BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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| MICHAEL HECHT,<br><br>Claimant,<br><br>vs.<br><br>HIGHLINE CONSTRUCTION, INC.,<br><br>Employer,<br><br>and<br><br>WESTERN NATIONAL MUTUAL INSURANCE COMPANY,<br><br>Insurance Carrier,<br>Defendants. | FILED<br>JAN 25 2018<br>WORKERS' COMPENSATION<br><br>File No. 5052175<br><br>APPEAL<br><br>DECISION<br><br>Head Note No: 1803 |

Defendants Highline Construction, Inc., employer, and its insurer, Western National Mutual Insurance Company, appeal from an arbitration decision filed on July 6, 2016. Claimant Michael Hecht responds to the appeal. The case was heard on May 12, 2016, and it was considered fully submitted in front of the deputy workers' compensation commissioner on May 25, 2016.

In the arbitration decision, the deputy commissioner who presided at the arbitration hearing found claimant satisfied his burden of proof that he sustained hearing loss and tinnitus as a result of the stipulated injury which arose out of and in the course of claimant's employment with defendant-employer on August 13, 2014. The deputy commissioner found claimant is entitled to 30 percent industrial disability as a result of the work injury, which entitles claimant to 150 weeks of permanent partial disability (PPD) benefits commencing on October 25, 2014. The deputy commissioner found claimant's average weekly wage for the work injury is $1,331.43, which results in a weekly benefit rate for claimant for the injury, classification married with two exemptions, of $820.19. The deputy commissioner found claimant is entitled to $12,302.85 in penalty benefits for an unreasonable delay in the payment of PPD benefits. The deputy commissioner found claimant is entitled to reimbursement from defendants in the amount of $2,350.00 for the full cost of the independent medical evaluation (IME) performed by Sunil Bansal, M.D., on March 28, 2016. The deputy commissioner also ordered defendants to pay claimant's other costs of the arbitration proceeding.

Defendants filed their notice of appeal in this matter on July 26, 2016. On August 16, 2016, citing commissioner's rule 876-4.28(17A, 86), defendants filed an application to submit additional evidence, asserting there existed newly discovered material evidence, pertaining to claimant's employment history, which was relevant to the disputed issues in this case, which could not with reasonable diligence, have been discovered and produced by defendants at the arbitration hearing. Claimant resisted defendants' application to submit additional evidence citing the language of rule 876-4.28(17A, 86) which states, in pertinent part: "A party must file a request for taking additional evidence within 20 days after the notice of appeal was filed." Claimant asserted that because defendants' application was not filed until the twenty-first day following the filing of defendants' notice of appeal, defendants missed a mandatory filing deadline and the application to submit additional evidence must automatically be denied.

Defendants responded to claimant's resistance by acknowledging that the application to submit additional evidence was, in fact, filed on the twenty-first day following the filing of the notice of appeal. Defendants asserted that pursuant to Iowa rule of appellate procedure 6.1003(1), the 20-day deadline for filing the application to submit additional evidence is not a jurisdictional deadline and, pursuant to rule of appellate procedure 6.1003(2), non-jurisdictional deadlines may be extended by the appellate court in question on its own motion, or on motion of a litigant for good cause. Rule 6.1003(2) defines good cause to include the illness of counsel and the unavailability of counsel due to unusual and compelling circumstances. Defendants' attorney stated in the response to the resistance that she had been out of the office for a significant amount of time due to the extended illness and then death of her mother. Defendants' attorney also stated in the response that subsequent to her mother's illness and death, another family member was diagnosed with brain cancer. Defendants' attorney also stated that during part of this same time, her secretary changed, which resulted in a change in how calendar items were diaried and docketed. Defendants' attorney asserted that all of these factors caused her to inadvertently miss the 20-day deadline for filing the application to submit additional evidence. Defendants' attorney further asserted that claimant would not be prejudiced by extending the deadline for filing the application to submit additional evidence by one day because all of the information sought to be submitted was previously known by claimant or was available to claimant.

