BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHAEL SLOSS, Claimant, vs. TYSON FOODS, INC., Employer, Self-Insured, Defendant.	FILED APR 05 2017 WORKERS COMPENSATION	File No. 5053811 ARBITRATION DECISION Head Note Nos.: 1108.50, 1402.20 2208, 2502

STATEMENT OF THE CASE

Michael Sloss, claimant, filed a petition in arbitration seeking workers' compensation benefits from Tyson Foods, Inc., self-insured employer, as defendant. Hearing was held on January 27, 2017, in Des Moines, Iowa.

Michael Sloss testified live at trial. The evidentiary record also includes Claimant's Exhibits 1-16 and Defendant's Exhibits A-H. 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 requested the opportunity for post-hearing briefs, which were submitted on February 13, 2017.

ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant sustained an injury which arose out of and in the course of employment on April 14, 2015?

2. Whether the alleged injury was the cause of permanent disability? If so, the nature and extent of disability claimant is entitled to receive.

3. If claimant did sustain permanent disability, what is the appropriate commencement date for permanent partial disability benefits?

4. Whether claimant is entitled to past medical benefits?

5. Whether claimant is entitled to reimbursement for an independent medical examination (IME) pursuant to Iowa Code section 85.39?

6. Assessment of costs.

FINDINGS OF FACT

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

Claimant, Michael Sloss (hereinafter "Sloss") has alleged that he developed hearing loss and tinnitus which arose out of and in the course of his employment with Tyson Foods, Inc. Defendant denies these allegations.

At the time of the arbitration hearing claimant was in his mid-forties. Following graduation from high school he entered the Navy. While in the Navy he worked as a mess specialist for two years then he received an other than honorable discharge. While in the Navy he did not shoot firearms and was not exposed to any loud noises. Following his discharge, Sloss described himself as going on a four month Grateful Dead tour. (Testimony)

Prior to Sloss's employment at Tyson he worked building refrigerators, screen printing, performing maintenance work, building steel buildings, performing man-lift inspections, landscaping, labor, and production work for a variety of employers in Nebraska, Tennessee, Iowa, and Alabama. During some of these employments Sloss was exposed to loud noises; he testified that he wore ear plugs or other hearing protection. He worked at PMI from 1998 to 2001. At this job he used a hammer drill to put in bolts; this was a loud task. Sloss was also exposed to large noises when he worked at Greene Landscaping; he worked there part-time for four or five years. Sloss used a push mower, weed eater, or weed vacuum at the same time that the owner utilized a riding mower. Sloss worked at Solid Dal Tires for approximately three to four years. During this time he was exposed to loud noises; the tire molds were loud. Sloss was also exposed to loud noises from the CNC machines during his approximately 15 months working at Central Extrusion Die Company. None of Sloss's pre-Tyson employers conducted hearing tests. (Testimony, Exhibit 10, pages 117-18)

Sloss began working at Tyson on November 2, 2009. He underwent a pre-employment hearing test at Tyson on October 15, 2009. The test showed normal hearing in the speech frequencies in both ears, but mild to moderate hearing difficulty in the left and right ears in high frequencies. The testing included a questionnaire for Sloss to complete with hearing and medical information as well as non-occupational information; Sloss failed to disclose his military service and his metal and woodworking hobbies. Sloss's hobbies included utilizing a plasma cutter, miter saw, and various other power tools; he did not wear hearing protection while performing his hobbies until approximately 2011. Sloss indicated that he only performed this hobby for an hour or two each week. (Ex. 1; Ex. H) Defendant argues that this demonstrates Sloss had hearing loss prior to his employment with Tyson. Sloss testified that he did not believe

that he had hearing loss and he did not have difficulty hearing people or understanding conversations during this time period.

Sloss's first job at Tyson was building maintenance; he did this from November 2, 2009 through March 26, 2010. He testified that he was exposed to loud noises but he used ear plugs during this job. Subsequently, Sloss worked cutting hogs in half; this required the use of a split saw. He also wore hearing protection while performing this job. (Testimony)

In January of 2011, he began working as an Animal Well Being Officer/Livestock Handler; he worked in this position for five years. Sloss testified that at the start of this job he was not having any difficulty with his hearing. Sloss was responsible for the unloading of trucks at they came into Tyson's yard. Sloss usually worked 12 hour days, 5 days per week. He would be in the yard from the time the first truck arrived until the last truck left. (Testimony; Ex, 1, p. 4; Ex. C, p. 14; Ex. H)

