCC-A, an audiologist. (JE 2, pp. 10-11) Couse responded, noting, "I find it difficult to confirm that the city of Harlan is the sole cause of the hearing impairment in these individuals given the information I have received thus far." (JE 2, p. 12)

Dean Wampler, M.D., an occupational medicine physician, conducted an independent medical records review for the City on June 8, 2015, without examining or interviewing Thygesen. (JE 3, p. 14; Tr., p. 29) Dr. Wampler documented Thygesen had reported he wore hearing protection when in the plant or pump area, but not in the office, which was separated by walls and a door. (JE 3, p. 15) Dr. Wampler opined Thygesen "could not have sustained noise induced hearing loss in the course of his employment" with the City. (JE 3, p. 16) Dr. Wampler noted Thygesen's hearing loss is uncommon at his age, opined it is most likely the result of a genetic predisposition, noted his exposure to unprotected gunfire while hunting "has to be considered a significant factor," and found "I do not consider the office as a potential source of dangerous noise exposure." (JE 3, pp. 15, 16)

Thygesen received hearing aids in October 2015. (Tr., p. 30) The hearing aids cost $6,800.00. Thygesen relayed the delay in obtaining the aids was due to the cost. (Tr., p. 30) Thygesen testified his hearing is better since he started wearing hearing aids. (Tr., p. 35) Thygesen reported he no longer has to ask people to repeat what they say to him and he can hear soft noises when he wears the hearing aids. (Tr., p. 35)

Richard Tyler, Ph.D., an audiologist, conducted an independent audiological examination of Thygesen in January 2016. (JE 4) Dr. Tyler reviewed Thygesen's records and interviewed him by telephone. (JE 4, p. 17; Tr., p. 38) Thygesen denied a family history of hearing loss or tinnitus, noting his father died at age seventy, and his mother is currently seventy-six. (JE r, p. 19) Given the lack of family history, Dr. Tyler found it is unlikely Thygesen's hearing loss is the result of heredity factors. (JE 4, p. 19)

Dr. Tyler found no indication Thygesen had hearing loss or tinnitus before 1981, and noted Thygesen reported he had to raise his voice at work to communicate, and he

was exposed to impulsive noise from piston pumps at work. (JE 4, p. 18) Dr. Tyler further found noise records from November 4, 2014, did not measure impulsive noise, but documented continuous noise over 100 decibels, which he opined could produce noise induced hearing loss and tinnitus. (JE 4, pp. 17-18) Dr. Tyler noted Thygesen had fired guns from 1981 through 2017, taking twenty to fifty shots per year, and he used hearing protection some of the time, but he did not notice any ringing after shooting. (JE 4, p. 19)

Dr. Tyler assigned a 5.4 percent whole body impairment to Thygesen for tinnitus. (JE 4, p. 20-22) Dr. Tyler took issue with the criteria for measuring occupational hearing loss provided in Iowa Code chapter 85B, and used his own approach opining Thygesen had sustained a bilateral hearing impairment of seven percent, and noted Thygesen could benefit from hearing aids for his hearing loss. (JE 4, pp. 25-26)

Mark Zlab, M.D., an otolaryngologist, conducted an independent medical examination of Thygesen for the City on August 15, 2017. (JE 5) Dr. Zlab reviewed Thygesen's records and examined him. (Tr., p. 38) Thygesen told Dr. Zlab he had had problems with his hearing for approximately ten years. (Tr., pp. 38-39) Dr. Zlab assessed Thygesen with sensorineural hearing loss and tinnitus in both ears, and opined,

> [t]oday's hearing testing reveals a sensorineural hearing loss. The configuration of this loss is typical of noise induced hearing loss. Although supposedly, hearing testing was done while employed for Harlan dating back to 1992, I only have for my review audiograms dating back to 2009. Without audiograms to review from the distant past, I cannot give an accurate opinion whether this loss is due to he [*sic*] employment with the city of Harlan. Given his noise levels in which he was exposed without protection, it is highly likely that this loss is due to his exposure to noise while employed by Harlan. His loss only calculates to 1.6% today. Due to his troubling tinnitus, he would be entailed [*sic*] by law to an additional 5%. This is a permanent loss. There is no medical treatment for this condition. Only benefit comes from using hearing aids.

