BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DUANE PANSEGRAU, Claimant, vs. TAMA PAPERBOARD, LLC, Employer, and TRAVELERS INDEMNITY CO. OF CT, Insurance Carrier, Defendants.	File No. 21008913.01 ARBITRATION DECISION Head Note Nos: 1800, 1803, 3000, 3001, 2700, 2701
DUANE PANSEGRAU, Claimant, vs. TAMA PAPERBOARD, LLC, Employer, and ACE AMERICAN INS. CO., Insurance Carrier, Defendants.	File No. 19700372.03 ARBITRATION DECISION Head Note Nos: 2208, 1803, 3000, 3002, 2700, 2701

STATEMENT OF THE CASE

Claimant, Duane Pansegrau, has filed petitions for arbitration seeking workers' compensation benefits against Tama Paperboard, LLC, employer, and Ace American Insurance Company, insurer, for file No. 19700372.03, and Travelers Indemnity Company of Connecticut, insurer, for file No. 21008913.01, all as defendants.

In accordance with agency scheduling procedures and pursuant to the Order of the Commissioner in the matter of the Coronavirus/COVID-19 Impact on Hearings, the hearing was held on July 29, 2021 via Court Call. The case was considered fully submitted on August 20, 2021, upon the simultaneous filing of briefs.

The record consists of Joint Exhibits 1-9, Claimant's Exhibits 1-7, Defendants' Exhibits A-F, Defendants' Exhibits AA-DD, and the testimony of claimant.

ISSUES

File No. 19700372.03, date of injury June 22, 2019

1. The extent of claimant's scheduled member disability to the left lower extremity;

2. The appropriate rate;

3. Whether claimant is entitled to an independent medical examination under Iowa Code section 85.39;

4. Whether claimant is entitled to alternate medical care under Iowa Code section 85.27;

5. Whether claimant is entitled to penalty benefits for underpayment of rate;

6. Costs.

File No. 21008913.01, date of injury February 25, 2020

1. Whether the accepted work injury was the cause of a permanent disability, and if so, the extent;

2. The appropriate rate;

3. The commencement date of benefits;

4. Whether claimant is entitled to an independent medical examination under Iowa Code section 85.39;

5. Whether claimant is entitled to alternate medical care under Iowa Code section 85.27;

6. Costs.

STIPULATIONS

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.

File No. 19700372.03, date of injury June 22, 2019

The parties stipulate the claimant sustained an injury arising out of and in the course of his employment on June 22, 2019. They further agree the claimant sustained a scheduled member disability to the left lower extremity and that the commencement date for permanent partial disability benefits is January 14, 2020.

While the parties dispute claimant's gross earnings, they stipulate that at all times relevant hereto claimant was married and entitled to two exemptions.

Defendants waive all affirmative defenses. Defendants stipulate that they will pay $1600.00 of Dr. Manshadi's fees.

Prior to the hearing the claimant was paid 22 weeks of permanent partial disability compensation at the rate of $1046.63 per week and the claimant's hospital and medical expenses were paid.

File No. 21008913.01, date of injury February 25, 2020

The parties stipulate claimant sustained an injury arising out of and in the course of his employment on February 25, 2020.

While they dispute claimant sustained a permanent disability arising from that injury, they agree that if a disability is found to be compensable, it is industrial in nature.

They further agreed that at the time of the accepted work injury, and all relevant times hereto claimant was married and entitled to two exemptions.

The defendants waive all affirmative defenses. There are no credits in dispute.

FINDINGS OF FACT

At the time of the hearing claimant was a 65-year-old person with a high school education. He began working for the defendant employer in 1979 and continues to work there to this day. From 1979 until approximately 1986[1], claimant was a laborer. In 1986, claimant transferred to the maintenance department and in 1993 transitioned into an electrician position within the maintenance department. He is currently the lead person in the electrical department and is on call 24/7. (DE AA:2; see also CE 1)

[1] DE AA:22 cites the end date as 1983 while claimant testified to 1986 in the hearing. (See DE AA:2; Transcript p. 15)

As the lead man, claimant assists on jobs and creates job orders for electrical repairs throughout the facility.

