BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BRYAN FREESE, Claimant, vs. TREEHOUSE FOODS, INC., Employer, and TRAVELERS INDEMNITY INSURANCE COMPANY OF CONNECTICUT, Insurance Carrier, Defendants.	:	File No. 20004609.01 ARBITRATION DECISION Head Note Nos.: 1402.40, 1403.30, 1803, 2208, 2502, 2701, 2801, 2907, 4000.2

STATEMENT OF THE CASE

Bryan Freese, claimant, filed a petition for arbitration against Treehouse Foods, Inc., as the employer and Travelers Indemnity Insurance Company of Connecticut, as the insurance carrier. This case came before the undersigned for an arbitration hearing on August 23, 2021.

Pursuant to an order from the Iowa Workers' Compensation Commissioner, this case was heard via videoconference using CourtCall. All participants appeared remotely via CourtCall.

The parties filed a hearing report prior to the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no findings or decisions on factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 5, Claimant's Exhibits 1 through 3, as well as Defendants Exhibits A through B. Claimant testified on his own behalf. No other witnesses testified live at the hearing. The evidentiary record closed at the conclusion of the arbitration hearing.

However, counsel for the parties requested an opportunity to file post-hearing briefs. This request was granted and both parties filed briefs simultaneously on October 8, 2021. The case was considered fully submitted to the undersigned on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury, which arose out of and in the course of his employment, on June 26, 2018.

2. Whether the claim is barred for failure to give timely notice of the injury.

3. Whether the alleged injury caused permanent disability.

4. Whether the alleged injury should be compensated as a hearing loss or with industrial disability.

5. The extent of permanent partial disability benefits to which claimant is entitled, if any.

6. Whether claimant is entitled to payment, reimbursement, or an order requiring defendants to hold him harmless for past medical expenses.

7. Whether claimant is entitled to reimbursement of his independent medical evaluation pursuant to Iowa Code section 85.39.

8. Whether claimant is entitled to alternate medical care in the future.

9. Whether defendants should be ordered to pay penalty benefits for an unreasonable denial of permanent disability benefits.

10. Whether costs should be assessed against either party and, if so, in what amount.

FINDINGS OF FACT

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

Bryan Freese, claimant, is a 64-year-old man, who lives in Cedar Rapids, Iowa. Mr. Freese has a high school education, completing his high school education while in the military. He served in the Unites States Army from 1975 through 1978 and was honorably discharged.

After his military service, Mr. Freese obtained additional training at a community college. He obtained training in welding and road construction. He did not complete his welding training. He did complete the road construction training, but does not recall if he received a specific certificate for that training.

After leaving the military, claimant worked for a meat packing company on the kill floor, pulling toenails, and performing cleaning duties. He left the meat packing business and began working for National Oats in 1980. National Oats was subsequently sold several times. However, claimant essentially continued his work for the same business, which eventually became the employer in this case, Treehouse Foods, Inc.

Claimant formally retired from Treehouse Foods, Inc., on July 25, 2018, after he faced disciplinary action and possible termination. (Defendants' Ex. B, p. 3) Mr. Freese acknowledges that he retired as a result of the possibility of termination and that his retirement did not have anything to do with the hearing loss or tinnitus injury claims involved in this case.

As noted, Mr. Freese asserts that he sustained injuries that include hearing loss and tinnitus as a result of his work at Treehouse Foods, Inc. and its predecessors. Claimant testified that he worked several positions with the employer. However, the majority of his work was in the package department where he spent 38 years of his career. Mr. Freese also provided unrebutted testimony about the noise levels at the plant, including bells, whistles, grinding, pumps, clanking, motors, squeaking. He testified there was constant loud noises but also described noises that would be sudden. Mr. Freese testified he had to yell to be heard by co-workers above the noises in the plant.

Claimant also introduced documentation from noise testing performed at Treehouse Foods' plant, which demonstrated significant noise exposures occurring throughout the plant. (Joint Exhibit 2) These objective tests corroborate Mr. Freese's testimony about his noise exposure at Treehouse Foods. I find that claimant was exposed to significant noise throughout his employment at Treehouse Foods.

