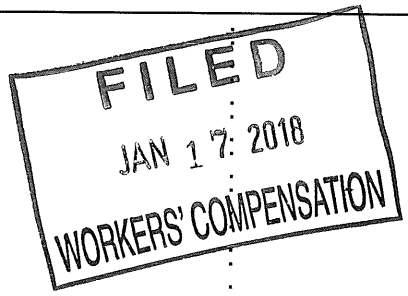
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



STEVE KENKEL, Claimant, vs. CITY OF HARLAN, Employer, and EMCASCO, Insurance Carrier, Defendants.	File No. 5062153 ARBITRATION DECISION Head Notes: 1100, 1803, 2208

STATEMENT OF THE CASE

Claimant, Steve Kenkel, filed a petition in arbitration seeking workers' compensation benefits from City of Harlan, employer, and EMCASCO, insurance carrier, both as defendants, as a result of an alleged injury sustained on August 19, 2014 or October 29, 2014. This matter came on for hearing before Deputy Workers' Compensation Commissioner Erica J. Fitch, on September 11, 2017, in Des Moines, Iowa. The record in this case consists of joint exhibits 1 through 15, claimant's exhibit 1, and the testimony of the claimant. The parties submitted post-hearing briefs, the matter being fully submitted on November 3, 2017.

ISSUES

The parties submitted the following issues for determination:

1. Whether claimant sustained an injury on August 19, 2014 or October 29, 2014 which arose out of and in the course of his employment;

2. Whether claimant's claim is barred for failure to give timely notice under Iowa Code section 85.23;

3. Whether claimant's claim is barred as an untimely claim under Iowa Code section 85.26;

4. Whether the alleged injury is a cause of permanent disability;

5. Whether the alleged disability is a scheduled member disability or an unscheduled disability;

6. The extent of any permanent disability;

7. The commencement date for permanent disability benefits;

8. Whether defendants are responsible for claimed medical expenses; and

9. Specific taxation of costs.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, 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.

FINDINGS OF FACT

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

Claimant's testimony was clear and consistent as compared to the evidentiary record, deposition testimony, and recorded statements. His demeanor at the time of evidentiary hearing was excellent and gave the undersigned no reason to doubt claimant's veracity. Claimant is found credible.

Claimant was 58 years of age at the time of hearing. He is a lifelong resident of Earling, Iowa. Claimant graduated high school in 1977. In November of 1977, claimant began work at defendant-employer. From 1977 to April 1978, claimant worked as a draftsman. He then transitioned into the position of wastewater operator and technician, a role he filled until 1993. During his tenure with defendant-employer, claimant earned his certification in wastewater treatment from a community college. From 1993 to 2010, claimant worked as assistant plant superintendent. In 2010, claimant took over the role of plant superintendent for defendant-employer; he remained in his position on the date of evidentiary hearing. (Claimant's testimony; JE7, pages 42-43; JE13, Deposition Transcript p. 6) In addition to his employment with defendant-employer, claimant once held an elected school board position and for the last five years, has served as an elected county supervisor. (Claimant's testimony)

Claimant testified he began experiencing hearing difficulties in approximately the 2005 to 2007 time period. He testified he first experienced ringing and whistling in his ears. He subsequently noticed hearing problems and needing to ask others to repeat themselves. Claimant testified he noticed words were unclear or he was mixing up words he heard. He testified it bothered him not to hear properly. (Claimant's testimony; JE13, Depo. Tr. pp. 13, 16)

Claimant indicated defendant-employer provided nearly annual hearing tests, dating to 1992. (Claimant's testimony) A selection of hearing test records dating to 1992 was included in evidence. (JE1, pp. 1-3) Although claimant spoke with the performing technician, claimant indicated he was not provided with a copy of the results until he specifically requested the information in 2014. (Claimant's testimony; JE9, p. 62) Claimant acknowledged that approximately 5 to 7 years prior to hearing, the audiologist informed claimant his hearing was worsening and indicated he may want to look into hearing aids. (JE9, p. 63) A notation following a July 2013 audiogram indicates hearing aids were discussed with claimant. (JE1, p. 3) Claimant stated he did not follow through with the recommendation due to cost concerns. (JE9, p. 63)

