BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DANIEL HANEY, Claimant, vs. ARCONIC, INC., Employer, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier, Defendants.	:	File No. 5067358 ARBITRATION DECISION Head Notes: 1108.50, 1402.30, 1403.30, 1803, 2208, 2402, 2501

STATEMENT OF THE CASE

Daniel Haney filed a petition in arbitration seeking workers' compensation benefits from employer Arconic, Inc. and insurance carrier Indemnity Insurance Company of North America for alleged occupational hearing loss and tinnitus.

The agency held a hearing in Davenport, Iowa. The undersigned presided. Haney participated personally and through attorney Brian T. Fairfield. The defendants participated through attorney Jane V. Lorentzen.

ISSUES

Under agency rule 876 IAC 4.19(3)(*f*), the parties jointly submitted a hearing report identifying the following disputed issues:

1) Did Haney sustain injuries, in the form of occupational hearing loss and tinnitus, which arose out of and in the course of his employment with Arconic on May 7, 2018?

2) Did Haney timely commence this action under Iowa Code section 85.26?

3) If the alleged injuries arose out of and in the course of his employment with Arconic, what is the nature and extent of Haney's permanent disability relating to the injuries, if any?

4) Is Haney entitled to payment of medical expenses relating to the alleged injuries?

5) Are costs taxed against Haney or the defendants?

After discussion of the disputed issues at hearing, the undersigned issued an order adopting the hearing report as part of the record in this case because it accurately reflects the disputed issues submitted to the agency for determination.

STIPULATIONS

In the hearing report, the parties also entered into the following stipulations:

1) An employer-employee relationship existed between Haney and Arconic at the time of the alleged work injury.

2) At the time of the alleged work injuries:

    a) Haney's gross earnings were one thousand two hundred thirty-five and 42/100 ($1,235.42) per week.

    b) Haney was married.

    c) Haney was entitled to two exemptions.

3) With respect to the disputed medical expenses:

    a) Although disputed, the medical providers would testify as to the reasonableness of their fees and/or treatment set forth in the listed medical expenses and the defendants are not offering contrary evidence.

    b) Although causal connection of the medical expenses to a work injury cannot be stipulated, the listed expenses are at least causally connected to the medical condition upon which Haney's claim of injury is based.

The parties' stipulations in the hearing report are accepted and incorporated into this arbitration decision. This decision contains no discussion of any factual or legal issues relative to the parties' stipulations unless necessary for clarity. The parties are bound by their stipulations.

FINDINGS OF FACT

The evidentiary record in this case consists of the following:

- Joint Exhibits 1 through 3;

- Claimant's Exhibits 1 through 5;
- Defendants' Exhibits A through E; and
- Hearing testimony by Haney and Adrianne Stoltenberg, an industrial hygienist employed by Arconic.

After careful consideration of all evidence in the record and the parties' post-hearing briefs, the undersigned makes the following findings of fact.

Haney was 57 years old at the time of hearing. (Hrg. Tr. p. 10) He has achieved a GED. (Hrg. Tr. p. 10) Haney has taken some postsecondary courses, but has not earned a postsecondary degree or certificate. (Hrg. Tr. p. 10)

In Haney's younger years, he liked to attend concerts. (Ex. C, p. 15) He attended concerts primarily in the 1980s. (Ex. C, p. 15; Hrg. Tr. p. 44) The concerts were mostly outdoors. (Ex. C, p. 15) Usually, he stayed in the back. (Ex. C, p. 16)

Haney mowed lawns growing up. (Ex. C, p. 17; Hrg. Tr. p. 45) He lived in an apartment for several years before buying his first house in the 1990s. (Ex. C, p. 17; Hrg. Tr. p. 45) Haney has been mowing the lawns of his houses since that time. For the 12 or 13 years before the hearing, Haney has worn hearing protection while mowing. (Ex. C, p. 18; Hrg. Tr. pp. 42–43)

Haney infrequently fired guns in his youth and has not done so in over 25 years. (Hrg. Tr. p. 41) Haney uses a chainsaw to cut down trees on his property, but less often than once per year on average in the roughly 16 years he has lived at his current residence. (Ex. C, Hrg. Tr. pp. 41–42) He also has saws that he uses on occasion around the house, while wearing hearing protection. (Ex. C, p. 19)

Haney's mother has had no issues with her hearing. (Hrg. Tr. p. 40) Neither have his three siblings. (Hrg. Tr. p. 40) Haney's father sustained hearing loss that led to him getting hearing aids after the age of 70. (Hrg. Tr. p. 39) There is insufficient evidence in the record from which to conclude Haney's father sustained hearing loss due to a genetic condition.

The weight of the evidence shows Haney has had multiple jobs during his career, but none with a work environment as consistently as loud as the one at Arconic, which specializes in aluminum manufacturing. (Ex. B, p. 5; Cl. Ex. 1, Depo Ex. E, p. 34; Hrg. Tr. p. 11) Haney worked for Iowa Beef Processing in Joslin, Illinois, for about nine years. (Hrg. Tr. pp. 11–12) He began working on the kill floor, where he wore plastic earplugs for protection, and worked his way up the organizational ladder to the job of supervisor. (Hrg. Tr. p. 12) Haney credibly testified he did not notice any problems with his hearing while working for Iowa Beef Processing. (Hrg. Tr. pp. 12–13) After Iowa Beef Processing, Haney installed lawn sprinklers for Suburban Landscape for the summer of 1994. (Hrg. Tr. pp. 11–12)

Arconic hired Haney in or around 1995. (Hrg. Tr. p. 11) Prior to going to work with Arconic, Haney did not seek a doctor's care for hearing-related issues. (Hrg. Tr. p. 13) The work environment at Arconic is loud enough that the company has implemented a hearing protection program, which Stoltenberg oversees. (Hrg. Tr. 60) As part of the program, Arconic has set standards defining what is acceptable noise exposure for its workforce: exposure over a 12-hour period to 83 decibels and over an eight-hour period to 85 decibels. (Hrg. Tr. p. 61)

Arconic requires employees to wear hearing protection in certain parts of its facility as part of its hearing protection program. (Hrg. Tr. p. 45) Haney wore molded or fitted earplugs and foam earplugs for protection throughout his employment with Arconic. (Hrg. Tr. p. 16) The molded hearing protection is customized to the individual worker so that it cannot be worn incorrectly. (Hrg. Tr. pp. 62–63)

Despite Arconic's hearing-protection mandate, employees regularly remove hearing protection when they need to talk to one another about how to address issues on the floor. (Hrg. Tr. p. 25) According to the questionnaire Haney filled out for Richard Tyler, Ph.D., he removed his hearing protection to talk with others six to 20 times per day for time periods of less than a minute to as many as 10 minutes at a time. (Cl. Ex. 1, Depo. Ex. E, p. 31)

Haney initially worked in the conventional end of the Arconic aerospace department, which had some noise but nothing like what he experienced on the job after changing positions in 2002. (Hrg. Tr. pp. 13–14) In 2002, He moved to the department's continuance end, processing coil. (Hrg. Tr. p. 14) In the continuance end of the department, Haney worked on the one and two 84-inch line, the continuous skin pass mill, the 86-inch continuous heat treat, the 12-coil slitter, and 4 prep. (Hrg. Tr. p. 14)

Haney was exposed to loud noise on a "fairly consistent" basis between 2002 and 2018. (Hrg. Tr. p. 15) The degree of Haney's exposure depended on his assigned duties. (Hrg. Tr. p. 15) For example, working on the 84-inch shears, he experienced loud noises all day because that is where the metal is cut. (Hrg. Tr. p. 15) In contrast, Haney explained, the entry had more periodic loud noise:

> On the entry end, when we finish a coil, it falls off of a mandril, which is a device that holds the coil in place. When we finish, the coil falls off of there, and depending on how heavy a gauge it is, it slams against the equipment like a plate. And as it goes in, it is usually fairly loud. You can pretty much hear it throughout the whole end of the department.