In the course of his duties as an electrician for the defendant employer, claimant worked throughout the mill and would spend approximately one hour a day in either the machine shop or electrical shop. When claimant transitioned to the maintenance department, his workload decreased to six days a week. Overtime was not required but claimant worked overtime whenever it was available.

Claimant currently earns $30 an hour with annual earnings of over $100,000 per year. He testified that he spends about 2/3 of his life at work.

During the first twenty years of his employment with defendant employer, claimant was offered no hearing protection and no hearing tests were conducted. Hearing protection and testing began in 2000.

According to an industrial hygiene exposure assessment on August 20 and 21, 2019, there were several areas where the decibel area exceeded OSHA actionable level of 85 including the collation of the paper machine, maintenance room, warehouse, quality room, reminder area, and production floor. (DE CC:10)

He stated that in some areas it was so loud that you could not hear the person standing next to you and that you would have to leave the area to speak with a colleague. He has been exposed to loud noises, gears, vacuum pumps, dryers.

In addition to his position as lead person in the electrical department for the defendant employer, claimant also worked as a general contractor from 2005 through 2014 remodeling and building homes. (DE AA:4) He did not perform any work, but hired subcontractors and reviewed the progress or work. He has used power tools, rode a snowmobile and/or motorcycles in the past.

Since 1979, claimant has had to raise his voice to communicate with coworkers. (Ex 2:6)

Claimant has no history of hearing loss, no family history of hearing loss or hearing aid usage. Claimant began experiencing severe ringing in the ears after work on or around September 2018. (Joint Exhibit 2:39) He testified that the symptoms are constant, greater on the left than the right. He had complained of ringing in his ears in 2002, 2003, and 2004. (JE 2:6, 8, 10)

In 1998, claimant's hearing was tested and compared to a baseline test in 1980 when claimant had normal hearing in both ears. (JE 2:3) In the 1998 test, he had mild hearing difficulty in both ears at high frequency. (JE 2:3) In 2000, 2002, 2003, he had moderate hearing loss at high frequencies in the left ear and mild hearing loss at high frequencies in the right ear. (JE 2:4, 7, 9) By 2004, the hearing loss in the right ear had advanced from mild to moderate at high frequencies. (JE 2:11)

In 2005, claimant underwent a hearing conservation consult and was diagnosed with significant hearing loss affecting communication bilaterally. (JE 1:1) He was advised to use custom plugs and a hearing aid evaluation was recommended. (JE 1:1) In 2006, the hearing in his right ear had improved from moderate to mild hearing loss but returned to the moderate levels in 2007. (JE 2:14, 18) Hearing in the right ear improved in 2010 and 2011. (JE 2:24, 26) In 2012, claimant began to have hearing loss at the speech frequencies in addition to the high frequencies. (JE 2:28) In 2018, claimant's last workplace testing date in the record, he had mild hearing loss with speech frequencies in the left ear and moderate hearing difficulty in the high frequencies in the left ear. He had normal hearing with speech frequencies in the right ear and moderate hearing difficulty in the high frequencies for the right ear. (JE 2:40)

On or about March 17, 2021, claimant was sent to see an audiologist and physician at Broadlawns Medical Center. (JE 9) Audiologist Courtney Thayer diagnosed claimant with tinnitus of both ears, noting claimant had nearly twenty years of occupational noise exposure prior to the deployment of hearing protection. (JE 9:38; 80) Dr. Matt Brown concurred, diagnosing claimant with bilateral tinnitus. (JE 9:80-82)

Claimant filled out a questionnaire on October 4, 2019, for audiologist Richard Tyler, Ph.D. (CE 2) On February 25, 2020, Dr. Tyler issued a report. (CE 2) In the report, Dr. Tyler writes that claimant developed tinnitus 3-5 years ago, worse in the left than the right with a loudness level of around 75 percent. (CE 2:18) Dr. Tyler believes that tinnitus causes impairment via loss of concentration, anxiety, depression, speech understanding, and lack of sleep. (CE 2:19) These impairments could lead to many handicaps and have a major impact on economic earning potential. (CE 2:19) Based on the questionnaire filled out by claimant, Dr. Tyler created the following table to assess severity of claimant's tinnitus:

