BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHAEL PHILLIP WADDELL,		
Claimant,		File Nos. 5053583, 5053584
vs.		ARBITRATION
AMSTED RAIL COMPANY, INC.,		DECISION
Employer, Self-Insured, Defendant.		Head Note Nos.: 1108, 1402, 1803

STATEMENT OF THE CASE

Michael Waddell, claimant, filed a petition in arbitration seeking workers' compensation benefits from Amsted Rail Company, Inc., self-insured employer, as defendant. Hearing was held on August 29, 2016 in Des Moines, Iowa.

Claimant, Michael Waddell, and Frank Bavery both testified live at trial. The evidentiary record also includes joint exhibits 1-11 and defendant's exhibits 12-14. The parties submitted a hearing report at the commencement of the evidentiary hearing. On the hearing report, the parties entered into certain stipulations. Those stipulations are accepted and relied upon in this decision. No findings of fact or conclusions of law will be made with respect to the parties' stipulations.

The parties requested the opportunity for post-hearing briefs which were submitted on October 3, 2016.

ISSUES

File No. 5053583 (Date of Injury: April 30, 2015):

The parties submitted the following issues for resolution:

1. The extent of permanent partial disability sustained by claimant as a result of the April 30, 2015 work injury.

File No. 5053584 (Dates of Injury: December 15, 2014; December 15, 2015; April 15, 2015):

The parties submitted the following issues for resolution:

1. Whether claimant sustained any permanent disability as a result of the alleged work injuries? If so, the nature and extent of disability.

2. Whether defendant is entitled to a credit/apportionment for the benefits paid pursuant to the prior Agreement for Settlement.

FINDINGS OF FACT

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

Claimant, Michael Waddell, has filed two petitions in arbitration. The first petition alleges he sustained permanent disability as a result of hearing loss and tinnitus; the alleged date of injury is April 30, 2015. The second petition alleges permanent disability as a result of a cumulative injury to his low back.

At the time of hearing Michael was 60 years of age. He graduated from high school and described himself as an average student.

He began working for the defendant employer in 1977; at that time the employer was Griffin Wheel. Michael worked there until he retired on April 30, 2015. During his 38 years at Amsted, Michael worked extensive overtime; he typically worked 8 to 12 hours of overtime each week. The employer makes railroad wheels that are 36-42 inches and weigh approximately 800-1200 pounds. He was hired as a third helper at the railroad wheel manufacturer. This job involved driving a fork truck in the basement to haul items. The job also involved cleaning items from the floor by hand, including shoveling; he did this for approximately 8 months. (Testimony)

Next, he worked in the second helper position; this position assisted the first helper who runs the furnace. The second helper position required extensive shoveling of raw materials into the furnace. Each shovel scoop weighed 15-30 pounds depending on whether it was lime or iron ore. He averaged 100 shovels of lime per heat with a heat every 3-4 hours each day. He was on his feet the entire shift and shoveling a good portion of the day. He worked in this position for 8-10 years. (Testimony)

The next position Michael worked in was the first helper job; he did this for 20-25 years. The first helper job required physical activities including shoveling the alloys into the furnace, patching the furnace, and weighing carbon to put in the furnace. He was required to put approximately 500 pounds of carbon into the furnace each heat. He was also required to put graphite in each heat. This happened 4 times per day and he had to throw approximately 50 bags per day, each weighing 40-50 pounds. He also had to shovel manganese of 120-150 pounds per heat. During the last several years he had to do more patching inside the furnace. He testified that the level of noise from the electrodes of the furnace were similar to a jet engine. (Testimony)

During the last 18 months of his employment he also worked in the second crane position. In this job he worked two and a half stories above the floor in a glass cab. His job was to unload scrap cars and semis. This was the least noisy position he worked for the employer. (Testimony)

Michael testified that throughout his employment the environment was extremely noisy; this testimony was not refuted. According to Michael the noise was so loud that he could feel the hair vibrating on his arm. In the 1980s during a check of noise levels the decibel levels rose to 115 to 120 decibels. Michael saw peak noise levels for 2010 testing showed 139.3 decibels. Michael said the majority of the time the plant was extremely loud and he would have to yell to talk to people. There was constant noise from the electric arc on the furnaces; there were also loud bangs and loud spikes of noise. He described the loud bangs as similar to 50 people banging on a trash can. Additionally, there was the noise of the wheels being dropped in the wheel bin; this occurred daily. In approximately 1982 or 1983, "soundproof" booths were added; these were not actually soundproof but they did reduce the noise level. Michael testified that he was only able to be in the soundproof booths a couple of hours per day. Additionally, Michael testified that these booths were not soundproof; it was still loud. He wore sound protection inside the booths. (Testimony)

