BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

GORDON TRENHAILE, Claimant, vs. CITY OF DES MOINES, Employer, Self-Insured, Defendant.	:	File No. 20001301.01 ARBITRATION DECISION Head Note No.: 1108.50, 1402.40, 1803, 2208, 2803, 2907

STATEMENT OF THE CASE

Gordon Trenhaile, claimant, filed a petition in arbitration seeking workers' compensation benefits from City of Des Moines, self-insured employer as defendant. Hearing was held on April 20, 2021. This case was scheduled to be an in-person hearing occurring in Des Moines. However, due to the outbreak of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via video means, using CourtCall. Accordingly, this case proceeded to a live video hearing via CourtCall with all parties and the court reporter appearing remotely.

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.

Gordon Trenhaile and William Foster were the only witnesses to testify live at trial. The evidentiary record also includes joint exhibits JE1-JE3, claimant's exhibits 1-4, and defendant's exhibits A-F[1]. Defendants timely objected to claimant's exhibit 3; the objection was overruled. The evidentiary record closed at the conclusion of the arbitration hearing.

The parties submitted post-hearing briefs on May 28, 2021, at which time the case was fully submitted to the undersigned.

ISSUES

[1] The City attached a corrected version of their exhibit B-8 to their post-hearing brief. Claimant did not file a resistance nor an objection. Thus, the corrected version is accepted.

The parties submitted the following issues for resolution:

1. Whether claimant sustained hearing loss which arose out of and in the course of his employment on October 11, 2018.
2. Whether claimant sustained permanent disability as the result of the work injury. If so, the nature and extent of entitlement.
3. Whether claimant's claim is barred by operation of Iowa Code section 85.23 for failure to provide notice.
4. Apportionment of occupational hearing loss.
5. Whether claimant is entitled to hearing aids under section 85.27.
6. Assessment of costs.

FINDINGS OF FACT

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

Claimant, Gordon Trenhaile, has filed a workers' compensation claim alleging work-related hearing loss and tinnitus. Defendant disputes that Mr. Trenhaile sustained hearing loss as the result of his employment. Defendant admits that claimant's tinnitus did arise out of and in the course of his employment.

Mr. Trenhaile was 62 years old at the time of the hearing. He graduated from East High School in the mid-1970s. His first job out of high school was working for Dahl's Foods for a couple of years. Next, he worked for about a year at a gas station. He then worked at Monfort for approximately 10 years. Mr. Trenhaile then worked for Anderson Erickson Dairy for less than a year. He left Anderson Erickson to go work for the City of Des Moines ("the City").

Mr. Trenhaile worked for the City for approximately 25 years; from March 1993 until he retired from the City on October 11, 2018. Mr. Trenhaile's retirement was the first break in his employment and exposure to loud occupational noised during the last 25 years of his employment. (Testimony)

For the first five years at the City, Mr. Trenhaile worked at the wastewater plant. He was hired as an operator/helper and then he earned his wastewater license and moved to assistant operator. His duties included taking readings on generators, pumps, and centrifuges every two hours. Mr. Trenhaile testified the noise level in the wastewater treatment plant was loud. He estimated he was exposed to the loud noise level to a total of three hours per day in the wastewater treatment plant. He wore ear protection. (Testimony)

In 1998, Mr. Trenhaile moved to street maintenance for the City where he worked on the paving crew. His duties included jackhammering, being on the paver, and raking asphalt. His duties also involved blowing debris off the streets with an air compressor. The jackhammers, air compressor, and pavers were loud. He was also exposed to loud

noises when the dump trucks slammed their gates to get the asphalt out. This was extremely loud because it was metal slamming on metal. Mr. Trenhaile did wear foam earplugs. (Testimony)