Table: Tinnitus Impairment

	Area	Description	Personal Severity Assigned by Pansegrau	Comparative Severity Assigned by Tyler
1.	Concentration	Sometimes I lose my concentration because of it. It interferes with me trying to focus on my job.	60	30
2.	Emotional well being	Sometimes it drives me insane. I just wish it would go away.	40-50	45
3.	Hearing	It is like having background noise there. I have to hear over the top of the ringing.	90	50

4.	Sleep	I stay up really late until I am really tired to help with the tinnitus. Sometimes the tinnitus wakes me up.	60	40

(Ex 2:19)

Dr. Tyler admits that assigning an impairment rating for tinnitus is difficult and suggests based on other maximum ratings for disabilities that a whole-body impairment maximum for tinnitus would be 60 percent. (CE 2:21) This is based on his own personal judgment of the worst instance of tinnitus he has observed along with his understanding of impairment that can be caused by tinnitus and other types of injuries. (CE 2:21) With the 60 percent max impairment in mind, Dr. Tyler assessed a 25 percent whole person impairment for claimant based on a reasonable audiological certainty. (CE 2:21) For the actual hearing loss, Dr. Tyler assigned at 15 percent binaural hearing handicap which translated into a 10.50 percent age-corrected hearing loss. (CE 2:24-25)

For restrictions, Dr. Tyler recommended claimant not work around loud noise, in situations where the noise levels are unpredictable, where accurate concentration is required, where situations are stressful. (CE 2:23)

Claimant has difficulty hearing coworkers and the tinnitus causes difficulty in concentration. It negatively impacts his sleep and he runs a fan at night to compensate.

At this time, claimant had not sought any treatment for hearing loss or tinnitus problems. (CE 2:11) He has not missed work due to his hearing loss or tinnitus either although he testified that he has difficulty communicating with co-workers.

On June 29, 2021, claimant expressed the desire to see either Richard Tyler or Bruce Gantz at UIHC for his hearing issues. (CE 7:156)

On or about June 22, 2009, claimant injured his left knee when he slipped on ice. (DE AA:10) Two days later, he was seen by Jerry Wille, M.D., at Mercy Care for pain that was 4 on a 10 scale. (JE 3:42) X-rays showed tricompartmental degenerative knee changes medially. (JE 3:41)

He returned to work on July 1, 2019, without restrictions or further treatment scheduled. (JE 3:48)

On July 9 2019, claimant was seen by Daniel Fabiano, M.D., for the ongoing left knee pain. (JE 4:52) The left knee was aspirated and about 40 cc of fluid was withdrawn. (JE 4:53) A total knee replacement was recommended. (JE 4:53) Claimant was taken off work until his next appointment. (JE 4:56)

The nurse case manager observed claimant walking with a slight limp on the left.

On August 6, 2019, claimant returned to Dr. Wille. (JE 3:44) It was noted claimant had decreased range of motion and increased swelling. (JE 3:45) He was to avoid squatting and excessive use of stairs beginning on August 12, 2019. (JE 3:50) On August 8, 2019, in response from an inquiry from the nurse case manager, Dr. Wille stated that the treatment he was providing to claimant was for a temporary aggravation to his knee arising out of a work injury. (JE 3:49)

Dr. Wille retuned claimant to work without restrictions on August 22, 2019, as it was noted claimant could do his job with no restrictions. (JE 3:47) Claimant still presented with aching pain at a 1 on a 10 scale and noted that NSAIDs, heat and rest provided significant relief. (JE 3:46)

On September 20, 2019, claimant was seen by Tracy Schiller, PA-C. (JE 5:58) He reported not being happy with the care received from Dr. Wille and Dr. Fabiano and wanted a referral to Dr. Sneller. Claimant described having pain with any kind of weight bearing. (JE 5:58)

In August 2019, claimant met with plant management regarding possible restrictions for his knee. (DE AA:7) On October 4, 2019, he was seen by Polly H. Hineman, D.O. (JE 5:61) Initially, claimant had returned to work but continued to have a lot of discomfort in the left knee along with decreased range of motion. (JE 5:61) He was laid off until he was released with no restrictions, returning to work in February 2020. (DE AA:9) An MRI was ordered. (JE 5:63)