The application to submit additional evidence was considered by another deputy workers' compensation commissioner who granted the application on September 7, 2016. The deputy commissioner found that given the record in this matter, defendants showed good cause for requesting the extension of time to file the application under rule 876-4.28(17A, 86). In further support of the decision to grant the extension, the deputy commissioner also cited commissioner's rule 876-2.1(86), which states: "For good cause the workers' compensation commissioner or the commissioner's designee may

modify the time to comply with any rule." The material which defendants sought to introduce pursuant to the application to submit additional evidence was accepted into the record in this matter as defendants' Exhibits O, P and Q. On September 22, 2016, claimant timely filed his notice of appeal of the deputy commissioner's September 7, 2016, ruling which granted claimant's application to submit additional evidence.

In their appeal, defendants assert the information contained in Exhibits O, P and Q establishes that claimant is not credible and it establishes that the finding that claimant satisfied his burden of proof that he sustained hearing loss and tinnitus as a result of the work injury should be reversed. Defendants assert the information contained in Exhibits O, P and Q establishes that the award of 30 percent industrial disability should be reversed. Defendants assert the information contained in Exhibits O, P and Q establishes that the award of penalty benefits should also be reversed. Defendants assert the deputy commissioner erred in finding claimant's average weekly wage for the work injury is $1,331.43, and in finding claimant's weekly benefit rate for the injury is $820.19. Defendants assert the deputy commissioner erred in finding Dr. Bansal's IME charge of $2,350.00 is reasonable and defendants assert the deputy commissioner erred in failing to limit reimbursement to claimant for the IME charge to $725.00 or less.

Claimant asserts in his appeal that the deputy commissioner who sustained defendants' application to submit additional evidence erred in that ruling, and claimant asserts that ruling should be reversed. Claimant asserts 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 July 6, 2016, which relate to the following issues:

I affirm the deputy commissioner's finding that claimant's average weekly wage for the work injury is $1,331.43, and I affirm the finding that claimant's weekly benefit rate for the injury is $820.19.

I affirm the deputy commissioner's finding that Dr. Bansal's IME charge of $2,350.00 is reasonable and I affirm the finding that claimant is entitled to receive reimbursement from defendants for the full IME charge.

For the reasons discussed above at page 2, I also affirm the second deputy commissioner's ruling dated September 7, 2016, which sustained defendants' application to submit additional evidence and I affirm the deputy commissioner's admission of Exhibits O, P and Q into evidence in this matter.

I find the information contained in Exhibits O, P and Q establishes that claimant is not credible and I reverse the finding that claimant satisfied his burden of proof that he sustained hearing loss and tinnitus as a result of the work injury.

Based on the information contained in Exhibits O, P and Q, I reverse the award of 30 percent industrial disability.

Based on the information contained in Exhibits O, P and Q, I reverse the award of penalty benefits.

I provide the following analysis regarding my decision in this matter:

## FINDINGS OF FACT

At the time of the arbitration hearing, claimant was 28 years old. He is a high school graduate. (Hearing Transcript, page 6) He lives in rural Traer, Iowa, roughly 20 miles straight south of Waterloo, Iowa. (Exhibit K, deposition p. 5) Claimant's wife is a nurse at Allen Hospital, working in the pediatrics unit. (Ex. K, depo pp. 6-7) Claimant has a number of skills. His work history includes working on a family farm, working as a mechanic, and construction work. (Ex. 2, p. 7) While working for a former employer, claimant received schooling and on-the-job training in troubleshooting hydraulic and electrical systems in construction equipment and how to deal with customers. (Ex. K, depo pp. 10-12) Claimant has welding skills and a forklift certification. (Ex. K, depo p. 14) He has worked as a dozer operator (Ex. K, depo p. 23) and has done electrical work. (Ex. K, depo pp. 13-14) Claimant also holds a Class A commercial driver's license. (Ex. K, depo pp. 15-16) At the time of the arbitration hearing, claimant also was working as a representative for CS Outdoors leasing company. In this position he provides advice on how to hunt particular properties. (Ex. K, depo pp. 102-104)

