BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHAEL MARTIN, Claimant, vs. MIDAMERICAN ENERGY, Employer, Self-Insured, Defendant.	:	File No. 5055340 APPEAL DECISION Head Note Nos: 1803; 2208

FILED
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WORKERS' COMPENSATION

Defendant MidAmerican Energy, self-insured employer, appeals from an arbitration decision filed on August 16, 2016. Claimant Michael Martin responds to the appeal. The case was heard on July 7, 2016, and it was considered fully submitted in front of the deputy workers' compensation commissioner on July 22, 2016.

In the arbitration decision, the deputy commissioner found claimant satisfied his burden of proof that he sustained an injury which arose out of and in the course of his employment with defendant-employer on May 9, 2014, which resulted in hearing loss and tinnitus. The deputy commissioner found claimant sustained a .0022 percent age-corrected binaural hearing loss which entitles claimant to .00385 weeks of permanent partial disability (PPD) benefits. The deputy commissioner found claimant sustained ten percent permanent impairment to the body as a whole as a result of the tinnitus and awarded claimant 15 percent industrial disability for the tinnitus, which entitles claimant to 75 weeks of PPD benefits commencing on May 9, 2014. The deputy commissioner found that because defendant paid claimant one full week of PPD benefits for the hearing loss before the arbitration hearing, which is .615 weeks more than what is owed for that condition, defendant is entitled to a credit for that overpayment against the 75 weeks of PPD awarded for the tinnitus. The deputy commissioner also ordered defendant to pay claimant's costs of the arbitration proceeding.

Defendant asserts on appeal that the deputy commissioner erred in finding claimant carried his burden of proof that his employment with defendant caused his tinnitus. Defendant asserts the deputy commissioner erred in finding claimant has ten percent permanent impairment to the body as a whole as a result of the tinnitus. Defendant asserts the deputy commissioner erred in awarding claimant 15 percent industrial disability for the tinnitus. Defendant asserts that if it is found on appeal that claimant's tinnitus was caused by his employment with defendant, the impairment rating and the award of industrial disability should be reduced substantially. Defendant also

asserts the deputy commissioner erred by improperly addressing a claim for other compensable hearing loss under Iowa Code section 85.34(2)(r)(1), when no such claim was raised by claimant at hearing.

Claimant asserts on appeal that the arbitration decision should be affirmed in its entirety.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, pursuant to Iowa Code sections 86.24 and 17A.15, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed in this matter on August 16, 2016, which relate to the following issues:

I affirm the deputy commissioner's finding that claimant satisfied his burden of proof that he sustained a work-related injury on May 9, 2014, which resulted in hearing loss and tinnitus.

I affirm the deputy commissioner's finding that claimant sustained a .0022 percent age-corrected binaural hearing loss which entitles claimant to .00385 weeks of PPD benefits. I affirm the deputy commissioner's finding that because defendant paid claimant one full week of PPD benefits for the hearing loss before the arbitration hearing, which is .615 weeks more than what is owed for that condition, defendant is entitled to a credit for that overpayment against the PPD owed for the tinnitus. I also affirm the deputy commissioner's order that defendant pay claimant's costs of the arbitration proceeding.

I modify the deputy commissioner's finding that claimant sustained ten percent permanent impairment to the body as a whole as a result of the tinnitus and I modify the deputy commissioner's finding that claimant is entitled to 15 percent industrial disability for the tinnitus. I provide the following additional analysis regarding those issues:

FINDINGS OF FACT

Claimant started working for defendant in 1984. (Hearing Transcript, p. 11) Claimant's employment with defendant continued for nearly 30 years and he was 63 years old when he retired from defendant on May 9, 2014, which is the alleged injury date in this case. (Tr. p. 7) Claimant, a high school graduate, completed additional vocational education courses through a local community college and he completed an apprenticeship for the ironworkers. (Tr. pp. 7-8) Claimant has previous experience in construction, ironworking and welding. (Tr. pp. 9-10) At one time, he was also a journeyman ironworker. (Tr. p. 8) Claimant also has training in blueprint reading and cutting with a torch. (Tr. p. 8)