(Hrg. Tr. pp. 15–16)

Arconic ran noise tests at the machines Haney and his coworkers used. On August 8, 2014, Arconic sent a memo to staff, including Haney, regarding the noise levels it measured. (Cl. Ex. 1, Depo. Ex. B) The memo contained a time weighted average (TWA) for the machines the employees worked during the years 2006, 2007, and 2008 (Historical) and 2014 (Current):

PC	Historical	Current
12 Slitter	89.6	85.3
2 Slitter	85.7	81.9
60”	85.3	81
4 Coil Prep	88.4	85.1
1-84”	89.6	86.8
86”	86	85.2

(Cl. Ex. 1, Depo. Ex. B, p. 9)

The reduction in noise exposure is due largely to changes Arconic made in its use of compressed air. (Cl. Ex. 1, Depo. Ex. B, p. 9) It is more likely than not Haney was exposed to higher noise levels from 2002 through at least 2008, the last year of the “Historical” measurements cited by Arconic in the memo.

Arconic also tracked Haney’s personal exposure to noise during part of his employment.

Start Date	End Date	Job	Maximum TWA dbA	Average TWA, dbA
12/13/2005	2/29/2008	Flat Sheet Coil Operator	87.8	84.5
3/1/2008	3/1/2008	Flat Sheet Coil Operator	92.9	88.9
3/2/2009	3/15/2009	Coil Finishing Operator	92.1	88.7
3/16/2009	10/30/2016	Sheet Finish Coil Operator	88.0	85.4
10/31/2016	4/9/2017	Sheet 84 Operator	85.1	79.4
4/10/2017	12/31/2018	Sheet 86 Operator	85.8	81.8

(Ex. C; Cl. Ex. 1, Depo. Ex. A)

There is no data in the evidentiary record from Haney’s early years of employment with Arconic. Nonetheless, the record shows Haney worked around pneumatic shears during this time. Defense expert Mark Zlab, M.D., noted, “This entailed a great deal of noise. Hearing protection was provided.” (Ex. B, p. 5)

Prior to 2006, Arconic employees worked eight hours daily from Monday through Friday. (Hrg. Tr. p. 17) In 2006, Arconic changed the schedule to a 12-hour workday. (Hrg. Tr. p. 17) Haney typically worked 12-hour days during a 36- or 48-hour week. (Hrg. Tr. p. 17) If he worked overtime, he would work about 56 hours in a week. (Hrg. Tr. p. 17)

Generally, Arconic does not unilaterally assign employees to work in specific jobs. (Hrg. Tr. p. 46) Arconic has a seniority system in place for when incumbent employees change jobs. (Hrg. Tr. p. 46) An employee may choose to bid on an open job. (Hrg. Tr. p. 46) The decision to bid for a job is voluntary. (Hrg. Tr. p. 46) If the employee bids and has the most seniority, the employee gets to work that job. (Hrg. Tr. p. 46) Based on the totality of the evidence, it is more likely than not a collective bargaining agreement (CBA) with a union governs employee transfers.

On May 7, 2018, Haney bid into a different job. (Hrg. Tr. p. 28) Haney moved from working on the floor, in close proximity to noise-producing machinery, to the pulpit of the 86-inch line, which is inside. (Hrg. Tr. pp. 28–29, 45–46) He runs a machine inside that controls speed and tension and monitors quality using cameras. (Hrg. Tr. p. 28) The job is less noisy. (Hrg. Tr. p. 29) Haney does not have to wear hearing protection while performing duties in the pulpit. (Hrg. Tr. p. 29)

Despite bidding into a job based in the pulpit, Haney still experiences loud noise while working. He testified he occasionally has to go to the floor to work through problems with the crew. (Hrg. Tr. p. 29) Haney testified this can take anywhere from 45 minutes to an entire workday. (Hrg. Tr. p. 49) He estimated he had to work an entire workday on the floor about a dozen times in his two years working the pulpit job. (Hrg. Tr. p. 56) Haney is also exposed to noise when walking to and from break, during which time Arconic requires him to wear ear protection. (Hrg. Tr. p. 47)

Haney was still working in the position based primarily in the pulpit on the date of hearing. (Hrg. Tr. p. 28) In response to a question about whether he hoped the job would be permanent, Haney testified, “I’m hoping, yes.” (Hrg. Tr. p. 30). But it is possible another worker with more seniority could bump Haney out of the pulpit job under the Arconic transfer system. (Hrg. Tr. p. 49)

Neither Haney’s hearing loss nor his tinnitus has impacted his earnings at Arconic. (Hrg. Tr. p. 52) He testified that he received raises under the contract. (Hrg. Tr. p. 52) Haney was earning higher pay at the time of hearing than he was in May of 2018. (Hrg. Tr. p. 52) There is no indication he has worked fewer hours due to either his hearing loss or tinnitus.

As part of Arconic’s hearing protection program, it annually tests the hearing of employees, including Haney. (Hrg. Tr. pp. 25–26) With respect to the disputed issues in this case, the record establishes David Tutor, M.D., the Arconic medical director, was the first medical professional to review Haney’s hearing tests and offer an opinion on the cause of the hearing loss they reflect.

On April 27, 2018, Dr. Tutor performed an audiometric review and work relatedness determination of Haney’s hearing loss by reviewing the company testing of both ears from April 26, 1995, to February 15, 2018. (Ex. A, p. 1) Dr. Tutor did not address Haney’s tinnitus. (Ex. A, p. 1) As part of the review, Dr. Tutor noted (*sic*):

> [Haney] has a confirmed left ear 10dB STS with a 25 average. His left ear audiograms did show a "notch" in 3, 4, or 6K with recovery at 8K from 1995-2006, but showed the employee to have "normal" hearing, that is no hearing loss. Hearing loss in the left ear is noted to have commenced around 2007 and has progressed rapidly over the interval 10 years in a SNHL pattern. There is no noise notch at 3, 4, or 6K plus no recovery at 8K. In fact, 8K has "lead the way" with the loss. This represents a left ear accelerated asymmetrical hearing loss pattern over the past 10 years and should receive further audiology or ENT workup. The hearing loss now exceeds that which would be expected with noise exposure alone.