Claimant began working for defendant-employer on April 30, 2013, as a mechanic. In that position, he worked in the main shop and he also traveled throughout Iowa and into neighboring states to repair the company's trucks and equipment while they worked at various sites putting up power lines. (Tr. p. 37) Claimant was required to have a CDL to drive the repair truck. While working for defendant-employer, claimant earned $24.00 per hour and worked roughly 40 to 50 hours per week. (Ex. A, p. 1) Defendant-employer also paid claimant "per diem" benefits of $50.00 per day. (Ex. K, depo pp. 50-51) Claimant stated he traveled every day for work. (Ex. K, p. 51)

On August 13, 2014, the date of the work injury, claimant was called out into the field for a service call. (Tr. p. 14) When he arrived to repair the disabled vehicle, he was told a boom on a bucket truck was stuck in position and would not move. (Tr. p. 14) To repair the problem, claimant crawled underneath the truck to adjust the hydraulic system. (Id.) While under the truck, the airbrake system went "over relief" which means

it exploded, next to claimant's head, about six inches from his right ear. (Ex. 2, p. 8; Tr. pp. 15-16)

Claimant testified he was disoriented and he layed on the ground under the truck for a while before coming out. (Tr. p. 16). After getting out from under the truck, Claimant was nauseated and vomited two or three times. (Id.) He initially refused medical attention, but his supervisor insisted he be seen. (Tr. pp. 17-18)

At the initial evaluation at Allen Hospital ER in Waterloo on the day of the injury, it was noted claimant's "TM intact with rupture of small blood vessels and small purulent effusion on top half of TM. No blood present in canal/behind TM. No fluid present in canal." (Ex. AA, p. 3) Claimant was released to return to work as of August 15, 2014. (Ex. AA, p. 6) Allen Occupational Health referred claimant to a local ENT specialist, Joseph Hart, M.D., who evaluated claimant on August 25, 2014. (Ex. BB) On exam, Dr. Hart noted claimant's external auditory canals were normal and his tympanic membranes were intact with no fluid. (Ex. BB, p. 1) Dr. Hart performed an audiogram and noted "mild SNHL AD in the lower and mid frequencies AD." (Ex. BB, p. 4) Dr. Hart's audiogram was improved over the first audiogram taken on August 14, 2014, at Allen Occupational Health (Ex. AA, p. 8; Ex. M, p. 1) Dr. Hart recommended claimant be seen by Marlan R. Hansen, M.D., in the Department of Otolaryngology – Head and Neck Surgery at the University of Iowa Hospitals and Clinics (UIHC). (Ex. BB, p. 5)

Dr. Hansen evaluated claimant on September 9, 2014, and noted claimant's ear structure was "normal" with "TM intact." (Ex. CC, p. 4) An MRI was recommended to rule out retrocochlear lesion. (Ex. CC, p.5) An audiogram was performed (Ex. CC, p. 6) Although claimant's ear structure showed no abnormalities, his audiogram inexplicably worsened over his two prior audiograms. (Ex. M)

The MRI was done on October 9, 2014, and it did not show any abnormalities to explain claimant's reported hearing loss. (Ex. AA, p. 17) On that same day, Claimant was also seen at Allen Occupational Health by Kenneth McMains, M.D. (Ex. AA, pp. 15-16) An audiogram was done at that visit and it was significantly worse than the audiogram done at UIHC just one month prior. (Ex. AA, p. 16; Ex. M, p. 1) At that time, Dr. McMains recommended one more evaluation at UIHC. (Ex. AA, p. 15) However, claimant testified he went home and talked with his wife and decided to forgo further follow-up at UIHC and accept that he had suffered a "total hearing loss" and he asked Dr. McMains to give him an impairment rating. (Ex. K, depo pp. 79-80)

As requested by claimant, Dr. McMains provided claimant with an impairment rating of ten percent whole person due to hearing loss in claimant's right ear and tinnitus. (Ex. AA, pp. 18-19) This occurred just two months after the work injury without defendants' knowledge and without claimant returning to Dr. Hansen as recommended (Id.)