Mr. Freese also testified that he did not use (and was not required to use) hearing protection early in his career. In fact, he did not use hearing protection from the commencement of his employment in 1980 until approximately the early 1990s. Once hearing protection was required, it was still not required in all areas of the plant. Mr. Freese also testified that he typically used foam earplugs for his hearing protection but removed them periodically to hear co-workers.

Treehouse Foods performed hearing testing on Mr. Freese. (Joint Ex. 1) Unfortunately, those hearing tests demonstrated significant changes and shifts in claimant's hearing throughout his career. Mr. Freese testified about being required to retake a test because he "flunked" the test. Claimant also submitted to an audiometric hearing test in October 2020. (Joint Ex. 4) That testing demonstrated sensorineural hearing loss in both ears, as well as tinnitus in both ears. (Joint Ex. 5, p. 84)

Mr. Freese certainly had other significant noise exposures throughout his life. He testified that he fired guns (M-16s and M-60s) during his military career. He testified that he hunted earlier in life but estimates he has not shot a shotgun since the early 1980s. He testified to the use of chainsaws since he was young. He has a fishing boat

with an outboard motor. He purchased a Harley Davidson motorcycle and has upgraded that motorcycle since he left Treehouse. Mr. Freese also acknowledges that he operates a riding lawn mower, a tiller, and hand tools. Mr. Freese testified that he wears a helmet when he rides his motorcycle and wears earmuffs for hearing protection when operating his lawn mower, chain saws, tiller, and hand tools.

The record is clear that Mr. Freese sustained hearing loss in both ears and experiences tinnitus in both ears. (Joint Ex. 5, p. 84) Given these multiple exposures to loud noise over the course of claimant's life, expert testimony is needed to determine whether the noise exposures at Treehouse Foods are a substantial factor in the development of claimant's hearing loss or tinnitus. Claimant introduces an unrebutted opinion from a well-qualified audiologist, Richard S. Tyler, Ph.D. (Claimant's Ex. 1)

Dr. Tyler has extensive experience, training, qualifications, and publications on hearing loss and tinnitus issues. He reviewed claimant's medical records, hearing tests, as well as the test results obtained at the Treehouse Foods' plant. Dr. Tyler conducted a telephone interview of Mr. Freese on September 24, 2020. He authored a detailed report on October 24, 2020.

Defendants critique Dr. Tyler's opinions for a few different reasons. First, defendants challenge Dr. Tyler's interview over the phone. Indeed, a telephone interview for a hearing loss and tinnitus case is somewhat troubling. Yet, there is no evidence in this case to suggest that Dr. Tyler's interview was inappropriate, insufficient, or inaccurate.

Defendants also challenge the basis and completeness of Dr. Tyler's factual basis for his opinions. Defendants accurately point out that Dr. Tyler does not refer to the motorcycle claimant purchased after his employment ended. Certainly, if competing evidence from another audiologist or a physician would have contradicted Dr. Tyler's opinions, this incomplete or inaccurate history may have caused me concern or convinced me to reject Dr. Tyler's opinions. However, in this case, Dr. Tyler provides a thorough written opinion that is not contradicted or even questioned by another qualified expert.

Ultimately, I perceive no reason why I should reject the unrebutted opinions of Dr. Tyler. Instead, I find Dr. Tyler's opinions to be thorough, credible, and convincing in this case. I accept Dr. Tyler's opinions as accurate with respect to the issues of the diagnoses of claimant's conditions, claimant's noise exposure, causation to his work exposures, and the level of compensable hearing loss pursuant to the directives of Iowa Code Chapter 85B.

Dr. Tyler opines that claimant was exposed to excessive noise exposure during his employment at Treehouse Foods. Dr. Tyler also opines that Mr. Freese has bilateral hearing loss. He calculates that hearing loss at the 0.5, 1, 2 and 3 kHz frequencies to be 29.8 percent. He opines that it is "very unlikely" that claimant's hearing loss is due to aging or hereditary. (Claimant's Ex. 1, p. 10) Dr. Tyler specifically concludes, "that the sensorineural hearing loss and tinnitus experienced by Mr. Freese was most probably a

result of his work at Treehouse Foods. His condition is unlikely to improve." (Claimant's Ex. 1, p. 11)

