BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CORRINE DVORSKY,

Claimant,

vs.

ROCKWELL COLLINS,

Employer,
Self-Insured,
Defendant.

File No. 5056324

ARBITRATION

DECISION

Head Note Nos.: 1100; 1108; 2502

STATEMENT OF THE CASE

Corrine Dvorsky, claimant, filed a petition in arbitration seeking workers' compensation benefits against Rockwell Collins, a self-insured employer, for alleged work injuries dated March 19, 2015.

This case was heard on December 12, 2017, in Cedar Rapids, Iowa. The case was considered fully submitted on January 16, 2018 upon the simultaneous filing briefs.

The record consists of Joint Exhibits 1-10, claimant's exhibits 1-5, defendants' exhibits A-B, and testimony of the claimant.

ISSUES

1. Whether claimant sustained an injury which arose out of and in the course of employment;

2. Whether claimant's claim is barred by an affirmative defense in Iowa Code 85.16;

3. Whether the alleged injury is a cause of permanent disability and, if so;

4. The extent of claimant's industrial disability;

5. Whether claimant is entitled to reimbursement of an IME under Iowa Code section 85.39.

STIPULATED FACTS

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The parties agree that at the time of the alleged injury claimant was an employee. They further agree that temporary disability is no longer in dispute. The parties stipulate that if an injury is found to be the cause of a permanent disability, the disability is industrial in nature and that the commencement date for permanent partial disability benefits, if any are awarded, is March 19, 2015.

At the time of the alleged injury, the claimant's gross earnings were $1,096.00 per week. She was single and entitled to one exemption. Based on the foregoing numbers the weekly benefit rate is $636.14.

When claimant began working for the defendant employer, she did not suffer any symptoms of tinnitus.

FINDINGS OF FACTS

Claimant was a 63-year-old person at the time of the hearing. She began working for the defendant employer in 1974 and for most of her employment, she was stationed in Building 108. She continues to work in Building 108 performing essentially the same duties as when she was allegedly injured. She does not have work restrictions or accommodations at this time.

Her duties included assembling partial parts of a radio and starting the final unit before passing it on to another individual to finish. At the time of the alleged injury, claimant worked the first shift from 7:00 a.m. to 3:30 p.m. Claimant testified she sat at approximately the L9 location on joint Exhibit 9:17. (Joint Exhibit 9:17) This workstation is between 20 and 30 feet away from what is known as the vibe chambers. Between 2000 and 2007, insulated curtains were placed around the vibe chamber to isolate the noise. Up until that point in time, claimant had worked exposed to loud noises from the vibe chambers and/or testing areas. In 2013, defendant employer added additional five chambers with the insulated curtains surrounding them.

Claimant was not a test technician at any time and only test technicians were permitted to work in the vibe chamber. (JE 7:10)

The five chambers are located at the bottom right-hand portion of joint Exhibit 9:17. The claimant's workstation is slightly closer to testing machines located next to HF – 9550 test area. (Joint Exhibit 9:17) In 2001, defendant employer conducted a sound survey for building 108. The survey was performed to identify any areas where

the noise level may exceed 85 dBA. (Joint Exhibit 10:5) When the five machines or testing area machines are operating, decibel readings such as 92.5 to 108 were recorded. When the machines were not operating, the decibel recordings for those problem areas were between 69 and 77. Claimant's workstation at L9 had a reading of 69.9. In 2010, defendant employer conducted another study of Building 108. The study was similar to the 2007 study in which snapshot decibel readings, identified by the minute, were taken. A subsequent study was performed by defendant employer Jennifer Ryan, who testified at hearing, in May 2013. None of the results were over the OSHA standard.