Upon receipt of the records from UIHC and the report from Dr. McMains, the claims adjustor assigned to this claim sought to schedule the follow-up at UIHC as recommended to clarify whether there was further care available to claimant or whether he was actually at maximum medical improvement (MMI). (Ex. 1, p. 1) As noted above, the three audiograms taken during the two-month period after the injury were not consistent and the last audiogram actually worsened. (Ex. M, p. 1) Claimant was advised on November 25, 2014, what clarification defendants were seeking and why. (Ex. 1, p. 1) Claimant's attorney then sent a letter dated December 2, 2014, to the adjustor and demanded payment of Dr. McMains' impairment rating. (Ex. 1, p. 2) The adjustor sent claimant's attorney a letter dated December 3, 2014, advising there was a bona fide dispute as to whether claimant was indeed at MMI given his refusal to follow up with UIHC as recommended and the adjustor notified claimant's attorney that the evaluation was scheduled for January 6, 2015. (Ex. 1, p. 3) However, as a compromise of the dispute, the adjustor stated defendants would pay accrued PPD benefits up to the time of the scheduled appointment. (Id.)

Claimant's attorney then advised the adjustor claimant had started a new job and "does not get any time off for one year from that start date." (Ex. 1, p. 5) Claimant's testimony at his deposition revealed this statement to be false. (Ex. K, depo pp. 86-88)

Defendants made it clear they were suspending claimant's benefits pursuant to Iowa Code section 85.39 for failure to attend the medical appointment at UIHC. (Ex. L, p. 1) When claimant continued to refuse to attend the evaluation with Dr. Hansen, defendants also asserted the right to the examination under Iowa Rule of Civil Procedure 1.515. (Ex. L, p. 2) After that, claimant finally agreed to attend the exam.

Dr. Hansen re-evaluated claimant on September 22, 2015. During that evaluation, additional testing was done including a distortion product optoacoustic emissions (DPOAEs) test and auditory brainstem responses testing. In his report issued on October 10, 2015, following the evaluation, Dr. Hansen stated the following, in pertinent part, in response to questions posed by defendants' attorney:

> 1. **Mr. Hecht's medical records indicate a diagnosis of a possible ear drum perforation. As you review the records do you see any verifiable evidence of a perforated ear drum? At the time Mr. Hecht was seen at UIHC on 9/9/14 or on the current visit was/is there any evidence of a perforated ear drum?**
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> At the prior visit on 9/9/14 and at the more recent visit on 9/22/15, there was no evidence of a perforated eardrum with the use of the otomicroscope. Pneumatic otomicroscopy confirms the lack of a perforation.

2. **Mr. Hecht's hearing test of 10/9/14 (Allen Occupational Health) appears significantly worse than the audiograms from 8/25/14 (Dr. Joseph Hart, Cedar Valley ENT) and 9/9/14 (UIHC). Is this change in testing consistent with the mechanism of injury described by Mr. Hecht? Is the 10/9/14 (Allen Occupational Health) testing consistent with UIHC findings and testing from 9/9/14? Would you expect a significant decrease in Mr. Hecht's hearing, causally related to the 8/13/2014 visit after Mr. Hecht was seen on 9/9/14 at UIHC?**

The audiogram performed on 10/9/14 is not consistent with prior or current audiological evaluations. Mr. Hecht's audiograms have been inconsistent across time and, at the University, within the tests. This inconsistency raises the possibility of a functional component to the hearing loss. I would not expect a significant decrease in Mr. Hecht's hearing after he was seen at UIHC on 9/9/14.

3. **Based on your most recent exam and testing, what is Mr. Hecht's current level of hearing? Are there any inconsistencies with regard to his audiogram or other testing conducted at this visit at UIHC?**

Based on all of the audiological tests performed on 9/22/15 at UIHC, Mr. Hecht has normal hearing in both ears. His subjective audiogram demonstrated a persistent hearing loss in the right ear. However, there were again inconsistencies in these subjective responses. Therefore, auditory brainstem response thresholds and otoacoustic emissions were tested. These objective measures reveal normal hearing in the right ear.