(JE 5, p. 39)

Thygesen relayed his tinnitus is worse when he is in a quiet environment like a bedroom. (Tr., p. 44) Dr. Zlab recommended Thygesen run a fan while sleeping, which he does now. (Tr., p. 44)

Thygesen performs his regular job duties for the City. (Tr., p. 43) At hearing he did not identify anything he cannot due at work because of his hearing problems. (Tr., p. 43) As of the date of the hearing Thygesen has not lost any wages or earnings because of his hearing loss and tinnitus. (Tr., pp. 43-44) Thygesen acknowledged he would not work anywhere other than the City, even if his hearing were perfect. (Tr., p. 43)

Thygesen intends to retire at age sixty-two. (Tr., p. 35) Thygesen believes he will be able to continue working until age sixty-two. (Tr., pp. 36-37)

CONCLUSIONS OF LAW

I. Notice and Statute of Limitations

Thygesen avers he sustained cumulative injuries, hearing loss and tinnitus, while working for the City. The City contends Thygesen failed to provide timely notice to the City of his claim, and failed to comply with the statute of limitations.

Cumulative injuries are occupational diseases that develop over time. Baker v. Bridgestone/Firestone, 872 N.W.2d 672, 681 (Iowa 2015). A cumulative injury results from repetitive trauma in the workplace. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842, 851 (Iowa 2009); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368, 372-74 (Iowa 1985). "A cumulative injury is deemed to have occurred when it manifests – and 'manifestation' is that point in time when 'both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person.'" Baker, 872 N.W.2d at 681.

Under the notice provision, an employee is required to provide notice to his or her employer within ninety days of the occurrence of an injury, unless the employer or the employer's representative has actual knowledge the occurrence of the injury. Iowa Code § 85.23 (2013). The purpose of the notice provision is to afford the employer the opportunity to investigate the circumstances of the injury when the information is fresh. Johnson v. Int'l Paper Co., 530 N.W.2d 475, 477 (Iowa Ct. App. 1995). "Actual knowledge must include information that the injury might be work related." Id. The employer bears the burden of proving the affirmative defense. DeLong v. Iowa State Highway Comm'n, 299 Iowa 700, 703, 295 N.W. 91, 92 (1940).

Under the statute of limitations provision, an employee is required to bring a contested case proceeding within two years "from the date of the occurrence or injury for which benefits are claimed" if weekly compensation benefits have not been paid to the employee. Iowa Code § 85.26(1). The City has not paid weekly benefits to Thygesen, therefore, the two-year statute of limitations applies to his claim. Again, the City bears the burden of proving Thygesen failed to comply with the statute of limitations. DeLong , 299 Iowa at 703, 295 N.W. at 92.

The Iowa Supreme Court has held the discovery rule is applicable to the notice and limitation provisions contained in Iowa Code sections 85.23 and 85.26. IBP, Inc. v. Burress, 779 N.W.2d 210, 218-19 (Iowa 2010). Thygesen bears the burden of establishing the discovery rule is applicable to this proceeding. Id. at 219. Under the discovery rule, the period "does not begin to run until the claimant knows or in the exercise of reasonable diligence should know 'the nature, seriousness[,] and probable compensable character' of his or her injury." Baker, 872 N.W.2d at 685. Thus, the

claimant must have actual or imputed knowledge of all three elements before the period begins to run. Swartzendruber v. Schimmel, 613 N.W.2d 646, 650-51 (Iowa 2000).

> Under the imputed knowledge prong, the period begins to run
>
> when a claimant gains information sufficient to alert a reasonable person of the need to investigate. Thus, a claimant's knowledge is judged under the test of reasonableness. The need to investigate arises when a reasonable person has knowledge of the *possible* compensability of the condition. This knowledge must include all three characteristics of the condition. As of that date, the duty to investigate begins and the claimant has imputed knowledge of all the facts that would have been disclosed by a reasonable investigation.

Id. (internal citations omitted). The discovery rule does not require "exact knowledge of the seriousness of an injury," nor does it require an expert opinion "to establish knowledge of the characteristics of the injury," rather, the claimant has a duty to investigate when the claimant is aware of the problem. Id. at 650-51. "[I]f it is reasonably possible an injury is seriousness enough to be compensable as a disability, the seriousness of the test is satisfied." Id. at 651.