When Michael first began his employment in 1977 there was no hearing protection. At some point, ear plugs were available but practically speaking it was difficult for the employees to obtain the ear plugs. Also, even when ear plugs were being used there were times when he would have to take out his ear plugs to talk to other employees. Even with the earplugs in, the noise was still loud. (Testimony)

Michael noticed that his hearing began decreasing while working for the company. He testified that he had no other extensive noise exposure; the only extensive noise exposure he had was from his job. Approximately six or seven years ago, Michael began experiencing intermittent tinnitus which continued to worsen up until his last date of employment. He retired on April 30, 2015; at that time he hoped that his hearing and tinnitus would improve. Michael described his tinnitus now as a three or four on a scale of one to ten. Prior to starting work for the defendant Michael did not have any hearing problems. (Testimony)

Michael continues to experience problems with his hearing and tinnitus. He would like to have hearing aids but he has not obtained them because he cannot afford them. His wife often tells him the television is too loud. There are times when his wife thinks he is ignoring her, but he actually cannot hear her speaking. He cannot hear his cell phone ringing unless he is looking at it. If more than one person is talking it is difficult for him to understand what is being said. Michael has learned how to read lips as a crutch for his hearing problems. He hears a high pitched whine. This began six or seven years ago. At first it was not as loud and was only intermittent. However, it has gradually gotten worse. Now the high pitched whine it is louder and more constant. He falls asleep with the television on so he does not hear the ringing in his ears. It was sometime after his last day of work that he realized these problems were permanent. (Testimony)

Michael did not miss any time from work because of his low back pain, hearing loss, or tinnitus. (Testimony)

Since retiring from Amsted Michael has not applied for any jobs. He had hoped to work part-time at a sporting goods type store after his retirement. However, he is not sure he could perform that type of work due to his tinnitus and hearing loss. He thinks he would have difficulty hearing the customers and difficulty hearing through the sound systems utilized by stores. He believes he could work in a quiet environment if he was allowed to have a radio on for background noise. Due to his back pain, Michael believes he could only stand for approximately 15-20 minutes before his back pain would increase. (Testimony)

Frank Bavery also testified at hearing. He has worked for Amsted as a safety manager since September of 2015. Prior to that position, he was the supervisor of safety from 2005. His current job duties include training and workers' compensation issues. He worked for 23 years as a laborer on the floor of Amsted. Frank testified about the various type of hearing protection that is now available to Amsted employees.

First, the April 30, 2015 petition will be addressed. Defendants accepted the alleged injury for hearing loss and tinnitus. Defendants have also accepted that the April 30, 2015 injury resulted in permanent disability for hearing loss with a commencement date of April 30, 2015. However, there is a dispute between the parties as to whether claimant has permanent tinnitus and the extent of permanency as it relates to hearing loss and tinnitus.

Claimant relies on the opinions of Richard S. Tyler, Ph.D. (Joint Exhibit 2) Dr. Tyler interviewed Mr. Waddell via telephone on March 7, 2016. Dr. Tyler also reviewed past audiograms that were provided to him. He noted that in December of 1977, Michael had high frequency hearing loss in both ears. The percent of hearing loss was zero. He noted that the hearing loss at 8000 Hz was severe. Dr. Tyler noted this noise-induced hearing loss likely began before he started at Amsted. Michael did work at a steel mill prior to working for Amsted. Dr. Tyler noted that the most recent audiogram was performed on October 20, 2014. Dr. Tyler opined that Michael sustained an occupational hearing loss of 43 percent.

Michael also reported problematic tinnitus in both ears; he described it as constant and sounded like a ringing. Dr. Tyler believes that tinnitus can cause impairment in the areas of concentration, emotional well-being, hearing, and sleep. He further opined that Michael had sustained permanent tinnitus as a result of the noise exposure at work. Dr. Tyler suggested an impairment rating system for tinnitus and assigned 17 percent impairment of the whole person due to the tinnitus.

Dr. Tyler noted that it was very unlikely that Michael's hearing loss or tinnitus was due to aging or was hereditary. He recommended bilateral hearing aids, bilateral cochlear implants for the hearing loss, and counseling and sound therapy for his tinnitus. Dr. Tyler felt that Michael should not work around loud noise, work in a situation where the noise levels are unpredictable, work in dangerous situations where accurate concentration is required, and he should not work in stressful situations. Finally, Dr. Tyler concluded that the sensorineural hearing loss and tinnitus experienced

by Michael was probably a result of his work at Amsted. He felt the condition was unlikely to improve. (Jt. Ex. 2)