In this position, hearing protection was not required in the yard; he typically did not wear hearing protection in this job. The trucks were metal trailers, which had three levels, and carried approximately 180 hogs per truck. The job site was noisy when hogs were being taken off the truck and hogs squealed when they had problems exiting a ramp or gate. His job duties included shooting hogs with a retractable bolt gun. Sloss testified that on a good day he would only have to shoot one hog but some days he would have to shoot up to 20 to 30 hogs. In order to shoot the hogs, he had to position the gun between the eyes of the hog. The gun was usually 12 to 14 inches away from Sloss's head. Sloss testified that the noise from the gun was very loud and was made worse by the fact that they were in a metal truck. Sometimes he was able to hold the gun at arm's length, but other times he had to be closer to the gun when he shot. Sloss described the sound of the gun as "painful." (Testimony; Ex. H, p. 56)

Sloss noticed having difficulties with his hearing approximately one year after starting the officer position. A May 17, 2012 note states that he had difficulty hearing on both the right and left sides. (Ex. 1, p. 7) He noticed he had to have the volume on his television louder and often had to ask people to repeat themselves. Sloss testified that he generally had to make eye contact with the person talking to him in order to hear them. (Ex. H, Deposition p. 71; testimony)

Sloss also noticed that his tinnitus became worse over time. He initially experienced ringing in his ears and later a whistling sound in his left ear. For example, he would try to turn off his alarm even when it was not ringing. (Ex. H, Depo. p. 71) His hearing loss is worse on the right and the ringing has become worse over time. He has felt depressed because the ringing will not stop. The ringing also interferes with his ability to concentrate. As part of his employment with Tyson, claimant underwent subsequent annual hearing tests. Following Sloss's April 14, 2015 test he was informed of a standard threshold shift in his right ear. (Ex. 1, p. 15; Ex, 4, p. 33) According to Sloss, this is when he was first told of the problems with his hearing. Sloss was retested on May 12, 2015; the results did not show a standard threshold shift in the right ear. (Ex. 1, pp. 15-18; Testimony)

Sloss was moved from the animal protection position into the laundry area. The laundry position was only a 40 hour per week job and paid $12.00 per hour as opposed to the $14.00 per hour he was previously earning. Sloss did not wear hearing protection in this job either. According to Sloss, the laundry job was loud, but he was generally able to leave the room when necessary.

Sloss eventually moved to a job in maintenance where he did wear hearing protection. He was fired for gross misconduct shortly after starting his maintenance job. He was awarded unemployment benefits. (Testimony; Ex. G, p. 30; Ex. 15)

Throughout the course of this workers' compensation claim, Sloss has been evaluated by Douglas R. Hoisington, D.O. and Richard S. Tyler, Ph.D.

Dr. Hoisington, ENT Clinic of Iowa, issued his opinions in this matter. Dr. Hoisington personally met with Sloss in order to be able to observe his behavior and personally interview and examine Sloss. Dr. Hoisington felt it was important to meet with Sloss face-to-face and to have an up-to-date audiometric exam. Dr. Hoisington's assessment included sensorineural hearing loss and subjective tinnitus. Dr. Hoisington opined that Sloss does have hearing loss. However, there was little to no change from 2009 to 2015. Dr. Hoisington felt that there was very little change in Sloss's hearing form the time he stated working at Tyson until the time the employment was terminated. Dr. Hoisington opined that his symptoms were "not related to his work at Tyson but are related to his hearing loss probably from previous employers." (Ex. A, p. 4) He also noted that Sloss's tinnitus did not significantly affect his activities of daily living and therefore a disability rating under the AMA Guides was not appropriate. He also noted that Sloss had zero percent impairment for his hearing loss. (Ex. A)

On July 23, 2016, Dr. Tyler authored a letter to claimant's counsel. Dr. Tyler ultimately concludes that the sensorineural hearing loss and tinnitus experienced by Sloss was probably a result of his work at Tyson. He further opined that Sloss was unlikely to improve. He assigned 23 percent whole body impairment. (Ex. 7, pp. 49-62) I do not find the opinions of Dr. Tyler to be persuasive. Dr. Tyler did not conduct any type of audiometric testing on Sloss. Rather, in reaching his conclusions he relied on a telephone interview and a questionnaire completed by Sloss. The record shows that Sloss neglected to include his wood and metal working hobbies and his prior occupational noise exposures on his questionnaire. Also, Dr. Tyler indicated that the tinnitus began in the 1970's; this is simply not supported by the facts in this case. Thus, Dr. Tyler's opinions are based on an inaccurate and incomplete history and cannot be relied upon. Furthermore, the opinions of Dr. Tyler are not supported by the AMA Guides or the American Academy of Otolaryngology Head and Neck Surgery. (Ex. A, p. 20) Instead, Dr. Tyler seems to have devised his own rating system; I do not find this rating method to be persuasive. Thus, I do not find the opinions of Dr. Tyler to be carry much weight.