4. **Are the audiograms from 8/25/14 (Dr. Joseph Hart, Cedar Valley ENT) and 10/9/14 (Allen Occupational Health) consistent with his most recent hearing exam at UIHC? If not, can you explain why not? What are the differences? Is this consistent with what you would expect based on the work incident of 8/13/2014 reported by Mr. Hecht?**

As noted above, there have been significant inconsistencies in the various hearing tests. I do not know for sure the reason for the inconsistent responses but they raise the possibility of a functional hearing loss. For this reason, auditory brainstem responses and otoacoustic emissions were performed. These reveal normal hearing. Based on this Mr. Hecht did not suffer any permanent hearing loss as a result of the work incident on 8/13/2014.

5. **Can you state, within a reasonable degree of medical certainty whether or not Mr. Hecht has tinnitus? If so, can you state within a reasonable degree of medical certainty whether same is related to his work related incident of 8/13/14.**

Tinnitus is a subjective symptom that cannot be confirmed or measured. Mr. Hecht related that he has tinnitus in his right ear that began following the work related incident on 8/13/14. Based on the difficulties in assessing hearing thresholds, it is difficult to state within a reasonable degree of certainty as to whether or not Mr. Hecht suffers from tinnitus or the extent to which it is disruptive of his activities of daily living.

6. **In your expert medical opinion is Mr. Hecht now at maximum medical improvement as it relates to the work incident of 8/13/14? If not, do you have recommendations for any further testing or treatment? If so, please detail.**

He is at maximal medical improvement. There is no need for further testing or treatment.

7. **If Mr. Hecht is at maximum medical improvement, please advise what, if any impairment rating you would assign Mr. Hecht for injuries sustained as a result of the work incident of 8/13/14. In rendering an impairment rating, please use the Fifth Edition of the AMA Guides.**

The AMA Guides to Impairment, 5th Edition allow for up to 5% additional hearing impairment provided there is measurable hearing loss and the tinnitus impacts the ability to perform activities of daily living. Mr. Hecht has no hearing loss and reports that his tinnitus is fairly bothersome but that it does not significantly impact his abilities to perform activities of daily living. Based on these factors the patient does not have any applicable, permanent impairment due to tinnitus according to the AMA Guides to Impairment, 5th Edition.

8. **Does claimant require any permanent restrictions due to his alleged tinnitus condition?**

Mr. Hecht does not require any permanent restrictions due to tinnitis. He should continue to use noise protection when he is in a noisy environment.

9. **Regardless of causation, would you recommend any treatment for Claimant's hearing loss or tinnitus? If so, what?**

Mr. Hecht has normal hearing. There are no (sic) currently no treatments that reliably relieve tinnitus. If tinnitus causes or exacerbates any depression or anxiety, he should seek medical attention for those problems.

(Ex. CC, pp. 16-18)

In a supplemental report issued on March 23, 2016, Dr. Hansen stated the following, in pertinent part, in response to questions posed by defendants' attorney:

1. **You indicate in your report of 10/10/15 that Mr. Hecht's "audiogram performed on 10/9/14 is not consistent with prior or current audiological evaluations." Furthermore the audiologist notes from 9/22/15 indicate the "the pure tone results are not consistent with the SRT results. Also unmasked bone thresholds are not consistent with the better air thresholds." Can you please state, in layman's terms how these tests are done and the significance of the same?**

An audiogram is a battery of tests that seek to determine the patient's hearing thresholds or sensitivity to certain tones as well as to words spoken by human voice, among other factors. The patient's response is subjective, meaning they report what they hear. Accurate tests require that the patient provides accurate responses. Given that the audiogram is a battery of tests, there should be internal consistency among the results. For example, the thresholds or results for pure tones are generally in a similar range as for spoken words (or the SRT). In this case, there was a lack of consistency among the various tests. This raises the suspicion that the patient was not, for whatever reason, providing accurate responses. Often this is seen when patients exaggerate the extent of their hearing loss.