Claimant started his employment with defendant in the position of plant utility helper where he performed various maintenance-related and assistive tasks inside

defendant's power plant. (Tr. p. 12) Claimant wore hearing protection while in this role. (Tr. p. 14) He worked in this role for approximately three years. (Tr. p. 17) Claimant then moved to the position of fuel handling technician, which was in the coal yard, where he worked for roughly two and a half years. (Tr. pp. 18, 25)

Claimant then bid for, and obtained, the job of equipment operator (EO). (Tr. p. 26) He remained in that job for the next 25 years until his retirement from defendant. The EO job required claimant to open and close valves, monitor gauges, and assist in the maintenance and repair of the generating units, coal handling equipment, various high pressure pumps, and high pressure steam and chemical pipes inside defendant's plant. (Tr. pp. 28-29; Ex. B) As an EO, claimant typically worked long hours during rotating shifts which typically lasted well over 40 hours a week. He also routinely worked 12-hour shifts on weekends, and many times he worked 30 days straight. (Tr. pp. 40-45)

Claimant testified he worked in areas having excessive noise throughout his career with defendant. He stated that noise in the plant was three times noisier than his prior construction work. (Tr. p. 61) He stated that except for the years he was in the coal area outside the plant, he was continually performing his work inside the power plant. This plant had three generating units. (Tr. pp. 12-13) He was assigned to unit one, the oldest unit, for his entire time as an EO. (Id.) The units consist of steam operated turbines. (Id.) Claimant described the noise inside the plant from these power generating units and supportive equipment as a constant roar, similar to a jet engine, except at a lower pitch. (Tr. p. 14-17) The noise was so loud that any conversations with other workers had to be face to face after taking off the hearing protection devices. (Id.) Claimant said workers usually went to quieter areas to converse, such as the lunchroom, offices, or the locker room. (Tr. pp.14, 17, 47)

Claimant testified that the noisiest area in the plant was inside the fan room, which contains fans that force air into the boilers. (Tr. pp. 29-30) The fan room had four inches of acoustic insulation in the walls to keep the noise inside the room because the noise was horrendous in that area. (Id.) Claimant stated his job required him to work inside the fan room three times per shift, for 30 to 45 minutes at a time, to inspect the equipment, and longer if repair work was necessary. (Tr. p. 31)

Claimant stated he was also exposed to loud noise when he used a jackhammer to break up chunks of slag in the boiler and to pull chunks of slag into a loud grinder. (Tr. pp. 34-36) He said that in the past, he would use a 12-gauge shot gun and fire 150-200 rounds inside the boiler to loosen the slag on the burners. For the last 12 years, an 8-gauge industrial gun was used which was placed into the boiler with chains. (Tr. pp. 38-39) Claimant testified his noise exposure in the plant also included impulse or sudden, repetitive noise from the machinery in the plant, especially the machine that ground up the slag. (Tr. pp. 45-46) Claimant stated that even when he worked outside in the coal yard, he was exposed to loud noise from falling coal chunks, moving conveyer belts, the operation of the crusher or hammer mill, and the operation of the dozer and the vacuum machine. (Tr. pp. 19-25)

Claimant testified that the noise in the plant necessitated use of earplugs and he wore earplugs constantly while working in the plant. (Tr. p. 14) Although the use of ear protection was mandatory in the plant, he occasionally had to take out the earplugs to talk to co-workers about a problem in order to perform his job. (Tr. p. 17)

Defendant had a hearing conservation program which required workers in the plant to wear ear protection, attend training sessions on proper use of hearing protection devices, and submit to regular audiometric testing. (Tr. pp. 70-72) Audiometric testing began in 1984, but it was not conducted yearly until after 2010. (Ex. C) Claimant stated he was offered three types of hearing protection devices, any one of which was acceptable. (Tr. p. 14-15) He chose to use a foam ear plug, because a plastic pre-form plug caused pain (Tr. p. 72) and the muff did not seal up around his safety glasses. (Tr. p. 14) During the last five years claimant worked for defendant, he was required to use two items of hearing protection while working in the fan room and he used the muffs in addition to the foam plugs while in that area. (Tr. p. 30) He stated he used hearing protection while working in the coal yard. (Tr. p. 82-83)