In August 2006, Mr. Trenhaile left street maintenance and moved to street cleaning with the City. Initially at street cleaning, Mr. Trenhaile's duties included hauling debris to the dump. In order to dump the sweeper, he would raise the box, accelerate forward, slam on the brakes so there would be a rebound effect to the endgate. This action caused a jarring effect, so the debris would come out. Mr. Trenhaile described the endgate slamming against the rear of the box as very loud. For approximately ten years he also had to spray out the sweepers. According to Mr. Trenhaile, the sweepers ran the entire time which caused constant engine noise and machinery running resulting in excessive noise. (Testimony)

In the street cleaning department Mr. Trenhaile's supervisor was Craig Shepherd. As part of his job, it was necessary for Mr. Trenhaile to communicate with Mr. Shepherd and other employees over the City radio. However, Mr. Trenhaile could not understand the communications via the radio. Mr. Trenhaile would tell Mr. Shepherd that he could not understand him over the radio, so they would meet in person to discuss job instructions. Mr. Trenhaile testified that he told Mr. Shepherd that he could not hear and he was confused about what he was saying. Mr. Trenhaile also testified that he told Mr. Shepherd on numerous occasions about the ringing in his ears. (Testimony)

During cross-examination, the City questioned Mr. Trenhaile about a couple of his answers to the interrogatories the City propounded. In one of the interrogatories the City asked Mr. Trenhaile to "identify each and every individual who has knowledge of the facts in this case. If the individual witnessed the accident, . . . " The answer was, "None". (Def. Ex. A, p. 5) In a different interrogatory Mr. Trenhaile was asked to "state whether you have made any statement in any form to any person regarding any event or happening related to this occurrence. . ." (Def. Ex. A, p. 6) Mr. Trenhaile did not identify any individuals. Mr. Trenhaile seemed confused by the questions and how they relate to his case when there was not a specific accident or event. He did not offer an explanation as to why Mr. Shephard was not listed in his answers to interrogates; however, Mr. Trenhaile did credibly reiterate that he had told Mr. Shepherd about his hearing loss and ringing in his ears. (Testimony)

Mr. Foster also testified at the hearing. He testified that he has worked for the City for 28 years and hearing protection has been available since he started working at the City. It is not clear to the undersigned what Mr. Foster's role is at the City or what department he worked in. Mr. Foster testified that he did not have any reason to disagree with Mr. Trenhaile's description of the noise levels with the City. According to Mr. Foster, hearing protection was provided to the City employees in the departments discussed because employees are exposed to excessive noise levels. (Testimony)

I find Mr. Trenhaile's testimony that he told Mr. Shepherd he had difficulty hearing and ringing in his ears to be credible. Mr. Trenhaile and Mr. Shepherd were unable to effectively communicate via their radios. Rather than simply giving Mr. Trenhaile instructions via the radio like he did other employees, Mr. Shepherd had to physically meet Mr. Trenhaile somewhere so they could talk face-to-face. Despite his ongoing symptoms, Mr. Trenhaile was able to perform his job until his retirement. Mr. Trenhaile worked in an environment with excessive noise which is why hearing protection was always provided to him by the City. I find that at a minimum the City had inquiry notice of a potential work injury claim for tinnitus and hearing loss.

There is no dispute that Mr. Trenhaile's tinnitus is related to his work for the City. However, the City does dispute the hearing loss claim. (Hearing Report)

Before Mr. Trenhaile began working for the City he had a hearing test on March 4, 1993. The test results indicated that his hearing was within normal limits in the low-pitched or speech frequencies, such as people's voices, buzzers, and many common sounds. However, the results indicated a pronounced hearing loss in the high-pitched sounds, such as whistles, sirens, and phones. The note states there may be many causes for this type of hearing loss, such as aging, heredity, head injury, diseases or excessive exposure to noise. It is very important that Mr. Trenhaile wear hearing protection when exposed to high noise levels. (JE1, pp. 2-4)