Claimant argues that the aforementioned studies were inadequate because they took snapshots rather than testing the area for a full shift as was initially recommended in the 2007 study due to the fact that noise intensity fluctuates over time. (Joint Exhibit 10:2)

Claimant testified that these machines run on a near daily basis but not constantly and that these machines are loud, like a jet engine or 10 times a vacuum cleaner. In a questionnaire filled out by the claimant, she indicated that at times the noise was so loud you could not hear the person next to you. (Joint Exhibit 4:2)

Claimant claimed she works with and around the chemical Toluene. (Ex 2:1) The chemicals at claimant's work station include isopropyl alcohol, pro clean flux remover, 3M ScotchWeld, Meta Grip 3803 Epoxy, Meta Grip 3803 Base, and Locktite Threadlocker 242. (Ex. 2:1) 3M Scotchweld does contain Toluene but it is less than <0.5% by weight and the only risk of damage to the auditory system is through poisoning or abuse, both of which claimant denied. (JE 2:9)

Claimant has not been provided hearing protection nor is she regularly tested for hearing loss. She has used guns in the past.

Claimant maintains that she developed a constant hum in her right and left ears approximately 17 years ago. A May 13, 1980 audiogram showed no hearing loss. (Joint Exhibit 1) The audiogram from April 2, 2013 showed high frequency hearing loss in both ears. (Joint Exhibit 1) The March 19, 2015 audiogram showed a worsening of hearing thresholds. (Joint Exhibit 1) As a result, she has difficulty understanding people and has a hard time hearing voices and sounds, such as a phone ringing. The noise can be very distracting affecting her concentration and sometimes affects her ability to sleep. (Joint Exhibit 4:6)

Richard S. Tyler, Ph.D., provided an expert opinion at the request of the claimant on March 10, 2016. (JE 4) The process began with a questionnaire dated January 19, 2016. (JE 4:1) Dr. Tyler is an audiologist specializing in hearing loss and tinnitus, among others. (Joint Exhibit 4:11) He reviewed noise study documents, hearing records and interviewed the claimant on the telephone. (Joint Exhibit 4:11) Dr. Tyler concluded that it is possible claimant was exposed to sounds in excess of 100 dBA for more than 40 hours a week, along with unsafe chemicals which have the "potential to exacerbate

the potential of noise to produce hearing loss and tinnitus." (Joint Exhibit 4:21) He did not find that her use of guns impacted her hearing adversely.

He found from his interview that the high-frequency hearing loss prevented her from hearing high-frequency speech sounds and, as a result, it would be difficult for her to communicate in some situations. (Joint Exhibit 4:15) In a subsequent letter, Dr. Tyler wrote that noise exposure is one of the most common causes of hearing loss. (Exhibit 4:1)

> Noise exposure is one of the most common causes of hearing loss. Noise exposure causes a direct insult on the hearing sensory organ, the cochlea. The audiometric configuration associated with noise induced hearing loss from broadband continuous noise exposure usually begins with a threshold loss in the 3000 to 6000 Hz region, with better hearing thresholds at 8000 Hz. As the noise induced hearing loss continues, hearing loss becomes worse at adjacent and lower frequencies. At advanced states, the hearing loss at frequencies at 8000 Hz can be as impaired as thresholds between 3000 and 6000 Hz.

(Exhibit 4:1) He also articulated the difference between continuous and impulsive noise. Continuous noise is a steady state of noise whose maximum levels remain constant or change gradually. Impulse noise has sudden peaks in the noise. (Exhibit 4:2)

The high-frequency hearing loss can also make it difficult for claimant to be aware of oncoming traffic. As a result, Dr. Tyler assigned a 17.4 percent whole person impairment. (Joint Exhibit 4:19)

Christine Pernetti, an occupational audiologist, provided an opposing report on December 22, 2016. (Joint Exhibit 6:1) Ms. Pernetti reviewed the medical records and audiograms along with the noise studies and concluded that the recreational firearm use, the diagnosis of Ménière's disease, the history of upper respiratory and sinus infections in the long period of NSAID use caused or contributed to the tinnitus and hearing loss. She also opined the documented noise levels in Building 108 were not sufficiently loud enough to be considered either cause or contributor to the claimant's hearing loss or tinnitus. (Joint Exhibit 6:4)