The City conducted yearly hearing tests of Thygesen's hearing from 1992 through 2003, in 2009 and 2010, and from 2012 through 2015. (JE 1, pp. 1-3) Thygesen testified the City did not provide him with a copy of the results of the hearing tests until he asked for them in 2014. (Tr., pp. 28-29) Thygesen's testimony was unrebutted at hearing.

During the hearing Thygesen did not engage in any furtive movements. His rate of speech, eye contact, and general demeanor were appropriate. His testimony was clear and consistent. I found his testimony concerning his knowledge of his condition, discussions with medical practitioners concerning his hearing loss and tinnitus, his receipt of information from the City, and discussions with City management personnel reasonable and consistent with the other evidence I believe.

Kenkel, Thygesen's supervisor, initiated a workers' compensation claim in 2014. (Tr., p. 29) On February 4, 2015, Thygesen completed an employee work injury report, alleging he sustained hearing loss in his right and left ears while working for the City from 1981 through 2015. (JE 5, p. 44) Thygesen testified at hearing he discussed filing a workers' compensation claim with Kenkel and Cox, the administrator for the City, six months before he filed an employee injury report in February 2015. (Tr., pp. 29, 45) There was no contrary evidence presented at hearing. The evidence supports the City had knowledge of Thygesen's injury six months before he completed the employee work injury report when he discussed filing a claim with his supervisor and the City administrator.

The City contends Thygesen was aware his hearing problems were both serious and work-connected by July 6, 2012, yet he did not provide notice to the City for more than two years. It is undisputed Thygesen knew he was having problems with his hearing ten years ago, and he wondered whether his hearing problems were related to the noise he was exposed to at work. (Tr., pp. 39-40) Thygesen testified, "but I didn't really know until I seen some of the numbers and stuff. I really didn't – I didn't know then what the severity was." (Tr., p. 40)

On June 2, 2012, Thygesen attended an appointment with his family practitioner and completed a health questionnaire. (Tr., p. 41; JE 16) The questionnaire asked whether Thygesen had "recently experienced or are now experiencing . . . 5. Ears: Pain, ringing, muffled hearing, discharge, hearing loss?" (JE 16, p. 2) Thygesen responded on the form he was experiencing one or more of those issues. (Tr., p. 42) Thygesen testified his family physician never made any comments to him about the questionnaire. (Tr., p. 48) As discussed above, I find Thygesen's testimony credible and consistent with the other evidence I believe.

The record does not support Thygesen knew or in the exercise of reasonable diligence should have recognized the seriousness and probable compensable character of his hearing loss in June 2012. The record does not support Thygesen recognized the seriousness and probable compensable character of his hearing loss before the City received actual notice of the injury during Thygesen's discussions with his supervisor, Kenkel, and Cox, the administrator for the City, six months before he filed the February 2015 employee work injury report.

Thygesen has experienced buzzing or tinnitus in his ears for the past ten years. The City relies on the case of Chapa v. John Deere Ottumwa Works, 652 N.W.2d 187 (Iowa 2002), to support its contention Thygesen's claim is barred by the statute of limitations. The facts concerning Chapa's awareness are much different than the facts of this case. Chapa's tinnitus affected his sleep and he felt tired and less alert at work, it affected his ability to concentrate on tasks, and it negatively affected his communication by making him speak louder than normal to others. Id. at 189. Thygesen's tinnitus was not interfering with his ability to concentrate, work, or remain alert. The record evidence does not support he knew or in the exercise of reasonable diligence should have recognized the seriousness and probable compensable nature of his tinnitus before he discussed his conditions with Kenkel and Cox, approximately six months before he completed the February 4, 2015 injury report. The City has not established Thygesen failed to provide timely notice.

Thygesen filed his petition on July 27, 2016. Based on the above analysis, I find Thygesen did not know or in the exercise of reasonable diligence should have recognized the seriousness and probable compensable character of his hearing loss or tinnitus before he discussed his conditions with Kenkel and Cox, within six months of the February 4, 2015 employee work injury report. The City has not proven either affirmative defense.

II. Nature and Extent of Disability

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of and in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment, and not merely incidental to the employment. Koehler Elec. v. Willis, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs "in the course of employment" when:

> it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. *An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of the employer.*

Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979) (emphasis in original).