However, in 2014, claimant's daughter began to become quite irritated with claimant's inability to hear and claimant was prompted to arrange for a hearing aid evaluation. In August 2014, claimant indicated he telephoned his health insurance provider to inquire of coverage amounts and to locate a preferred provider. At that time, claimant indicated he was advised to contact defendant-employer's human resources department to determine if hearing aids would be covered as a result of occupational hearing loss. (Claimant's testimony; JE9, pp. 63-64) The following day, claimant testified he approached Terry Cox, the city administrator. Claimant asked Mr. Cox how to proceed and who would pay for the necessary hearing aids. It was during this timeframe, August 2014, that claimant testified he connected his complaints to work at defendant-employer. (Claimant's testimony)

Claimant testified a number of items of equipment produce noise at defendant-employer. Primarily, he focused upon three sludge pumps and a boiler located in the plant building which houses the office, laboratory and restrooms. He described the plant as very loud and noted that from 1987 to 1993, the office was not enclosed. Even following enclosure of the office, the door was routinely left open and that door was adjacent to a grate which led directly to the pumps below. (Claimant's testimony) The three sludge pumps were installed in 1978. The first pump and second pumps were replaced in 1998 and 2014, respectively. Claimant testified each replacement led to a quieter plant. (Claimant's testimony; JE13, Depo. Tr. pp. 14-15; *see also* CE1, page 3) Claimant testified additional buildings, including a shop, held noisy equipment such as pumps and a generator. (Claimant's testimony)

On August 19, 2014, claimant participated in a hearing test per defendant-employer's annual policy. Following the test on August 19, 2014, the technician noted hearing aids and further testing were discussed with claimant. (JE1, p. 3)

On August 22, 2014, claimant presented to Hearing Healthcare Centers and reported he had been advised to look into procuring hearing aids. Claimant indicated he first noticed hearing loss over the past 5 years, with the loss developing gradually. He identified work as the cause of the hearing loss. Claimant also noted a complaint of ringing of his ears. (JE2, p. 5) Claimant underwent an audiogram. (JE2, p. 6)

A report was generated regarding the August 19, 2014 hearing loss evaluation. The report is dated October 16, 2014 and describes a mild loss bilaterally at speech frequencies, as well as severe left-sided and moderate to severe right-sided loss at high pitched frequencies. (JE1, p. 4)

The parties stipulate defendant-employer had knowledge of his workers' compensation claim on October 29, 2014. (Claimant's testimony) On November 19, 2014, claimant provided a recorded statement to defendant-insurance carrier. At that time, claimant admitted he noticed hearing loss over the last few years, which had gradually worsened. (JE8, p. 53)

In November 2014, noise readings were taken throughout the facility by defendant-employer's safety director. (Claimant's testimony) The results showed 11 areas with 80 dB or greater noise: the boiler room, where the three pumps are located, was identified as 81 dB; the shop air compressor was identified as 90 dB; and the shop generator was identified as 104 dB. (JE7, p. 46)

After receipt of these readings, claimant, as plant superintendent, began to pay particular attention to noise levels and implement mitigation measures. Claimant testified he "really got on the guys" about use of hearing protection and required use of hearing protection in any area where noise levels exceeded 85 dB. Decibel readings were posted in each building. (Claimant's testimony; JE13, Depo. Tr. p. 33) Steps were also taken to minimize the levels of noise in the facility. Following the readings, the shop generator was moved outside, the laboratory/office area was closed off from the plant and an air conditioner was installed, and the third pump was rebuilt in 2016 to make it run more quietly. (Claimant's testimony; JE13, Depo. Tr. pp. 14-15, 34; *see also* CE1, p. 3)

On November 26, 2014, the city administrator, Terry Cox, completed claimant's annual performance evaluation. Mr. Cox rated claimant as consistently well above average overall. (JE10, p. 72)