At the request of the defendant, Mr. Trenhaile saw Timothy Simplot, M.D., on November 16, 2020. Mr. Trenhaile reported that he worked for the City from 1993 to 2018 and faithfully wore hearing protection at all times. Although he would remove his hearing protection for a few minutes at a time to better communicate with other City workers. Over the last 20 years he gradually noticed reduced hearing. He also had tinnitus issues for over 10 years. He described the tinnitus sensation is vibration-like and is much worse when it is quiet. Dr. Simplot reviewed the audiometric testing from 1993. He noted there was a definite asymmetry to his hearing loss at that time, with left ear significantly worse. Dr. Simplot noted that in order to evaluate hearing loss problems over the course of years it was necessary to take into account the degree to which occupational and environmental noise exposure contributed to hearing loss versus the natural progression of hearing decline with time. Dr. Simplot utilized The United States Department of Labor Occupational Safety and Health Administration guidelines to calculate the loss. He determined that at multiple frequencies Mr. Trenhaile had a loss of hearing that exceeds what one would expect based on aging alone. Dr. Simplot stated, "[i]t is impossible to say with certainty what factors and to what degree each factor has played a role in this accelerated loss but it is reasonable to assume that the noise exposure in his work environment has contributed to this process." (JE3, p. 9) Dr. Simplot also noted that Mr. Trenhaile had dealt with tinnitus for approximately 10 years, left worse than right. Dr. Simplot felt that his complaints of tinnitus could at least in part be related to the noise exposure through his work over the years. (JE3, p. 6-11) Dr. Simplot's hearing loss calculation provides a 1.685185 percent Age Corrected Binaural loss. (Def. Ex. B, p. 8 (corrected)

On March 13, 2021, at the request of his attorney, Mr. Trenhaile had a telephone interview with Richard S. Tyler, Ph.D., an audio consultant in hearing loss, tinnitus, hyperacusis, and acoustics. (Cl. Ex. 2) In addition to interviewing Mr. Trenhaile over the telephone, Dr. Tyler also reviewed hearing evaluation from City of Des Moines and a letter authored by Dr. Simplot. (Cl. Ex. 2, p. 2)

Dr. Tyler noted that Mr. Trenhaile worked as a street cleaner, street maintenance, and other jobs. Mr. Trenhaile had to raise his voice in order to communicate at work which suggests the noise was intense enough to produce noise induced hearing loss and tinnitus. He was also exposed to impulsive noise, including jackhammers and air compressors, which Dr. Tyler noted is more damaging than continuous noise. Mr. Trenhaile did wear cheap earplugs for noise protection. He often worked 6 days a week and sometimes 7 days. Mr. Trenhaile reported that he worked as many as 19 hours in one day and 14 consecutive days. This did not give his ears a rest from the noise. Dr. Tyler felt it was probable the guidelines for limiting noise induced hearing loss were grossly inadequate for exposures of more than 40 hours in one week. Dr. Tyler reviewed Mr. Trenhaile's family history and felt it was unlikely he had a familial hearing loss or tinnitus. (Cl. Ex. 2)

Dr. Tyler noted that Mr. Trenhaile was exposed to high levels of damaging noise, including impulsive noise, during his work at the City. Dr. Tyler felt his audiograms were consistent with noise induced hearing loss. He also noted that because of overtime work, Mr. Trenhaile was exposed to excessive noise far greater than 40 hours per week. Dr. Tyler opined it was very unlikely that the most probable cause of his hearing loss was due to aging or was hereditary. Dr. Tyler's calculation on percentage corrected binaural loss results in an 8.212623 percent loss first, and then a .45 percent loss when considering the hearing loss at the time the City hired Mr. Trenhaile. (Cl. Ex. 2: Def. Ex. C, p. 9, D, p. 10)

Both Dr. Simplot and Dr. Tyler opine that the noise exposure at the City contributed to his hearing loss. Both Dr. Simplot and Dr. Tyler are qualified under Iowa Code section 85B.9(2), to offer such opinions. With regard to causation on the issue of hearing loss, I accept their opinions and find that claimant has proven he sustained permanent hearing loss as a result of the noise exposures he experienced during his employment at the City.

