BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

STANLEY L. KEIPER,

Claimant,

vs.

QUAKER OATS COMPANY,

Employer,

and

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

Insurance Carrier,
Defendants.

File No. 5060842

ARBITRATION

DECISION

Head Note Nos.: 1100, 1402, 1403, 1700, 1803, 2209, 2400, 2502, 2800

STATEMENT OF THE CASE

Stanley Keiper, claimant, filed a petition in arbitration seeking workers' compensation benefits from defendants Quaker Oats Company, employer, and Indemnity Insurance Company of North America, insurer. The hearing occurred before the undersigned on January 15, 2019, in Cedar Rapids, Iowa.

The parties filed a hearing report at the commencement of the arbitration hearing. In 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 evidentiary record submitted and accepted at hearing consists of: Joint Exhibits 1 through 5, Claimant's Exhibits 1 through 3, and Defendants' Exhibits A through B. Claimant testified on his own behalf. No other witnesses testified. The evidentiary record closed on January 15, 2019, and the parties' submitted briefs on February 15, 2019.

However, on February 19, 2019, I issued an order to show cause directing the parties to submit additional evidence regarding claimant's rate using a July 1, 2016 date of injury instead of the June 28, 2017 injury date alleged. The parties notified me via e-mail correspondence on February 27, 2019 that they agreed to a weekly rate of $810.74 based on claimant's average weekly wage of $1,449.00 (single with one exemption). As such, the case was considered fully submitted as of February 27, 2019.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury (tinnitus) that arose out of and in the course of his employment.

2. If claimant sustained an injury that arose out of and in the course of his employment, whether June 28, 2017 is the correct date of injury.

3. Whether the claim is barred by Iowa Code section 85.23 and/or 85.26.

4. Whether claimant sustained any industrial disability and the extent of any such disability.

5. Whether June 29, 2017 is the appropriate commencement date for permanent partial disability benefits.

6. Whether claimant is entitled to medical care in the form of hearing aids.

7. Whether defendants are entitled to an apportionment credit.

8. Whether claimant is entitled to reimbursement for his independent medical examination under Iowa Code section 85.39.

9. Costs

Claimant also sought penalty benefits, but his penalty claim is bifurcated per my January 9, 2019 Order.

FINDINGS OF FACT

Claimant, who was 63 years old at the time of the hearing, has worked for defendant-employer since June 25, 1973. (Hearing Transcript, pp. 8-9) He alleges his 45-year career with defendant-employer led to the development of tinnitus. (Claimant was not making a claim for hearing loss at the January 15, 2019 hearing. (See Tr., pp. 3, 28)).

Claimant's long career with defendant-employer began shortly after he graduated high school. (Tr., p. 9) But for a few stints in other departments, claimant has worked primarily in the packaging department. (Tr., p. 10) In packaging, claimant was exposed to sounds such as "metal scraping against metal," "clangs and clicks and screeches," vacuuming, suctioning, and motors. (See Tr., pp. 12-17)

Claimant testified he was not exposed to significant noise outside his job with defendant-employer. (Tr., pp. 22-24)

Hearing protection was not mandatory when claimant was first hired in the 1970s. (Tr., p. 11) This changed in the 1980s when defendant-employer began requiring foam ear plugs. (Tr., p. 11) Eventually the foam plugs were exchanged for ear muffs and then molded hearing protection in the 2000s. (Tr., p. 12) Claimant testified it was sometimes necessary to remove the hearing protection to hear co-workers. (Tr., pp. 17, 19)

Claimant provided several noise studies that were performed at defendant-employer's plant from 1997 through 2017. (See Claimant's Exhibit 2) These studies revealed several areas where there was the potential for noise exposure that exceeded ACGIH-recommended guidelines and OSHA-mandated limits, along with several specific measurements from individual employees that exceeded these levels. (Cl. Ex. 2, pp. 11, 37, 53, 67, 80, 118, 137, 152)

Claimant testified he first began noticing a hissing in his ear in July of 2016 and reported it during his annual hearing check in 2017. (Tr., pp. 19-20, 43) This testimony is consistent with claimant's audiograms. In the form filled out by claimant for his audiogram in June of 2016, claimant denied ringing or roaring in his hears. (JE 2, p. 53) However, the form accompanying claimant's audiogram from June of 2017 lists ringing and roaring as a symptom. (JE 2, p. 55)

It does not appear from the record that claimant ever sought or received treatment for the hissing, ringing, or roaring symptoms. Instead, the only medical evidence in the record is in the form of independent medical examination (IME) reports.