(Ex. A, p. 1)

It is Dr. Tutor's impression that Haney "has diffuse sloping hearing loss left ear consistent with SNHL but in a pattern not consistent with NIHL. Consider age, genetic, or medical condition as cause." (Ex. A, p. 1) Dr. Tutor further opined, "Work related determination is that this employee's left ear hearing loss is not consistent with noise induced hearing loss and should be considered a potential medical exception case and not recorded on the OSHA log." (Ex. A, p. 1) He recommended advising Haney to seek care from his personal physician or a specialist to rule out hearing loss due to a medical condition. (Ex. A, p. 1)

In addition to hearing loss, Haney has experienced ringing in his ears. (Hrg. Tr. p. 31) In Haney's right ear, it manifests as a high-pitched buzzing noise since around 2007. (Hrg. Tr. p. 32) He has experienced a similar buzzing in his left ear from 2015 or 2016 forward. (Hrg. Tr. pp. 32–33) The ringing has grown louder with time. (Hrg. Tr. pp. 31–32)

Haney credibly described how the tinnitus has impacted his life. The tinnitus can be heavy on Haney's mind. (Hrg. Tr. p. 34) It makes communicating frustrating because he has to be in the same room and facing the person with whom he is attempting to communicate. (Hrg. Tr. p. 35) This impacts him at work and at home. (Hrg. Tr. p. 34)

Haney's tinnitus makes it hard for him to understand certain parts of speech because they are similar in sound to the buzzing. (Hrg. Tr. p. 33) The problem is particularly pronounced when he attempts to listen to women and children talk and the noise when pronouncing certain sounds relating to letters and letter combinations like "s", "ph", and "th." (Hrg. Tr. p. 33) Haney described an example of how this impacts him at work:

> [S]ometimes when I'm out on the floor or having to talk to somebody through the PA, understanding what they are saying can be difficult. If, like, we are trying to talk at a distance, like, 5 or 6 feet with my earplugs in, usually I can't even understand what they are saying; whereas other people that I work with can usually understand what they are saying.

(Hrg. Tr. p. 34)

In order to hear what coworkers are saying, Haney has to get closer to them or have another coworker repeat what was said. (Hrg. Tr. p. 34) He also feels compelled to remove his hearing protection to better communicate. (Hrg. Tr. p. 34) Haney believes he would not have to remove his hearing protection as often as he does if he did not experience the buzzing from tinnitus. (Hrg. Tr. p. 34)

Dr. Tyler performed an assessment of Haney's hearing loss. (Cl. Ex. 1) Dr. Tyler had Haney complete a questionnaire relating to hearing loss, tinnitus, and causation. (Ex. 1, Depo. Tr. pp. 5–6; Ex. 1, Depo. Ex. E, pp. 30–36) In Haney's responses to the questionnaire, he stated his work included exposure to impulsive noise, like banging or clanging. (Cl. Ex. 1, Depo. Ex. E, p. 31) He also shared with Dr. Tyler that Arconic required hearing protection, but that he had to remove it to effectively communicate when speaking with other workers. (Cl. Ex. 1, Depo. Ex. E, p. 31)

In addition to the answers to the questionnaire, Dr. Tyler reviewed records relating to Haney's hearing and performed an interview by telephone. (Ex. 1, Depo. Tr. p. 7) Based on his review of the records, answers to the questionnaire, and phone conversation with Haney, Dr. Tyler issued a report dated January 5, 2019. (Cl. Ex. 1, Depo. Ex. D, p. 15) The evidence establishes this is the first time a medical professional informed Haney that his work at Arconic caused permanent hearing loss or tinnitus, and that the tinnitus resulted in a permanent disability.

Dr. Tyler opined Haney's years of working in an environment with a time-weighted average (TWA) of 88 decibels was excessive. (Ex. 1, Depo. Tr. p. 10) After considering Haney's work environment and other possible causes, he concluded the most likely primary cause of Haney's hearing loss and tinnitus was noise exposure while working for many years at Arconic. (Ex. 1, Depo. Tr. p. 10) Dr. Tyler found Haney's hearing tests at Arconic instructive on causation:

> [T]he audiogram back in 1995 is within normal limits. Normal limits are usually considered 0 to 25 dB hearing level. And over time the hearing became worse and became worse in the high frequencies. There is something called a noise-induced notch that happens with noise exposure when that's the most probable cause, and what that means is that hearing is worse at 3 or 4 or 6,000 hertz and then gets better at 8,000 hertz. And the interesting thing is that it does not matter whether it's low-frequency noise or high-frequency noise, it doesn't matter if it's continuous noise or impulsive noise, one always gets a noise-induced notch, and that's likely as a result of the mechanics of the cochlea, of the inner ear, for hearing.

(Ex. 1, Depo. Tr. p. 13)

When asked why the notch is indicative of noise-induced hearing loss, Dr. Tyler explained human and animal studies have shown "that's where hearing loss due to noise starts and any other cause of hearing loss, like the aging or medications or disease process, does not have a hearing loss audiogram that is shaped like that." (Ex. 1, Depo. Tr. pp. 13–14) In Dr. Tyler's report, he opines Haney's audiograms show a

notch in his right ear beginning in 2000 and in his left ear in 2006. (Ex. 1, Depo. Ex. D, p. 18) Moreover, he states Haney's 2018 audiograms "show a clear noise-induced notch in both ears" that is "non-disputable." (Ex. 1, Depo. Ex. D, p. 18)

Dr. Tyler has worked with people suffering from tinnitus for over 30 years. (Ex. 1, Depo. Tr. pp. 19–20) He explained, "Tinnitus is when you hear a sound in your ears on a regular basis that's not associated with an acoustic stimuli on the outside." (Ex. 1, Depo. Tr. p. 19) Tinnitus may impact a person's hearing, sleep, concentration, thoughts, and emotions. (Ex. 1, Depo. Tr. p. 20) Dr. Tyler further opined that the most common cause of tinnitus is noise exposure. (Ex. 1, Depo. Tr. p. 20) In his expert opinion, the cause of Haney's bilateral tinnitus is noise exposure while working at Arconic. (Ex. 1, Depo. Tr. p. 21)

Dr. Tyler used a custom formula he devised for rating impairment caused by tinnitus to assess Haney. He did so using a scale from zero (least) to 100 (most) in the areas of concentration, emotional well-being, hearing, and sleep. (Cl. Ex. 1, p. 21) He then averaged them and multiplied the average by .60 based on a valuation derived from comparing the maximum impairment ratings in the Fifth Edition of the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (Guides) for emotional or behavioral, mental status, two impaired upper extremities, and blindness, and then arriving at his own percentage rating for tinnitus, based on his professional experience. (Cl. Ex. 1, pp. 22–23) Based on this calculation, Dr. Tyler opined that Haney's whole body impairment from tinnitus is 19 percent. (Cl. Ex. 1, p. 23)

During Dr. Tyler's deposition, defense counsel asked him about the formula he used to determine Haney's impairment relating to tinnitus:

> Q. Has your method calculating [impairment relating to] tinnitus been endorsed by the [Guides]?
>
> A. Absolutely not.
>
> Q. And in fact the [Guides] provide that on page 246, tinnitus in the presence of unilateral or bilateral hearing impairment may impair speech discrimination, therefore add up to 5 percent for tinnitus in the presence of measurable hearing loss if the tinnitus impacts the ability to perform activities of daily living.
>
> What was your impairment rating for tinnitus with Mr. Haney?
>
> A. Well, I'll say the [Guides] – What you're reading from is only in the chapter on hearing, and the [Guides] also allow calculations and contributions to people's distress and emotional consequences, which can be added to the hearing loss rating in that guide.
>
> Q. Did you calculate impairment for emotional distress in accordance with the [Guides]?

> A. No. I don't believe the [Guides] are appropriate and don't specifically address tinnitus in a very appropriate way.
>
> I've been on committees from the National Academy of Science, for example, where they indicate that the consequences of tinnitus in some people can be much, much more severe than the consequences of hearing loss. There are people, for example that can – [. . .] [1] For example, people commit suicide because of tinnitus.