Claimant testified he wore hearing protection when needed when he was doing construction work before working for defendant, such as when he was jackhammering, but he admitted there were some instances where he did not wear hearing protection when exposed to loud noise. (Tr. pp. 68-69) Claimant told Douglas Martin, M.D., an occupational medicine physician, that he used hearing protection about 75 percent of the time before he worked for defendant. (Ex. 2, p. 1) Claimant testified that his use of hearing protection in his past construction work would depend on the job, but he usually wore protection when it was noisy. (Tr. p. 70)

Following the commencement of his workers' compensation claim for hearing loss, claimant was evaluated at defendant's request by Dr. Martin in June 2014. Dr. Martin stated that audiometric testing done on claimant in January 2014 was invalid due to inconsistent results. Claimant testified he was distracted during this testing due to very cramped quarters, shoulder to shoulder, in the testing booth which was in Dr. Martin's office. (Tr. pp. 55-58) Claimant testified he had no problems with testing by other audiologists who provided larger and more comfortable testing booths. (Tr. pp. 53-54) Dr. Martin stated claimant's use of the medication Diclofenac, an NSAID, along with his past use of firearms, his work on his vehicles at home, and his age could contribute to hearing loss. (Ex. 2)

Claimant admitted having been a pheasant hunter and using a shotgun for many years, going about ten times a year, except for the last few years due to lack of pheasants in Iowa. (Tr. pp. 51-52, 111-112) He also admitted to target practice with his grandsons using a rifle for about four years. (Id.) He estimated that during the time he was target shooting and hunting, he would shoot a gun 150 to 200 times a year, but only ten times using a 12-gauge, and the remaining times he used a .22 rifle. (Id.) He stated he used hearing protection when hunting and during target practicing. (Tr. pp. 111-113) He also admitted to working on cars at home, both before and after his retirement, but he denied doing any body work. (Tr. pp. 99-100)

In October 2014, claimant was evaluated by Thomas Kenny IV, M.D., an ENT specialist. Another audiogram was taken by an audiologist in Dr. Kenny's clinic. Dr. Kenny stated the following in his clinical note, in pertinent part:

> The patient is a 64 year old male who presents with hearing loss. Symptoms include hearing loss and tinnitus. Symptoms are located in the left ear and the right ear. The hearing loss is described as difficulty with all sounds. Onset was gradual year(s) ago. Onset followed loud noise exposure. The symptoms occur constantly. The episodes occur daily. The patient describes this as worsening. Symptoms are exacerbated by crowded room and background noise. The patient is not currently being treated for this problem. Pertinent medical history does not include prior ear surgery. Rick factors include history of loud noise exposure. Pertinent family history does not include early onset hearing loss.

(Ex. 4, p. 1)

Dr. Kenny concluded as follows:

> Today's Impression: We retested his hearing today and had a better test than the last to [sic] tests at MidAmerican where responses were inconsistent. He has normal low and mid frequency SNHL with precipitous drops at 4k consistent with noise exposure. I have reviewed his history of noise exposure both occupational and nonoccupational. In my opinion, working around loud noises daily for this many years at Mid American has contributed to his noise induced hearing loss as there has been progression in the higher frequencies since 1984. It is difficult to say to what degree work versus non work exposures have played a role, but in my opinion, he worked and was exposed to noise MUCH more than has been exposed to recreational non work related noise since 1984. Therefore, I would say that the progreesion [sic] is MOST likely related to his noise exposure day in and day out at Mid American.