Claimant was evaluated by Richard Tyler, Ph.D., via telephone for purposes of an IME on August 13, 2018. (JE 3, p. 12) In his report, dated September 11, 2018, Dr. Tyler opined the tinnitus reported by claimant "was most probably a result of his work" with defendant-employer. (JE 3, p. 21) In coming to this conclusion, Dr. Tyler noted claimant was exposed to high levels of damaging noise at work, often times for more than 40 hours a week and occasionally without hearing protection. (JE 3, p. 20)

Dr. Tyler opined claimant sustained a 21 percent whole-body impairment due to his tinnitus, though Dr. Tyler did not rely on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (JE 3, p. 19) Instead, Dr. Tyler used a formula he developed for assigning impairment. (See JE 3, pp. 16-19) Dr. Tyler also recommended restrictions of avoiding jobs around loud noise, work where noise levels are unpredictable, and situations that are stressful and/or accurate concentration is required. (JE 3, p. 31)

Timothy Simplot, M.D., evaluated claimant for an IME at defendants' request in late-November or early-December of 2018. (JE 4) Dr. Simplot opined that claimant's tinnitus "could at least in part be related to his work environment over the years." (JE 4, p. 3) He then assigned a five percent whole body impairment for claimant's tinnitus pursuant to the Guides but recommended no work restrictions other than noise protection. (JE 4, p. 4)

With this history and these opinions in mind, the threshold issue is whether claimant's tinnitus arose out of and in the course of his employment with defendant-employer.

Both experts agree that claimant's tinnitus is at least in part related to his job with defendant-employer. Dr. Tyler opined claimant's tinnitus was "most probably" caused by his work with defendant-employer. Defendants offered no contrary opinions. Further, claimant was not engaged in any activities outside of his job with defendant-employer that would have contributed to his tinnitus. For these reasons, I find by a preponderance of the evidence that claimant's tinnitus was caused by and occurred during his employment activities.

The next issue to address is the correct date of injury. Claimant testified he began to notice hissing in his ears in July of 2016. (Tr., pp. 19, 43) I therefore find claimant was aware he suffered from a condition in July of 2016. Claimant also testified he never thought the hissing was from anything other than noise at defendant-employer's plant. (Tr. p. 29) I therefore find claimant was aware this condition was caused by his employment with defendant-employer in July of 2016 as well.

Claimant did not offer a specific day in July of 2016 when he noticed the hissing condition, nor are there any medical records from July of 2016 to rely upon. I will therefore use July 1, 2016 as the date upon which claimant was aware both that he suffered from a hissing condition in his ears and that the condition was caused by his employment.

Even with a manifestation date of July 1, 2016, however, I must also decide when claimant knew the hissing condition was serious enough to have an adverse impact on his employment or employability. Claimant testified the hissing began intermittently and worsened over time until it became constant. (Tr., p. 20) As the hissing worsened, claimant continued to work his regular job without medical treatment, work restrictions, or absences.

Claimant's 2017 audiogram was performed on June 27, 2017, and it appears this was the first time claimant reported ringing and roaring in his ears during one of his audiograms. (JE 3, pp. 54-55) Claimant consulted legal counsel after this exam. (Tr., p. 43) Claimant testified the hissing during this timeframe was "unbearable." (Tr., p. 20) I therefore find June 27, 2017 was the earliest point at which claimant knew that the hissing, roaring, or ringing in his ears was serious enough to have a permanent adverse impact on his employment. In other words, June 27, 2017 was the earliest date on which claimant knew or should have known of the nature, seriousness, and probable compensable nature of his symptoms.

Claimant's petition was filed on January 16, 2018. I find claimant's petition was filed within two years of June 27, 2017.