2. **The audiologist's report from 9/22/15 also indicates distortion product otoacoustic emissions (DPOAEs) were tested suggesting hearing loss in the right ear was within normal limits or at worst a mild hearing loss. Would you please indicate in layman's terms, what this test is and how it is performed and the significance of the findings?**

Distortion product otoacoustic emissions (DPOAEs) is an objective test of ear function. It does not depend on the patient's subjective response. In brief, two probes are placed in the ear canal. One probe provides sound to the ear. When a normal inner ear is activated by sounds, it produces or emits a different sound in response. A second, very sensitive probe records these responses that the ear generates or emits. When DPOAEs are present it indicates that the ear is functioning normally. These tests are used to evaluate hearing in patients unable to provide subjective responses (e.g. newborn babies) and in patients where there is concern that the subjective response is not accurate. In this case, the presence of DPOAE indicates normal or very near normal ear function. Thus, the inconsistent responses on the subjective audiogram are deemed inaccurate and likely to reflect exaggeration by the patient in terms of the extent of hearing loss. Essentially, the DPOAEs provide an objective measure that the hearing is normal or, at worst, very near normal.

3. **You indicated an auditory brainstem response threshold and otoacoustic emissions were tested on Mr. Hecht. Please describe what these tests are and how they are performed. What is the accuracy rate of these tests? Do they require any effort on the part of the patient to complete the same.**

Auditory brainstem responses represent a different form of objective measures of hearing function and this test is often used to further verify the results of the otoacoustic emissions testing described above. Auditory brainstem responses measure the responses of the auditory nerve and the areas of the brainstem to sound. The test is performed by putting sounds into the patient's ear and then recording nerve and brain electrical responses to the sounds using electrodes placed on the scalp. A computer averages the responses over several hundred to thousands of brief sounds. The results provide a highly accurate measure of the response of the ear, hearing nerve, and brainstem to sounds. Like otoacoustic emissions, the auditory brainstem response does not require any effort on the part of the patient. Both are objective measures of hearing and are highly accurate. In the case of Mr. Hecht, the auditory brainstem response and otoacoustic emissions results indicate that Mr. Hecht has normal hearing in both ears. Based on these tests and the inconsistent, suspicious responses on the subjective audiogram, I conclude that, to a high degree of medical certainty, Mr. Hecht did not suffer permanent hearing loss to his right ear.

(Ex. CC, pp. 19-20)

At the request of his attorney, claimant was evaluated by Richard Tyler, Ph.D., an audiologist, on September 22, 2015, the same day he was re-evaluated by Dr. Hansen. (Ex. DD) While Dr. Tyler is employed by UIHC, he did not perform his evaluation of claimant as part of his employment with UIHC. (Ex. H, pp. 11-12) Dr. Tyler concluded claimant has four percent bilateral hearing impairment and whole body impairment of 22 percent for tinnitus. (Ex. DD, p. 8) Dr. Tyler based his calculation for hearing loss on Iowa Code section 85B.9A. (Ex. DD, p. 4) Dr. Tyler recommended permanent restrictions of no work around loud noise, no work around unpredictable noise, no work requiring accurate concentration and no work in stressful situations. (Ex. DD, pp. 8-9)

In a report issued on October 27, 2015, Dr. McMains changed his opinion regarding permanency. Dr. McMains stated after reviewing the medical records from Dr. Hansen and Dr. Tyler, he no longer believes claimant has permanent hearing loss and permanent impairment resulting from the work injury. (Ex. AA, pp. 21-22) Dr. McMains based his new opinion on the extensive auditory brain stem response and otoacoustic emission testing performed at UIHC. (Ex. AA, p. 21) In his report, Dr. McMains stated the following in pertinent part:

> As noted above, my opinion has changed based on the extensive work up Mr. Hecht underwent at the University of Iowa, where they discussed the inconsistencies of his hearing test dating from the date of injury through the last test performed in our clinic, on 10/09/14, showing inconsistencies of testing. In Mr. Hecht's case, the hearing loss worsened over time, which was an unexpected finding.
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> Prior to my change in opinion, I reviewed the consult from Dr. Tyler, PHD, where it appears that Dr. Tyler has some interesting theories about hearing loss, that do not appear to conform to standard peer reviewed literature. The over-riding persuasive report was from the University of Iowa Hospitals and Clinics, Department of Otolaryngology, where there was clear, concise, reporting of the events that occurred, including referencing of testing showing inconsistencies in Mr. Hecht's hearing tests and then checking brain stem auditory responses, taking any guess work out of the equation, showing no evidence of hearing loss, thus a 0% whole person impairment from the *AMA Guides, Fifth Edition,* and equally no additional impairment based on tinnitus, since the hearing was normal.

(Ex. AA, pp. 21-22)

Claimant underwent another exam at the request of his attorney with Sunil Bansal, M.D., on March 28, 2016. (Ex. EE) Dr. Bansal is an occupational medicine physician. He also based his calculation on Iowa Code section 85B.9A for occupational

hearing loss. (Ex. EE, p. 7) However, Dr. Bansal used a different audiogram than the one used by Dr. Tyler and Dr. Bansal concluded claimant sustained 17 percent binaural hearing loss and he summarily agreed with Dr. Tyler's 22 percent whole person impairment rating for tinnitus. (Ex. EE, p. 7)

Neither Dr. Tyler nor Dr. Bansal conducted their own audiograms or addressed the inconsistencies in claimant's objective testing at UIHC. (Ex. DD; Ex. EE)

Claimant quit his job with defendant-employer on December 14, 2014, two months after the work incident. (Tr. p. 8) He admitted he did not leave that employment because of the injury. (Id.) Following his departure from his employment with defendant-employer, claimant took a similar position as a field mechanic with Telcom Construction (Telcom) starting in December 2014. (Ex. C; Ex. P, p. 2)

During his testimony at the arbitration hearing on May 12, 2016, claimant stated for the first time that he quit his employment with Telcom about a month before the hearing. (Tr. p. 25) Claimant stated he left Telcom because he ran a car off the road while out on a repair job. (Id.) Claimant indicated he felt it was not safe for him to drive a commercial vehicle anymore because of his claimed hearing loss. (Id.) Claimant specifically testified he resigned his employment with Telcom and was not terminated. (Tr. p. 49)

Claimant testified that after leaving Telcom, he took a job with Pyramid Network Services as a construction manager. (Tr. p. 26)

The evidence contained in Exhibits O, P and Q, obtained after the arbitration hearing, documents a different history. Employment records from Telcom document claimant resigned due to "unacceptable performance." (Ex. O, p. 1) Handwritten notes on the "Employment Separation Notice" state:

> DOT Performed on a out of service trailer, letting trailers out of the yard without repairs being made for out of service. Doing personal things on the computer during his work day. Sending out work that he is able to do in our shop. Not showing up to shop in Marion until 8:00-8:30 AM each day.

(Id.)

Records from Iowa Workforce Development for claimant's unemployment claim against Telcom document yet another version of the story: (Ex. P) Those records document claimant told the unemployment judge the following:

> I quit. I was asked several times to conduct illegal DOT inspections. Ken Peterson asked me to do that. He was my supervisor. I told him that I was uncomfortable. The first two times, I did the inspections. In Minnesota, you have to be certified to conduct an inspection if the vehicle is going to Minnesota. I was not certified by the State to do it. I brought it up to the Safety Director Allan. He told me that he would handle it. I was asked again to do the inspection. I was not going to risk myself getting in trouble. I told Ken that I was quitting. He did not ask for a reason. I verbally resigned. He accepted it with no questions asked.