Defendant relies on the opinions of Marlan R. Hansen, Professor at the University of Iowa Hospitals and Clinics, Department of Otolaryngology-Head and Neck Surgery. (Jt. Ex. 3) Professor Hansen diagnosed Michael with bilateral sensorineural hearing loss and subjective tinnitus. He felt Michael would likely benefit from bilateral hearing aids. Professor Hansen recommended Michael avoid ongoing exposure to loud noises without the proper noise protection devices. He opined that Michael had been exposed to noise exposure which was greater than 90 decibels throughout his work day and also exposed to several peaks of more intense noise. Professor Hansen opined that Michael's hearing loss was related to the noise exposure at Amsted. He assigned 33.6 percent age-adjusted hearing impairment. He also concluded that Michael sustained 12 percent whole body impairment for the hearing loss. However, Professor Hansen did not offer any opinions regarding tinnitus, he merely noted that Michael did have bilateral tinnitus. (Jt. Ex. 3)

Shortly before the arbitration hearing Professor Hansen stated that a portion of Michael's hearing loss could be considered pre-existing and a portion of the hearing loss was due to aging. (Jt. Ex. 3, page 13) Claimant argues that Dr. Hansen's opinion is flawed because Iowa Code Chapter 85B already takes age and pre-existing hearing levels into account when determining the percentage loss applicable under the guides. Thus, his calculations under chapter 85B result in additional or duplicate age reduction or pre-existing hearing reduction and are inappropriate. Claimant further argues that Dr. Hansen's opinions are flawed because there was no pre-existing hearing loss in the test that was performed in 1977 per the calculation under Iowa Code Chapter 85B. (Jt. Ex. 2, p. 14)

Michael retired in April of 2015. He had hoped to work at a part-time job after his retirement. I find that Michael credibly testified regarding his hearing loss and tinnitus. Michael's hearing loss and his tinnitus appear to be permanent in nature and at maximum medical improvement. Both Dr. Tyler and Professor Hansen agree that his hearing loss caused permanent impairment and both agree his hearing loss is due to his work at Amsted. I find that Michael is restricted as a result of his hearing loss and tinnitus. I find his restrictions are as set forth by Dr. Tyler; no work around loud noise, no work in situations where the noise levels are unpredictable, no work in dangerous situations where accurate concentration is required, and he should not work in stressful situations. I find that claimant has sustained permanent impairment as a result of the hearing loss. I further find that claimant has sustained permanent impairment as a result of the tinnitus. Therefore, Michael shall be compensated pursuant to Iowa Code section 85.34(2)(u).

Considering Michael's age, educational background, employment history, ability to retrain, length of healing period, permanent impairment, substantial permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that he has sustained a 35 percent loss of future earning capacity as a result of his April 30, 2015, work injury with Amsted.

We now turn to the alleged low back claim with a date of injury of December 15, 2014. As previously noted, Michael did not miss any time from work due to the stipulated cumulative back injury. The first issue that must be addressed with regard to the back is whether the injury was the cause of permanent disability.

Michael testified regarding his back claim. He first injured his back in 1980 when he fell off of a furnace while working for Amsted. He fell approximately 15 feet. He received treatment for his left forearm but did not receive much treatment for his back. However, his back got better on its own. He also injured his back a few years later while performing job duties. He went to physical therapy and received ultrasonic treatment. His condition improved. He was returned to full duty without pain. In 2006, he injured his back again while patching a furnace. He underwent surgery on his low back in 2007. After the recovery period he was released to return to work, full duty. He returned to his job as first helper. He was able to perform all the heavy physical aspects of the job, including overtime. (Testimony)

He did not have any back problems again until 2014 when the chair in the crane he operated broke. Michael testified that he reported the broken chair to his employer but it took four months before the issue was resolved. As a result, he worked in a broken chair for four months. The brake on the chair was broken so the chair flopped from side to side. The broken chair resulted in significant movement in the chair and Michael believes this caused discomfort in his low back. He told Nathan Frye at the employer that his back hurt because of the chair. (Testimony)

His back started to hurt in December of 2014. At first he was simply sore at the end of the day but as the weeks went by he was already sore at the start of his day. Initially, his back would improve after a weekend of rest, but eventually his back reached the point where even a weekend of rest did not help. Once his chair was repaired Michael believes that his condition stabilized, it did not get any worse but it also did not improve. (Testimony)

Michael sought treatment with Dr. Foster. He recommended a CT scan and physical therapy. Despite treatment, Michael's low back symptoms have not improved. (Jt. Ex. 4)

There are several experts who have rendered opinions regarding Michael's back. Richard F. Neiman, M.D. saw Michael for an independent medical evaluation (IME) on April 20, 2016; this was done at the request of claimant's counsel. (Jt. Ex. 5)
Dr. Neiman felt that claimant had developed arthritis in his back which was related to his work at the defendant employer. He noted that more recently Michael had an aggravation of the discomfort with the broken seat. The seat caused him to be in abnormal positions for a number of months. Dr. Neiman opined that these conditions were permanent and assigned 15 percent whole person impairment as a result of the injury. He restricted claimant to 5-10 pounds of lifting, with a maximum of 40 pounds as a result of the work injury. (Jt. Ex. 5)