Claimant offered no specific testimony as to whom he gave notice of his hissing, roaring, or ringing symptoms. However, as mentioned, claimant indicated on his "Hearing Test Case History" form from his June 27, 2017 audiogram that he had ringing and roaring in his ears. (JE 2, p. 55) This audiogram appears to have been performed by a third-party company, but the annual audiograms were commissioned by defendant-employer. (See JE 2)

While defendants argue in their brief that claimant did not give timely notice of his tinnitus, defendants do not offer any rebuttal of the fact that claimant reported the ringing and roaring of his ears during his employer-commissioned audiogram on June 27, 2017. In fact, they offered no evidence at all to support their assertion that claimant did not give timely notice, such as testimony from a supervisor or human resources representative. I therefore find insufficient evidence to support defendants' assertion that claimant did not give timely notice.

Instead, because it was an employer-commissioned audiogram, I find defendant-employer was aware on or about June 27, 2017 that claimant suffered from a potentially work-related condition. As discussed, this is the same day on which claimant was aware or should have been aware of the nature, seriousness, and probable compensable character of his tinnitus.

The next issue to be addressed is the extent of claimant's permanent disability, if any, due to his work-related tinnitus. As discussed above, Dr. Tyler assigned a 21 percent whole body impairment, while Dr. Simplot assigned a 5 percent whole body impairment. In coming to his rating, Dr. Tyler did not use the Guides but instead used his own formula. This agency has adopted the Guides as a preferred tool for determining permanent partial disabilities. See 876 IAC 2.4 (2016) Further, while I appreciate Dr. Tyler's expertise, I do not know whether Dr. Tyler's calculation has been peer reviewed, tested, or adopted by anyone other than himself. For these reason, I find Dr. Simplot's impairment rating more convincing.

Claimant testified the tinnitus has negatively impacted his situational awareness and concentration at work. (Tr., pp. 20-21) However, he also testified he has never followed any work restrictions, missed work, or received a write-up due to the tinnitus. (Tr., pp. 32-33) Further, claimant was making more money at the time of the hearing than he was in 2017, and he has no plans to leave his employment with defendant-employer. (Tr. pp. 41-42) Because claimant has continuously performed his regular job and has no plans to stop, I do not find Dr. Tyler's restrictions convincing.

While claimant's tinnitus is most certainly an annoyance, his work and personal life have been minimally affected by the condition. I therefore find claimant sustained a five percent industrial disability due to the tinnitus.

Having found claimant sustained an industrial disability, the next issue to address is the date on which claimant's weekly benefits should commence. Claimant has missed no work due to his tinnitus. Using an injury date of July 1, 2016, I therefore find claimant returned to work on July 2, 2016.

In addition to weekly benefits, claimant is also seeking medical care in the form of hearing aids. Dr. Tyler's report recommends hearing aids, but this recommendation is due to claimant's noise-induced hearing loss—not his tinnitus. (JE 3, p. 21) Dr. Simplot only recommends hearing protection. (JE 4, p. 4) While claimant testified both Dr. Tyler and Dr. Simplot recommended hearing aids to block his tinnitus (see Tr., pp. 36-38), this testimony is not supported by the record. I therefore find insufficient evidence to support claimant's claim for hearing aids.

Defendants are also seeking an apportionment credit against claimant's industrial disability award in this case for a work-related neck injury sustained by claimant in the early 2000s. There is no dispute claimant's neck injury resulted in surgery and a 25 percent whole body impairment rating. (JE 5) Claimant also testified he received a settlement for his work-related neck injury, but he could not remember the specifics of it. (Tr., p. 33) Defendants offered no additional evidence regarding the settlement, such as the type of settlement or the amount of money claimant was paid. I therefore find there is insufficient evidence to determine the extent of percentage of disability for which claimant was previously compensated, if any.

Lastly, claimant seeks reimbursement for his IME. Claimant was evaluated by Dr. Tyler months before Dr. Simplot's evaluation of permanent disability. I therefore find there had been no evaluation of permanent disability when claimant was evaluated for his IME with Dr. Tyler.

CONCLUSIONS OF LAW

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

As discussed above, I relied on the opinions of Dr. Tyler and Dr. Simplot to find that claimant's tinnitus was causally related to claimant's work with defendant-employer. Defendants offered no contrary opinions. I therefore conclude claimant's tinnitus arose out of and in the course of his employment with defendant-employer.

Because I concluded claimant sustained work-related tinnitus, the next issue to address whether June 28, 2017 is the correct injury date. This issue turns on when claimant's tinnitus manifested.