On October 10, 2019, claimant was seen by Dr. Sneller at McFarland Ortho. (JE 6:64) He complained of lateral-sided knee pain with no swelling. (JE 6:64) He had some trace effusion and was 5 degrees short of full extension with no obvious instability. (JE 6:64) Dr. Sneller diagnosed claimant with severe arthritis on the inside of the knee as well as moderate arthritis underneath the kneecap. (JE 6:64) Dr. Sneller recommended claimant undergo cortisone injection therapy, physical therapy, and use a Breg brace for support. (JE 6:65)

Bilateral knee x-rays showed osteoarthritis in both knees. (JE 6:67)

On October 22, 2019, claimant began PT. (JE 7) He was discharged from PT on January 30, 2020. (JE 7:72) In the intake report at PT it was noted claimant felt he was doing pretty well and that the knee ached but was not slowing him down. (JE 7:72) In the discharge assessment section, claimant was described as showing improved gait and tolerated activity with minimal pain. (JE 7:74)

Claimant returned to Dr. Sneller on January 13, 2020. He had full extension of the left knee but continued to have pain and requested another injection which was administered. (JE 6:68)

On February 6, 2020, Dr. Sneller returned claimant to work without restrictions so that claimant could undergo an FCE. (JE 6:71) The employer would not allow him to return to work without one.

On February 7, 2020, claimant underwent an FCE and was deemed to have met the essential job functions. (JE 8:78) With this FCE, claimant was returned to work.

On September 30, 2020, Thomas Gorsche, M.D. performed an IME and issued an impairment rating of 10 percent for the left lower extremity for the flexor contracture of 5-9 degrees. (DE A:5) He found that claimant's injury was only a temporary exacerbation of an underlying arthritic condition which was resolved through physical therapy and cortisone injections. (DE A:4) The loss of extension was deemed to be related to the work inquiry but there was no atrophy, no swelling, and no loss of strength. (DE A:4) Claimant had some pain with movement in the knee but it was not localized. (DE A:4) No rating was given for the underlying arthritis. (DE A:5) Dr. Gorsche also opined claimant needed no further treatment to his knee due to the work injury. (DE A:5)

On May 14, 2021, claimant was examined by Farid Manshadi for the purposes of an IME. (CE 3:94) Dr. Manshadi diagnosed claimant with severe left knee joint arthritis with bone-on-bone with reduced active range of motion, as well as mild laxity of the medial collateral ligament. (CE 3:97) In his June 1, 2021, report, Dr. Manshadi opined that claimant suffered a severe aggravation of his underlying left knee arthritis as a result of the work injury and issued an impairment rating of 16 percent to the left lower extremity based on range of motion loss and underlying arthritis. (CE 3:97) Dr. Manshadi asserts that the AMA 5th Edition Guides allow for diagnosis-based estimates to be combined with other methods of assessment. (CE 3:99)

On June 8, 2021, James Milani, D.O., was asked to review the rating methodology used by Dr. Manshadi. (DE B:9) Dr. Milani stated that table 17-2, cited by Dr. Manshadi, does not allow range of motion impairments to be combined with diagnosis-based estimates. (DE B:13)

Dr. Manshadi wrote that 17-2 states "Diagnosis-based estimates are used to evaluate impairments caused by specific fractures and deformities, as well as ligamentous instability, bursitis and various surgical procedures, including joint replacements and meniscectomies. In certain situations, diagnosis-based estimates are combined with other methods of assessment . . ." "These two diagnoses are completely separated and different. As such, this is one of those situations where these two values for the ligamentous laxity and range of motion can be combined." (CE 3:99)

In an email dated June 28, 2021, Dr. Milani maintained that the claimant's injury did not meet the exception. If there was laxity, it was related to the underlying arthritis and not the work aggravation. (DE B:15) The knee space gets more "loose" as the meniscus wears out. (DE B:15) A sprain of the collateral ligaments does not cause permanent laxity whereas a complete tear can. (DE B:15)

For the injury of June 22, 2019, claimant was paid an average of $1819.87. This amount includes a quarterly bonus paid and vacation pay. (CE 5:121) According to the wage records, claimant's overtime rate was $15.56 and his regular rate was $31.12 per hour. He made a shift premium of $0.50 and $0.70. (DE DD:9) His net pay for the pay period ending June 28, 2019, was $1630.52.