Brian J. Harms, senior project engineer for a company called TRC provided a response to Dr. Tyler's report on December 21, 2016. (Joint Exhibit 5:1) Mr. Harms is a certified industrial hygienist and has experience performing community noise studies, indoor noise mapping at industrial facilities, as well as full shift work dosimeter readings for compliance with OSHA noise regulations. (Joint Exhibit 5:1) Mr. Harm's report concluded defendant employer had complied with OSHA standards regarding noise exposure limits. (Joint Exhibit 5) The defendant's argument appears to be that because the claimant was not exposed to levels of noise in excess of the OSHA standards, she could not have developed any compensable hearing loss.

Steven Rippentrop, M.D., also authored an opinion as to whether claimant sustained a work-related injury to her hearing. (JE 7) He believed that because claimant's exposure was below the OSHA requirement and that she had Ménière's disease, recurrent otitis media, age-related changes, as well as repeated use of ototoxic antibiotics, her hearing loss was not work related. (JE 7:11) Dr. Rippentrop ruled out measles and mumps as well as cholesterol as contributing to sensorineural hearing loss given that the cholesterol was well controlled with medications and the mumps and measles were remote in time. (JE 7:12)

He found that it was possible the recurrent middle ear infections, use of azithromycin and ototoxic antibiotics contributed to the hearing loss. (JE 7:12-13) He also opined that claimant had multiple episodes of Ménière's disease but there appeared to be only two references to the disease in 1997. Dr. Rippentrop found that claimant's family history of hearing loss was significant whereas Dr. Tyler did not. (JE 7:13) He concluded that if the hearing loss was compensable, it would be a 13 percent impairment rather than the 17.4 percent impairment Dr. Tyler assessed. (JE 7:14)

> Dr. Tyler calculated an impairment using a method that he created. It has not been accepted into Iowa Code 85B. Neither has it been incorporated into the American Medical Association's Guides to the Evaluation of Permanent Impairment. It conflates the concepts of impairment with disability. This makes the resulting "17.4% whole body impairment" a blend of various expected/subjective disabilities rather than an impairment. This is different from objective information on which an actual impairment rating can be given. I disagree with this method. Instead, I have used the Iowa Code 85B for the definitions and calculation of the hearing loss.
>
> Even if the hearing loss and tinnitus were found to be compensable under the worker's compensation system, this would result in a 8% whole person impairment for hearing (22.8% hearing loss and impairment according to the Iowa Code 85B.4 and the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition's Relationship of Binaural Hearing Impairment to Impairment of the Whole Person table (Table 11-3) on page 250) and up to an additional 5% whole person impairment for tinnitus (according to American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition's section 11.2a on page 246). This would result in a maximum of 13% whole person impairment.

(JE 7:14)

Thomas F. Viner, M.D., was asked about whether the claimant suffered from Ménière's disease. His response is as follows:

> 2. Records have been reviewed. Diagnosis of Ménière's was made in the past by Dr. Flynn in Cedar Rapids. I do know Dr. Flynn and have great confidence that he has done a thorough otolaryngologic exam, to include history of physical. Since records are not available, I cannot personally cannot [sic] confirm a diagnosis of Ménière's disease. This would include unilateral sensorineural hearing loss, as well as continuation of ear fullness and episodic spells of dizziness which she does not state have been present. So I would have to say that I do not have enough information to go along with this diagnosis. I do feel she has had sensorineural hearing loss and tinnitus does certainly does [sic] go along with this. The causes of her sensorineural hearing loss can be multiple. The one hearing test provided to me was after she received an ototoxic antibiotic, vancomycin, and does seem hearing test showed bilateral suppression of sensorineural hearing level from low to high frequencies. This would go along more with an ototoxic situation, I feel. The tinnitus can be ongoing symptom. Her work environment at Rockwell Collins does present with some issues with documentation as far as the noise exposure which could be an aggravating cause of tinnitus, which does sound to be a bilateral symptom for her. I would feel much better to have been able to personally evaluate the patient with both physical exam and with our audiology department. Hearing test would show a progression of sensorineural hearing levels for which her tinnitus certainly could be an ongoing symptom.

