BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOSEPH HESSE,

Claimant,

vs.

ARCONIC, INC.,

Employer,

and

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

Insurance Carrier,
Defendants.

File No. 5059891

ARBITRATION

DECISION

Head Note Nos.: 1803, 2208, 2701

STATEMENT OF THE CASE

Claimant, Joseph Hesse, filed a petition in arbitration seeking workers' compensation benefits from Arconic, Inc., employer, and Indemnity Insurance Company of North America, insurance carrier, both as defendants, as a result of an alleged injury sustained on September 30, 2017. This matter came on for hearing before Deputy Workers' Compensation Commissioner Erica J. Fitch, on September 11, 2018, in Davenport, Iowa. The record in this case consists of claimant's exhibits 1 through 12, defendants' exhibits A through E, and the testimony of the claimant. The matter was fully submitted with filing of the hearing transcript on September 21, 2018.

ISSUES

The parties submitted the following issues for determination:

1. Whether claimant sustained an occupational hearing loss arising out of and in the course of his employment with defendant-employer, and if so;
2. The proper injury date;
3. Whether claimant's claim is barred for failure to give timely notice under Iowa Code section 85.23;
4. Whether claimant's claim is barred as an untimely claim under Iowa Code section 85.26;

5. Whether the alleged injury is a cause of permanent disability;
6. The extent of claimant's permanent disability;
7. The commencement date for permanent disability benefits;
8. Whether claimant is entitled to an award of alternate medical care pursuant to Iowa Code section 85.27;
9. Whether claimant is entitled to reimbursement for an independent medical examination under Iowa Code section 85.39; and
10. 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 and his deposition testimony. 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 51 years of age at the time of hearing. He resides in Bettendorf, Iowa with his wife of 32 years. (Claimant's testimony) Claimant served active duty in the US Army for approximately one year. Thereafter, he served in the National Guard. Claimant was weapon-trained and tested, but did not otherwise use firearms. He utilized hearing protection during training and testing. (CE12, Depo. Tr. pp. 21-22) Claimant does not hunt, ride motorcycles or boat. (CE12, Depo. Tr. pp. 23, 39-40) While he used to perform lawn care for his home, claimant hired a service to complete such tasks in 2008. (CE12, Depo. Tr. p. 31) Claimant has been a long-term weightlifter, predating his employment at defendant-employer. He is a co-owner of a lifting gym, Quad City Strong Men. (Claimant's testimony)

Claimant began work as a production worker at defendant-employer, a manufacturer of aluminum products, in October 1994. He was 27 years of age and reported no complaints regarding his hearing at the time of his hire. (Claimant's testimony) On October 14, 1994, claimant underwent a post-offer physical examination. At that time, claimant also underwent an audiogram, which the provider opined revealed some high frequency loss in the left ear, specifically at the 6000-8000 Hz range. (DEC, p. 4) Claimant testified he was contemporaneously unaware of this denoted hearing loss. (Claimant's testimony)

In March 1998, claimant presented to defendant-employer's medical clinic in follow up of a low back strain. Claimant also underwent a physical and audiogram. The provider opined testing revealed some high frequency changes at the 4000, 6000, and 8000 Hz levels of the left ear; the provider noted claimant had been hired with loss, but "some minor change" was demonstrated. No change was demonstrated in the right ear. The provider opined the left ear loss did not appear work-related, due to the asymmetric nature and presence on claimant's post-offer physical. (DEC, p. 2)

Claimant continued in the role of a production employee from 1994 to 2001. From 2001 to 2003, claimant worked as a production supervisor. During the entirety of this period, from 1994 to 2003, claimant worked 8 to 16 hours per day, up to 7 days per week. (CE9, p. 18) While a production employee, claimant worked 46 weekends per year and averaged 66 to 72 hours per week. (Claimant's testimony) In 2003, claimant earned the position of Ingot plant EHS; in this role, claimant estimated his noise exposure as 3 to 5 hours per day. In 2005, claimant began work as a general supervisor, which he denoted also had intermittent noise exposure. From 2006 to 2015, claimant worked as plate mill area manager/lead area manager. In this role, claimant estimated he was exposed to noise while on the floor for 2 to 4 hours per day, and also in his office on the floor for 4 to 6 hours per day. In 2015, claimant accepted the position of operational excellence manager. In this position, claimant's noise exposure remained generally the same as in his prior position. (CE9, p. 18) Claimant testified an 8-hour workday was the exception; he was expected to work a minimum of 10 hours per day as operational excellence manager. As a manager, his expectation was 60 hours per week. (Claimant's testimony) During the entirety of his employment, claimant consistently used hearing protection while on the plant floor, but did not utilize hearing protection in the office, as hearing protection was not required in such areas. (Claimant's testimony; CE9, p. 18; CE12, Depo. Tr. p. 44)