Employer pays a bonus which claimant called "quarterly gains share," a bonus that is paid quarterly. The actual payment occurs after the end of the quarter. Claimant testified that the employer considers several factors in awarding the bonus. Vacation pay is the greater of either 40 hours times an employee's base wage rate for the weeks earned or on the basis of such employee's earnings from the company for the fifty-two (52) weekly pay periods ending April 1, multiplied by the percentage set out opposite such employee's applicable length of service. (DE F:47) For claimant, that multiplier was 12 percent. (DE F:48)

The first quarter of 2019 was January through March 2019. (Tr. p. 45). For that first quarter of 2019, claimant received a bonus payment of $897.49 that was actually paid to claimant on May 21, 2019. (DE E:38; Tr. p. 47). That bonus for the first quarter averages $69.04 per week ($897.49 ÷ 13 weeks in a calendar quarter = $69.04).

Claimant included two pay periods ending June 9, 2019 and June 16, 2019 where he did not work and the only pay he received was vacation pay. (CE 5:121, 150-151).

For the injury of February 25, 2020, claimant asserts an average weekly wage of $1744.84 excluding the weeks of September 9, 2019 through February 8, 2020, as claimant was not working and earned no wages. According to claimant's exhibits, claimant's hourly wage rate in February 2020, was $31.85 with an overtime rate of $15.97. (CE 5:142)

Claimant asserts costs of $231.30 for File No. 19700372.03. (CE 4:112) Claimant asserts costs of $2,381.30 for File No. 21008913.01 with $2,150.00 representing the cost of Dr. Tyler's report. (CE 4:116) The Tyler bill included interviewing the client, reading documents and preparation of his letter. (CE 4:119)

CONCLUSIONS OF LAW

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. 6.904(3).

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 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).

The parties agree claimant developed hearing loss as a result of industrial exposure on the premises of the defendant employer.

HEARING LOSS

Claimant asserts a claim for hearing loss. However, claimant is employed by defendant employer. He has not retired nor been terminated. He continues to work his pre-injury position. According to Iowa Code section 85B.8, a separation from employment must occur before hearing loss claims can be made. Thus, the hearing loss claim is not ripe.

TINNITUS

Claimant was diagnosed with tinnitus, has hearing tests that show hearing loss in the mild to moderate range for both speech and high frequencies, and has testified to a constant ringing in his ears, greater on the left than the right. This constant buzzing makes it difficult to hear his coworkers, is distracting, and impairs his ability to sleep.

Claimant was exposed to a noisy environment for decades without hearing protection. Hearing protection was implemented in 2000. All medical providers who have seen claimant for his hearing issues concur that he incurred tinnitus. Dr. Tyler credibly opines without rebuttal that this tinnitus is the result of claimant's noise exposure from the work environment. It is found claimant sustained tinnitus bilaterally as a result of the work exposure.

The question is the extent of the permanent disability, if any. Defendants argue that claimant has suffered no work loss as a result of the tinnitus nor has he sought any medical care and thus there is no permanent disability.

Claimant testified that the constant ringing in his ears affects his ability to communicate with co-workers, affects his sleep, his ability to drive, and his ability to concentrate. It is found claimant has sustained a permanent disability arising out of tinnitus.

The next question is the extent of claimant's disability. Because tinnitus does not qualify under Code section 85B.4 (occupational hearing loss) nor Code section 85.34(2)(s) (scheduled hearing loss), it should be compensated under Code section 85.34(2)(v), the section for all other cases of permanent partial disability. Tinnitus is an unscheduled injury that is considered as a personal injury under Chapter 85 of the Iowa Code and is compensated industrially, if it causes permanent disability. Ehteshamfar v. UTA Engineered Systems Div., 555 N.W. 2d 450 (Iowa 1996).

Iowa Code section 85.34(2)(v) provides:

> In all cases of permanent partial disability other than those hereinabove described or referred to in paragraphs 'a' through 't' hereof, the compensation shall be paid during the number of weeks in relation to five hundred weeks as the reduction in the employee's earning capacity caused by the disability bears in relation to the earning capacity that the employee possessed when the injury occurred. A determination of the reduction in the employee's earning capacity caused by the disability shall take into account the permanent partial disability of the employee and the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury. If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity.

Iowa Code section 85.34(2)(v).