With regard to the amount of hearing loss Mr. Trenhaile sustained as the result of his employment with the City, I find the calculations of Dr. Tyler to be more persuasive than those of Dr. Simplot. Dr. Tyler's calculations include consideration for age-related change in hearing and pre-employment corrected percentage for hearing loss. (Cl. Ex. 2)

We now turn to the tinnitus claim. On March 18, 2021, Dr. Simplot authored a missive setting forth is opinions. With regard to tinnitus, Dr. Simplot stated:

> Mr. Trenhaile has had complaints of tinnitus for over 10 years in the setting of asymmetric nerve hearing loss. Tinnitus typically does not resolve, and is therefore, a permanent impairment. In regards to relationship to the work environment, as previously stated, I do feel his work environment has contributed to his accelerated hearing loss and related to that the tinnitus is at least in part a result of his alleged work injury.

(JE3, p. 12)

With regard to impairment Dr. Simplot stated:

> According to the [sic] **The AMA Guides to the Evaluation of Permanent Impairment, 5th Edition** tinnitus in the presence of measureable hearing impairment which impacts daily living also affects the rating impairment. The allowable percentage for this can be up to 5% in addition to the hearing impairment rating. Based on this degree of complaints, in my medical opinion, a 5% rating in relationship to tinnitus is appropriate. The criteria for tinnitus rating can be found on page 246 section 11.2a.

(JE3, p. 12)

Dr. Simplot felt that hearing aids for tinnitus were not specifically indicated. However, hearing loss and tinnitus often coexist and often hearing aids lessen the subjective annoyance of tinnitus. (Id.)

Dr. Tyler also provided his opinion with regard to permanent disability and tinnitus. In his report, Dr. Tyler initially rates the tinnitus via a rating system that he devised because he does not agree with the methodology utilized by the AMA Guides. Because this method is not consistent with the AMA Guides, I reject his methodology and the resulting impairment rating. Dr. Tyler appears to agree with Dr. Simplot that the maximum rating under the Guides for tinnitus is 5 percent, but then he proceeds to exceed the maximum rating. I find that Dr. Simplot's rating for tinnitus is consistent with the AMA Guides and is the most appropriate rating in this case.

We now turn to the issue of restrictions. Dr. Tyler notes that hearing loss and tinnitus can result in isolation. He recommended that Mr. Trenhaile should not work around loud noise or in environments where the noise level is unpredictable. He should not work in dangerous situations where accurate concentration is required, he should not work in situations that are stressful, and he should not work in situations where it is important to hear and understand instructions and warnings. (Cl. Ex. 2, p. 14) I find Dr. Tyler's opinion with regard to restrictions to be persuasive.

At the time of the hearing, Mr. Trenhaile was not working. He testified that he has not worked since his retirement because he has some other health issues including an issue with his liver and essential tremors. I find he demonstrated little to no

motivation to return to work since the date of injury. I find that the number of years he was expected to continue working at the time of injury were very minimal. The date of injury was the date he retired. Unfortunately, the record is not entirely clear regarding the reason for his retirement.

Considering Mr. Trenhaile's age, educational background, employment history, lack of motivation to obtain a job, permanent impairment, permanent restrictions, the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that he has sustained a 10 percent loss of future earning capacity as a result of his work injury with the City.

CONCLUSIONS OF LAW

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 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); Dunlavev 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.

When the 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).

Under Iowa Code section 85B.4(3), "occupational hearing loss" is defined as that portion of permanent sensorineural loss that exceeds an average hearing level of 25 decibels at the frequencies of 500, 1000, 2000 and 3000 Hz when "arising out of and in the course of employment caused by excessive noise exposure," but does not include loss attributable to age or any other condition or exposure that is not job related. "Excessive noise exposure" is exposure to sound capable of producing occupational hearing loss. Iowa Code section 85B.4(1)

Section 85B.5 provides a table establishing presumptive "excessive noise exposure" at various decibel levels tied to duration of exposure; for example, 8 hours per day at 90 dBA. There is no presumptive excessive noise exposure at levels below 90 dBA. The table in section 85B.5 then, is not the minimum standard defining an excessive noise level in section 85B.4(2). The table in section 85B.5 lists noise level times and intensities which, if met, will be presumptively excessive noise levels of which the employer must inform the employee. See Muscatine County v. Morrison, 409 N.W.2d 685 (Iowa 1987).