Claimant is critical of the opinions of Dr. Hoisington. According to Sloss, Dr. Hoisington was not the one who performed the hearing test and Dr. Hoisington only spent approximately ten minutes with Sloss. Sloss also points out what he believes to

be errors in Dr. Hoisington's report. For example, Dr. Hoisington indicates that the tinnitus did not interfere with his activities of daily living but Sloss says Dr. Hoisington never even asked him about this. (Testimony) Claimant is correct that Dr. Hoisington did not conduct the testing; this was performed by audiologist Erica Wenner. I note Ms. Wenner was unable to state with any certainty on whether Sloss incurred any hearing loss due to his work at Tyson.

While neither expert's opinion is flawless, I find the opinions of Dr. Hoisington to be more persuasive than those of Dr. Tyler. Dr. Hoisington pointed out the importance of a provider's ability to assess hearing loss and tinnitus in a face-to-face evaluation rather than over the telephone. Additionally, the patient questionnaire that Dr. Tyler relied on is not accurate. For example, Sloss failed to disclose his metal and wood working hobbies and his pre-Tyson occupational noise exposures. Additionally, Dr. Tyler somewhat arbitrarily decided that the 500 Hz reading from the October 15, 2009 testing was in error and instead changed the number from 30dB to 10dB. (Ex. 7, p. 54) Interestingly, Dr. Tyler has created his own system for rating impairment for tinnitus. (Ex. 7, p. 55) I do not find that method to be as persuasive. Furthermore, Dr. Tyler did not conduct any updated testing on Sloss and has never even seen him face-to-face. Dr. Hoisington also noted that the Dr. Tyler's assessment of impairment or tinnitus is simply not supported by the AMA Guides Fifth or Sixth editions or the American Academy of Otolaryngology Head and Neck Surgery. (Ex. A, p. 10) Dr. Hoisington indicated that it is not appropriate to use unsubstantiated scoring and testing methods. I find the opinions of Dr. Hoisington to carry much greater weight than those of Dr. Tyler.

Ultimately, it is the claimant who has the burden of proof to show by a preponderance of the evidence that he sustained an injury that arose out of and in the course of his employment. In the present case, I find claimant failed to carry his burden of proof to show that his hearing loss and/or tinnitus are related to his work at Tyson. Therefore, I find claimant failed to prove that he sustained an injury that arose out of and in the course of his employment.

Claimant is seeking reimbursement for the IME of Dr. Tyler pursuant to Iowa Code section 85.39. Defendant obtained an evaluation of disability from Dr. Hoisington on April 13, 2016. Claimant felt the rating was too low and obtained an IME with Dr. Tyler in July of 2016. I find the requirements of Iowa Code section 85.39 were met. I find claimant is entitled to reimbursement from defendant for the IME of Dr. Tyler in the amount of $1,237.50.

Costs are to be assessed at the discretion of the deputy commissioner hearing the case. Because claimant was not successful in his claim, I exercise my discretion and do not assess costs against the defendant. Each party shall bear their own costs.

Because claimant failed to prove that he sustained an injury that arose out of and in the course of his employment all other issues are rendered moot.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6)(e).

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).

Based on the above findings of fact, I concluded that the opinions of Dr. Hoisington were more persuasive than those of Dr. Tyler. I concluded that Dr. Hoisington's opinions were more persuasive because he conducted an in-person

examination and interview of Sloss and his office conducted updated testing. Additionally, Dr. Hoisington's deferred to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition and I conclude that this lends credibility to his findings and conclusions. See also Ament v. Quaker Oats Co., File Nos. 5044299 and 5044298 (App. March 17, 2016) (Cortese noted the methods utilized by Dr. Tyler "do not appear to have been validated, adopted by medical or occupational health boards, or subjected to peer review."). Thus, I concluded claimant failed to carry his burden of proof to show by a preponderance of the evidence that he sustained an injury which arose out of and in the course of his employment with Tyson.