Dr. Tyler also explains that claimant's hearing loss is mostly at the higher frequencies and that the percentage hearing loss calculated within the frequencies permitted by Iowa Code section 85B.4(3) may not fully quantify claimant's hearing impairment, including his ability to localize where a sound is coming from or his speech perception in noisy environments. (Claimant's Ex. 1, pp. 4-5) Dr. Tyler also explains that claimant will have difficulties hearing certain sounds due to his high frequency hearing loss, as well as more difficulties hearing children and women speak. (Claimant's Ex. 1, p. 5)

Dr. Tyler also diagnosed claimant with bilateral tinnitus. Mr. Freese explained that his tinnitus sounds like crickets or ringing in his ears. Dr. Tyler has created his own method of rating tinnitus and his own theory on the maximum value of tinnitus. While he provides a good explanation of his analysis and theories, the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, does not adopt Dr. Tyler's rating system for tinnitus.

Nevertheless, Dr. Tyler provides an impairment rating attempting to utilize the AMA Guides. He opines that claimant's tinnitus affects claimant's concentration, emotional well-being, hearing, and sleep. He assigns impairment using the AMA Guides with a total whole-body impairment of 40 percent. (Claimant's Ex. 1, p. 9) I am not necessarily in agreement with the rating methodology utilized by Dr. Tyler to reach this result under the AMA Guides. Dr. Tyler generically cites chapters 11, 13, and 14 of the AMA Guides to support his impairment ratings. He provides no specific explanation of where each of the impairments derives under the AMA Guides or whether those impairments can be combined or may include overlapping impairment. I do not find Dr. Tyler's impairment rating to be convincing, though I do accept his opinion that claimant has sustained permanent impairment and permanent disability as a result of the tinnitus.

Claimant continued to work full duty for the employer until his retirement in 2018. He did not have any work restrictions at the time of his retirement and he did not complain of any inability to perform work because of hearing loss or tinnitus. Nor were any of the disciplinary actions pending against claimant at the time of his retirement the result of hearing loss, tinnitus, or the inability to perform his work due to either of those conditions.

Nevertheless, Dr. Tyler provides unrebutted opinions about necessary work restrictions resulting from claimant's hearing loss and tinnitus. Dr. Tyler opines that claimant should not work around loud noises, in situations with unpredictable noise levels, in dangerous situations where concentration is required, or in stressful situations. (Claimant's Ex. 1, p. 11) Again, these opinions are not rebutted in this record. Therefore, I accept Dr. Tyler's recommended work restrictions.

Defendants contend that claimant failed to give timely notice of his injuries and that his claims for both hearing loss and tinnitus are barred under Iowa Code section

85.23. With respect to this issue, I find that the employer had actual knowledge of Mr. Freese's hearing loss. The employer required periodic hearing tests and required claimant to resubmit at least once because he "flunked" a hearing test. The hearing tests in evidence clearly establish a shift in claimant's hearing levels. The employer had actual knowledge of claimant's hearing loss at the time of his retirement. (Joint Ex. 1)

With respect to Mr. Freese's tinnitus claim, the employer asserts that claimant did not give notice of the tinnitus claim within 90 days of his retirement and, therefore, is barred from making a claim for tinnitus. Mr. Freese contends that he did not know what tinnitus was or that he had it until he was interviewed by Dr. Tyler and/or reviewed his report. In response, defendants point out that claimant reported to Dr. Tyler that he experienced ringing in his ears approximately 10 years before his retirement.

There is no notation in the hearing testing reports that claimant reported experiencing ringing in his ears prior to his retirement. There is no diagnosis of tinnitus in those reports and no evidence that the testing audiologist ever explained the significance of the ringing to claimant. I find that claimant was not aware, and objectively or reasonably would not have been aware, that the ringing in his ear was significant beyond his hearing loss or that it was necessarily related to his employment at Treehouse Foods until Dr. Tyler interviewed him.

Since his retirement from Treehouse Foods, claimant applied for unemployment. He performed some job searches during the six months he received unemployment because he was obligated to perform those searches to receive benefits. However, as soon as his unemployment benefits ended, claimant discontinued any job search. He has not searched for a job since approximately January 2019. Mr. Freese considers himself retired and is drawing both Social Security retirement benefits and a pension. He is not motivated to return to work and is not likely to do so.

In this case, claimant's lack of motivation to return to work and his retirement appear to be significant factors. Claimant certainly could return to work at his age and given his otherwise physical abilities. However, he does not appear to have any desire or intention to return to work at this time. Therefore, these factors reduce his future loss of earning capacity significantly.