Due to corporate restructuring, claimant's position at defendant-employer was eliminated. As a result, claimant elected to take early retirement. His last date of employment was September 30, 2017. (Claimant's testimony)

During the course of claimant's employment with defendant-employer, claimant underwent 20 hearing tests, including an exit hearing test on September 21, 2017. Prior to this, claimant's most recent employer-screened hearing test occurred on April 8, 2013. (CE8, p. 16) Claimant testified defendant-employer no longer required annual hearing tests for certain employees and he did not voluntarily seek an audiogram during this period. (Claimant's testimony) On September 21, 2017, claimant underwent an exit audiogram with defendant-employer. At the time, claimant reported awareness of left ear hearing loss. The administering provider noted no significant changes. (DEC, p. 1) Claimant received a notification letter whereby he was advised the results of his hearing tests revealed no significant change from baseline levels. (CE7, p. 15) However, claimant received a medical referral letter, which noted claimant's hearing test had revealed poorer hearing in the bilateral ears for high pitched sounds as compared to claimant's baseline, October 13, 1994, test. The letter suggested claimant consult

with his personal provider for additional information. (CE6, p. 14) Claimant did not recall receiving any similar letters in the past. (Claimant's testimony)

Claimant testified he first noticed hearing loss in approximately 2005 or 2006. Thereafter, the loss very gradually worsened. (CE12, Depo. Tr. pp. 46-47) Claimant testified that over time, high-pitched conversational tones became more difficult to hear. (Claimant's testimony) Claimant attributes his hearing loss to direct and indirect noise exposure at defendant-employer. Specifically, he relates his hearing loss to exposure to noisy equipment performing grinding, milling, cutting, and cooling tasks on the floor, as well as banging and metal-on-metal collisions. Additionally, claimant relates his hearing loss to exposure to such noises through the thin-walled, portable office from which he worked on the plant floor. While the offices reduced exposure to noise, noises remained audible and capable of interfering with conversation. Claimant testified he spent the entirety of his employment on the plant floor or in such an office in the manufacturing area; he denied ever working from a separate brick-and-mortar building. During his managerial positions, claimant also remained required to observe and engage with the various crews and processes on the plant floor. (Claimant's testimony; CE9, pp. 20-21) Shortly following the conclusion of his employment, claimant raised a claim of occupational hearing loss.

Defendants created a document detailing the noise exposure, in decibels, gleaned from similarly exposed employees during the duration of claimant's employment. This document denotes that from the commencement of his employment in October 1994 until mid-2005, claimant's average noise exposure ranged from 74.2 to 87.2 dBA. In June 2005, when claimant began work as an operations manager and subsequently senior operations manager, his average noise exposure is identified as 72.57 dBA. From March 16, 2015 through the end of claimant's employment, the document identifies claimant as a senior professional, whose average decibel exposure is classified as "[o]ffice," with negligible exposure potential. The document states all of claimant's jobs were 8-hour work shifts and identified the OSHA 8-hour permissible exposure limit as 90 dBA. (CE5, p. 13)