(Ex. 4, p. 2)

Using Dr. Kenny's audiogram results from October 2014 to calculate loss of hearing at the frequencies of 500, 1000, 2000, & 3000 Hz as prescribed by the Iowa Code and the age apportionment formula prescribed by this agency's rules, defendant determined claimant has a .0022 percent occupational hearing loss and then paid claimant one week of permanent disability benefits. (Exs. J & K)

Claimant testified his tinnitus, which he describes as a hissing sound, began during the last two to three years before leaving defendant. (Tr. pp. 48,110) He stated that at the time of the hearing, his hearing loss and tinnitus were about the same as they were when he retired. (Tr. p. 110) He stated his tinnitus impairs his ability to hear in noisy places and he has difficulty sleeping due to the tinnitus. (Tr. p. 49) He admitted

he did not report or seek treatment for tinnitus during his employment at defendant. He explained that his tinnitus is a hissing sound and he always thought tinnitus was a ringing sound. He stated he did not learn that a hissing sound can also be tinnitus until after he left defendant, when he talked with a former co-worker whose hissing sound was diagnosed as tinnitus. (Tr. pp. 48-50) Claimant also testified that his retirement was not caused by his hearing loss or tinnitus and he stated he was able to fully perform his EO duties at the time he retired. (Tr. p. 97) Claimant stated the only time his tinnitus bothers him is while he works on cars and engages in hobbies where he needs to read a manual because he has difficulty concentrating. (Tr. pp. 100-101)

Claimant does not wear a hearing aid. (Tr. p. 92) He does have difficulty hearing in crowds or in places with significant background noise. He testified he typically has no problem communicating in quiet settings and he had no problem communicating with the doctors in this case. (Tr. pp. 92-102) Claimant admitted his hearing loss and tinnitus have not limited his ability to work and he stated "Just learn to live with it, I guess." (Tr. p. 102)

Claimant testified he currently has no interest in seeking employment because he is retired. (Tr. pp. 98-99) He currently receives his pension and social security retirement benefits. (Tr. p. 98)

In a report dated August 19, 2015, audiologist, Richard Tyler, Ph.D., concluded from his review of a work, family and health history provided by claimant, and from his review of the prior audiograms and medical records, that claimant has sensorineural hearing loss and tinnitus which probably is the result of his noise exposure while working for defendant. Dr. Tyler concluded these conditions are unlikely to improve. (Ex. 6, p. 13) Dr. Tyler opined that aging or heredity are not likely causes of claimant's hearing loss and tinnitus. (Ex. 6, p.12) He indicated claimant had to remove his hearing protection three to four times per week for about two to three minutes at a time to perform his job, such as to converse with a co-worker, which reduces the effectiveness of hearing protection. (Ex. 6, p. 2) Using an average of testing results from the last four audiograms, Dr. Tyler opined claimant has a 25 percent bilateral hearing loss using the Iowa Code which only assesses hearing loss at four frequencies, 500, 1000, 2000 and 3000 Hz. Dr. Tyler stated claimant's primary hearing loss is in the higher frequencies of 1000, 2000, 3000 and 4000 Hz. Using the higher frequency hearing loss testing, Dr. Tyler opined claimant has a binaural hearing loss of 34 percent. (Ex. 6, p. 6)

Dr. Tyler also opined that due to loss of concentration, emotional well-being, disturbance in hearing, and problems sleeping, claimant has suffered a ten percent permanent partial impairment of the body as a whole from the tinnitus caused by his noise exposure at defendant. (Ex. 6, pp. 8-9) Dr. Tyler recommended hearing aids for claimant. Dr. Tyler recommended counseling and sound therapy for claimant's tinnitus. Dr. Tyler also recommended permanent work restrictions of no work around loud noise or where noise levels are not predictable; no work in dangerous situations where accurate concentration is required, and no stressful work. (Ex. 6, p 12)