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. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

I found claimant was aware on July 1, 2016 that he suffered from a hissing condition and the condition was caused by his employment. I therefore conclude the injury manifested and is deemed to have occurred as of July 1, 2016—not June 28, 2017 as pled.

Defendants raised two affirmative defenses; the notice defense under Iowa Code section 85.23 and the statute of limitations defense under Iowa Code section 85.26. Although I concluded claimant's injury date is July 1, 2016, I must also decide when claimant's notice and statute of limitations periods commence pursuant to the discovery rule. See Herrera, 633 N.W.2d at 288 ("The preferred analysis is to first determine the date the injury is deemed to have occurred . . . , and then to examine whether the statutory period commenced on that date or whether it commenced upon a later date upon application of the discovery rule.")

Under the discovery rule, the 90-day notice period and statute of limitations do 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. See Herrera, 633 N.W.2d at 288. More specifically,

> a condition is implied in limitations provisions of most workers' compensation statutes that "(t)he time period for notice or claim does not begin to run until the claimant, as a reasonable man, should recognize the nature, seriousness and probable compensable character of his injury or disease." 3 A. Larson Workmen's Compensation s 78.41 at 15-65 to 15-66 (1976). This rule is applicable to the notice of claim provision in section 85.23 of our workers' compensation statute. Robinson v. Department of Transportation, 296 N.W.2d 809, 812 (Iowa 1980).

Orr v. Lewis Cent. Sch. Dist., 298 N.W.2d 256, 257 (Iowa 1980).

In this case, I found the earliest date upon which claimant should have known the nature, seriousness, or probable compensable nature of his tinnitus was June 27, 2017. Thus, I conclude claimant's notice requirement and statute of limitations began to run on June 27, 2017. See Herrera, 633 N.W.2d at 288; Orr, 298 N.W.2d at 257.

Turning first to the statute of limitations defense, Iowa Code section 85.26(1) requires an employee to bring an original proceeding for benefits within two years from the date of the occurrence of the injury if the employer has paid the employee no weekly indemnity benefits for the claimed injury or within three years from the date of last payment of weekly compensation benefits if indemnity benefits were paid.

That the employee failed to bring a proceeding within the required time period is an affirmative defense that the employer must plead and prove by a preponderance of the evidence. See Dart v. Sheller-Globe Corp., II Iowa Industrial Comm'r Rep. 99 (App. 1982).

In this case, defendants denied claimant's injury and volunteered no indemnity benefits. Thus, the two-year statute of limitations is applicable. I found claimant filed his petition within two years of June 27, 2017. I therefore conclude defendants' affirmative statute of limitations defense fails.

With respect to the notice defense, Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

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

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Iowa State Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

In this case, I found insufficient evidence to support defendants' assertion that claimant failed to give timely notice. Defendants offered no testimony, for example, to support their defense, nor did they offer any evidence to rebut the fact that claimant reported ringing and roaring in his ears at his employer-commissioned audiogram on June 27, 2017. I therefore conclude defendants failed to prove by a preponderance of the evidence that claimant failed to give timely notice of his tinnitus.

Instead, I found defendant-employer was alerted to a potential workers' compensation claim on or about June 27, 2017 when claimant for the first time indicated he had ringing and roaring in his ears. In other words, I conclude defendants had actual knowledge under Iowa Code section 85.23 on June 27, 2017. Because this was the same day that the period for claimant's notice requirements began to run, I conclude claimant provided timely notice pursuant to Iowa Code 85.23. I therefore conclude defendants' affirmative notice defense fails.

Having concluded claimant's tinnitus is work-related and that defendants' affirmative defenses fail, the next issue to be decided is the extent of claimant's permanent disability, if any. The parties agree that any permanent disability is industrial in nature.

Industrial disability was defined in Diederich v. Tri-City Ry. Co. of Iowa, 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the Legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Industrial disability can be equal to, less than, or greater than functional impairment. Taylor v. Hummel Insurance Agency, Inc., 2-2, Iowa Industrial Comm'r Dec. 736 (1985); Kroll v. Iowa Utilities, 1-4, Iowa Industrial Comm'r Dec. 937 (App. 1985); Birmingham v. Firestone Tire & Rubber Company, II, Iowa Industrial Comm'r Rep., 39, (App. 1981).