Defendants retained audiologist Abby Couse, MS, to review claims brought by claimant and another individual. The report is undated, but bears a fax transmittal date of March 31, 2015. Ms. Couse noted she was informed hearing protection was worn at all times, except when inside the office. However, Ms. Crouse indicated she did not receive a breakdown of the time spent in each area, nor information as to how long use of hearing protection had been enforced. Ms. Couse reviewed recently measured decibel levels and noted she lacked knowledge of decibel readings prior to November 2014. Following review of the information in her possession, Ms. Couse opined it was "difficult to confirm" that claimant's work at defendant-employer was "the sole cause of the hearing impairment." (JE3, p. 7)

In his role as plant superintendent, claimant contacted a representative of the sludge pump manufacturer and requested information regarding the decibel levels associated with the pumps installed in the plant. On May 6, 2015, a representative

authored claimant an email identifying the decibel levels corresponding to the plunger pumps used at defendant-employer. The current pumps were identified as producing 75 dB, while the earlier pumps ran at 81 dB. Given that defendant-employer ran multiple pumps, the representative indicated an additional 10 percent of the decibel value would be added for each of the multiple pumps. The representative also cautioned that room size and configuration could play a role in noise values. (JE7, p. 45; *see also* CE 1, p. 4)

The evidentiary record contains a copy of the email authored by the manufacturer's representative; on that record are handwritten notes identifying the periods the pumps were in use and the corresponding decibel levels. From 1978 to 1998, with three original pumps, the decibel level is estimated at 98 dB. After replacement of the first pump, the decibel level was estimated at 89 dB from 1998 to 2014. Following replacement of the second pump in 2014, the estimated decibel level is estimated as 81 dB. (JE7, p. 45)

On May 13, 2015, defendant-insurance carrier contacted Dean Wampler, M.D. and requested he perform a records review. Defendant-insurance carrier included the November 2014 noise level readings, manufacturer information regarding estimated decibel levels, and quantity and replacement dates for the pumps. The accompanying letter also indicated claimant had admitted to use of hearing protection on the floor, but not in the office area. (JE4, pp. 9-10)

Dr. Wampler, a certified independent medical examiner, authored a responsive report on June 8, 2015. In crafting his report, Dr. Wampler reviewed provided information, including the noise levels and claimant's recorded statement. Dr. Wampler noted three pumps were originally installed, with one pump yielding approximately 81 dB and by the accepted formula adding 10 percent per additional pump, a total noise level of 98 dB for the three pumps from 1978 to 1998. Following replacement of pump one, the level decreased to 90 dB, and with replacement of pump two, the level fell below 85 dB. Dr. Wampler indicated claimant, in his recorded statement, stated he followed defendant-employer's policy on use of hearing protection in the plant and pump areas, with no such use in the office. Dr. Wampler further noted claimant commonly used foam ear plugs, but had used muffs at times. (JE4, p. 12)

Dr. Wampler opined that with use of hearing protection, claimant's actual noise exposure at defendant-employer had been 85 dB or less from 1978 to 1998 and 77 dB or less thereafter. He therefore opined claimant's exposure did not meet the definition of excessive noise exposure. (JE4, p. 13) Dr. Wampler opined claimant's severe hearing loss "could not have been produced by noise exposure in the course of his work." (JE4, p. 14) He posited alternate explanations for claimant's hearing loss, including a possible underlying medical condition or genetic factor, given the presence of significant hearing loss already present in 1992. Dr. Wampler also opined claimant's hunting activities without use of hearing protection was a significant factor in his hearing loss. (JE4, p. 13)

Claimant expressed disagreement with the facts relied upon by Dr. Wampler. (Claimant's testimony) On June 25, 2015, he provided another recorded statement to defendant-insurance carrier. Claimant indicated he was unaware defendant-employer possessed a hearing protection policy. (JE9, pp. 59, 65-66) He stated the only direction he ever received from defendant-employer on this topic consisted of an oral statement advising hearing protection should be used around "really loud noises," like the shop generator, jackhammer, or loud power tools. (JE9, p. 59) Claimant represented he was never told to use hearing protection around the pumps, boiler system, or air compressor. (JE9, p. 60) Claimant acknowledged he did not wear hearing protection with hunting, an activity he estimated he performed approximately 3 to 5 days per year. Claimant indicated he wears earmuffs with target practice prior to the hunting season. (JE9, pp. 64-65)