(Cl. Ex. 1, Depo. pp. 44–45)

Dr. Tyler co-authored "Noise-Induced Tinnitus," AAOHN J. Sep 1987; 35(9) 403-6. (Cl. Ex. 1, Depo. Ex. 1) The article states, "A complete history and physical examination must be performed to rule out the presence of other more life-threatening diseases, such as acoustic neuromas, meningiomas, and other central nervous system lesions. (Cl. Ex. 1, Depo. Ex. 1, p. 1) Further, according to Dr. Tyler and his co-author, an exam is "followed by a complete medical examination with blood pressure and consultation with an otolaryngologist for neurotologic examination." (Cl. Ex. 1, Depo. Ex. 1, p. 2)

The article of which Dr. Tyler is a co-author also states tinnitus "is commonly reported by the victim of noise-induced hearing loss (NIHL) but may represent the first symptom of a variety of disease processes. Tinnitus is directly related to noise exposure. There is a 70% increased risk of developing tinnitus with a positive history of occupational noise exposure when compared to those without a history of noise exposure." (Cl. Ex. 1, Depo. Ex. 1, p. 1)

Dr. Zlab, an otolaryngologist hired by Arconic for this case, examined Haney on January 7, 2020, and opined on the cause of his hearing loss and tinnitus, as well as its extent. (Ex. B, pp. 2–4) Dr. Zlab performed a physical examination of Haney, including his ears. (Ex. B, p. 6) Dr. Zlab issued a report based on the examination and a review of Haney's records and the exam. (Ex. B)

In the report, Dr. Zlab noted Haney was exposed to "kitchen noise but nothing of significance" when he worked at a restaurant in the early '80s. (Ex. B, p. 5) Moreover, he stated "[m]andatory hearing protection was observed" when Haney worked for Iowa Beef Packers and Haney had "[n]o noise exposure" when installing sprinklers for Suburban Landscape. (Ex. B, p. 5) With respect to noise exposure outside of employment, Dr. Zlab stated:

> Noise outside of the work environment entails usual and routine lawnmowing. Minimal woodworking. He does report to me that he does wear hearing protection when yardwork is being completed.

[1] Defense counsel objected to Dr. Tyler's answer as unresponsive. That objection is overruled.

(Ex. B, p. 5)

Dr. Zlab did not directly address Dr. Tyler's opinion or articulate why he disagreed with it. (Ex. B) He summarized Haney's hearing tests at Arconic, viewing these as the most important records included in his review. (Ex. B, p. 5) He concluded, "At no time has the configuration of the hearing loss [been] consistent with noise damage." (Ex. B, p. 7) He did not elaborate on what type of hearing loss configuration is consistent with noise damage. (Ex. B, p. 7)

Dr. Zlab also offered the following opinion on causation (*sic*):

> After reviewing his history, past audiograms, [and] noise levels in the factory, I have come to the conclusion that while he does suffer a mild to moderate sensorineural hearing loss bilaterally, it does not appear to be as a result of noise exposure in the work environment. The tinnitus which he is experiencing would be associated with his hearing loss. There are no treatment options for tinnitus. Hearing aids with benefit him in day-to-day activities. As always, noise protection should be observed.

(Ex. B, p. 7)

Dr. Zlab did not further elaborate on the reasoning behind his causation opinion. Thus, he offered a conclusory statement on causation with regards to Haney's hearing loss and tinnitus. Dr. Zlab did not identify any diseases that might have caused Haney's tinnitus. (Ex. B) He provided no impairment rating relating to Haney's tinnitus. (Ex. B)

Haney's personal physician referred him to Audiology Consultants. (Hrg. Tr. p. 36) Audiology Consultants recommended hearing aids. (Hrg. Tr. p. 36) Haney ultimately obtained hearing aids. (Hrg. Tr. p. 36) He paid the bills for the care he received from Audiology Consultants ($120) and hearing aids ($4,900). (Hrg. Tr. p. 36; Cl. Exs. 3, 4)

Haney does not wear his hearing aids while working because care providers advised him the effect would be too loud and intense, which would likely further damage his hearing. (Hrg. Tr. p. 37) He has experienced some improvement when wearing the hearing aids outside of work. (Hrg. Tr. p. 37) Haney does not have to have the volume turned up as high on the television or radio to hear and is better able to understand family members when they speak. (Hrg. Tr. pp. 37–38) However, the hearing aids do not reduce the buzzing Haney experiences due to tinnitus, though they are equipped to emit white noise, which Dr. Tyler opined may help combat the effects of his tinnitus. (Hrg. Tr. pp. 38, 51)

CONCLUSIONS OF LAW

In 2017, the Iowa legislature amended the Iowa Workers' Compensation Act. See 2017 Iowa Acts, ch. 23. The 2017 amendments apply to cases in which the alleged date of injury is on or after July 1, 2017. Id. at § 24(1); see also Iowa Code § 3.7(1). Because the injuries or conditions at issue in this case are alleged to have occurred

after July 1, 2017, the Iowa Workers' Compensation Act, as amended in 2017, applies. See, e.g., Smidt v. JKB Restaurants, LC, File No. 5067766 (App. Dec. 11, 2020).

1. Timeliness.

Arconic has asserted the affirmative defense that Haney did not timely initiate this case under Iowa Code section 85.26. During the review of the hearing report, the parties and undersigned affirmed Arconic was asserting this affirmative defense without further discussion. (Hrg. Tr. p. 5) Arconic makes one mention of the affirmative defense in its post-hearing brief, under the "Procedural" section. (Def. Brief, p. 2) Arconic did not include elsewhere in the brief any argument with respect to how the facts of the case or law support a finding in its favor on the statute of limits question. (See Def. Brief)

By failing to brief on the timeliness issue, Arconic has effectively left it to the agency to comb through the evidence and research the law in support of its affirmative defense. It would be unjust for the agency to take on such a role. Consequently, Arconic waived its affirmative defense when it failed to brief the issue with citations to the evidentiary record and law. Arconic has therefore failed to meet its burden of proof on the affirmative defense of an untimely claim under Iowa Code section 85.26.

Further, even assuming *arguendo* it is appropriate for a presiding deputy to consider a disputed issue in the hearing report that the party asserting it did not substantively address in its post-hearing brief, the evidence shows Haney's claims are not untimely under the law.

a. Occupational Hearing Loss.

If Arconic meant to attack the timeliness of Haney's occupational hearing loss claim, it has failed. As discussed in Section 2(b) below, the "date of occurrence" under Iowa Code section 85B.8(1) has not taken place in this case, so Haney's occupational hearing loss claim is not ripe for determination and the statute of limitations has not yet begun to run. There is no basis under the law to conclude Haney's occupational hearing loss claim is untimely.

b. Tinnitus.

This decision assumes *arguendo* Arconic intended to attack the timeliness of Haney's tinnitus claim. As discussed below, Haney proved it is more likely than not his work at Arconic caused his tinnitus. Haney has shown his tinnitus is a cumulative injury, caused by years of working in a noisy environment at Arconic.