Defendants arranged for claimant to be evaluated by otolaryngologist, Michael Tomek, M.D. On December 5, 2017, defendants' counsel authored a letter to Dr. Tomek, providing the created noise exposure document. Counsel noted each of claimant's positions appeared to fall under levels for excessive noise exposure pursuant to Chapter 85B; counsel provided Dr. Tomek with a copy of section 85B.5 for review. Counsel also provided Dr. Tomek with claimant's hearing test records. While claimant had been requested to complete a questionnaire regarding his exposure, counsel noted claimant had not yet returned that document. (DEB, pp. 7-8) Counsel requested Dr. Tomek's opinion as to whether claimant's work involved excessive noise exposure and, if so, the date which claimant was no longer exposed to such noise. (DEB, p. 8) Counsel also requested opinions as to whether claimant had suffered permanent hearing loss, the extent of any permanent loss, whether the loss had been related to

claimant's employment, and apportionment between any occupational and nonoccupational losses. (DEB, p. 9)

Claimant presented to Dr. Tomek on December 14, 2017. Claimant underwent an audiogram and tympanogram. (DEB, pp. 4-5) Dr. Tomek noted claimant had been referred by defendants for evaluation of moderate loss of hearing in the left ear. He noted claimant's hearing loss began gradually, years prior, without a known precipitating event. Dr. Tomek noted claimant had no familial history of hearing loss and noncontributory medical history. (DEB, p. 1)

Dr. Tomek opined claimant demonstrated some asymmetry in the left ear on audiogram dating to his hire. (DEB, p. 3) Claimant reported he consistently utilized hearing protection during his employment at defendant-employer. (DEB, p. 1) Dr. Tomek opined claimant's hearing examination revealed mild sensorineural hearing loss of claimant's left ear. (DEB, p. 2) He assessed sensorineural hearing loss of the left ear with unrestricted hearing of the contralateral ear. Dr. Tomek opined claimant's gradual hearing loss bilaterally was equal, given consideration of claimant's initial left-sided loss. He opined this gradual loss was more likely due to aging and further, expressed belief claimant's noise exposure did not play a role in the loss. (DEB, p. 3) Dr. Tomek calculated claimant's age-corrected hearing loss at zero percent of the right ear and 9.26 percent of the left ear, for a binaural hearing loss of 1.54 percent. (DEB, pp. 3, 6) Dr. Tomek opined claimant was a candidate for a left-sided hearing aid. (DEB, p. 3)

Claimant testified he did not recall engaging in significant discussion with Dr. Tomek regarding the details of his work duties at defendant-employer. Claimant described their discussion as brief and general in nature, with basic discussion of activities and hobbies. Claimant denied the two discussed overtime or extended work periods. Claimant testified there was not a detailed discussion of the work environments, noise levels, or claimant's roles within these environments. (Claimant's testimony)

Claimant retained audiologist, Richard Tyler, Ph.D., of the University of Iowa Department of Otolaryngology, to offer opinions with respect to the cause of claimant's hearing loss. (See CE4, p. 10) Claimant's counsel provided a number of records for Dr. Tyler's review, including: the original notice and petition; hearing test results; Dr. Tomek's report and audiogram, as well as the documents forwarded to Dr. Tomek for review; claimant's answers to interrogatories; and a completed questionnaire on hearing loss and tinnitus. Dr. Tyler reviewed the supplied documents. (CE1, pp. 1-2; DEA) On August 7, 2018, Dr. Tyler interviewed claimant via telephone. (CE1, p. 2)

Following records review and interview, Dr. Tyler authored a report containing his opinions on August 8, 2018. In his report, Dr. Tyler described claimant's work history at defendant-employer from 1994 to 2017. Dr. Tyler noted during this period, claimant worked in production and as a supervisor. He indicated claimant reported a need to

raise his voice to communicate, which Dr. Tyler opined suggested the noise was intense enough to cause noise-induced hearing loss. Dr. Tyler also noted claimant reported at times, the noise was loud enough to prevent individuals from communicating by yelling, resulting in the need to leave the area to communicate. In addition, claimant reported exposure to impulsive noise, such as fork trucks dropping items, which Dr. Tyler opined was more damaging than continuous noise. (CE2, p. 3)

Dr. Tyler noted claimant had a history of working overtime at defendant-employer. He specifically noted claimant often worked 6 or 7 days per week and as many as 16 hours per day and 72 hours per week. Claimant also noted a stretch of working over 70 consecutive days. Dr. Tyler opined such overtime hours allowed claimant no ability to rest his ears from the noise exposure. Dr. Tyler opined the guidelines for limiting exposure are probably "grossly inadequate" for workweeks exceeding 40 hours. (CE2, p. 3)

