

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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EUGENE SCHOCKER,

**FILED**

Claimant,

APR 19 2017

vs.

WORKERS COMPENSATION

File No. 5053993

NICHOLS ALUMINUM n/k/a ALERIS,

ARBITRATION DECISION

Employer,

and

SENTRY CASUALTY CO.,

Insurance Carrier,  
Defendants.

Head Note Nos.: 1803, 2500, 2208

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STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, Eugene Schocker, filed his original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on March 10, 2016. Claimant alleged he sustained a hearing loss and tinnitus on or about April 2, 2014. (Original notice and petition.)

For purposes of workers' compensation, Nichols Aluminum, n/k/a Aleris, defendant, is insured by Sentry Casualty Insurance, defendant. Defendants filed their answer on April 4, 2016. They denied the occurrence of the work injury. A First Report of Injury was filed on March 29, 2016.

The hearing administrator scheduled the case for hearing on March 21, 2017. The hearing took place in Davenport, Iowa at the Kahl Building. The undersigned appointed Ms. Victoria Fickel as the certified shorthand reporter. She is the official custodian of the records and notes.

Claimant testified on his own behalf. Defendants called Mr. Phillip McBroom as a witness. The parties offered exhibits. Claimant offered exhibits marked 1 through 3. Defendants offered exhibits marked A through I. All proffered exhibits were admitted as evidence in the case.

Post-hearing briefs were filed on or before March 29, 2017. The case was deemed fully submitted on that date. The original transcript was filed on April 17, 2017.

### STIPULATIONS

The parties completed the designated hearing report. The various stipulations are:

1. There was the existence of an employer-employee relationship at the time of the alleged injury;
2. The parties agree, if a permanent work injury is determined, claimant reached maximum medical improvement on May 13, 2016;
3. The parties agree, the weekly benefit rate is \$558.75;
4. Defendants have waived any affirmative defenses they may have had available;
5. Prior to the date of the hearing, defendants paid claimant 0 weeks of permanent partial disability benefits; and
6. The parties agree certain costs that are detailed were paid by claimant.

### ISSUES

The issues presented are:

1. Did claimant sustain an injury on April 2, 2014 which arose out of and in the course of her employment? (alleged hearing loss and tinnitus)
2. Is the alleged work injury a cause of permanent disability?
3. Is claimant entitled to permanent partial disability benefits?
4. If so, to what extent is claimant's permanent partial disability?
5. Defendants allege claimant did not comply with Iowa Code section 85.23;
6. Defendants allege claimant did not comply with Iowa Code section 85.26;
7. Is claimant entitled to an independent medical examination pursuant to Iowa Code section 85.39?
8. To whom shall costs be assessed?

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This deputy, after listening to the testimony of claimant at hearing, as well as the testimony of Mr. McBroom, after judging the credibility of the witnesses, and after reading the evidence, and the post-hearing briefs, makes the following findings of fact and conclusions of law:

The party who would suffer loss if an issue were not established has the burden of proving the issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

Claimant is 60 years old and married. He worked for Nichols Aluminum, or "Nichols" from January 17, 2000 through May 13, 2016, when he was terminated. (Exhibit I, page 1)

Claimant resides in rural New Liberty, Iowa. He and his brother have been farming since claimant left high school. The farming operation involves growing corn and beans, raising cattle and goats, and making silage. (Ex. D, pp. 4-6) Most of the acres are devoted to raising crops. Claimant and his brother prepare the ground for planting, they plant the crops, in the fall they harvest the crops, and they chop the silage.

According to Exhibit C, claimant operated all types of equipment on the farm. Some of the equipment included: a chopper wagon, a 4450 tractor, a bob cat, a soil finisher, various trucks, an 8 row planter, a John Deere spreader, a John Deere combine, a 4955 John Deere tractor, an auger, a silage wagon, a John Deere Cutter, a spreader, a John Deere excavator, a Polaris all-terrain vehicle, a Caterpillar skid loader, and a chain saw. Claimant testified the only time he wore hearing protection was when he operated the chain saw.

First of all, claimant is making a claim for hearing loss pursuant to Chapter 85B, "The Iowa Occupational Hearing Loss Act." Iowa Code section 85B.4(1) defines "*Excessive noise exposure*" as "exposure to sound capable of producing occupational hearing loss."

Iowa Code section 85B.4(3) defines occupational hearing loss. The definition is:

3. "*Occupational Hearing Loss*" means 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 and in the course of employment caused by excessive noise exposure. "*Occupational hearing loss*" does not include loss of hearing attributable to age or any other condition or exposure not arising out of and in the course of employment.