Claimant was earning $31.12 at the time of his 2019 injury and $31.875 at the time of the February 2020 injury. There is no evidence that his wages

decreased following the February 2020 injury. Thus, the claimant is earning the same or greater today than at the time of the injury and thus the employee's injury is compensated on a functional impairment basis.

According to the AMA Guides, 5th edition, chapter 11, "Tinnitus in the presence of unilateral or bilateral hearing impairment may impair speech discrimination. Therefore, add up to 5% for tinnitus in the presence of measurable hearing loss if the tinnitus impacts the ability to perform activities of daily living." AMA Guides, 5th edition, p. 246. The Guides set out the activities of daily living. See Table 1-2, p. 4 of the AMA Guides.

While Dr. Tyler's rating is based on years of experience and study, the AMA Guidelines are adopted herein. Claimant's functional disability is 5 percent of 500 weeks or 25 weeks of impairment.

The appropriate commencement date of PPD benefits would be on or about February 25, 2020, when Dr. Tyler issued his report.

RATE

The parties dispute the appropriate rate. Defendants assert the appropriate rate is $1,736.00 and claimant argues it is $1,745.00. Defendants Tama and Travelers do not provide argument as to why its calculation should be adopted over claimant. However, in the brief of Defendants Tama and Ace, defendants argued that vacation rate was abnormally high and should not be counted. Defendants also argue that forty hours of vacation is not representative as claimant often worked more than forty hours.

Exhibit D contains pay stubs for 2019 but not in the 13 weeks preceding the February 25, 2020, injury date. Claimant's calculations lay out the representative weeks excluding 24 weeks wherein claimant earned no wages. During the inclusive weeks, claimant had vacation earnings, quarterly bonuses, shift differentials, holiday rates and overtime. The weekly wages varied from $1,402.64 to $2,491.47. The quarterly bonus was divided into several payments even though the quarterly bonus is paid once a quarter rather than weekly. The largest weekly earnings were when claimant was paid at a vacation rate for forty hours.

Because claimant often worked more than forty hours a week, the vacation pay is a customary earning as it takes into account the lack of shift differential and overtime.

Bonuses are included in the gross earnings of an employee for the purposes of calculating the workers' compensation rate if the bonus is regular. An annual bonus is considered regular if it is regularly paid over a number of years. Ratliff v. Quaker Oats Co., File No. 5046704, p. 11 (App. Dec. 1/5/17). A

bonus is regular even if it is discretionary or varies in amount. Id. ("It matters not whether an annual or quarterly bonus payment is discretionary or varies in amount ....")

In other cases, regular bonuses are calculated on an annual basis and then divided by 52 weeks. See Himmelsbach v. Quaker Oats Company, File Nos. 5066732, 5066867. (June 23, 2021). In File No. 21008913.01, it is not clear when the quarterly bonus was earned, however, based on the evidence, it is found that the claimant's rate calculation is the most representative of the average weekly wages of the claimant at the time of his injury and thus the rate of $1,087.78 is adopted.

IME

Claimant is seeking reimbursement of Dr. Tyler's IME report. The cost of the report is $2,150.00. There is no breakdown as to how Dr. Tyler arrived at the cost of his report. (Cl. Ex. 4, p. 119). According to Iowa Code section 85.39, claimant's counsel is entitled to be reimbursed for an IME after an impairment rating has been obtained by the defendants. There was no impairment rating issued by an expert retained by defendants and thus claimant's right to an 85.39 examination has not been triggered.

The question then is should the cost of the report be taxed as costs. Hearing costs are awarded at the discretion of the Agency. Dr. Tyler does not provide an itemization or breakdown of the cost of the report, however, claimant was not examined by Dr. Tyler and thus the whole of the bill appears to be the cost of obtaining the report which can be assessed under 876 IAC 4.33. Claimant is entitled to the recovery of Dr. Tyler's fees.

Claimant is entitled to ongoing care for his hearing loss and bilateral tinnitus under Iowa Code section 85.27. Claimant has requested care from Dr. Tyler however, the triggering factors entitling claimant to seek out care from the physicians of his choice have not been met. Claimant is entitled to care, but care selected by the defendants at this time.

LEFT LOWER EXTREMITY

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(u) or for loss of earning capacity under section 85.34(2)(v). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998).