"By their very nature, cumulative injuries develop over time and eventually result in a compensable disability." Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842, 851 (Iowa 2009) (citing McKeever, 379 N.W.2d at 373). Under the cumulative injury rule, the date of injury is the date on which the disability manifests itself. Larson, 763 N.W.2d at 852; see also Herrera v. IBP, Inc., 633 N.W.2d 284, 287 (Iowa 2001). And the

manifestation date of a cumulative injury is when the claimant, as a reasonable person, would be plainly aware that:

1) The claimant suffers from a condition or injury; and

2) This condition or injury was caused by the claimant's employment. Id.; see also Herrera, 633 N.W.2d at 287 (quoting Orr v. Lewis Cent. Sch. Dist., 298 N.W.2d 256, 257 (Iowa 1980).

Under the discovery rule for cumulative injuries, the limitations period for giving notice to the employer does not begin to run until the claimant knows that the physical condition is serious enough to have a permanent adverse impact on the claimant's employment or employability. Id. This is the point in time when the claimant, as a reasonable person, knew or should have known of the nature, seriousness, and probable compensable character of the injury or condition. Id.; see also Iowa Code § 85.26(1) (defining the "date of occurrence of the injury" for statute of limitations purposes as "the date that the employee knew or should have known that the injury was work-related").

Haney worked for over a decade in a noisy environment at Arconic. He first noticed buzzing in his left ear in or around 2007 and in his right ear in or around 2015 or 2016. But it was not unreasonable for him to believe the buzzing would cease after he stopped working in the noisy environment; after all, no doctor had told him he had permanent tinnitus or that it was caused by his work at Arconic. In May of 2018, Haney transferred out of the noisy environment, to the pulpit. Haney later saw Dr. Tyler, who issued a report dated January 5, 2019.

Thus, Dr. Tyler was the first medical professional to tell him his tinnitus was caused by his employment and it had caused permanent damage. The evidence establishes the date of Dr. Tyler's report is the date on which Haney knew or should have known his tinnitus was work-related and the cause of permanent disability under the Iowa Workers' Compensation Act. Haney filed his petition within two years of the date of Dr. Tyler's report.

For these reasons, Arconic has failed to meet its burden of proof on the question of timeliness. The evidence does not show it is more likely than not Haney knew or should have known his tinnitus was caused by his employment and is permanent in nature more than two years before he filed his petition. Arconic's affirmative defense fails.

2. Occupational Hearing Loss.

a. Causation.

Haney seeks workers' compensation benefits under the Iowa Occupational Hearing Loss Act, Iowa Code chapter 85B. The record shows the question of causation in this claim is intertwined with the same for his tinnitus claim. Further, the question of

whether a transfer constitutes the "date of occurrence of the injury" under Iowa Code section 85B.8(1) and makes the claim ripe for determination on the question of permanent disability, requires a determination of whether the transfer is "from excessive noise exposure employment" under the statute. Therefore, it is appropriate to address the question of causation regarding Haney's occupational hearing loss claim regardless of whether his occupational hearing loss claim is ripe under Iowa Code 85B.8(1).

"The legislature responded to medical awareness of the potential for hearing loss due to prolonged exposure to excessive noise by enacting chapter 85B, removing many obstacles to proving an occupational hearing loss." Muscatine Cty. v. Morrison, 409 N.W.2d 685, 687 (Iowa 1987). Iowa Code section 85B.4(1) defines "excessive noise exposure" to mean "exposure to sound capable of producing occupational hearing loss." Further, the statute includes a table outlining time and intensity exposure standards that create a presumption on the question of whether a claimant's employment caused hearing loss. Id. at 686–88.

> By adopting time and intensity exposure standards, the legislature did not seek to rule out hearing losses that do not rise to those levels; rather, the legislature sought to simplify prior problems of proof by recognizing presumptive exposure levels for gradual noise-induced hearing loss. When the tables are not implicated, the claimant must prove the loss of hearing was due to exposure at work to sound capable of producing that loss. Duration and intensity of exposure will be helpful to prove the necessary link between noise at work and the hearing loss. Other causes of the hearing loss may be explored by the employer or its insurer in defense of the claim.

Id. at 687–88.

In the current case, the evidence does not establish Haney was exposed to noise levels working at Arconic that create a presumption under the statute that his employment caused his hearing loss. This is due in large part to the fact the tables codified by the legislature end at eight hours of exposure and Haney worked 12-hour shifts for about 12 years while working on the floor. Because the tables are not implicated, it is appropriate to consider the evidentiary record, including the duration and intensity of Haney's noise exposure and the expert opinions on medical causation.

"Medical causation 'is essentially within the domain of expert testimony.'" Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 845 (Iowa 2011) (quoting Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845, 853 (Iowa 1995)). "With regard to expert testimony[,] [t]he commissioner must consider [such] testimony together with all other evidence introduced bearing on the causal connection between the injury and the disability. The commissioner, as the fact finder, determines the weight to be given to any expert testimony. Such weight depends on the accuracy of the facts relied upon by the expert and other surrounding circumstances. The commissioner may accept or reject the expert opinion in whole or in part.'" Schutjer v. Algona Manor Care Ctr., 780

N.W.2d 549, 560 (Iowa 2010) (quoting Grundmeyer v. Weyerhaeuser Co., 649 N.W.2d 744, 752 (Iowa 2002)).

The evidence shows Haney was exposed to noisy work conditions that produced sound capable of causing hearing loss. For the last 12 or so years of his time working on the floor, he was subject to noise levels during shifts lasting 12 hours, a time duration not listed in Iowa Code section 85B.5(1). And while Arconic took commonsense steps to reduce employee noise exposure, this took place after Haney had worked on the floor for several years—meaning it is more likely than not he was exposed to higher noise levels during the time he was working eight-hour shifts, though the measured noise levels were lower than those codified by the legislature for such duration. Lastly, there is the reality that Haney had to remove his hearing protection with regularity when performing his job duties on the floor in order to communicate with other employees.

As an initial matter, Dr. Tutor's opinion on causation with respect to Haney's hearing loss is unavailing. He states Haney's hearing loss was not caused by noise exposure at work because there was not a qualifying notch, even though there is plainly a notch. Dr. Tutor also suggested age as an alternative cause to Haney's employment even though Iowa law requires an adjustment for age when determining occupational hearing loss. See 876 IAC 8.10. Put otherwise, hearing loss causation in Iowa is not an either-or proposition between age and noise exposure at work. The law accepts that both can be causes of hearing loss and requires an adjustment for an employee's age-related hearing loss when determining that which is attributable to employment.

Dr. Zlab's opinion is also unpersuasive on causation. He did not give a detailed explanation as to why the information he reviewed led him to believe Haney's hearing loss is not caused by employment at Arconic. Instead, Dr. Zlab made a conclusory statement without mentioning Haney's removal of hearing protection to communicate with coworkers multiple times in a given day for periods of time up to ten minutes, a fact included in the questionnaire answers Haney provided to Dr. Tyler. Moreover, Dr. Zlab did not explain why his opinion differed from Dr. Tyler's regarding the observable "notch" in Haney's audiograms. Presumably, if the foundation of Dr. Tyler's opinion is off base, Dr. Zlab, as the expert retained by the defendants to opine on causation and disability, could have articulated why. Moreover, Dr. Zlab's physical examination did not result in the finding of an articulated alternative cause.