Claimant and the claims adjuster engaged in a discussion regarding claimant's prior statements on use of hearing protection, specifically in noisy environments and when walking in the plant. Claimant indicated he only used such devices in noisy environments, not when involved in normal plant operation. (JE9, pp. 64-65) Claimant further stated at the time the safety director performed noise level testing in November 2014, he advised claimant that if any levels were 90 dB or higher, hearing protection was required. (JE9, pp. 60-61) Claimant indicated it was at that time he "first learned" the pumps and air compressor were so high in decibel level. Prior to this testing, claimant indicated he did not wear hearing protection around the plant; he only wore hearing protection around "things out of the ordinary," such as the generator or power tools. (JE9, p. 61)

Following the noise level survey in November 2014, claimant indicated he began to wear hearing protection around equipment identified as noisy in the survey. Claimant indicated he did not utilize hearing protection in the plant building. (JE9, p. 64) Claimant indicated he did not wear hearing protection around the pumps specifically. He utilized earmuffs if around the generator or power tools and had earplugs available for use at various jobsites. Claimant acknowledged the earplugs had been available for an extended period of time, but indicated employees only wore the devices around "exceptionally loud things." (JE9, p. 65)

On July 2, 2015, defendant-insurance carrier provided Dr. Wampler with a copy of claimant's recorded statement for review. Defendant-insurance carrier specifically represented claimant denied use of hearing protection at work. (JE4, p. 15) On July 9, 2015, Dr. Wampler authored a written response to defendant-insurance carrier. Dr. Wampler indicated in a prior statement, claimant had described use of foam plugs or earmuffs in the plant. He expressed belief claimant's recent statements on use of hearing protection were not credible. As a result, his prior opinions remained unchanged. (JE4, p. 17)

At the arranging of claimant's counsel, on November 7, 2016, claimant participated in a telephonic interview with audiologist, Richard Tyler, PhD. Following interview and records review, Dr. Tyler authored a report containing his findings and

opinions dated December 28, 2016. Claimant indicated he first noticed tinnitus approximately 15 to 20 years prior. He described experiencing the condition constantly in both ears, with an approximate loudness of 30 to 40 percent. (JE5, p. 21) Claimant also described hearing loss and noted his audiograms were not provided to him by defendant-employer. Dr. Tyler reviewed claimant's audiogram results. (JE5, pp. 19-20) Claimant denied familial history of hearing loss and/or tinnitus. He reported recreational exposure to noise during target shooting, hunting, and use of a chainsaw. Dr. Tyler noted claimant used hearing protection with such activities. (JE5, p. 20)

During interview, claimant reported exposure to continuous and impulsive noise in his work for defendant-employer. Claimant reported noise levels exceeded 90 dB from 1978 to 1998 and the shop generator was measured at 104 dB, with exposure from 1978 to 2016. Claimant reported he did not use hearing protection often, as it was not mandatory and defendant-employer lacked a hearing protection policy. Additionally, claimant indicated he worked overtime hours. (JE5, pp. 18-19)

Dr. Tyler opined the most probable cause of claimant's hearing loss and tinnitus was his work at defendant-employer. (JE5, p. 24) He opined claimant's audiogram results were consistent with noise-induced hearing loss. Dr. Tyler also opined there was no evidence claimant began his employment at defendant-employer with ill-health, significant hearing loss, or tinnitus. He found it very unlikely claimant's hearing loss was due to age or hereditary factors. (JE5, p. 25)

Dr. Tyler opined claimant's sensorineural hearing loss and tinnitus were most probably a result of claimant's work at defendant-employer. (JE5, p. 27) Dr. Tyler further opined claimant sustained a high frequency binaural hearing loss of 18.3 percent and a permanent impairment of 9 percent whole person as a result of tinnitus. (JE5, pp. 24-25) Dr. Tyler agreed claimant was a candidate for and would likely benefit from use of bilateral hearing aids. (JE5, pp. 24, 26) Dr. Tyler recommended permanent restrictions, including that claimant should not work around loud and/or unpredictable noise, should not work in dangerous situations requiring accurate concentration, and should avoid stressful situations or scenarios requiring auditory localization skills. (JE 5, p. 25)