(JE 8:1-2)

Claimant's past medical history includes a diagnosis of Ménière's disease. This was first referred to in 1997 when she reported trouble hearing. (Joint Exhibit 2) However, in subsequent medical records during her well woman visits, claimant reported no symptoms of ringing in the ears, recurrent epistaxis or dysphagia. (Joint Exhibit 3:3, 5, 6, 9, 13) Claimant testified at hearing that she believes that the Ménière's disease was a possibility and no actual confirmation. There are no medical records of claimant seeking any treatment for symptomatology related to the Ménière's disease.

Dr. Viner's opinion was that symptoms of Ménière's disease would include unilateral sensorineural hearing loss as well as ear fullness and episodic spells of dizziness. These symptoms were not recorded in claimant's medical records.

Therefore I find that the claimant does not have a diagnosis for Ménière's disease.

Claimant also had periods of time in which she suffered from sinus problems and was given indication to treat those sinus problems. In 2001, she suffered from migraine headaches and received Toradol injection as well as ibuprofen. (Joint Exhibit 7:3) She continued to take Ibuprofen 800 mg, Imitrex, and Paroxetine in varying dosages until at least 2013. (JE 7:7)

Claimant's father began using hearing aids at the age of 62.

There is some contradiction as to when claimant's hearing problems began. She denied any ringing in her ears from 2006 to 2014. (JE 3:3, 5, 6, 9, 13) However, she told Dr. Tyler that her hearing problems began 17 years ago which is also consistent with the medical note recording diagnosis of Ménière's disease.

Claimant testified, and Dr. Tyler recorded, that she did not have a ringing but rather a high-pitched hum. Claimant responded yes to an April 2013 questionnaire asking whether she had ringing in her ears. (JE 1:8) Later that year, she reported that she had no ringing in her ears. (JE 3:16) Claimant also referred to "ringing and humming" as distracting in her interview with Dr. Tyler. (JE 4:17-18) It is difficult to believe that this high-pitched hum would not have been mentioned in any of the well woman visits wherein claimant was asked about noise in her ears and that she specifically denied any ringing in her ears even as recently as December 30, 2014.

Dr. Tyler recorded that claimant often worked overtime. Claimant testified at hearing that she rarely worked overtime. Therefore, it is found that claimant did not work overtime on a regular basis.

Claimant testified that her father's hearing loss was as a result of a drug that was administered while he suffered from cancer. In the worksheet claimant filled out for Dr. Tyler, she does not qualify her father's hearing loss as drug-related. (JE 4:3) Dr. Tyler makes no note of this drug-related hearing loss in his report. (JE 4:14)

Currently, claimant maintains she has difficulty concentrating and hearing people and emergency vehicles.

Claimant seeks reimbursement for costs including but not limited to Dr. Tyler's report in the amount of $1,131.50 and depositions of the claimant for total of $112.00. (Exhibit 3) Dr. Tyler's report was broken out into 7.3 hours at $155.00 per hour for reading documents, phone calls, and preparation of the letter. (Exhibit 3:7)

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational

consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

The claimant also 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).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

The stipulated facts include that the claimant suffered no hearing loss or tinnitus when she began working but did develop it at some point after 1980. There is some contradictory testimony as to when the high-pitched hum, as claimant describes it, began. The parties agree that the onset of permanent partial disability benefits, if any are awarded, would be March 19, 2015.

There are two expert opinions regarding the cause of claimant's tinnitus and hearing loss. Both are flawed.

Claimant argues more weight should be afforded Dr. Tyler given his voluminous publications on the matter of tinnitus. It is true that Dr. Tyler has published over 270 articles and textbooks on tinnitus. He has developed standard of measurement for the severity of tinnitus. His research has been funded by the United States and United Kingdom's governments as well as many nonprofit corporations.