Dr. Tyler gave credible and persuasive testimony during his deposition on the cause of Haney's occupational hearing loss. He gave a thorough explanation for why the notch shown on Haney's audiograms led him to believe his hearing loss was caused by noise exposure, most likely from employment at Arconic. Dr. Tyler also explained that he believed it was likely Arconic did not properly measure impulsive noise to which Haney was exposed during his shifts working on the floor. Dr. Tyler's opinion on the cause of Haney's hearing loss is most persuasive based on the totality of the evidence.

Haney has met his burden of proof. Noise exposure while working at Arconic is the primary factor causing Haney's hearing loss. The evidence shows it is more likely

than not that he has sustained hearing loss arising out of and in the course of his employment with Arconic.

b. Ripeness.

The Iowa Occupational Hearing Loss Act provides:

> A claim for occupational hearing loss due to excessive noise exposure may be filed beginning one month after separation from the employment in which the employee was subjected to excessive noise exposure. The date of the injury shall be the date of occurrence of any one of the following events:
>
> *a*. Transfer from excessive noise exposure employment by an employer.
>
> *b*. Retirement.
>
> *c*. Termination of the employer-employee relationship.

Iowa Code § 85B.8(1).

In the current case, Arconic employed Haney at the time of hearing, so neither retirement nor termination can be a qualifying occurrence. The question is whether Haney's most recent transfer constitutes an occurrence under section 85B.8(1)(*a*).

As an initial matter, Arconic contends it did not transfer Haney so his job change cannot qualify under section 85B.1(*a*). The evidence establishes it is more likely than not Arconic agreed to a seniority-based bidding system for jobs at the facility where Haney works. Haney transferred using this system. Thus, while Haney may have initiated the transfer and obtained it due to his seniority status, he did so via a system Arconic is at least in part responsible for putting in place and administering. Haney's transfer is therefore of a type that constitutes a transfer "by an employer," under the statute, because it occurred using a system to which Arconic agreed and helps administer.

The analysis now shifts to whether the transfer is one "from excessive noise exposure employment." The Iowa Supreme Court considered in John Deere Dubuque Works of Deere & Co. v. Weyant, 442 N.W.2d 101 (Iowa 1989), what constitutes the "date of occurrence" of a hearing loss injury when an employee transferred positions. After holding the earliest of the three alternative events under section 85B.8(1) triggers the statute of limitations, the court considered whether Weyant's transfer qualified under section 85B.8(1)(*a*) to ripen his claim and trigger the statute of limitations. Weyant, 442 N.W.2d at 104–05.

With respect to Weyant's employment with John Deere, the court recited the following findings of fact:

> During his employment with Deere, Weyant had been exposed to noise levels measured as high as 91 decibels (dBA) and held more than forty positions in the plant. The last position Weyant held was that of stores and tool crib attendant, which he held from November 15, 1982 until his retirement. While working as a tool crib attendant, Weyant was exposed to noise levels averaging 73 dBA. Prior to being assigned the tool crib position, Weyant had worked as a foundry inspector since December 17, 1979. As a foundry inspector, Weyant was exposed to noise levels of 89 dBA.

Id. at 103.

The court also quoted the Commissioner's decision on appeal affirming the deputy's decision:

> [T]he record reveals that claimant [Weyant] was subject to reassignment to varying levels of noise exposure. He experienced those transfers numerous times throughout his employment with defendant [Deere]. Claimant's move from the inspector position to the tool crib attendant position was not a transfer within the meaning of section 85B.8. Rather, such action was merely a reassignment within the same work force and subject to change.

Id. at 104–05 (alterations in original).

The court adopted the test articulated by the presiding deputy in the arbitration decision for determining whether a transfer qualifies as an occurrence under the statute, which consists of the following prongs:

1) Did the change in employment result in a clearly recognizable change in employment status?

2) Did the change provide a reduction of noise exposure to a level that is not capable of producing an occupational hearing loss?

3) Was the change permanent or indefinite in the sense that there is no reasonable expectation that the worker will be returned to a position with excessive noise level exposure in the ordinary course of operations in the employer's business?

4) Did the change actually continue for at least six months?

Id. at 105.

The court adopted this framework because it "provides that the change of employment must be a specific change to a low noise area which is not part of a normal or periodic rotation of employees" and "takes into account the prevailing view that a permanent hearing loss cannot be validly measured until approximately six months'

separation from the noisy environment." Id. (citing John Deere Dubuque Works of Deere & Co. v. Meyers, 410 N.W.2d 255, 257 (Iowa 1987)).

With respect to the first prong of the Weyant test, Haney's change in job resulted in a clearly recognizable change in employment status. He moved from the 84-inch to the 86-inch line. In Haney's new job, he works primarily within the pulpit as opposed to the floor. Moreover, his job duties have substantively changed as a result even if he must work on the floor to perform some of them.

The second factor cuts against Haney's claim being ripe. Haney's change in jobs caused a reduction in noise exposure. But Haney must still work on the floor, subject to the noise levels he alleges caused his occupational hearing loss. Thus, the evidence does not support the conclusion that he is six months' removed from working in a noisy environment. It shows that, while Haney spends the majority of his time in his new job working in a relatively quiet environment, he must return to work in the noisy environment periodically when business need dictates.

Combining the third and fourth elements, at the time of hearing, Haney had held his new position for more than six months. Unlike the claimant in Weyant, there is no indication Arconic had reassigned him multiple times to work other jobs. But that, standing alone, does not mean the record supports the conclusion Haney's transfer is not subject to change. Rather, the evidence establishes Haney's transfer would be subject to change if another Arconic employee, with more seniority, chose to bid into it. Consequently, the record does not support the conclusion there is no reasonable expectation Haney will not be returned to a position with excessive noise level exposure in the ordinary course of operations in Arconic's business.

For these reasons, Haney has failed to establish a qualifying transfer under the Weyant test. While Haney might have a ripe occupational hearing loss claim in the future, no "occurrence" has occurred under section 85B.8(1)(*a*) because Haney continues to work periodically in a noisy environment. Consequently, it is inappropriate to make a determination regarding the extent of Haney's hearing loss at this time.

3. Tinnitus.

a. Causation.

The law cited above regarding causation in workers' compensation cases applies to Haney's tinnitus claim just as to his occupational hearing loss claim. Dr. Tyler gave a detailed, well-reasoned explanation for why he believes Haney's tinnitus was caused by his work. He credibly testified the most common cause of tinnitus is noise exposure. Further, Dr. Tyler's questionnaire included questions about the frequency with which Haney removed his hearing protection while in a high noise environment at work and how long such removal lasted.

Dr. Zlab's opinion is not as detailed as Dr. Tyler's. Dr. Zlab did not provide deposition testimony expanding on his written opinion like Dr. Tyler did. Dr. Zlab

provided little analysis of Haney's tinnitus, opining, "The tinnitus which he is experiencing would be associated with his hearing loss."

Dr. Tyler's opinion on the cause of Haney's tinnitus is most persuasive. Dr. Tyler gave a detailed explanation for why the noise levels Haney experienced while working for Arconic would cause his hearing loss and tinnitus. The detail and reasoning in Dr. Tyler's opinions are more persuasive than the cursory assessment in Dr. Zlab's report on causation.