Id.

The date of occurrence in an occupational hearing loss claim is defined in Iowa Code section 85B.8. The section provides in relevant portion:

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.

Id.

Entitlement to benefits for occupational hearing loss is based on a schedule of up to 175 weeks. Iowa Code section 85B.6. Measuring hearing loss is calculated pursuant to Iowa Code section 85B.9.

Nichols operates two plants in the Quad Cities. The first plant is known as the "Casting Plant." The other is called the "Finishing Plant." Claimant and defendants agree the Casting Plant is generally considered noisier than the Finishing Plant. One of the reasons the Casting Plant is so noisy is because of a machine known as the Herr-Voss shredder. This machine grinds large pieces of aluminum into small pieces.

The workers in the Finishing Plant produce large, long heavy aluminum rolls. The rolls are then cut to specifications consistent with customer orders.

In his deposition and during the arbitration hearing, claimant testified about the dates he worked at the two plants. He was not absolutely certain of the various dates. His "best guesstimate" was he worked in the Casting Plant for approximately 10 years and in the Finishing Plant for about 2 years.

In his deposition, claimant testified about wearing hearing protection at Nichols. He testified:

Q. (By Mr. Garberson) Did you wear hearing protection at Nichols?

A. Yes.

Q. Always?

A. Always. In the designated areas.

Q. And some areas you were required to wear hearing protection?

A. Yes.

Q. And did you wear hearing protection in those areas?

A. Yes, I did.

Q. Always and without exception?

A. Always, no exception, yes.

(Ex. D, p. 9)

Later in his deposition, claimant also testified:

Q. (By Mr. Garberson) Did you wear them a hundred percent of the time in the areas you were supposed to?

A. Yes.

Q. Without exception?

A. Without exception.

(Ex. D, p. 11)

Q. So when you were at the casting plant, the number three step here for a couple years, did you wear hearing protection?

A. Yes, I did.

Q. What type?

A. The casting earmuffs.

Q. Always?

A. Always.

Q. Without exception?

A. Without exception.

(Ex. D, pp. 11-12)

During the course of claimant's employment at Nichols, he underwent various training sessions on the importance of wearing hearing protection. He also had a number of audiometric tests. Claimant had no hearing loss at the time of his pre-employment physical on October 12, 1999. (Ex. A, p. 1) Claimant's baseline test was on September 21, 2000. Claimant had normal hearing in both ears. (Ex. A, p. 2)

Claimant had normal hearing in both ears on August 16, 2001. He reported ringing in his ears, however. (Ex. A, pp. 4-5) On September 17, 2002, there was no significant change for noise sensitive frequencies. There was a 0.0 percent hearing loss in each ear. Once again, claimant reported a ringing in his ears. (Ex. A, pp. 6-7) On January 6, 2004, audiometric testing revealed no significant change for noise

sensitive frequencies. Claimant again complained of ringing in the ears. (Ex. A, pp. 8-9) On December 7, 2004, claimant reported to Audiology Consultants he had ringing in the ears. (Ex. A, p. 10) One year later, claimant had the same ringing. (Ex. A, p. 12) However, claimant had normal hearing in both ears and there was no significant change for noise sensitive frequencies. (Ex. A, p. 11) On November 8, 2008, testing demonstrated claimant had normal hearing in each ear. (Ex. A, p. 13) Claimant did not report ringing in his ears. (Ex. A, p. 14) On October 9, 2009, claimant was found to have normal hearing in each ear. (Ex. A, p. 15) Claimant did not complain of ringing in his ears. (Ex. A, p. 16) On December 1, 2011, claimant had normal hearing in each ear. There was no significant change for noise sensitive frequencies. (Ex. A, p. 17) Claimant did not report ringing in his ears. (Ex. A, p. 18) The next audiometric exam occurred on October 10, 2013. Claimant's hearing was once again normal in both ears. There was no significant change for noise sensitive frequencies. Claimant did not report ringing in his ears. (Ex. A, pp. 19-20)

On November 16, 2016, claimant presented to Audiology Consultants, P.C. for a hearing evaluation. (Ex. A, pp. 21-22) The results were contained in Exhibits A, pages 21 and 22. Ms. Heather Sandy, M.A, an audiologist with Audiology Consultants issued a report for defense counsel on December 20, 2016. In the report, Ms. Sandy opined:

At your request, a calculation of percentage of hearing loss based on the Iowa Code (85B) has been performed. **The results of the testing completed 11/16/16 yield a 0.00% binaural hearing loss, without age correction.** No previous hearing tests or dates of hire were available at the time this calculation was made. (As a note: using age correction would only reduce the percentage of hearing loss. The current evaluation results in 0%, therefore age correction should have no effect on this calculation.) (Emphasis in original.)