In the present case, the evidence does not establish conclusively that Mr. Trenhaile was exposed to noise levels at the City that were presumptively excessive noise exposure. Thus, a determination must be made whether the actual noise exposure experienced by Mr. Trenhaile at the City was a cause of his hearing loss. Based on the above findings of fact, I conclude claimant demonstrated by a preponderance of the evidence that he sustained permanent hearing loss as a result of the noise exposures he experienced during his employment at the City. This conclusion is based primarily on the opinions of Dr. Tyler.

With respect to the tinnitus claim, the City asserted that claimant failed to give timely notice of his tinnitus. The Iowa Workers' Compensation Act imposes time limits on injured employees both as to when they must notify their employers of injuries and as to when injury claims must be filed.

Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury. Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

Effective July 1, 2017, the Iowa Legislature emended section 85.23. Before the Legislature's 2017 amendments to Iowa Code sections 85.23 and 85.26, failure to give notice within 90 days of the occurrence of the injury or failure to commence an action within two years of the occurrence of the injury was not necessarily fatal to a claimant's claim. Instead, the analysis continued with a second step: "to examine whether the statutory period commenced on [the date the injury is deemed to have occurred] or whether it commenced upon a later dated based upon application of the discovery rule." Herrera v. IBP, Inc., 633 N.W.2d 284, 288 (Iowa 2001); Dillinger v. City of Sioux City, 368 N.W.2d 176, 180 (Iowa 1985) (noting the "discovery rule has been applied to section 85.23 [in addition to section 85.26] for the employee's benefit to satisfy the purposes of the workers' compensation law").

In 2017 the Legislature added the following sentence to section 85.23: "For the purposes of this section, 'date of the occurrence of the injury' means the date that the employee knew or should have known that the injury was work-related.". In a recent decision, the Commissioner stated, "I conclude the Legislature's amendments to Iowa Code sections 85.23 and 85.26 codified the judicial precedent establishing the

cumulative injury rule/manifestation test but did not abrogate the discovery rule." Carter v. Bridgestone Americans, Inc., File No. 1649560.01, p. 6 (App. July 8, 2021).

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Based on the above findings of fact, I conclude Mr. Trenhaile did tell Mr. Shepherd that he was having difficulty hearing and ringing in his ears. Thus, I conclude that, at a minimum, the City had inquiry notice of a potential work injury claim for tinnitus and hearing loss. Therefore, I conclude that the City did not prove that claimant failed to give timely notice. Defendant's notice defense fails.

Occupational hearing loss alone is compensated as a percentage of 175 weeks by use of a formula set forth in Iowa Code section 85B.9. Tinnitus is an unscheduled injury that is considered as a personal injury under Chapter 85 of the Iowa Code and is compensated industrially, if it causes permanent disability. Ehteshamfar v. UTA Engineered Systems Div., 555 N.W. 2d 450 (Iowa 1996). A claim for hearing loss and tinnitus from the same long-term noise exposure have the same injury date and are one loss and one disability. Meier v. John Deere Dubuque Works, File No. 5002128 (App. July 22, 2004).

Based on the above findings of fact, I conclude Mr. Trenhaile sustained permanent impairment as the result of his hearing loss and his tinnitus. With regard to the extent of permanent impairment due to hearing loss, I conclude the opinions of Dr. Tyler to be consistent with the AMA Guides and more persuasive. I also conclude that his calculations took claimant's age and prior hearing loss into consideration. Iowa Code section 85B.9A. With regard to the extent of permanent impairment due to tinnitus, I conclude the opinion of Dr. Simplot to be consistent with the AMA Guides and more persuasive.