Moreover, Dr. Tyler's opinion as an expert in this case is reinforced by the article he co-authored and that is in evidence. Specifically, the fact that tinnitus "is commonly reported by the victim of noise-induced hearing loss (NIHL) but may represent the first symptom of a variety of disease processes. Tinnitus is directly related to noise exposure. There is a 70% increased risk of developing tinnitus with a positive history of occupational noise exposure when compared to those without a history of noise exposure." (Cl. Ex. 1, Depo. Ex. 1, p. 1)

Haney has met his burden of proof on causation. The evidence shows it is more likely than not Haney's tinnitus arose out of and in the course of his employment due to noise exposure. The analysis now moves to whether Haney has proven his tinnitus caused a permanent disability.

b. Permanent Disability.

The "broad purpose of workers' compensation" is "to award compensation (apart from medical benefits), not for the injury itself, but the disability produced by a physical injury." Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, (Iowa 2010) (citing 4 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 80.02, at 80–2 (2009)). With the 2017 amendments, the legislature altered how this is done under the Iowa Workers' Compensation Act. Multiple of these legislative changes are at issue in the current case.

Tinnitus is an unscheduled injury under the Iowa Workers' Compensation Act. Ehteshamfar v. UTA Engineered Sys. Div., 555 N.W.2d 450, 453–54 (Iowa 1996). Prior to the 2017 amendments, unscheduled injuries such as tinnitus were automatically compensated based on the impact on the claimant's earning capacity using the industrial disability framework. See, e.g., id. For injuries on or after July 1, 2017, however, the legislature codified at Iowa Code section 85.34(2)(*v*) a new requirement for industrial disability to be considered:

> 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, not in relation to the employee's earning capacity.

The record shows that at the time of hearing, Haney was still working for Arconic in the pulpit position into which he bid. There is no indication tinnitus has reduced the salary, wages, or earnings Haney receives. See McCoy v. Menard, Inc., File No. 1651840.01 (App. Apr. 9, 2021). Therefore, under the statute, Haney's entitlement to benefits must be determined based only upon his functional impairment resulting from tinnitus, not in relation to his earning capacity.

Another requirement the legislature added to the Iowa Workers' Compensation Act in 2017 governs the determination of Haney's functional disability. Before the 2017 amendments, the agency could use all evidence in the administrative record, as well as agency expertise, when determining the permanent disability of an injured worker. See, e.g., Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 421 (Iowa 1994). Under agency rules before the 2017 amendments, the Guides were considered a "useful tool in evaluating disability." Seaman v. City of Des Moines, File Nos. 5053418, 5057973, 5057974 (App. Oct. 11, 2019) (quoting Bisenius v. Mercy Med. Ctr., File No. 5036055 (App. Apr. 1, 2013)).

However, in cases involving injuries on or after July 1, 2017, the Guides are now more than a tool; they are dispositive.

> [W]hen 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 § 85.34(2)(*x*).

Thus, the Iowa Workers' Compensation Act now limits the determination of what, if any, permanent disability Haney has sustained due to only his functional impairment. In making that determination, the agency is prohibited from using lay testimony or agency expertise by Iowa Code section 85.34(2)(*x*). Under the statute, that determination must be made "solely by utilizing" the Fifth Edition of the Guides.

Chapter 11 of the Guides covers assessments of various conditions, including tinnitus. The introduction to the chapter advises, "Before using the information in this chapter, the *Guides* user should become familiar with Chapters 1 and 2 and the Glossary." Guides at 246. The Glossary provides in pertinent part:

> **Disability** Alteration of an individual's capacity to meet personal, social, or occupational demands or statutory or regulatory requirements because of an impairment. Disability is a relational outcome, contingent on the environmental conditions in which activities are performed.

> ****
>
> **Functional limitations** The inability to completely perform a task due to an impairment. In some instances, functional limitations may be overcome through modifications in the individual's personal or environmental accommodations.
>
> ****
>
> **Impairment** A loss, loss of use, or derangement of any body part, organ system, or organ function.
>
> ****
>
> **Impairment evaluation** A medical evaluation performed by a physician, using a standard method as outlined in the *Guides*, to determine permanent impairment associated with a medical condition.
>
> ****
>
> **Impairment percentages or ratings** Consensus-derived estimates that reflect the severity of the impairment and the degree to which the impairment decreases an individual's ability to perform common activities of daily living as listed in Table 1-2

Id. at 600–01.

Chapter 1, "Philosophy, Purpose, and Appropriate Use of the Guides," further provides:

> Impairment percentages or ratings developed by medical specialists are consensus-derived estimates that reflect the severity of the medical condition and the degree to which the impairment decreases an individual's ability to perform common activities of daily living (ADL), *excluding* work. Impairment ratings were designed to reflect functional limitations and not disability. The whole person impairment percentages listed in the *Guides* estimate the impact of the impairment on the individual's overall ability to perform activities of daily living, *excluding work*, as listed in Table 1-2.

Id. at 4 (emphasis in original). Table 1-2 shows the activities of daily living as follows:

Activity	Example
Self-care, personal hygiene	Urinating, defecating, brushing teeth, combing hair, bathing, dressing oneself, eating
Communication	Writing, typing, seeing, hearing, speaking
Physical activity	Standing, sitting, reclining, walking, climbing stairs
Sensory function	Hearing, seeing, tactile feeling, tasting, smelling
Nonspecialized hand activities	Grasping, lifting, tactile discrimination
Travel	Riding, driving, flying
Sexual function	Organs, ejaculation, lubrication, erection
Sleep	Restful, nocturnal sleep pattern

And Table 1-3 contains a list of scales for the measurement of instrumental activities of daily living and activities of daily living. Id. at 6–7.

The Guides also explain why work is not considered in their framework for assessing impairment:

> The medical judgment used to determine the original impairment percentages could not account for the diversity or complexity of work but could account for daily activities common to most people. Work is not included in the clinical judgment for impairment percentages for several reasons: (1) work involves many simple and complex activities; (2) work is highly individualized, making generalizations inaccurate; (3) impairment percentages are unchanged for stable conditions, but work and occupations change; and (4) impairments intereact with such other factors as the worker's age, education, and prior work experience to determine the extent of work disability. [. . .]
>
> As a result, impairment ratings are not intended for use as direct determinants of work disability. When a physician is asked to evaluate work-related disability, it is appropriate for a physician knowledgeable about the work activities of the patient to discuss the specific activities the worker can and cannot do, given the permanent impairment.

Id. at 5.

The Guides go on to emphasize:

> **Impairment percentages derived from the *Guides* criteria should not be used as direct estimates of disability. Impairment percentages**

> **estimate the extent of the impairment on the whole person functioning and account for basic activities of daily living, not including work. The complexity of work activities requires individual analyses. Impairment assessment is a necessary *first step* for determining disability.**

Id. at 13 (emphasis in original).

Now back to Chapter 11, where the Guides address the criteria for rating impairment due to hearing loss as follows:

> Criteria for evaluating hearing impairment are established through hearing threshold testing, which serves as the most reproducible of the measures of hearing. Therefore, estimate an impairment percentage based on the severity of the hearing loss, which accounts for changes in the ability to perform activities of daily living. 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.

Id. at 246.

Thus, the Guides set forth a clear framework for assessing what, if any, disability tinnitus has caused an affected worker. The question presented in the current case is whether Haney has proffered sufficient evidence to establish a functional disability under the Iowa Workers' Compensation Act, as amended in 2017. Put otherwise, does the record support a determination of permanent disability made "solely by utilizing" the Guides?