At defendants' request, on August 8, 2017, claimant presented to Mark Zlab, M.D. of the Iowa Clinic ENT Department for an independent medical examination. (JE6, p. 38; JE13, Depo. Tr. p. 44) Claimant reported he had been exposed to noise at defendant-employer since 1977; he also admitted he participated in hunting and did not utilize hearing protection. Claimant reported to Dr. Zlab that he first noticed hearing issues in the early to mid-1990s and had used hearing aids since 2014. Claimant also complained of bilateral tinnitus. (JE6, p. 38)

Dr. Zlab examined claimant, including an audiogram and tympanometry. He assessed sensorineural hearing loss and tinnitus of the bilateral ears. Dr. Zlab determined claimant's age-corrected bilateral hearing loss as 14.65 percent and assigned a 5 percent whole person impairment related to tinnitus. He opined the loss

was permanent and hearing aids represented the only treatment available. Dr. Zlab related claimant's hearing conditions to his noise exposure at work. He further opined a review of claimant's audiograms dating to 1992 showed a pattern consistent with noise damage, and described claimant as having experienced only nominal non-occupational noise exposure. (JE6, pp. 38-39)

On August 11, 2017, claimant provided deposition testimony. Claimant testified in his early years at defendant-employer, ear plugs were made available for use. Claimant testified it was suggested employees wear the devices around power tools or equipment that they typically did not encounter. As a result, he testified he wore ear plugs on and off, when around such equipment or tools; however, he testified he never wore hearing protection in the plant or buildings. (JE13, Depo. Tr. pp. 31-32) Claimant testified his symptoms are considerably better since receiving his hearing aids. (JE13, Depo. Tr. p. 17)

Also on August 11, 2017, Melvin Martin provided deposition testimony. Mr. Martin began his employment at defendant-employer in 1970. His employment followed a similar path to that of claimant, with Mr. Martin preceding claimant. Mr. Martin became plant superintendent in 1990 and performed the job until his retirement in 2010, at which time, claimant replaced him in the role. (JE14, Depo. Tr. pp. 5, 7-8) Mr. Martin testified he began experiencing ringing in his ears in the early 1990s; he also experiences hearing problems and received hearing aids in 2014. (JE14, Depo. Tr. pp. 13, 17) Like claimant, he did not receive copies of his employer-provided hearing tests until recently. (JE14, Depo. Tr. pp. 13-14) Mr. Martin testified that while he remained employed at defendant-employer, ear plugs were worn with use of a jackhammer and earmuffs were installed near a grinder and the chop saw. (JE14, Depo. Tr. p. 23)

That same date, Jim Thygesen also provided deposition testimony. Mr. Thygesen began employment at defendant-employer in 1981 and, since 2010, has served as the assistant plant superintendent. (JE15, Depo. Tr. pp. 5, 7-8) He testified the plant became progressively quieter with replacement of two pumps and rebuilding of the third. (JE15, Depo. Tr. pp. 18-20) He also denied knowledge of any formal employer-instituted policy on hearing protection. (JE15, Depo. Tr. p. 16) Mr. Thygesen suffers with hearing problems and ringing in his ears; he received hearing aids in 2015. (JE15, Depo. Tr. pp. 10, 13, 21)

Since receipt of hearing aids in 2014, claimant has received periodic adjustments, cleaning, and battery replacements. Over time, claimant's hearing with the aids has stabilized and as a result, he only presents for such maintenance approximately every three months. Claimant testified his hearing aids assist with hearing, as well as seemingly mask his tinnitus. Prior to receipt of hearing aids, claimant testified he heard sounds akin to faint crickets and air escaping through a valve stem. With the hearing aids, claimant testified he does not hear these sounds unless he is thinking specifically of those complaints. He continues to hear such noises when he removes the hearing aids, but indicated the sounds are no longer as annoying as previously. (Claimant's testimony)

Claimant remains employed as plant superintendent for defendant-employer. Claimant currently holds the highest position available at the wastewater plant. He intends to remain so employed until he reaches age 62. With use of his hearing aids, claimant testified is he able to perform all elements of his job without difficulty. He testified his income has not been negatively impacted by his hearing difficulties and represented he would not be in a different employment situation regardless of his hearing difficulties. Claimant testified he likes his work and defendant-employer has treated him well. (Claimant's testimony)

CONCLUSIONS OF LAW

The first issue for determination is whether claimant sustained an injury on August 19, 2014 or October 29, 2014 which arose out of and in the course of his employment.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

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).