Considering all of the relevant factors of industrial disability, I found claimant sustained a five percent industrial disability. Of great significance is the fact that claimant continued to work his regular job without restrictions at the time of the hearing and had no plans to leave. I therefore conclude claimant is entitled to 25 weeks of permanent partial disability (PPD) benefits.

Having concluded claimant is entitled to 25 weeks of PPD benefits, I must also decide when those benefits are to commence.

The Iowa Supreme Court has specifically noted that PPD benefits commence whenever the *first* of three factors in Iowa Code section 85.34(1) is met. Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360 (Iowa 2016). In other words, once a claimant achieves one of the factors outlined in Iowa Code section 85.34(1), permanent disability benefits should commence.

The factors are whether (1) "the employee has returned to work," (2) "it is medically indicated that significant improvement from the injury is not anticipated" (MMI), or (3) "the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury." Iowa Code § 85.34(1).

I found claimant missed no work due to his tinnitus, meaning he returned to work on July 2, 2016. Claimant's return to work was the first factor of Iowa Code section 85.34(1) to occur in this case. I therefore conclude claimant's PPD benefits commence on July 2, 2016.

Claimant is also seeking medical treatment in the form of hearing aids.

Iowa Code section 85.27(4) provides, in relevant part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

I found insufficient evidence to support claimant's request for hearing aids. The only recommendation in the record for hearing aids relates to claimant's hearing loss—not his tinnitus. Thus, I conclude defendants are not responsible for furnishing hearing aids.

Defendants are also seeking an apportionment credit under Iowa Code section 85.34(7)(b)(1) for claimant's previous work-related neck injury. That section provides:

> If an injured employee has a preexisting disability that was caused by a prior injury arising out of and in the course of employment with the same employer, and the preexisting disability was compensable under the same paragraph of subjection 2 as the employee's present injury, the employer is liable for the combined disability that is caused by the injuries, measured in relation to the employee's condition immediately prior to the first injury. In this instance, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer.

Iowa Code § 85.34(7)(b)(1) (emphasis added).

In this case, I found there was not sufficient evidence to determine the extent of the percentage of disability for which claimant was previously compensated for his work-related neck injury. I therefore conclude defendants failed to satisfy their burden to prove their entitlement to an apportionment credit. See Iowa R. App. P. 6.14(6).

Claimant is also seeking reimbursement for his IME with Dr. Tyler under Iowa Code section 85.39. Iowa Code section 85.39 allows claimants to request reimbursement for an IME "[i]f 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." Iowa Code § 85.39.

In this case, I found there had been no evaluation of permanent disability by an employer-retained physician when claimant was evaluated for his IME with Dr. Tyler. Because claimant did not follow the reimbursement provisions in Iowa Code section 85.39, I conclude claimant did not satisfy his burden to prove his entitlement to reimbursement under that section. Iowa Code § 85.39; see Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015) (hereinafter "DART").

Claimant also seeks assessment of his costs. Assessment of costs is a discretionary function of the agency. Iowa Code § 86.40. Because claimant was generally successful in his claim, I conclude it is appropriate to assess claimant's costs in some amount.

Claimant requests assessment of his filing fee ($100.00); service fees ($13.00); and Dr. Tyler's fees ($1,911.00). Claimant's filing fee and services fees are reasonable and are assessed to defendants pursuant to 876 IAC 4.33 subsections (3) and (7).

With respect to Dr. Tyler's fees, only the cost of a report—and not the underlying examination—is taxable under 876 IAC 4.33(6). DART, 867 N.W.2d at 846-47 Unfortunately, Dr. Tyler's invoice is not itemized to reflect how much time he spent writing the report versus reviewing medical records or interviewing claimant, however. (See Cl. Ex. 3, p. 3) I therefore conclude none of Dr. Tyler's fees can be assessed as costs under rule 876 IAC 4.33. See Reh v. Tyson Foods, Inc., File No. 5053428 (App. March 26, 2018). In total, defendants are taxes costs in the amount of $113.00.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant twenty-five (25) weeks of permanent partial disability benefits at the stipulated of rate of eight hundred ten and 74/100 dollars ($810.74) per week from July 2, 2016.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018)

Pursuant to rule 876 IAC 4.33, costs of the arbitration decision are taxed to defendants in the amount of one hundred thirteen and 00/100 ($113.00).

Signed and filed this 8th day of March, 2019.

STEPHANIE J. COPLEY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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SJC/kjw

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.