The evidence shows Dr. Tyler did not follow the Guides for assessing disability relating to tinnitus in arriving at his rating for Haney. During Dr. Tyler's deposition testimony, he explained that he believes the Guides do not provide a framework for assessing impairment relating to tinnitus that accurately reflects the impact the condition has on a worker. Thus, while Dr. Tyler *referenced* the Guides in his report, he did not *utilize* them as they are intended to be used by their own terms or as required under Iowa Workers' Compensation Act, as amended in 2017.

Instead, Dr. Tyler compared what he believes to be the potential scope of the disability tinnitus can cause to the framework the Guides provide for assessing impairment caused by other conditions. In doing so, he rejected the Guides' method for calculating disability relating to tinnitus and came up with his own. The Commissioner has previously considered Dr. Tyler's approach and concluded, "'Dr. Tyler appears to have crafted his own impairment rating system which diverges significantly from the AMA Guides.'" Seaman, File Nos. Files Nos. 5053418, 5057973, 505797 (quoting Ament v. Quaker Oats Company, File Nos. 5044298, 5044299 (App. Mar. 17, 2016)). During Dr. Tyler's deposition in the current case, he confirmed the Commissioner's impression of his system, testifying it is "[a]bsolutely not" endorsed by the Guides.

For these reasons, the record shows Dr. Tyler did not determine Haney's functional impairment relating to his tinnitus "solely by utilizing" the Guides, as required under Iowa Code section 85.34(2)(*x*). Haney has therefore failed to meet his burden of proof on the question of permanent disability under the Iowa Workers' Compensation Act, as amended in 2017. There is an insufficient basis in the evidence from which to conclude Haney had sustained a permanent functional impairment relating to the tinnitus caused by his employment with Arconic as of January 5, 2019, the date of Dr. Tyler's report.

4. Medical Benefits.

The parties identify reimbursement for care as a disputed issue in the hearing report. Haney submitted a bill for $120 from Audiology Consultants and another for $4,900 for his hearing aids. Haney paid these bills. In the hearing report, the parties dispute whether:

- The care is reasonable and necessary;
- The fees or prices charged by providers are fair and reasonable; and
- The expenses are causally connected to the work injury.

While the defendants mention Haney submitted bills relating to care in the introduction of their brief, they did not advance an argument on whether he should be reimbursed for those expenses.

Iowa Code section 85.27(1) states:

> The employer, for all injuries compensable under this chapter or chapter 85A, shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies therefor and shall allow reasonably necessary transportation expenses incurred for such services. The employer shall also furnish reasonable and necessary crutches, artificial members and appliances but shall not be required to furnish more than one set of permanent prosthetic devices.

As discussed above, Haney's hearing loss and tinnitus arose out of and in the course of his employment with Arconic. Therefore, under the Iowa Workers' Compensation Act, Arconic must hold Haney harmless for reasonable care relating to the conditions. The parties dispute whether this includes costs relating to hearing aids.

With respect to the reasonableness and necessity of Haney obtaining hearing aids, Dr. Tutor, Arconic's medical director, recommended Haney see his personal physician regarding his hearing loss. Haney did just that. Haney's personal physician then referred him to Audiology Consultants, an act from which it is reasonable to infer

he believed the care was reasonable and necessary. Moreover, Dr. Zlab, the defense expert, opined, "Hearing aids will benefit [Haney] in day-to-day activities."

Thus, Haney acted in response to referrals from Dr. Tutor and his personal physician, as well as Dr. Zlab, regarding additional care for his hearing loss. The evidence shows Haney sought care that was reasonable and necessary. It was also beneficial, as demonstrated by the weight of the evidence establishing the hearing aids have benefited his ability to hear.

For these reasons, Haney has met his burden on his right to be held harmless for the cost of care from Audiology Consultants and for his hearing aids. The evidence establishes the disputed care was reasonable, necessary, and beneficial. He is entitled to reimbursement for medical expenses as well as ongoing care relating to his hearing loss and tinnitus.

5. Costs.

"All costs incurred in the hearing before the [C]ommissioner shall be taxed in the discretion of the [C]ommissioner." Iowa Code § 86.40. "Fee-shifting statutes using 'all costs' language have been construed 'to limit reimbursement for litigation expenses to those allowed as taxable court costs.'" Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 846 (Iowa 2015) (quoting Riverdale v. Diercks, 806 N.W.2d 643, 660 (Iowa 2011)). Statutes and administrative rules providing for recovery of costs are strictly construed. Id. (quoting Hughes v. Burlington N. R.R., 545 N.W.2d 318, 321 (Iowa 1996)).

Under the administrative rules governing contested case proceedings before the Iowa workers' compensation commissioner, hearing costs shall include:

- Attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions;
- Transcription costs when appropriate;
- Costs of service of the original notice and subpoenas;
- Witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72;
- Costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72;
- Reasonable costs of obtaining no more than two doctors' or practitioners' reports;

- Filing fees when appropriate, including convenience fees incurred by using the payment gateway on the Workers' Compensation Electronic System (WCES); and

- Costs of persons reviewing health service disputes.

876 IAC 4.33.

In the current case, both parties have asked the opposing side be taxed costs. Because Haney has prevailed on the majority of the disputed issues (and the question of ripeness also implicates the statute of limitations, which supports filing even if the issue is disputed to ensure the claim is not lost), Arconic is not entitled to a taxation of costs. That leaves the question of Haney's costs, which consists of the bill for Dr. Tyler's report.

Dr. Tyler charged Haney for 9.2 hours of work at $195 per hour, for a total of $1,794. (Cl. Ex. 5) There is a note, "Reading documents, preparation of letter." (Cl. Ex. 5) But there is not a more detailed itemization regarding how many hours Dr. Tyler spent on his report as compared to reading documents.

"[A] physician's report becomes a cost incurred in a hearing because it is used as evidence in lieu of the doctor's testimony. The underlying medical expenses associated with the examination do not become costs of a report needed for a hearing, just as they do not become costs of the testimony or deposition." Young, 867 N.W.2d at 846. Activities such as "research and review of the file are akin to expenses associated with an examination and therefore cannot be taxed" as the cost of a report. Voshell v. Compass Group, USA, Inc./Chartwells d/b/a Au Bon Pain Café, File No. 5056857, p. 7 (App. Sep. 27, 2019) (citing Young, 867 N.W.2d at 847, and Kirkendall v. Cargill Meat Solutions Corp., File No. 5055494 (App. Dec. 17, 2018)).

Because the evidence does not allow for the determination of what time Dr. Tyler spent reviewing records and examining Haney as opposed to preparing the report, the costs relating to the report are unknown and cannot be taxed. The parties shall be responsible for paying their own costs.

CONCLUSION

It is therefore ordered:

1) Haney shall take no benefits at this time.

2) The defendants shall reimburse Haney for care as follows:

    a) One hundred twenty and 00/100 dollars ($120.00) for the care he received from Audiology Consultants; and

    b) Four thousand nine hundred and 00/100 dollars ($4,900.00) for hearing aids.

3) The defendants shall hold Haney harmless for future reasonable care relating to his hearing loss or tinnitus.

4) The defendants shall file subsequent reports of injury as required by rule 876 IAC 3.1(2).

5) The parties shall be responsible for paying their own hearing costs.

Signed and filed this ____5th_____ day of October, 2021.

BENJAMIN G. HUMPHREY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Brian Fairfield (via WCES)

Jane Lorentzen (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.