Claimant has minimal educational training. He is not likely to pursue additional education. Claimant's employment history is mainly with this employer and its predecessor. Claimant now carries permanent restrictions from Dr. Tyler that preclude him from returning to his employment with Treehouse Foods or another similar facility.

Claimant certainly has hearing loss and tinnitus, which are both permanent. Although I did not adopt or accept Dr. Tyler's permanent impairment rating for his tinnitus, claimant clearly has functional disability related to both his hearing loss and his tinnitus, including difficulties hearing higher pitches, certain sounds, higher pitch voices, and localizing sounds. Claimant clearly had some difficulties hearing and discerning speech during the web-based hearing.

Although claimant has retired, he has the ability to return to work, if he desires or needs to do so. Therefore, considering claimant's educational background, employment history, permanent restrictions, permanent impairment, lack of a healing period, lack of motivation, and retirement, as well as all other factors of industrial disability outlined by the Iowa Supreme Court, I find that Mr. Freese proved a 20 percent loss of future earning capacity as a result of the combined effects of his bilateral hearing loss and tinnitus.

Claimant also seeks payment of past medical expenses in the hearing report. However, no past medical expenses are addressed in his post-hearing brief. Claimant failed to prove outstanding medical expenses, if any, are causally related, reasonable and necessary.

Claimant also seeks alternate medical care. Dr. Tyler recommends additional treatment for claimant's injuries. Specifically, Dr. Tyler recommends hearing aids for claimant to treat his noise induced hearing loss with replacement of those devices every 4-5 years. Dr. Tyler also mentions the possibility that claimant "is a candidate for a cochlear implant in both ears" due to his severe hearing loss. (Claimant's Ex. 1, p. 11) Finally, Dr. Tyler opines that claimant "requires counseling and sound therapy devices because of his noise induced tinnitus." (Claimant's Ex. 1, p. 11)

Defendants offer no contrary medical evidence. Dr. Tyler's recommendations appear to be reasonable, appropriate for claimant's injuries, and necessary. Claimant has proven that Dr. Tyler's recommended treatments are needed and that defendants are not offering any alternative treatment for his injuries.

Finally, Mr. Freese asserts a claim for penalty benefits, alleging that the defendants unreasonably denied weekly benefits. In this respect, I note that the employer required claimant submit to periodic hearing tests. The employer had actual knowledge of claimant's hearing loss at the time of his retirement. The employer did not further investigate that injury at the time of claimant's retirement to determine the permanent hearing loss or compensate claimant. Arguably, the employer acted unreasonably at that time.

However, even if it was reasonable for the employer to await the claim from claimant to be filed, it did not schedule an evaluation or pay weekly benefits for claimant's permanent hearing loss even after the claim was filed. Claimant scheduled and obtained a permanent impairment rating from Dr. Tyler. The employer still did not pay the hearing loss claim. Nor did the defendants introduce any evidence that they performed a subsequent investigation or that their continued denial of weekly benefits was the result of such an investigation. Instead, this case was submitted with an unrebutted opinion that assigned permanent impairment for hearing loss. Yet, defendants paid no weekly benefits toward that permanent hearing loss.

I find that claimant clearly and definitively proved a delay or denial of benefits since defendants paid no permanent disability by the date of trial. I further find that the defendants failed to prove they conducted a reasonable investigation or that their denial

after this claim was filed (and certainly after Dr. Tyler's report was authored) was reasonable or based upon the results of a reasonable investigation. Defendants' denial of healing loss benefits was unreasonable.

Mr. Freese also asserts a claim for penalty benefits asserting an unreasonable denial of benefits for his tinnitus. I note that claimant asserts he did not know about the tinnitus injury until his evaluation with Dr. Tyler. Presumably, if claimant did not know about the injury, the employer likewise did not know about the injury. The employer could not be expected to compensate claimant for an injury even claimant did not recognize until after the evaluation with Dr. Tyler.