Claimant claims he suffered hearing loss and tinnitus injuries arising out of and in the course of his employment with defendant-employer. Claimant has worked within the wastewater department for defendant-employer consistently on a full time basis since 1977. During that period, he was exposed to loud noises, as supported by November

2014 noise readings and manufacturer specifications. Following the noise readings, defendant-employer undertook noise mitigation measures and imposed stricter hearing protection policies. Prior to that time, claimant regularly worked without routine hearing protection, as supported by the testimony of current and former coworkers. Claimant has been diagnosed by multiple providers with bilateral hearing loss and tinnitus.

Multiple providers have analyzed the question of causal relationship between claimant's work-related noise exposure and the conditions of hearing loss and tinnitus. Audiologist, Abby Couse, MS, performed a records review and opined it was difficult to confirm claimant's work as the sole cause of his hearing impairment. Ms. Couse, however, indicated she lacked information describing the amount of time to which claimant was exposed to noise levels, the enforcement of hearing protection measures, or the decibel readings prior to November 2014. As Ms. Couse admittedly lacked this information, her opinions are entitled to lesser weight than those authored by providers with more complete records. Furthermore, Ms. Couse's causation standard is stricter than that required by the law, in that claimant's work need not be proven as the sole cause of a condition. Accordingly, Ms. Couse's opinion is entitled to negligible weight.

Dr. Wampler also performed a records review at defendants' request. Dr. Wampler possessed additional information regarding noise levels prior to the November 2014 noise readings. However, I am unconvinced Dr. Wampler possessed an accurate understanding of claimant's use of hearing protection over the course of his employment. Dr. Wampler recited that claimant utilized hearing protection in the plant and pump areas, but not in the office. I find this summary to be overly simplistic and incorrect. Claimant credibly testified to his limited use of hearing protection, specifically only when exposed to unusual noises. His testimony is corroborated by former and current coworkers regarding defendant-employer's expressed hearing protection measures. There is also no evidence Dr. Wampler possessed knowledge of the layout of defendant-employer's facility, specifically the placement of the office and degree of enclosure of said space. Dr. Wampler never interviewed claimant to discuss such relevant considerations and when provided with a more detailed statement, Dr. Wampler rejected claimant's attempted clarification as lacking credibility. Due to Dr. Wampler's inaccurate and incomplete understanding of claimant's exposure, I find his opinion entitled to no weight. I further note that Dr. Wampler lacks the specialized training in audiology and/or otolaryngology possessed by the other evaluating providers.

At defendants' referral, claimant was evaluated by otolaryngologist, Dr. Zlab. Following examination and testing, Dr. Zlab assessed sensorineural hearing loss and tinnitus of the bilateral ears. He related these conditions to claimant's noise exposure at work, noting only nominal non-occupational noise exposure and audiograms consistent with noise damage. Dr. Zlab, a medical doctor, specializes in treatment of the ears. He also personally examined and interviewed claimant. I find no inaccuracies in the history relied upon by Dr. Zlab.

Claimant arranged for an evaluation by audiologist, Dr. Tyler, who performed a records review and telephonic interview. Dr. Tyler assessed sensorineural hearing loss

and tinnitus and opined the most probable cause of the conditions was claimant's work at defendant-employer. He opined claimant's audiograms were consistent with noise induced hearing loss and further found it unlikely claimant's conditions were attributable to age or hereditary factors.