The claimant bears the burden of proving the claimant's work-related injury is a proximate cause of the claimant's disability and need for medical care. Ayers v. D & N Fence Co., Inc., 731 N.W.2d 11, 17 (Iowa 2007); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 153 (Iowa 1997). "In order for a cause to be proximate, it must be a 'substantial factor.'" Ayers, 731 N.W.2d at 17. A probability of causation must exist, a mere possibility of causation is insufficient. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997). The cause does not need to be the only cause, [i]t only needs to be one cause." Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60, 64 (Iowa 1981).

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The deputy commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation

arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

Iowa Code section 85B.4(3) defines "occupational hearing loss" as

> that portion of a permanent sensorineural loss of hearing in one or both ears that exceeds an average hearing level of twenty-five decibels for the frequencies of five hundred, one thousand, two thousand, and three thousand Hertz arising out of an in the course of employment caused by excessive noise exposure.

"Occupational hearing loss" does not include hearing loss attributable to age or any other condition or exposure that is not work-related. Iowa Code § 85B.4(3). The statute also provides weekly compensation for hearing loss other than occupational hearing loss, as a scheduled member disability under Iowa Code section 85.34(2)(r).

The Iowa Supreme Court has found tinnitus does not qualify as a scheduled injury under Iowa Code section 85.34(2)(r) or as an occupational hearing loss under Iowa Code section 85B.4, and thus is an unscheduled disability under Iowa Code section 85.34(2)(u). Ehteshamfar v. UT Engineered Sys. Div., 555 N.W.2d 450, 453 (Iowa 1996).

Four experts have provided causation opinions in this case, Couse, an audiologist, Dr. Wampler, an occupational medicine physician, Dr. Tyler, an audiologist, and Dr. Zlab, an otolaryngologist. I find the opinion of Dr. Zlab, as supported by Dr. Tyler, most persuasive.

Couse has received the least amount of education of any of the experts in this case. She did not interview or examine Thygesen, and noted "I did not receive information regarding the amount of time spent by the claimants at each particular area but told they were supervisors and were not stationed at a specific area in the sanitation department." (JE 2, p. 12) Couse opined "I find it difficult to confirm that the city of Harlan is the sole cause of the hearing impairment in these individuals given the information I have received thus far." (JE 2, p. 12) Couse was not provided with all of the facts in the case. I find her opinion should be given no weight.

Dr. Wampler is not trained as an audiologist or otolaryngologist. Dr. Wampler did not examine Thygesen or interview him. Dr. Wampler's opinion makes inaccurate assumptions concerning the work environment and Thygesen's family history. Thygesen does not have any family history of hearing problems. Dr. Wampler noted Thygesen wore hearing protection in the pump area, but not the office "which was separated by walls and a door; and acknowledged as much quieter than the plant." (JE 3, p. 15) Prior to Thygesen's work injury, the office door was open, exposing Thygesen to the pump noise through the open grate in the floor to the pump room below.

Dr. Tyler is a recognized expert in the field of audiology. Dr. Tyler interviewed Thygesen over the telephone, but did not examine him personally. Dr. Tyler's opinion concerning causation is reasonable and consistent with the other evidence I believe. When providing his impairment rating, Dr. Tyler disregarded the applicable statutory standards set forth in Iowa Code chapter 85B. While he may not agree with the applicable statutory standards, the standards have been established by the Iowa Legislature to be used in evaluating occupational hearing loss claims. Based on his failure to follow the applicable statutory standards, I do not find Dr. Tyler's impairment rating persuasive.

Dr. Zlab is a trained otolaryngologist who has served as an expert witness in several cases before this agency. Dr. Zlab is the only expert who personally examined Thygesen. Dr. Zlab diagnosed Thygesen with sensorineural hearing loss and tinnitus. The totality of the record evidence at hearing supports Thygesen sustained sensorineural hearing loss and tinnitus caused by his employment with the City. Dr. Zlab has opined Thygesen has sustained a 1.6 percent hearing loss permanent impairment, and an additional five percent permanent impairment for tinnitus. Dr. Zlab is the only expert who applied the statutory standards set forth in evaluating Thygesen's hearing loss. I find his opinion, as supported by Dr. Tyler on causation, most persuasive. Thygesen has established he has sustained permanent hearing loss and tinnitus caused by his work for the City.

"Industrial disability is determined by an evaluation of the employee's earning capacity." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 852 (Iowa 2011). In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (Iowa 2010). The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138.