However, qualifications alone do not render an opinion more valid. Most of Dr. Tyler's report was directed toward explaining possible causes of tinnitus that may have existed at the claimant's workplace. While he concludes at the end of his report that it is more likely than not claimant's hearing loss and tinnitus arose from her workplace conditions, there were few concrete pieces of evidence underpinning his conclusions other than that claimant did not have tinnitus or hearing loss prior to beginning work and did have it at the end of her career.

Dr. Tyler concluded the guidelines for limiting noise induced hearing loss were grossly inadequate for exposures of more than 40 hours in one week. (Joint Exhibit 4:13) Claimant testified that she rarely worked overtime, thus negating this potential hazard.

Dr. Tyler made the conclusion that sounds above 100 dBA were excluded from measurements because one tester set the sound level meter to a range of 30 dBA to 100 dBA. (Joint Exhibit 4:12) However, this is an inaccurate reading of the report. There were decibel measurements in excess of 100 dBA. (JE 10:5) (recording 108 dBA inside the vibrator booth at an open machine).

No study showed that claimant was exposed to sound levels in excess of what OSHA recommended. Instead, the exposure levels for claimant were between 67 and 75 dBAs. There were areas that were louder but they were farther away from claimant and protected by insulated curtains. The remainder of Building 108 fell under the OSHA guidelines, but Dr. Tyler did not make note of that.

Dr. Tyler opined that exposure to impulsive or impact noise should not exceed 140 dBA peak sound pressure level, however, there was no evidence that there was ever impulsive or impact noise exceeding or nearing those levels.

Dr. Tyler was critical that tests were not run continuously but in snapshots, however, no evidence was provided that sound varied from the snapshots taken.

Dr. Tyler concluded that it was possible that certain ototoxic chemicals may have some effect on tinnitus. (Ex. 4:11) This statement does not rise to the standard required of expert witness testimony. Moreover, Dr. Tyler did not make note of claimant's ingestion of ototoxic medications for over twenty years.

As it relates to the chemical exposure, the studies show that several chemicals have the potential to exacerbate "the potential of noise to produce hearing loss and tinnitus." (Joint Exhibit 4:13) A potential to exacerbate is not a probable cause. The only ototoxic chemical that Dr. Tyler referenced that claimant was exposed to on a regular basis was Toluene. (Ex. 4:11) Dr. Tyler appeared to be critical of the lack of documentation of the chemicals to which claimant was exposed but did not identify any single chemical factor as likely or probably contributing to claimant's hearing loss. He made a general claim that certain ototoxic chemicals may have some effect on tinnitus. (Ex. 4:11)

There was no medical evidence or scientific evidence the ototoxic chemical exposure at the worksite was sufficient to affect or cause hearing loss or tinnitus.

On the other hand, defendant's experts pointed to claimant's family history of hearing loss, her long-time use of ototoxic medications, and her age as contributing factors to her hearing loss. Claimant testified that her father's hearing loss was as a result of a drug that was administered while he suffered from cancer. There is not sufficient evidence to buttress this claim.

All of the defendant's experts concluded the claimant had a diagnosis of Ménière's disease. This finding is based on two mentions in 1997 medical records. As stated previously, it is a specific finding of the undersigned the claimant did not suffer from Ménière's disease.

One expert suggested that claimant's use of a firearm on an occasional basis was a more substantial factor in claimant's hearing loss and tinnitus than her work exposure. I do not find this to be a reasonable conclusion.

Claimant testified credibly that it was loud in Building 108 and that at times it was difficult to hear the person next to her. There were machines running every day, and while the overly loud machines were protected by insulated curtains, claimant was still exposed to noise levels in excess of what she likely would have been exposed to if she had not been working for the defendant employer.