Upon review of the entirety of the record, I find the consistent opinions of Dr. Zlab and Dr. Tyler entitled to the greatest weight. Both providers received specialized training in evaluation of the ear and also possessed accurate and complete histories, including of claimant's exposures and use of hearing protections. Both offered consistent interpretations of claimant's audiogram results and assessed the same diagnoses of hearing loss and tinnitus. Both Dr. Zlab and Dr. Tyler causally related claimant's conditions to his work at defendant-employer. I adopt these conclusions.

It is therefore determined claimant has proven by a preponderance of the evidence that he sustained hearing loss and tinnitus arising out of and in the course of his employment at defendant-employer.

It is further determined that claimant's injuries manifested on August 19, 2014, the date claimant underwent his 2014 audiogram for defendant-employer. At this time, the technician advised claimant of a need for further testing and evaluation for hearing aids. Claimant acknowledged the conditions and promptly sought further evaluation, at which time he identified work activities as the cause of his hearing loss. Claimant also contacted his personal health insurance regarding coverage for hearing aids and was advised to follow up with defendant-employer due to the potential work-related nature of his conditions.

Claimant acknowledges, and records corroborate, that claimant suffered with hearing loss and tinnitus symptoms long before August 2014. However, claimant was not provided with copies of his audiograms and it was not until August 2014 that claimant's symptoms had reached a level which interfered with his activities at home and work. It was also at this time that he was advised to investigate the potential work-related nature of his conditions. Upon receiving this information, claimant reported his claims and defendant-employer began further investigation into the noise readings in the facility. Based on the foregoing, I find claimant's bilateral hearing loss and tinnitus injuries manifested on August 19, 2014.

The next issue for determination is whether claimant's claim is barred for failure to give timely notice under Iowa Code section 85.23.

The Iowa Workers' Compensation Act imposes time limits on injured employees both as to when they must notify their employers of injuries and as to when injury claims must be filed.

Iowa Code section 85.23 requires an employee to 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. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

As outlined *supra*, the manifestation date for claimant's bilateral hearing loss and tinnitus conditions is August 19, 2014. Defendants acknowledge receipt of claimant claim for benefits as of October 29, 2014. Notice was, therefore, timely provided.

The next issue for determination is whether claimant's claim is barred as an untimely claim under 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).

As outlined *supra*, the manifestation date for claimant's bilateral hearing loss and tinnitus conditions is August 19, 2014. Claimant's original notice and petition for benefits was filed on July 27, 2016. Claimant's petition was filed within two years of the date of injury and was, therefore, timely filed.

The next issue for determination is whether the alleged injury is a cause of permanent disability.

As identified *supra*, I find the opinions of Drs. Zlab and Tyler entitled to greater weight than those of Dr. Wampler. Both Drs. Zlab and Tyler opined claimant sustained permanent impairment in the form of bilateral hearing loss and tinnitus. Dr. Tyler further recommended permanent work restrictions. As these providers opine claimant sustained permanent impairment and his conditions warrant permanent work restrictions, it is determined claimant sustained permanent disability as a result of the work injury of August 19, 2014.

The next issue for determination is whether the alleged disability is a scheduled member disability or an unscheduled disability.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). As claimant has proven permanent disability in the form of hearing loss and tinnitus, his disability is evaluated industrially.

The next issue for determination is the extent of any permanent disability. The next issue for determination is the commencement date for permanent disability benefits. These issues will be considered together.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Claimant was 58 years of age on the date of evidentiary hearing. He graduated high school and subsequently earned a certification in wastewater treatment. Claimant has spent the entirety of his working career, since 1977, in the employ of defendant-employer at the wastewater facility. Claimant worked his way up through the facility, working as a draftsman, wastewater operator, assistant plant superintendent, and plant superintendent. Claimant is demonstrably a valued employee at defendant-employer, given the duration and succession of his employment, as well as his performance evaluations. His only form of additional employment has been in the form of additional elected positions on the school board and as county supervisor.

As set forth *supra*, claimant sustained permanent disability resulting from hearing loss and tinnitus. Drs. Zlab and Tyler provided generally consistent permanent impairment ratings for these conditions. Dr. Zlab opined claimant sustained permanent

impairment of age-corrected bilateral hearing loss of 14.65 percent and a 5 percent whole person impairment relative to tinnitus. Dr. Tyler opined claimant sustained a high frequency binaural hearing loss of 18.3 percent and a permanent impairment of 9 percent whole person as a result of tinnitus. Claimant must utilize hearing aids as a result of his hearing loss. Claimant has obviously sustained impaired function of his hearing as a result of the work-related injury.