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u). When considering the extent of disability, the deputy commissioner considers all evidence, both medical and nonmedical. Evenson v. Winnebago Indus., Inc., 818 N.W.2d 360, 370 (Iowa 2016).

The City avers Thygesen has not sustained an industrial disability because he continues to work for the City, he has not missed any work due to hearing loss and tinnitus, and he has received regular raises. Thygesen is sixty. (Tr., p. 6) He completed high school and he obtained an associate of applied science degree. (JE 7, p. 66; Ex. 13, p. 6; Tr., pp. 7-8) He has worked for the City since 1981, and he has received several promotions and raises. (Tr., p. 9; Ex. 13, pp. 7-8; JE 7, p. 67) Thygesen continues to work for the City, he has no intention of leaving the City, and he plans to retire in less than two years. As a result of his work-related hearing loss

Thygesen must wear hearing aids, and his tinnitus interferes with his ability to sleep without the use of a fan as background noise. Considering all of the factors of industrial disability, I conclude Thygesen has established he has sustained a ten percent industrial disability, commencing on December 17, 2014.

III. Medical Expenses

Thygesen seeks to recover medical expenses of $6,800.00 for his hearing aids, and $399.00 for servicing the aids. (JE 14) The City avers it is not responsible for the medical expenses.

An employer is required to furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, hospital services and supplies, and transportation expenses for all conditions compensable under the workers' compensation law. Iowa Code § 85.27(1). The employer has the right to choose the provider of care, except when the employer has denied liability for the injury. Id. "The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee." Id. § 85.27(4). If the employee is dissatisfied with the care, the employee should communicate the basis for the dissatisfaction to the employer. Id. If the employer and employee cannot agree on alternate care, the commissioner "may, upon application and reasonable proofs of necessity therefore, allow and order other care." Id. The statute requires the employer to furnish reasonable medical care. Id. § 85.27(4); Long v. Roberts Dairy Co., 528 N.W.2d 122, 124 (Iowa 1995) (noting "[t]he employer's obligation under the statute turns on the question of reasonable necessity, not desirability"). The Iowa Supreme Court has held the employer has the right to choose the provider of care, except when the employer has denied liability for the injury, or has abandoned care. Iowa Code § 85.27(4); Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010). The Iowa Supreme Court has held an employer may be responsible for unauthorized care "upon proof by a preponderance of the evidence that such care was reasonable and beneficial," meaning "it provides a more favorable medical outcome than would likely have been achieved by the care authorized by the employer." Gwinn, 779 N.W.2d at 206.

As analyzed above, Thygesen's hearing loss and tinnitus were caused by his employment with the City. Hearing aids were recommended by Dr. Zlab for his hearing loss. The hearing aids and maintenance of the aids are related to the work injury. Thygesen is entitled to recover the cost of the hearing aids and maintenance of the aids from the City. The City is responsible for all causally related medical bills.

IV. Costs

Thygesen seeks to recover the $100.00 filing fee, $12.93 in service costs, the $1,535.50 cost of Dr. Tyler's report, and a deposition transcript cost of $50.70. (JE 15, p. 1) Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the

commissioner shall be taxed in the discretion of the commissioner." Rule 876 IAC 4.33(6), provides

> [c]osts taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes.

The administrative rule expressly allows for the recovery of the costs Thygesen seeks to recover. I conclude Thygesen's costs should be assessed to the City.

ORDER

Claimant is awarded fifty (50) weeks of permanent partial disability benefits, at the rate of six hundred fifty-one and 27/100 dollars ($651.27), commencing on December 17, 2014.

Defendants shall pay accrued benefits in a lump sum with interest on all received weekly benefits pursuant to Iowa Code section 85.30.

Defendants are assessed seven thousand one hundred ninety-nine and 00/100 dollars ($7,199.00) for the hearing aids and the servicing of the hearing aids.

Defendants are responsible for all causally related medical bills.

Defendants shall reimburse the claimant one hundred and 00/100 dollars ($100.00) for the filing fee, twelve and 93/100 dollars ($12.93) for service costs, one thousand five hundred thirty-five and 50/100 dollars ($1,535.50) for the cost of Dr. Tyler's report, and fifty and 70/100 dollars ($50.70) for the deposition transcript.

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

Signed and filed this 8th day of January, 2018.

HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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HLP/sam

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 in writing and received by the commissioner's office 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 a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.