Dr. Tyler reviewed claimant's audiograms. He opined claimant's October 11, 1994 audiogram revealed normal hearing bilaterally. Thereafter, Dr. Tyler opined claimant's hearing worsened over the years, consistent with noise-induced hearing loss. Dr. Tyler also opined the hearing tests revealed a noise-induced notch. Claimant noted he utilized hearing protection during his employment. Dr. Tyler opined hearing protection attenuates sounds, but does not prevent the possibility of suffering noise-induced hearing loss. (CE2, p. 3)

Dr. Tyler opined it unlikely claimant's hearing loss was familial or genetic in nature, due to a lack of reported familial hearing loss. Dr. Tyler noted claimant reported no history of illness or health condition which resulted in hearing loss, as well as no consistent recreational noise exposure. Dr. Tyler also noted claimant's military service and indicated claimant utilized hearing protection during weapons training. (CE2, p. 4)

Dr. Tyler ultimately opined claimant's sensorineural hearing loss was most probably a result of his work at defendant-employer. (CE2, p. 7) Dr. Tyler opined claimant did not begin employment with hearing loss, and subsequent audiograms were consistent with noise-induced hearing loss. Dr. Tyler opined claimant was exposed to high levels of damaging noise, including impulsive noise, during his work at defendant-employer. Due to claimant's performance of overtime, Dr. Tyler opined he was exposed to excessive noise for greater than 40 hours per week. (CE2, p. 6) He opined it was very unlikely the most probable cause of claimant's hearing loss was age or heredity. Dr. Tyler noted claimant was 50 years of age at the conclusion of his employment at defendant-employer, and hearing loss attributable to aging is not a factor prior to age 50. (CE3, p. 7)

Utilizing his own methodology, Dr. Tyler computed claimant's age-corrected, binaural hearing loss at 31 percent. (CE2, p. 5; CE3, p. 9) Dr. Tyler opined claimant's hearing loss presented mostly in the higher frequencies. (CE2, p. 4) He explained that high frequency hearing loss impacts one's ability to hear high frequency sounds such as

"s," "z," "ch," and "sh," as well as the ability to hear those who speak in higher pitches, like women and children. Dr. Tyler opined high frequency loss also made it much more difficult to communicate in sound and localize direction. (CE2, p. 5) He recommended claimant pursue hearing aids. Dr. Tyler also recommended restrictions of: no work around loud or unpredictable noise; no work in dangerous situations requiring accurate concentration; and no work in stressful situations. (CE2, p. 7)

Dr. Tyler opined Dr. Tomek's impairment computation methodology reflected an approximation of claimant's speech communication handicap, but did not adequately quantify claimant's hearing impairment. (CE2, p. 4) Additionally, Dr. Tyler opined Dr. Tomek only addressed claimant's left ear and recommended a hearing aid; Dr. Tyler expressed belief claimant would benefit from bilateral hearing aids. Dr. Tyler also disagreed with Dr. Tomek's attribution of claimant's hearing loss to aging and opined age-related loss was subtracted out by the Iowa Code. (CE2, pp. 5-6)

Claimant testified his interview with Dr. Tyler lasted 30 minutes or more. During the interview, Dr. Tyler asked a number of questions about claimant's work environments in the plant and office, the amount of time claimant spent on the floor, and details regarding overtime hours and number of consecutive days worked. (Claimant's testimony)

Claimant testified he experiences difficultly hearing conversations when background noise is present. He has been told he speaks loudly and also listens to the television at high volume. In an attempt to alleviate some of the associated stress caused by his hearing loss, claimant testified he is interested in and willing to pursue hearing aids, as recommended by both Drs. Tyler and Tomek. (Claimant's testimony)

CONCLUSIONS OF LAW

The first issue for determination is whether claimant sustained an occupational hearing loss arising out of and in the course of his employment with defendant-employer.

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).