Despite sustaining significant hearing loss and impaired hearing function, claimant admits he is fully capable of performing his work duties at defendant-employer with use of his hearing aids. Claimant has obtained the highest possible position within the wastewater facility. He has not lost any earnings as a result of his conditions. He further testified he has not sought alternative employment and frankly indicated he would not be employed with a different employer if his hearing was intact. Claimant is pleased with his employment and intends to remain so employed until he retires.

Accordingly, we are left with an employee who fully and more than adequately performs his employment and has no desire to pursue employment elsewhere. He has obtained the highest possible position within his facility and his earnings have not been detrimentally impacted by his work injuries. Nevertheless, claimant has sustained notable permanent impairment in the form of hearing loss and tinnitus. He secured treatment of these conditions despite denial of his workers' compensation claim and as a result, has obtained hearing aids which assist in his hearing and greatly reduce the impact of the tinnitus on his daily activities.

Upon consideration of the above and all other relevant factors of industrial disability, it is determined claimant sustained a 15 percent industrial disability as a result of the stipulated work-related injury of August 19, 2014. Such an award entitles claimant to 75 weeks of permanent partial disability benefits (15 percent x 500 weeks = 75 weeks). Such benefits shall commence on August 19, 2014, the date of his injury. The parties stipulated at the time of the work injury, claimant's gross weekly earnings were $1,190.76, and claimant was married and entitled to 2 exemptions. The proper rate of compensation is therefore, $741.10.

The next issue for determination is whether defendants are responsible for claimed medical expenses.

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).

Claimant incurred medical expenses in evaluation and treatment of his hearing conditions, specifically hearing aids and associated maintenance and modifications. Defendants admitted that should claimant's claims be found compensable, defendants were responsible for the claimed expenses. As claimant's hearing loss and tinnitus claims have been found compensable by this decision, defendants are accordingly responsible for the claimed medical expenses.

The final issue for determination is a specific taxation of costs pursuant to Iowa Code section 86.40 and rule 876 IAC 4.33. Claimant requests taxation of the costs of: $100.00 filing fee; $12.93 service fees; $105.30 deposition transcription; and $1,054.50 report fee of Dr. Tyler. Defendants dispute taxation of the cost of Dr. Tyler's fee.

The costs of filing fee ($100.00), service fees ($12.93), and transcription expense ($105.30) are allowable costs and are taxed to defendants. Claimant is not permitted to receive reimbursement for the full cost of Dr. Tyler's IME as a practitioner's report under rule 4.33. Rather, the Iowa Supreme Court has ruled only the portion of the IME expense incurred in preparation of the written report can be taxed. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015). Dr. Tyler's bill fails to itemize and identify what portion of the IME fee is attributable solely to report preparation. Therefore, consistent with the decision of LaGrange v. Nash Finch Co., File No. 5043316 (Appeal July 1, 2015), defendants are taxed with one-third of the total report fee. Defendants are taxed with $351.46 of Dr. Tyler's IME fee (33 1/3 percent x $1,054.50 = $351.46).

Defendants are taxed with costs in the amount of $569.69 ($100.00 + $12.93 + $105.30 + $351.46 = $569.69).

ORDER

THEREFORE, IT IS ORDERED:

The parties are ordered to comply with all stipulations that have been accepted by this agency.

Defendants shall pay unto claimant seventy-five (75) weeks of permanent partial disability benefits commencing August 19, 2014 at the weekly rate of seven hundred forty-one and 10/100 dollars ($741.10).

Defendants shall pay claimant's prior medical expenses submitted by claimant at the hearing as set forth in the decision.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

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

Costs are taxed to defendants pursuant to 876 IAC 4.33 in the amount of five hundred sixty-nine and 69/100 dollars ($569.69), as set forth in the decision.

Signed and filed this 17th day of January, 2018.

ERICA J. FITCH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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EJF/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.