In a report dated June 1, 2016, audiologist Bruce Plakke, Ph.D., opined from a review of claimant's audiograms and from the reports from Dr. Martin and Dr. Tyler, that claimant does not suffer from noise-induced hearing loss or tinnitus caused by his employment with defendant. (Ex. 8, p. 5) Dr. Plakke based his views on the audiogram performed in January 2014, as it was consistent with an earlier audiogram in 2013. This is the report viewed as invalid by Dr. Martin. Dr. Plakke disagreed with Dr. Tyler's hearing loss assessments at higher frequency levels which are contrary to Iowa law. Dr. Plakke also rejected the work-relatedness of any tinnitus as claimant did not report it until after he retired and he did not report tinnitus to Dr. Martin. Dr. Plakke criticized Dr. Tyler's methodology for arriving at an impairment rating for the tinnitus. (Ex. 8)

Both Dr. Tyler and Dr. Plakke issued further reports in which they were critical of each other's views. (Ex. 7 & 9)

CONCLUSIONS OF LAW

The claimant has the burden of proving by of 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.

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).

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 treating physician's opinions are not to be given more weight than a physician who examines the claimant in anticipation of litigation as a matter of law. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404, 408 (Iowa 1994); Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

The extent of claimant's entitlement to permanent disability benefits is determined by one of two methods. If it is found that the permanent physical impairment or loss of use is limited to a body member specifically listed in schedules set forth in one of the subsections of Iowa Code section 85.34(2)(a-t), the disability is considered a scheduled member disability and measured functionally. If it is found that the permanent physical impairment or loss of use is to the body as a whole, the disability is unscheduled and measured industrially under Iowa Code subsection 85.34(2)(u). Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133; 106 N.W.2d 95, 98 (1960).

Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 593; 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. However, consideration must also be given to the injured worker's medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured worker's qualifications intellectually, emotionally and physically; the worker's earnings before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted, Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616 (Iowa 1995); 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).

A showing that claimant had no loss of his job or actual earnings does not preclude a finding of industrial disability. Loss of access to the labor market is often of paramount importance in determining loss of earning capacity, although income from continued employment should not be overlooked in assessing overall disability. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Bearce v. FMC Corp., 465 N.W.2d 531 (Iowa 1991); Collier v. Sioux City Community School District, File No. 953453 (App. February 25, 1994); Michael v. Harrison County, Thirty-fourth Biennial Rep. of the Industrial Comm'r, 218, 220 (App. January 30, 1979).

Although claimant is closer to a normal retirement age than younger workers, proximity to retirement cannot be considered in assessing the extent of industrial disability. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). However, this agency does consider voluntary retirement or withdrawal from the work force unrelated to the injury. Copeland v. Boones Book and Bible Store, File No. 1059319 (App. November 6, 1997). Loss of earning capacity due to voluntary choice or lack of motivation is not compensable. Id.

Claimant is seeking permanent disability benefits for both occupational hearing loss and tinnitus.

Occupational Hearing Loss (Iowa Code Chapter 85B & Iowa Code section 85.34(2)(r)(2):

Claimants are entitled to compensation for an occupational hearing loss arising out of and in the course of employment. (Iowa Code section 85.34(2)(r)(2) & Iowa Code Section 85B.3) Occupational hearing loss is permanent sensorineural loss of hearing in one or both ears at 500, 1000, 2000 and 3000 Hz caused by prolonged exposure to excessive noise levels. Iowa Code section 85B.4(3). Excessive noise level means sound capable of producing occupational hearing loss. Iowa Code section 85B.4(2). In evaluating occupational hearing loss in Iowa only average losses in excess of 25 decibels at frequencies of 500, 1000, 2000 and 3000 Hz are considered. Iowa Code section 85B.4(3). Such loss is then apportioned pursuant to our rule 876 IAC 8.10. The

use of the retirement date for the injury date of the hearing loss was consistent with Iowa Code section 85B.8.

As stated above, I affirm the deputy commissioner's finding that claimant's occupational hearing loss is .0022 percent. Based such a finding, claimant is entitled to .385 weeks of permanent partial disability benefits under Iowa Code sections 85.34(2)(r)(2) and 85B.6, which is .0022 percent of 175 weeks, the maximum allowable weeks of disability for occupational hearing loss in those Code sections. Because defendant paid claimant one full week of PPD benefits for his occupational hearing loss, claimant has been paid in excess of his entitlement to permanent disability benefits for his occupational hearing loss.