Claimant is seeking reimbursement pursuant to Iowa Code section 85.39 for the IME he had with Dr. Tyler. Section 85.39 states in pertinent part:

> After an injury, the employee, if requested by the employer, shall submit for examination at some reasonable time and place and as often as reasonably requested, to a physician or physicians authorized to practice under the laws of this state or another state, without cost to the employee; but if the employee requests, the employee, at the employee's own cost, is entitled to have a physician or physicians of the employee's own selection present to participate in the examination.
>
> If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination.

Section 85.39 entitles an injured worker to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. Proof of employer's liability for the alleged injury, is not a requisite for entitlement for an 85.39 IME. Dodd v. Fleetguard, 759 N.W.2d 133 (Iowa App. 2008).

Furthermore, the Court of Appeals in Dodd v. Fleetguard, 759 N.W.2d 133 (Iowa App. 2008) held that an employer could be held liable for an examination when the injury did not arise out of or in the course of employment. Dodd at 140. The court cited the following language from IBP, Inc. v. Harker, 633 N.W.2d 322, 327 (Iowa 2001).

> The quid pro quo for these employer rights is the right of the employee to have a physician of his choosing present at any IME conducted at the employer's request and to have an IME conducted by a doctor of his own choice if the physician retained by the employer has given a disability rating unacceptable to the employee. In an apparent attempt to equalize

> the generally unequal financial positions of the parties, the legislature has said that the employer must pay for the employee's IME under the latter circumstances.

Harker at 327 (internal citations omitted).

In City of Davenport v. Newcomb, 820 N.W.2d 882 (Iowa App. 2012), the employer appealed the denial of an examination under Iowa Code section 85.39. This agency had ruled that because the employer denied liability for the claim the employer was not entitled to a section 85.39 IME. The Newcomb court reversed on this issue stating:

> Our supreme court has held that *reimbursement* for a medical examination under Iowa Code section 85.39 cannot be ordered until liability for an injury has been established. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 194 (Iowa 1980). In addition, the court has held an employer's "right to control treatment . . . is lost if the employer disputes liability." Winnebago Indus., Inc. v. Haverly, 727 N.W.2d 567, 575 (Iowa 2006). Although an admission of liability affects the employer's right to control treatment and an employee's ability to receive compensation for an employee-requested IME, we do not find a denial of liability wholly precludes an IME under Iowa Code section 85.39. In fact, if the purpose of the IME is to assist in determining causation, an admission of liability should not be a prerequisite to such an examination. *See* Daugherty v. Scandia Coal Co., 206 Iowa 120, 124, 219 N.W. 65, 67 (1928) (recognizing the purpose of what is now Iowa Code section 85.39 is "doubtless for the purpose of enabling the employer to ascertain the extent and character of the injury").

Newcomb, pp. 18, 19 (emphases in original).

In Newcomb, the court was concerned that the employer would not be able to obtain medical evidence to determine causation. The court recognized that one of the purposes of an IME is to determine causation. "In fact, if the purpose of the IME is to assist in determining causation, an admission of liability should not be a prerequisite to such an examination." Newcomb, p. 19. In Dodd, the court was concerned about the claimant being able to obtain medical evidence. In the present case, Tyson did direct the claimant to Dr. Hoisington. Claimant is entitled to a section 85.39 IME, provided the employer has retained a physician who has made an evaluation of permanent disability that is believed to be too low by the claimant. In this case I found that the prerequisites of section 85.39 were met; claimant is entitled to a section 85.39 IME. Thus, defendant is ordered to reimburse claimant the cost of the IME.

Based on the above findings of fact, I exercised discretion and did not assess costs against the defendants in this matter. 876 IAC 4.33. Each party shall bear their own costs.

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall reimburse claimant for Dr. Tyler's independent medical evaluation fee in the amount of one thousand two hundred thirty-seven and 50/100 dollars ($1,237.50).

Claimant shall take nothing further from these proceedings.

Each party shall bear their own costs.

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 5th day of April, 2017.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Martin Ozga
Attorney at Law
1441 – 29th St., Ste. 111
West Des Moines, IA 50266-1309
mozga@nbolawfirm.com

Stephanie Marett
Attorney at Law
700 Walnut St., Ste. 1600
Des Moines, IA 50309-3800
slm@nyemaster.com

EQP/srs

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.