Under Iowa Code section 85B.4(3), "occupational hearing loss" is defined as that portion of permanent sensorineural loss that exceeds an average hearing level of 25 decibels at the frequencies of 500, 1000, 2000 and 3000 Hz when "arising out of and in the course of employment caused by excessive noise exposure." "Excessive noise exposure" is defined as exposure to sound capable of producing occupational hearing loss. Iowa Code section 85B.4(1). Section 85B.5 provides a table establishing presumptive "excessive noise exposure" at various decibel levels tied to duration of exposure; for example, 8 hours per day at 90 dBA. There is no presumptive excessive noise exposure at levels below 90 dBA. The longest duration identified in the table is 8 hours. The table in section 85B.5, is not the minimum standard defining an excessive noise level in section 85B.4(2). The table in section 85B.5 lists noise level times and intensities which, if met, will be presumptively excessive noise levels of which the employer must inform the employee. See Muscatine County v. Morrison, 409 N.W.2d 685 (Iowa 1987).

Claimant has not provided evidence his noise exposure exceeded the levels identified by the table in section 85B.5. As a result, there is not definitive evidence to

establish a presumption of excessive noise exposure. Claimant's inability to establish this presumption is not dispositive of his claim, however. Claimant may establish, in another manner, that he was exposed to sufficient noise in his duties at defendant-employer to suffer resultant hearing loss.

In this case, both parties have supplied contradicting expert opinions regarding the question of whether claimant's noise exposure at defendant-employer was a cause of claimant's hearing loss. Claimant's expert, Dr. Tyler, opined claimant was exposed to excessive noise at defendant-employer, which caused claimant's hearing loss. Defendants' expert, Dr. Tomek, causally related claimant's hearing loss to aging.

Having considered the two competing expert opinions of Drs. Tyler and Tomek, I accept the causation opinions of Dr. Tyler as most credible and convincing in this case. I find Dr. Tyler possessed the most accurate understanding of claimant's job duties and related noise exposure over the course of his employment at defendant-employer. Claimant participated in interviews with both Dr. Tyler and Dr. Tomek. Claimant credibly testified Dr. Tyler asked more detailed questions with respect to claimant's work duties, exposures, and work hours. He described Dr. Tomek's interview as more general in nature. Claimant testified he believed Dr. Tyler possessed a more complete understanding of his work at defendant-employer.

Understanding of claimant's work environment, work duties, and work hours is of paramount importance in this case. Drs. Tyler and Tomek were both provided with the document summarizing the average decibel level to which similar employees were exposed during claimant's employment at defendant-employer. However, this document cannot be viewed in a vacuum. The document, like the table in section 85B.5, is premised upon an 8-hour workday. Claimant credibly testified an 8-hour work day was the exception during his employment, not the rule. Claimant's extended work weeks and consecutive days of work are unusual. Additionally, no numerical decibel readings are provided for claimant's managerial, office-based positions. Without further discussion, a reviewing provider could easily believe claimant had been removed from all significant noise exposure. This conclusion is false, as claimant continued to spend notable time observing processes on the manufacturing floor and his office was located on the manufacturing floor, with plant noise capable of interfering with conversation. Some details of claimant's exposure and work hours are included in the completed hearing loss questionnaire. Dr. Tyler possessed and reviewed the questionnaire. It is unclear if Dr. Tomek ever received this document for review, as counsel's letter to Dr. Tomek indicated claimant had not yet completed the document.

Given this knowledge of claimant's work environment and hours, Dr. Tyler opined claimant was exposed to excessive noise, as general guidelines for exposure were inadequate to address extended work periods and an individual's inability to allow the ears to rest from the exposure. Dr. Tyler, therefore, causally related claimant's noise exposure at defendant-employer to his hearing loss. As Dr. Tyler possessed a more accurate and complete history of claimant's work duties at defendant-employer, I award

his opinion greater weight with respect to the issue of causation. Accordingly, I find claimant has proven by a preponderance of the evidence that he suffered hearing loss arising out of and in the course of his employment with defendant-employer.

The next issue for determination is the proper injury date.

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).