I affirm the finding of the deputy commissioner that the most convincing opinions are those of Dr. Kenny, the ENT specialist, given his greater training and experience in his specialty which includes hearing and tinnitus problems. I find the history reported to Dr. Kenny consistent with claimant's un-rebutted testimony concerning exposure to excessive noise while working at defendant. I also find the audiogram conducted in Dr. Kenny's office to be the most credible as it measures claimant's hearing a few months after claimant retired from defendant, and it was done in a spacious, comfortable environment. The prior inconsistent testing was not credible due to the environment of the testing booths. Therefore, I affirm the deputy commissioner's finding that claimant has shown an occupational hearing loss arising out of and in the course of his employment at defendant with a date of injury of May 9, 2014, his retirement date.

I also find claimant's occupational hearing loss is .0022 percent, which was correctly calculated by defendants under Iowa Code chapter 85B and our rule 876 IAC 8.10 for apportionment due to age. This is based on the testing and views by Dr. Kenny and his staff. The methods used by Dr. Tyler and Dr. Plakke, the averaging of inconsistent testing results and the use of the suspect January 2014 results, were improper. The use of hearing loss at frequencies above 3000 Hz is not allowed to calculate occupational hearing loss in Iowa.

Permanent Impairment Rating and Industrial Disability for Claimant's Tinnitus:

I affirm the deputy commissioner's finding that claimant was credible concerning the onset of his tinnitus before he retired from defendant and the reason for his delay in reporting it. Dr. Plakke's opinion that claimant's tinnitus is not related to his employment because claimant did not report it before he retired is not convincing because Dr. Plakke apparently was not aware of the reason why claimant failed to report the tinnitus before his retirement. As a medical specialist, the causation views of Dr. Kenny are more persuasive. Based on Drs. Kenny's opinion, I affirm the deputy commissioner's finding that as a result of exposure to excessive noise over many years while working for defendant, claimant sustained a cumulative tinnitus injury arising out of and in the course of his employment, with a manifestation date of May 9, 2014, the date of his retirement.

The only permanent physical impairment rating in evidence in this matter for claimant's tinnitus is the ten percent impairment rating of the body as a whole which came from claimant's expert, Richard Tyler, Ph.D., who rated claimant's impairment for the tinnitus using his own personal methodology and scale for permanent impairment resulting from tinnitus. (Exhibit 6) Dr. Tyler's tinnitus evaluation methods are suspect for reasons noted by Dr. Plakke, defendant's expert, in his report and in his rebuttal reports. (Exs. 8, 9 and 10) Specifically, Dr. Plakke points out that Dr. Tyler asked claimant to rate his own tinnitus-related issues, but Dr. Tyler then re-rated those issues himself, providing no explanation for the re-rating. The re-rating is Dr. Tyler's scale - one completely created by Dr. Tyler, with no reference to the Iowa Code or the AMA Guides Fifth Edition. As such, this subjective rating system is not credible and it should not be the basis for rating permanent impairment for tinnitus. The evaluation of permanent impairment for tinnitus should not be based on one individual's unscientific personal methodology.

In a recent appeal decision addressing a tinnitus claim, it was noted that "Dr. Tyler appears to have crafted his own impairment rating system which diverges significantly from the AMA Guides." Ament v. Quaker Oats Co., File Nos. 5044299, 5044298 (App. Dec Mar. 17, 2016) After reviewing the personal methodology for assessment of tinnitus disability created by Dr. Tyler, it was noted in Ament that the whole person impairment rating assigned by Dr. Tyler in the Ament case was 850 percent higher than the maximum amount of a whole person rating assignable under the AMA Guides Fifth Edition. (Id.) As stated in the Ament decision: "Although our administrative rule 876 IAC 2.4 recognizes that the AMA Guides Fifth Edition, is a useful tool in evaluating disability and is only a guide and its use is not binding on this agency (Bisenius v. Mercy Medical Center, File No. 5036055 (Appeal April 1, 2013)), the methods used by Dr. Tyler do not appear to be have been validated, adopted by any medical or occupational health boards, or subjected to peer review." (Id.) It was noted, in part, in the Ament decision that the opinions of another expert in that case were more persuasive because they deferred to the AMA Guides Fifth Edition, which lent credence to the findings made by that expert. (Id.) However, the Ament decision was careful to note that the review by the other expert was not solely based on the AMA Guides. (Id.) It was found in Ament that Dr. Tyler's opinion was not the most persuasive in that case, so instead of following Dr. Tyler's impairment rating of 17 percent of the body as a whole for tinnitus, it was found in Ament that the claimant in that case sustained one percent whole-body impairment due to tinnitus (Id.) That impairment rating was reasonable and conceivable pursuant to the AMA Guides.