(Ex. B, p. 1)

Claimant testified he knows he has a hearing loss because he has to turn up the volume of his television set in order to hear the programming. Also, he has a difficult time listening to his spouse's conversations. Finally, claimant testified he finds it arduous to talk on the telephone.

It is the determination of the undersigned; claimant has failed to prove he is entitled to recover benefits under Chapter 85B for Occupational Hearing Loss. Claimant has not established he has been exposed to excessive noise exposure capable of producing occupational hearing loss while he was employed at Nichols. No audiometric testing supports claimant's claim he has occupational hearing loss. There is no objective measure to show claimant has any hearing loss attributable to his employment with this employer. Claimant takes nothing pursuant to Chapter 85B.

Secondly, claimant has a claim for tinnitus. There is no objective measure for tinnitus. For purposes of workers' compensation, tinnitus falls under Iowa Code

section 85.34(2)(u). In other words, it is an injury to the body as a whole and is to be compensated by the industrial method if a permanent condition is established.

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

When an expert's opinion is based upon an incomplete history it is not necessarily binding on the commissioner or the court. It is then to be weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the fact. Musselman v. Central Telephone Company, 154 N.W.2d 128, 133 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 521, 522, 133 N.W.2d 867 (1965).

The weight to be given an expert opinion may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. St. Luke's Hospital v. Gray, 604 N.W.2d 646 (Iowa 2000).

Expert testimony may be buttressed by supportive lay testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 380; 101 N.W.2d 167, 170 (1960).

The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence. Together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavy v. Economy Fire and Casualty Co., 526 N.W.2d 845 (Iowa 1995).

When claimant testified in his deposition, he was asked questions about his claim for benefits due to alleged tinnitus. Claimant testified as follows:

Q. (By Mr. Garberson) Did you ever say to your boss or anyone at Nichols that, you know, I don't think the hearing protection is doing its job?

A. No, I probably never said that because I - - I didn't realize it wasn't doing its job.

Q. When did you realize it wasn't doing its job?

A. A few years ago, I suppose. I'm not sure.

Q. Tell me the circumstances.

A. I would be at home and come home from - - My ears would ring especially at night.

Q. When was that would you say?

A. Probably in the - - when I was up to casting. I don't - - I mean not casting, the finishing plant.

Q. Just give me your best estimate.

A. The last couple three years.

Q. Did you ever tell anyone from Nichols that you thought you were having hearing issues or hearing problems?

A. No.

Q. Did you tell Lindsey Rodriguez that you thought you were having hearing problems?

A. Not - - No.

Q. You'd see her regularly, wouldn't you?

A. Yeah.

Q. Yes?

A. Yes.

Q. What hearing problems are you having currently?

A. Well, I have the tinnitus where I'm not - - I can't hear it right now, but if the room would be absolutely quiet, they ring in my ears.

Q. Both ears?

A. Yes. At night it - - it seems to wake me up, and then it's tough to get back to sleep. That is probably the worst time.

Q. So it's the tinnitus that's your main problem; would that be fair?

A. And then it was just a couple days ago, I was watching a movie, and my wife - - our kitchen's large, and my wife's on the other side, and she made me turn it down because it was too loud for her. And I'm like from here to the corner (indicating) from the TV, and she's almost on the other end of this room.

Q. Do you attribute that to the tinnitus or just the loss of hearing?

A. Loss of hearing, I guess. I don't know.

Q. When do you think you first sensed that you were having this ringing in one or both of your ears which you now know as tinnitus?



A. Two or three years ago, I suppose.

(Ex. D., pp.14-15)

During his arbitration hearing, claimant testified he noticed ringing in his ears a "couple of years ago." Claimant said the ringing was constant. It was very noticeable, especially when claimant was in a quiet room. Claimant's testimony was not exactly accurate since he had ringing in his ears as early as August 16, 2001. (Ex. A, p. 5) He continued to report the ringing on September 17, 2002; January 6, 2004; December 7, 2004; and December 15, 2005. (Ex. A-7, 9, 10, and 12) Claimant did not report ringing in his ears during the years of 2008, 2009, 2011, or 2013. (Ex. A-14, 16, 17, and 18). Upon cross-examination, claimant testified he did not recall if he had ringing in his ears dating back to 2001.