As outlined *supra*, claimant's transfer into managerial and/or salaried positions did not remove him from noise exposure. Although claimant's exposures lessened with attaining such positions in 2005 and 2015, claimant remained exposed to noisy equipment and processes throughout the duration of his employment at defendant-employer. In his managerial roles, claimant remained engaged with employees during performance of manufacturing and his office was placed on the manufacturing floor. His office was not a separate, stand-alone facility; but rather, was a thin-walled, portable building. The location of the office on the plant floor continued to allow noise exposure, with certain processes capable of interfering with conversation. As a result of this continued noise exposure, as well as his ability to continue working at defendant-employer without impediment related to the hearing loss, I conclude claimant's hearing loss manifested on his last date of employment on September 30, 2017. This date reflects claimant's last date of injurious exposure at defendant-employer.

The next issues for determination are whether claimant's claim is barred for failure to give timely notice under Iowa Code section 85.23 and whether claimant's claim is barred as an untimely claim under Iowa Code section 85.26.

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).

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 I determined the manifestation date for claimant's hearing loss was September 30, 2017, defendants' section 85.23 and section 85.26 defenses must fail. Claimant filed his petition for benefits on October 19, 2017, well within the 90-day notice period for section 85.23 and 2-year statute of limitations per section 85.26.

The next issues for determination are whether the alleged injury is a cause of permanent disability; the extent of claimant's permanent disability; and the commencement date for permanent disability benefits. These issues will be considered together.

Both Drs. Tyler and Tomek opined claimant sustained permanent hearing loss. Due to a lack of contrary evidence, it is determined claimant suffered permanent disability as a result of the work injury of September 30, 2017. Dr. Tyler's rating methodology does not comport with the computation set forth for occupational hearing loss in Chapter 85B. Dr. Tomek's computation follows the statutorily proscribed methodology. For this reason, claimant requests the undersigned determine claimant's occupational hearing loss in accordance with Dr. Tomek's rating. Based upon the

foregoing, it is determined Dr. Tomek's rating of 1.54 percent best reflects claimant's compensable hearing loss. It is determined claimant sustained a compensable hearing loss of 1.54 percent. Such an award entitles claimant to 2.695 weeks of permanent partial disability benefits (1.54 percent x 175 weeks = 2.695 weeks). The parties stipulated claimant's gross average weekly wage was $2,460.52 and he was married and entitled to two exemptions. His proper rate of compensation is therefore, $1,402.14. Such benefits shall commence on October 1, 2017, the date following his injury.

The next issue for determination is whether claimant is entitled to an award of alternate medical care pursuant to Iowa Code section 85.27.

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).

As claimant has established his hearing loss is causally related to his employment at defendant-employer, defendants are responsible for reasonable and necessary medical care. Both Drs. Tomek and Tyler opined claimant was a candidate for at least one hearing aid. Given these opinions, defendants shall designate an appropriate provider to evaluate claimant for hearing aids, and defendants shall be responsible for payment of devices recommended by the provider.

The next issue for determination is whether claimant is entitled to reimbursement for an independent medical examination under 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).

Section 85.39 allows claimant to be reimbursed for an IME performed by a physician. Dr. Tyler is not a physician, but an audiologist. As a result, his IME is not eligible for reimbursement under section 85.39.

The final issue for determination is a specific taxation of costs pursuant to Iowa Code section 86.40 and rule 876 IAC 4.33.

Defendants requested taxation of costs against claimant, namely transcription costs associated with claimant's deposition ($358.90) and evidentiary hearing. As claimant has prevailed in his claim, none of the requested costs are taxed to claimant.

Claimant requests taxation of the costs of: filing fee ($100.00); service fee ($13.34); and claimant's deposition transcript ($138.70). These are allowable costs and are taxed to defendants. Claimant also requests taxation of Dr. Tyler's IME ($1,989.00). (CE10, p. 23) 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 $662.99 of Dr. Tyler's IME fee (33 1/3 percent x $1,989.00 = $662.99).

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 two point six nine five (2.695) weeks of permanent partial disability benefits commencing October 1, 2017 at the weekly rate of one thousand four hundred two and 14/100 dollars ($1,402.14).

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 pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Defendants shall designate a provider to evaluate claimant for hearing aids.

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 as set forth in the decision.

Signed and filed this 30th day of October, 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.