Next, a determination must be made as to the extent of permanent partial disability benefits that claimant is entitled to receive. The 2017 legislative amendments to section 85.34 changed the analysis of industrial disability. The pertinent portion of Iowa Code section 85.34(2)(v) states:

> A determination of the reduction in the employee's earning capacity caused by the disability shall take into account the permanent partial disability of the employee and the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury. If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee

> receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity. Notwithstanding section 85.26, subsection 2, if an employee who is eligible for compensation under this paragraph returns to work with the same employer and is compensated based only upon the employee's functional impairment resulting from the injury as provided in this paragraph and is terminated from employment by that employer, the award or agreement for settlement for benefits under this chapter shall be reviewed upon commencement of reopening proceedings by the employee for a determination of any reduction in the employee's earning capacity caused by the employee's permanent partial disability.

Iowa Code section 85.34(2)(v)(2017).

In the present case, Mr. Trenhaile's date of injury, is the date he retired. Thus, he did not return to work after the injury and he shall be compensated in relation to his earning capacity. Based on the above findings of fact, I conclude he sustained a 10 percent loss of future earning capacity as a result of his work injury with the City. As such, he is entitled to 50 weeks of permanent partial disability benefits commencing on the stipulated date of October 11, 2018.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Claimant is also seeking hearing aids under Iowa Code section 85.27. Dr. Simplot indicated that hearing aids in relationship to treatment of tinnitus are not specifically indicated. Dr. Simplot did not address whether they were indicated for the hearing loss. (JE3, p. 12) In his report, Dr. Tyler stated Mr. Trenhaile requires hearing aids because of his noise induced hearing loss. (Cl. Ex. 2, p. 13) I conclude claimant has demonstrated entitlement to hearing aids due to his noise induced hearing loss. Defendant shall designate an appropriate provider to evaluate claimant for hearing aids, and defendant shall be responsible for payment of devices recommended by the provider.

Claimant is seeking an assessment of costs as set forth in claimant's exhibit 4. Costs are to be assessed at the discretion of the Iowa Workers' Compensation Commissioner by the deputy hearing the case. 876 IAC 4.33. I conclude that claimant

was generally successful in his claim and exercise my discretion to assess costs against the defendant.

First, claimant is seeking an assessment of costs for the filing fee in the amount of one hundred and no/100 dollars ($100.00). I find this is an appropriate cost under rule 4.33(7). Defendant is assessed costs in the amount of one hundred and no/100 dollars ($100.00).

Next, claimant is seeking costs in the amount of two thousand one hundred thirty-five and no/100 dollars ($2,135.00) for the interview and review of documents by Dr. Tyler. Pursuant to Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015), I conclude that only charges related to drafting of a report to avoid the necessity of trial testimony are legitimately taxed as costs. I cannot decipher, and I am not willing to speculate, on the charges specifically attributed to the expert's drafting of a report versus reviewing documents. Thus, I exercise my discretion and do not assess these costs.

Defendant is assessed costs totaling one hundred and no/100 dollars ($100.00).

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the stipulated rate of six hundred sixty and 84/100 dollars ($660.84).

Defendant shall pay fifty (50) weeks of permanent partial disability benefits commencing on the stipulated commencement date of October 11, 2018.

Defendant shall be entitled to credit for all weekly benefits paid to date.

Defendant shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Deciga Sanchez v. Tyson Fresh Meats, Inc., File No. 5052008 (App. Apr. 23, 2018) (Ruling on Defendants' Motion to Enlarge, Reconsider or Amend Appeal Decision re: Interest Rate Issue).

Defendant shall designate an appropriate provider to evaluate claimant for hearing aids, and defendant shall be responsible for payment of devices recommended by the provider.

Defendant shall reimburse claimant costs as set forth above.

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

Signed and filed this __28th__ day of September, 2021.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Christopher Spaulding (via WCES)

Luke DeSmet (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.