The testimony of the claimant and the summary conclusions of Dr. Tyler, despite the flaws in his report, are sufficient to meet the burden that claimant's work environment was a substantial contributing factor to the development of tinnitus and hearing loss.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code

section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The parties have stipulated claimant's disability shall be evaluated industrially. Tinnitus is not a sensorineural loss of hearing in one or both ears, because tinnitus does not cause a person to be unable to hear; instead, tinnitus causes a person to perceive sounds that do not exist. Because tinnitus does not qualify under Iowa Code section 85B.4 (occupational hearing loss) nor under Iowa Code section 85.34(2)(r) (scheduled hearing loss), it is compensable under Iowa Code section 85.34(2)(u), the section for all other cases of permanent partial disability. Consequently, the undersigned must measure claimant's loss of earning capacity as a result of this impairment. Ehteshamfar v. UTA Engineered Systems, 555 N.W.2d 450 (Iowa 1996).

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City 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.

Claimant was a 63 year old person at the time of the hearing. She worked for defendant employer most of her adult life. She continues to work for defendant employer. She has no official restrictions. She testified that, at times, she has difficulty concentrating, has difficulty hearing people and emergency vehicles.

While Dr. Tyler assessed a 17.4 percent impairment rating, I find that to be too high. Claimant's loss of access to the labor market is minimal. Based on the foregoing, it is found claimant's industrial disability is 5 percent.

The hearing report indicates that the defendants asserted the defenses of lack of timely notice under Iowa Code section 85.23, untimely claim under Iowa Code section 85.26, and timeliness under 85B.8. None of these arguments were advanced in the post-hearing brief. There was no evidence put forth on these issues by defendants on these matters.

Section 85B.8 states the following:

1. 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 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 section 85B.8 (2013). Claimant has not retired, been terminated and remains in Building 108. Therefore, to the extent that Iowa Code section 85B.8 serves as a limitation to filing, it is not applicable in this case.

Defendants also advanced lack of timely notice and statute of limitations defenses in the hearing report. In order to assess both, the date of manifestation must be ascertained.

When an injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

I find that the greater weight of evidence supports a finding that the cumulative injury of tinnitus manifested in conjunction with claimant's hearing loss. The April 2013 report showed high frequency hearing loss in both ears and the March 2015 audiogram showed a worsening of hearing thresholds. The parties stipulated that if permanent partial disability benefits are awarded, the commencement date would be March 19, 2015. Based on the stipulation along with the March 19, 2015 audiogram showing a

worsening of hearing thresholds it is determined that the appropriate manifestation date is March 19, 2015. The petition was filed on March 14, 2016, within the two year statute of limitations. Iowa Code section 85.26(1).

Defendants did not present evidence at hearing that there was no timely notice. Jennifer Ryan, an employee of the defendant, did not testify that she was unaware of claimant's hearing loss claim.

As such, defendants' affirmative defense of lack of timely notice is not supported by the evidence.

Claimant also seeks the reimbursement of the IME of Dr. Tyler. Defendant objects on the grounds the triggering event for an 85.39 examination did not occur. Under Iowa Code 85.39, an employee may obtain an evaluation at the cost of the defendants if the evaluation of permanent disability made by a physician retained by the employer is too low. Dr. Tyler's examination began on January 19, 2016. The first expert report obtained by the defendants was Dr. Harms dated December 21, 2016. Therefore, claimant is not entitled to reimbursement of an 85.39 examination. Further, under Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, (Iowa 2015), evaluations that are outside the 85.39 process cannot be reimbursed under 876 IAC Rule 4.33, allowing the assessment of costs.

ORDER

THEREFORE IT IS ORDERED,

That defendants are to pay unto claimant twenty-five (25) weeks of permanent partial disability benefits at the rate of six hundred thirty-six and 14/100 dollars ($636.14) per week from March 19, 2015.

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

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

That the defendants shall pay the costs of this action excluding the bills of Dr. Tyler.

Signed and filed this 6th day of March, 2018.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Nate Willems
Attorney at Law
PO Box 637
Cedar Rapids, IA 52406-0637
Nate@rushnicholson.com

Cassandra Wolfgram
Attorney at Law
PO Box 2457
Cedar Rapids, IA 52406
cwolfgram@lynchdallas.com

JGL/kjw

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.