However, after that evaluation occurred, a diagnosis of tinnitus was presented. At that point, in time, an investigation was required of defendants. It is possible that the defendants may have elected to deny the tinnitus claim under its asserted notice defense. Of course, the defendants offered no evidence that the notice defense was the basis for their denial of benefits. Nor did defendants offer any evidence that their investigation into the notice defense was reasonable or timely. Claimant has clearly proven a delay or denial of benefits because defendants paid no permanent disability benefits toward the tinnitus claim. Defendants failed to prove a reasonable investigation or reasonable basis for denial. Defendants' denial of the claim for permanent disability related to the tinnitus injury was unreasonable.

The parties stipulated that any permanent disability benefits would commence on June 26, 2018. Accordingly, all of the benefits awarded accrued before the hearing. I find that defendants unreasonably denied 100 weeks of permanent disability benefits. At the stipulated weekly rate of $698.76, defendants unreasonably denied or delayed payment of benefits totaling $69,875.00. I find that the denial of these claims without evidence of a reasonable investigation or reasonable basis for denial is egregious. I find that a penalty approximating 30-35 percent of the benefits denied is appropriate to deter future conduct and punish defendants for their unreasonable conduct. Specifically, I find that a penalty totaling $22,000.00 is appropriate to achieve the purposes of the penalty statute.

CONCLUSIONS OF LAW

The initial dispute in this case is whether claimant sustained an injury that arose out of and in the course of his employment. Mr. Freese asserts that he sustained occupational hearing loss, as well as tinnitus from exposure to excessive noise during his employment.

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" refer 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 Elec. 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 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).

Claimant introduced an unrebutted opinion from a well-qualified audiologist, Dr. Tyler, which established causal connection between claimant's work exposures to noise and the development of his hearing loss and tinnitus. Having accepted the unrebutted causation opinion of Dr. Tyler, I found that claimant proved by a preponderance of the evidence that his hearing loss and tinnitus arose out of and in the course of his employment with Treehouse Foods, Inc. Accordingly, I conclude that claimant has established compensable work injuries.

However, defendants assert that claimant failed to give timely notice of his injuries and that his claims are barred pursuant to Iowa Code section 85.23. 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).

The time period both for giving notice and filing a claim does not begin to run until the claimant as a reasonable person, should recognize the nature, seriousness, and probable compensable character of the injury. Herrera v. IBP, Inc., 633 N.W.2d 284, 287 (Iowa 2001). Orr v. Lewis Cent. Sch. Dist., 298 N.W.2d 256, 257 (Iowa 1980). The reasonableness of claimant's conduct is to be judged in light of claimant's education and intelligence. Claimant must know enough about the condition or incident to realize that it is work connected and serious. Robinson v. Department of Transp., 296 N.W.2d 809, 811 (Iowa 1980). Claimant's realization that the injurious condition will have a permanent adverse impact on employability is sufficient to meet the serious requirement. Herrera, 633 N.W.2d at 287. Positive medical information is unnecessary if information from any source gives notice of the condition's probable compensability; Robinson, 296 N.W.2d at 811.

In this instance, I will analyze the notice defense asserted by defendants with respect to each alleged injury. The first injury alleged is an occupational hearing loss. By statute, claimant's hearing loss claim did not ripen until he separated from his employment or noisy work environment. Iowa Code section 85B.8.

Defendants assert that claimant's occupational hearing loss claim is barred under Iowa Code section 85.23 because he did not give notice of that claim within 90 days of his employment separation. However, I found that the employer had actual knowledge of claimant's hearing loss. Iowa Code section 85.23 requires the employee to give notice of the injury within 90 days "Unless the employer or the employer's representative shall have actual knowledge of the occurrence of an injury." In this instance, the employer required claimant to submit to periodic hearing testing throughout his employment. Those hearing tests demonstrated obvious shifts in claimants' level of hearing and obvious hearing loss. The employer had actual knowledge of claimant's hearing loss by the date of his retirement. I conclude that the defendants' notice defense fails with respect to the occupational hearing loss claim.

Defendants also assert that claimant's tinnitus claim should be barred for lack of timely notice. The evidentiary record clearly demonstrates that claimant did not give notice of his tinnitus within 90 days of his retirement. Defendants assert that claimant reported to Dr. Tyler that he had ringing in his ears approximately 10 years prior to the alleged injury date.

However, this does not end the analysis. The 90-day notice period does not begin to run until the claimant, as a reasonable person, should recognize the nature, seriousness, and probable compensable character of the injury. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001). Claimant offered unrebutted testimony that he did not know what tinnitus was or the significance of the diagnosis until he was interviewed by and/or reviewed Dr. Tyler's report. Claimant amended his petition timely thereafter to allege a tinnitus injury.