(Ex. P, p. 2)

On March 21, 2016, claimant took a job with Baker Concrete and Excavating (Baker) as a mechanic. Claimant failed to mention his employment with Baker during his testimony at the arbitration hearing. Claimant quit the job with Baker three days after being hired. (Ex. P, pp. 6-7) Based on his comments to the judge in his unemployment case, it appears claimant left the job at Baker because they had only one service truck, he wanted to be out in the field more, and he wanted to be able to use his own tools on the job. (Ex. P, p. 7) There is no indication in the record that when it came to his brief employment with Baker, claimant had any concerns about whether it was unsafe for him to drive a commercial vehicle because of his alleged hearing loss.

## CONCLUSIONS OF LAW

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).

On the other hand, industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man." Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity. However, consideration must also be given to the injured workers' 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).

This case boils down to the credibility of claimant and the medical evidence. I find the opinions of Dr. Hansen and Dr. McMains, that claimant has no permanent hearing loss from the work incident, to be more convincing than the opinions of Dr. Tyler and Dr. Bansal who gave opinions to the contrary. Dr. Hansen's testing was objective, it was thorough, it appears to be reliable, and the results of that testing are entirely consistent, whereas the results of the audiograms relied on by Dr. Tyler and Dr. Bansal are subjective and are not consistent. Furthermore, Dr. Hansen has given a clear and

logical explanation as to why the inconsistent audiograms, by themselves, are additional evidence that claimant does not actually have a permanent hearing loss. Dr. McMains' opinions issued on October 27, 2015, are based on Dr. Hansen's findings and are consistent with the more convincing evidence in this case. Based on the opinions of Dr. Hansen and Dr. McMains, I find claimant has failed to carry his burden of proof on the issue of whether he has permanent hearing loss as a result of the work incident.

The question of whether claimant has established he has tinnitus as a result of the work injury depends entirely on whether claimant is found to be credible because there is no objective testing which can establish whether tinnitus is present. I find claimant is not credible because the objective testing conducted by Dr. Hansen establishes that claimant's claim of permanent hearing loss is not believable. Furthermore, the evidence contained in Exhibits O, P and Q clearly establishes claimant intentionally gave inaccurate testimony regarding where he worked following the August 13, 2014, work incident. I therefore find claimant has failed to carry his burden of proof that he suffers from tinnitus as a result of the work incident.

I find claimant is entitled to receive nothing in the way of permanency benefits for either alleged hearing loss or alleged tinnitus. The award of 30 percent industrial disability is hereby reversed.

Because I find claimant is entitled to receive nothing in the way of permanency benefits, I also find there is no basis for an award of penalty benefits. Furthermore, I find the question of whether claimant was entitled to receive PPD benefits was fairly debatable throughout the entire pendency of this matter and I find defendants conducted a reasonable and timely investigation into the issue of whether clamant was entitled to receive PPD benefits. I find claimant's refusal to submit to the second evaluation by Dr. Hansen as scheduled on January 6, 2015, was unreasonable and defendants therefore had a good faith basis for continuing to refuse to pay PPD benefits until claimant was re-evaluated by Dr. Hansen. Upon receipt of Dr. Hansen's report for the September 22, 2015, re-evaluation, defendants had a good faith basis for continuing to refuse to pay PPD benefits. The award of penalty benefits is hereby reversed.

I also reverse the deputy commissioner's order that defendants pay claimant's costs of the arbitration proceeding.

## ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on July 6, 2016, is MODIFIED as follows:

Claimant shall receive nothing in the way of permanency benefits.

Claimant shall receive nothing in the way of penalty benefits.

Defendants shall receive a credit for all weekly benefits paid.

Defendants shall reimburse claimant the sum of two thousand three hundred fifty and 00/100 dollars ($2,350.00) for the cost of Dr. Bansal's IME.

Pursuant to rule 876 IAC 4.33, the parties shall bear their own costs of the arbitration proceeding, and claimant shall pay the costs of the appeal, including the cost of the hearing transcript.

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

Signed and filed this 25th day of January, 2018.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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