In all cases of permanent partial disability described in paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity, the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American medical association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A. Lay testimony or agency expertise shall not be utilized in determining loss or percentage of permanent impairment pursuant to paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity. Iowa Code section 85.34(2)(x).

The parties presented competing expert opinions. Dr. Manshadi assigned a 16 percent impairment while Dr. Gorsche assessed a 10 percent impairment. The difference was that Dr. Manshadi assigned an additional impairment based on diagnosis-based estimates. Dr. Milani argued that this is an incorrect application but Dr. Manshadi pointed out that it was allowable under the guidelines. Based on the language in the AMA Guides as discussed by Dr. Manshadi, two values for ligamentous laxity and range of motion can be combined and therefore the impairment rating of 16 percent is adopted.

RATE

As previously discussed, weeks of vacation are representative in this case as the increased wage rate for vacation pay is offset by the lack of shift differential and overtime. However, in this file number, there is an issue regarding the bonuses. Defendants point out that claimant was paid a bonus of $897.49 in May for the first quarter of 2019. (DE E:38) That quarter averages $69.04.

The introductory paragraph of Iowa Code Section 85.36 requires that any rate calculation determine the "weekly earnings" as if claimant had "worked the customary hours for the full pay period in which the employee was injured." The parties agree that a regular quarterly bonus claimant receives should be included in the rate calculation….but claimant erroneously includes bonuses based on when they were paid, versus the correct method of including them in the weeks when the bonus was earned. "The statute focuses on when the earnings are earned, not when the employee is paid." Vought v. Smithway Motor Xpress, file nos. 1283750, 1237111 (App. Dec. April 14, 2004).

Claimant's wage calculation includes a bonus paid on March 5, 2019, but for work performed in the last calendar year of 2018. Thus, the appropriate wage calculation in this case would be the claimant's calculation, but using $69.04 per week for bonuses for March 25, 2019, through March 31, 2019; $31.29 per week for bonuses from April 1, 2019, through June 23, 2019 for a total of $444.52 in bonuses. Claimant's bonuses totaled $967.27.

The thirteen week total would be $23,658.31-$967.27+$444.52=$23,135.56. $23,135.56/13 is an average weekly wage of $1,779.66. The rate would then be $1,011.11.

Claimant is not entitled to a penalty benefit for underpayment of benefits.

Claimant is entitled to ongoing medical care for his left knee. However, the claimant did not carry his burden as it relates to the alternate care claim.

As claimant is seeking relief in this case, claimant bears the burden of proof to show by a preponderance of the evidence that the offered medical treatment is not reasonably suited to treat the injury without undue inconvenience to the employee. See Lawyer and Higgs, Iowa Practice, Workers' Compensation, §15-4 and cases cited therein.

Under Iowa law, the employer is required to provide care to an injured employee and is permitted to choose the care. Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997). Iowa Code section 85.27 provides, in relevant part:

> For purposes of this section, this 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.

Claimant has not provided evidence that the requested care and/or the care being provided is unsatisfactory. Claimant is entitled to ongoing care for his left knee but claimant did not meet his burden to prove entitlement to alternate care.

ORDER

THEREFORE, it is ordered:

FILE NO. 19700372.03

That defendants are to pay unto claimant 35.20 weeks of permanent partial disability benefits at the rate of one thousand one hundred one and 11/100 dollars ($1,101.11) per week from January 14, 2020.

That defendants shall pay accrued weekly benefits in a lump sum

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

That defendants are to be given credit for benefits previously paid.

That defendants shall provide reasonable medical care for the left lower extremity injury.

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

That defendants shall pay the costs of this matter pursuant to rule 876 IAC 4.33, including the bill of Dr. Tyler and the report costs of Dr. Manshadi.

FILE NO. 21008913.01

That defendants are to pay unto claimant 25 weeks of permanent partial disability benefits at the rate of one thousand eighty-seven and 78/100 dollars ($1,087.78) per week from February 25, 2020.

That defendants shall pay accrued weekly benefits in a lump sum.

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

That defendants are to be given credit for benefits previously paid.

That defendants are to provide reasonable medical care for the tinnitus.

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

That defendants shall pay the costs of this matter pursuant to rule 876 IAC 4.33.

Signed and filed this 29th day of December, 2021.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Nate Willems (via WCES)

Julie Burger (via WCES)

James Peters (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.