Having found that claimant was not aware, and objectively or reasonably would not have been aware, that the ringing in his ear was significant beyond his hearing loss or that it was necessarily related to his employment at Treehouse Foods until he was

interviewed by Dr. Tyler, I conclude that the notice defense asserted fails with respect to the tinnitus claim. Accordingly, I must address the claim for both weekly and medical benefits asserted by claimant.

Specifically, Mr. Freese asserts that he sustained permanent disability as a result of his hearing loss and tinnitus. Defendants disputed whether the injuries caused any permanent disability. (Hearing Report)

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).

In this case, the parties introduced hearing tests that clearly demonstrate hearing loss. Claimant introduced the opinions of Dr. Tyler, who opined that claimant sustained permanent injuries and sustained permanent functional impairment. Dr. Tyler opined that Mr. Freese requires permanent work restrictions as a result of these injuries and offered permanent impairment ratings for both the hearing loss and tinnitus. Again, Dr. Tyler's opinions were unrebutted and accepted as credible and accurate. Having accepted Dr. Tyler's opinions in this respect, I found that claimant proved he sustained permanent disability. I conclude claimant is entitled to permanent disability benefits in some amount.

However, there is also dispute in this case whether claimant's permanent disability should be compensated as a scheduled member loss using the occupational hearing loss statute found at Chapter 85B or if the injuries resulted in an unscheduled injury, tinnitus, which should be compensated with industrial disability.

Tinnitus is an unscheduled injury that is compensable under Iowa Code section 85.34(2)(v). See Chapa v. John Deere Ottumwa Works, 652 N.W.2d 187 (Iowa 2002); Ehteshamfar v. UTA Engineered Systems Div., 555 N.W.2d 450 (Iowa 1996). When an injury claim involves both an occupational hearing loss and tinnitus, the claim converts to an unscheduled injury compensable under Iowa Code section 85.34(2)(v). Ehteshamfar v. UTA Engineered Systems Div., 555 N.W.2d 450 (Iowa 1996). If the claimant no longer works for the employer at the time of the hearing, unscheduled injuries are not limited to the functional impairment rating but are compensated with industrial disability. Iowa Code section 85.34(2)(v).

In this case, claimant retired from the employer and was not working at the time of the hearing. He has proven both industrial hearing loss and tinnitus caused by his noise exposures at work. Accordingly, I conclude that his claim is compensable pursuant to Iowa Code section 85.34(2)(v) using an industrial disability method.

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 Ry. Co. of Iowa, 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.

Having considered claimant's age, his proximity to retirement (having already retired), his educational and employment backgrounds, his permanent restrictions, his permanent functional impairment, his lack of motivation to return to work, and all other factors of industrial disability, I found that his retirement and lack of motivation significantly reduced his industrial disability. Iowa Code section 85.34(2)(v). Having weighed all of the industrial disability factors outlined in Iowa Code section 85.34(2)(v) and by the Iowa Supreme Court, I found that Mr. Freese proved a 20 percent loss of future earning capacity as a result of the combined effects of his occupational hearing loss and tinnitus. Accordingly, I conclude that claimant proved entitlement to 20 percent industrial disability. Iowa Code section 85.34(2)(v).

Industrial disability benefits are paid proportional to 500 weeks. Accordingly, a 20 percent industrial disability entitles claimant to 100 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(v). The parties stipulated permanent disability benefits should commence on June 26, 2018. (Hearing Report)

In addition to permanent disability, claimant asserted a claim for past medical expenses on the hearing report. However, claimant did not address this issue in his post-hearing brief. Claimant failed to establish entitlement to past medical expenses for these work injuries.

Mr. Freese also asserted a claim for alternate medical care moving forward. Iowa Code section 85.27(4) provides, in relevant part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly

> and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

In Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433, 437 (Iowa 1997), the supreme court held that "when evidence is presented to the commissioner that the employer-authorized medical care has not been effective and that such care is 'inferior or less extensive' than other available care requested by the employee, . . . the commissioner is justified by section 85.27 to order the alternate care."