The maximum impairment rating assignable for tinnitus pursuant to the AMA Guides, Fifth Edition, is five percent. (AMA Guides, Fifth Edition, p. 246) Dr. Tyler's impairment rating in this case is not credible, not only because he uses his unscientific method to come up with it, but his impairment rating is 100 percent higher than the maximum impairment rating assignable under the AMA Guides, Fifth Edition.

Claimant described his tinnitus as a hissing sound, which began about two or three years before he retired. (Tr. pp. 48, 110) He testified at the hearing, which took

place on July 7, 2016, that both his hearing loss and his tinnitus are about the same as what they were when he retired on May 9, 2014. (Tr. p. 110) He stated his tinnitus impairs his ability to hear in noisy places and he has some difficulty sleeping due to the tinnitus. Claimant does not wear a hearing aid. (Tr. p. 92) He stated he typically has no problems communicating in quiet settings, and he had no problem communicating with the doctors in this case. He testified his work life and recreational activities have been largely unaffected. (Tr. pp. 100-101) Based on all of the evidence in the record in this case, I find claimant has sustained two percent impairment of the body as a whole as a result of his tinnitus.

With regard to industrial disability resulting from the tinnitus, I find it has minimal effect on claimant's earning capacity. Claimant testified he can carry on most conversations normally. (Tr. p. 50) He testified his work life and recreational activities have been largely unaffected. (Tr. pp. 100-101) Claimant testified he had no trouble working while at defendant before he retired for reasons which were unrelated to his hearing loss and tinnitus. (Tr. pp. 94-97) Considering all of the relevant factors of industrial disability, I find claimant has sustained five percent industrial disability, which entitles claimant to 25 weeks of PPD benefits commencing on May 9, 2014.

Other Compensable Hearing Loss Under Iowa Code section 85.34(2)(r)(1):

The deputy commissioner noted in the arbitration decision that there may also be a possible claim in this matter for hearing loss due to noise exposure pursuant to Iowa Code section 85.34(r)(1). However, claimant did not make a claim under this particular statutory section, nor did claimant argue for such compensation at hearing or in his post-hearing brief. No award was made by the deputy commissioner under section 85.34(r)(1). Therefore, the section of the arbitration decision that references a possible claim under section 85.34(r)(1) is stricken from the arbitration decision and is not included in this appeal decision.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on August 16, 2016, is MODIFIED as follows:

Defendant shall pay claimant twenty-five (25) weeks of permanent partial disability benefits at the stipulated weekly rate of one thousand eighty-two and 80/100 dollars ($1,082.80) commencing May 9, 2014. Credit shall be given to defendant for the point six one five (.615) weeks of benefits paid in excess of claimant's entitlement to occupational hearing loss benefits.

Defendant shall be given credit for all benefits previously paid.

Defendant shall pay accrued weekly benefits in a lump sum together with interest pursuant to Iowa Code section 85.30.

Pursuant to rule 876 IAC 4.33, defendant shall pay claimant's costs of the arbitration proceeding, and the parties shall split the costs of the appeal, including the cost of the hearing transcript.

Pursuant to rule 876 IAC 3.1(2), defendant shall file subsequent reports of injury as required by this agency.

Signed and filed on this 16th day of February, 2018.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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