Claimant had two telephone interviews with Richard S. Tyler, Ph.D., an audiologist and consultant in hearing loss, tinnitus, hyperacusis and acoustics. Counsel for claimant recommended Dr. Tyler as an expert in order to provide an independent evaluation and report. The two telephone interviews occurred on October 16, 2016 and December 27, 2016. Dr. Tyler generated his report on December 27, 2016. In the report, Dr. Tyler opined the following about claimant's farm work:

#### **Previous work noise exposure**

He worked on a farm, but in a soundproof cab. He reports no other noisy work history.

(Ex. 3, p. 24)

With respect to the issue of tinnitus, Dr. Tyler wrote the following in relevant portion:

On his 10-12-99 audiological report, it is documented he did not have tinnitus. Similarly, no tinnitus is reported in 9-21-00. On 8-16-01, he started to complain about his tinnitus. This is consistent with later audiological evaluations (e.g. 9-17-02, 1-6-04, 12-7-04)[.]

He reports a problematic tinnitus in both ears. It is constant and sounds like a ringing. The loudness of his tinnitus is about 75%. His understanding is that there is nothing that can be done for it.

(Ex. 3, pp. 25-26)

#### **Other Possible Causes of Hearing Loss and Tinnitus**

It is very unlikely that his hearing loss or tinnitus is due to aging or is hereditary.

(Ex. 3, p. 29)

### Conclusions

Based on the information available to me, I conclude that the sensorineural hearing loss and tinnitus experienced by Mr. Schocker was most probably a result of his noise exposure at Aleris. His condition is unlikely to improve.

(Ex. 3, p. 30)

The opinion of Dr. Tyler concerning the cause of tinnitus is given little weight. Dr. Tyler did not take into consideration claimant's 40 year history as a working farmer. Claimant testified during the arbitration proceeding, he did not recall the questions Dr. Tyler posed during the two telephone interviews. Moreover, claimant testified he did not discuss farming with Dr. Tyler or he did not recall talking about farming with Dr. Tyler. Claimant apparently neglected to inform Dr. Tyler about the equipment claimant operated over the course of his long farming career. Claimant testified he only wore hearing protection when he operated a chain saw. He purchased the chain saw in 2015. Otherwise, he did not believe there was a need for hearing protection when working in open areas.

It is difficult for this deputy to accept claimant's argument that farming is not a noisy occupation. The undersigned lives in rural Iowa. There are corn and bean fields on two sides of the home. When equipment is operated in a field, the environment is extremely noisy. Claimant's premise is just not logical. Claimant did not wear hearing protection for 40 years while farming, he wore hearing protection at Nichols 100 percent of the time without exception.

It is the determination of the undersigned: claimant did not sustain a work injury in the form of tinnitus as a result of his employment at Nichols. Claimant takes nothing in the way of workers' compensation benefits.

Claimant is requesting the payment of the independent medical examination and report provided by Dr. Tyler pursuant to Iowa Code section 85.39. Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

In this case claimant obtained an independent medical evaluation from Dr. Tyler. The audiologist interviewed claimant on October 18, 2016 and December 27, 2016. Then Dr. Tyler generated his report on December 27, 2016. The costs totaled \$1,332.00. As of October 18, 2016 and the days or weeks prior to that date when Dr. Tyler was initially engaged, Nichols had not obtained any "evaluation of permanent disability" (concerning hearing loss) which claimant could contend was "too low" within the meaning of section 85.39. Nichols never obtained an evaluation concerning a disability in connection with claimant's claim for tinnitus. The date of Ms. Sandy's audiology report was December 20, 2016. Claimant's arrangements with Dr. Tyler occurred prior to the time Nichols obtained a hearing loss rating. Defense counsel stated he did not receive Ms. Sandy's report until January 3, 2017.

Claimant has failed to establish the necessary prerequisites to qualify for an employer-reimbursed examination pursuant to Iowa Code section 85.39. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 843-844 (Iowa 2015).

The final issue is costs to litigate. Iowa Code section 86.40 states:

**Costs.** All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

**Costs.** Costs 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. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, “persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation.” A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010). The entire reasonable costs of doctors’ and practitioners’ reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

It is the determination of the undersigned; each party shall pay his/its/their own costs to litigate this case.

ORDER


THEREFORE, IT IS ORDERED:

Claimant shall take nothing in the form of benefits in this case.

Each party shall pay his/its/their own costs in this case.

Defendants shall file all reports as required by law.

Signed and filed this 19<sup>th</sup> day of April, 2017.

  
MICHELLE A. MCGOVERN  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

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**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.