In this case, claimant established that the defendants are offering him no care for either his hearing loss of tinnitus. However, claimant introduced the unrebutted opinions of Dr. Tyler that established claimant could use bilateral hearing aids and may qualify for bilateral cochlear implants for his occupational hearing loss. Claimant also proved via the unrebutted opinions of Dr. Tyler that he requires counseling and sound therapy devices for treatment of his tinnitus. Given that these recommendations for future care were unrebutted, I accepted those recommendations as accurate.

Mr. Freese has established by a preponderance of the evidence that the defendants are currently offering him no medical care for his occupational hearing loss or his tinnitus. Claimant has also established that there is reasonable and necessary treatment that can and should be offered to claimant. Accordingly, claimant has established that the care he requests is more extensive than the lack of care being offered by defendants. Claimant has proven he is entitled to alternate care, including bilateral hearing aids, potentially bilateral cochlear implants, as well as counseling and sound therapy for his tinnitus. Defendants will retain the right to select the authorized provider for this treatment provided they authorize a provider promptly. Iowa Code section 85.27(4).

Mr. Freese also seeks reimbursement of the independent medical evaluation charges from Dr. Tyler. 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).

Claimant's request for reimbursement of Dr. Tyler's evaluation fees fails under Iowa Code section 85.39 for multiple reasons. First, defendants did not obtain an evaluation of permanent impairment or disability. This is a prerequisite to obtaining reimbursement under Iowa Code section 85.39.

Claimant's request under Iowa Code section 85.39 also fails because the statute only provides for reimbursement for an evaluation performed by a physician. Dr. Tyler is an audiologist and is not a licensed physician. His evaluation does not qualify for reimbursement under Iowa Code section 85.39.

Claimant also failed to produce evidence that the care offered by defendants, if it had been requested, was inferior, unreasonable, or unduly inconvenient. Claimant failed to establish that the care offered by defendant was unreasonable. Moreover, having found that claimant failed to prove a permanent injury and disability, claimant failed to prove entitlement to ongoing medical care for the work injury. Iowa Code section 85.27(4).

Mr. Freese asserts that defendants unreasonably delayed and/or denied his weekly benefits in this case and that defendants should be ordered to pay penalty benefits pursuant to Iowa Code section 86.13.

Iowa Code section 86.13(4) provides:

> a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
>
> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:

> (1) The employee has demonstrated a denial, delay in payment, or termination in benefits.
>
> (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."
>
> Christensen, 554 N.W.2d at 260.

The supreme court has stated:

> (1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.
>
> (2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.
>
> (3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).

(4) For the purpose of applying section 86.13, the benefits that are underpaid as well as late-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse. Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application of wrong wage base; in absence of excuse, commissioner required to apply penalty).

> If we were to construe [section 86.13] to permit the avoidance of penalty if any amount of compensation benefits are paid, the purpose of the penalty statute would be frustrated. For these reasons, we conclude section 86.13 is applicable when payment of compensation is not timely . . . or when the full amount of compensation is not paid.

Id.

(5) For purposes of determining whether there has been a delay, payments are "made" when (a) the check addressed to a claimant is mailed (Robbennolt, 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112), or (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235.

(6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

(7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.

Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

Weekly compensation payments are due at the end of the compensation week. Robbennolt, 555 N.W.2d 229, 235.

Penalty is not imposed for delayed interest payments. Davidson v. Bruce, 593 N.W.2d 833, 840 (Iowa App. 1999). Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008).

When an employee's claim for benefits is fairly debatable based on a good faith dispute over the employee's factual or legal entitlement to benefits, an award of penalty benefits is not appropriate under the statute. Whether the issue was fairly debatable turns on whether there was a disputed factual dispute that, if resolved in favor of the

employer, would have supported the employer's denial of compensability. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

In this case, claimant clearly demonstrated a delay or denial of weekly benefits since defendants paid no weekly benefits prior to trial. I found that defendants did not offer a reasonable excuse for the delay in payment of benefits. Iowa Code section 86.13(4)(b)(2). Defendants put in no evidence to establish the reasonableness of the investigation they conducted or the reasons for their denial of benefits. Moreover, defendants did not contemporaneously convey their bases for delay of benefits. Iowa Code section 86.13(4)(c)(3). Defendants bore the burden to establish a reasonable basis, or excuse, and to prove the contemporaneous conveyance of those bases to the claimant. Defendants failed to carry their burden of proof on the penalty issues, and a penalty award is appropriate. Iowa Code section 86.13.