In August of 2016, Robert D. Foster, M.D. saw claimant for an IME; this was done at the request of defendant's counsel. Dr. Foster performed surgery on claimant's back in 2006 and has been the authorized treating physician for the low back condition since December of 2014. Dr. Foster's impression was lumbar degenerative disc disease with transient exacerbation and lumbar sprain. He opined that some back complaints were from a change in seating and this would be an exacerbation not an aggravation. Dr. Foster felt this should improve with the therapy program. He recommended a MedX program and then once Michael's strength was "within 1 degree standard of normal I would think he would be medically maximized and released from care." (Jt. Ex. 7, p. 2) Dr. Foster felt that the objective findings and physical findings were all pre-existing and not related to his work. The doctor noted that Michael had pre-existing lumbar degenerative disc disease and stenosis and had undergone surgery. He also noted that Michael was overweight and had poor cardiovascular fitness which increased his risk factor for chronic low back pain. Dr. Foster felt that the change in seating had merely resulted in transient exacerbation or a lumbar sprain. Dr. Foster did not think that Michael had sustained any permanent impairment as a result of this work. He explained that Michael's complaints were in no way the result of any permanent damage or change in the structural activity or problems in his spine. (Jt. Ex. 7)

With regard to Michael's back claim, I find the opinions of Dr. Foster to carry greater weight than those of Dr. Neiman. Dr. Foster is the only expert in this case who has knowledge of claimant's back condition both before and after the alleged dates of injury. Further, Dr. Foster's report provided his rationale for why he believes that claimant did not sustain any permanent impairment as a result of the alleged work injury. Also, it is unclear from the record if Dr. Neiman had the benefit of all the information regarding the prior back injury. For example, it is not known if he had an opportunity to review the prior ratings assigned to Michael by Dr. Foster and Dr. Kuhnlein. Based on the evidentiary record as a whole, I find claimant has failed to carry his burden of proof to show that he sustained any permanent disability as a result of the alleged back injury. As such, I conclude that claimant has failed to carry his burden of proof to show that he is entitled to any permanent partial disability benefits as a result of the alleged back injury.

CONCLUSIONS OF LAW

The initial dispute submitted by the parties for determination is the amount of permanency benefits claimant proved he is entitled to as a result of the hearing loss and tinnitus a result of the April 30, 2015 work injury. 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).

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

In this case, I found that claimant had shown that he sustained permanent disability as a result of hearing loss related to the April 30, 2015, work injury. I also conclude that those conditions were permanent in nature and that claimant was at maximum medical improvement for those conditions. Therefore, claimant has proven entitlement to permanent partial disability benefits for his hearing loss and tinnitus.

Hearing loss is compensated pursuant to Iowa Code Chapter 85B. However, tinnitus is considered an unscheduled injury that qualifies claimant for industrial disability benefits pursuant to Iowa Code section 85.34(2)(u). Ehteshamfar v. UTA Engineered Systems, 555 N.W.2d 450 (Iowa 1996). The combined effects of the hearing loss and the tinnitus are used to determine claimant's loss of future earning capacity and industrial disability. Id.

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

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure

to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

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

In this instance, no claim is asserted for healing period benefits. Therefore, claimant's entitlement to permanent partial disability benefits should commence on the stipulated commencement date of April 30, 2015.

In this case, I considered all of the relevant industrial disability factors and found that Mr. Waddell proved a thirty-five percent (35%) loss of future earning capacity as a result of his left ear hearing loss and tinnitus. I conclude this entitles claimant to thirty-five percent (35%) of 500 weeks of permanent partial disability benefits, or 175 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u).

We now turn to the claimant's back claim. Based on the above findings of fact, I concluded that claimant failed to carry his burden of proof to show by a preponderance of the evidence that he sustained any permanent disability as a result of the alleged back injury. Therefore, claimant is not entitled to any permanent partial disability benefits for his low back claim.

Because claimant failed to prove entitlement to permanent partial disability benefits the issue of credit in file number 5053584 is moot.

ORDER

THEREFORE, IT IS ORDERED:

File No. 5053583 (Date of Injury: April 30, 2015):

All weekly benefits shall be paid at the stipulated rate of seven hundred seven and 76/100 dollars ($707.76).

Defendant shall pay claimant one hundred seventy-five (175) weeks of permanent partial disability benefits commencing on the stipulated commencement date of April 30, 2015.

All past due weekly benefits shall be paid in lump sum with applicable interest pursuant to Iowa Code section 85.30.

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.

File No. 5053584 (Dates of Injury: December 15, 2014; December 15, 2015; April 15, 2015):

Claimant shall take nothing further from these proceedings.

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 28th day of December, 2016.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876 4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.