The purpose of Iowa Code section 86.13 is both punishment for unreasonable conduct but also deterrence of similar conduct in future cases. Id. at 237. In this regard, the Commission possesses discretion to determine the amount of the penalty imposed with a maximum penalty of 50 percent of the amount of the delayed, or denied, benefits. Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 261 (Iowa 1996).

In exercising its discretion, the agency must consider factors such as the length of the delays, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996). Neither party put evidence on, or offered argument, about the employer's past record of penalties. I note that no benefits were paid to claimant prior to hearing, though all benefits awarded were accrued by that date. The total amount of benefits denied is substantial. In fact, defendants denied benefits that total $69,875.00. Defendants offered no competing medical or expert causation opinions to challenge the alleged injury. They offered no evidence or investigation establishing any alternative basis for denial, including their notice defense. Having considered the relevant factors, as well as the purposes of Iowa Code section 86.13(4), I found that an appropriate penalty to both punish defendants for their unreasonable denial, as well as deter similar future conduct is $22,000.00.

The final disputed issue is whether costs should be assessed against either party. Costs are assessed at the discretion of the agency. Iowa Code section 86.40. In this case, claimant recovered permanent partial disability benefits and future medical care. Exercising the agency's discretion, I conclude it is appropriate to assess claimant's costs in some amount.

Claimant identifies his requested costs in Claimant's Exhibit 3. The first cost is not controversial and is a request for reimbursement of the cost ($100.00) for claimant's filing fee. This is clearly a permitted cost pursuant to 876 IAC 4.33(7) and is assessed against defendants.

The second cost request asserted by claimant is reimbursement of Dr. Tyler's IME charges. Claimant seeks Dr. Tyler's initial fee of $2,160.00, as well as the cost of his supplemental report ($195.00). Review of Dr. Tyler's billing statement is somewhat questionable. He charged only $185 for his interview time and for reading documents related to the case. He then charged $1,975 for preparation of his report. This seems a bit out of proportion but there is not a specific challenge to this billing or breakdown. Accordingly, I find that Dr. Tyler's charges are reasonable and that he charged $1,975 for preparation of his report in lieu of offering deposition or live testimony in this case.

Dr. Tyler's second billing statement charges $195.00 for "reading documents, preparation of report." I am not willing to try to apportion these charges and assess none of this fee as a cost.

Pursuant to Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, (Iowa 2015), only that portion of Dr. Tyler's charges relating to preparation of his report are taxable under 876 IAC 4.33(6). Accordingly, I conclude that defendants should be assessed $1,975.00 of Dr. Tyler's charges as a cost pursuant to 876 IAC 4.33(6).

The other listed costs are medical expenses. Again, these were not specifically addressed in claimant's post-hearing brief. They are not permissible costs under 876 IAC 4.33 and are not assessed. In total, I conclude that defendants should be assessed $2,075.00 in costs.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant one hundred (100) weeks of permanent partial disability benefits commencing on June 26, 2018.

Weekly benefits are payable at the stipulated weekly rate of six hundred ninety-eight and 76/100 dollars ($698.76).

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.

Defendants shall promptly select and authorize a medical provider to provide claimant additional treatment for his occupational hearing loss and tinnitus, including bilateral hearing aids, bilateral cochlear implants, if deemed appropriate, therapy and sounds therapy devices for his tinnitus.

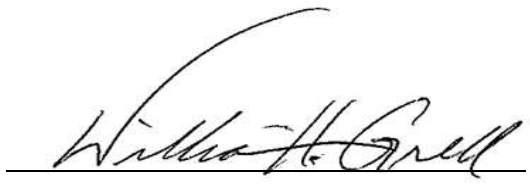
Defendants shall retain the right to select and authorize a medical provider of their choosing to provide the above ordered medical care provided defendants authorize this care promptly.

Defendants shall pay claimant penalty benefits in the amount of twenty-two thousand and 00/100 dollars ($22,000.00).

Defendants shall reimburse claimant's costs in the amount of two thousand seventy-five and 00/100 dollars ($2,075.00).

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

Signed and filed this __8th___ day of February, 2022.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Andrew Giller (via WCES)

Julie Burger (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.