

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

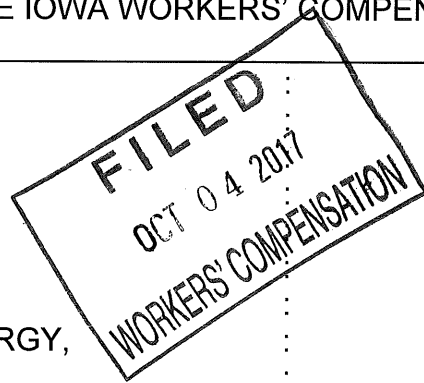
KEVIN LUKKEN,

Claimant,

vs.

MIDAMERICAN ENERGY,

Self-Insured Employer,
Defendant.



File No. 5055339

ARBITRATION

DECISION

Head Note Nos.: 1100, 1108
1400, 1803 2208

STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, Kevin Lukken, filed his original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on December 4, 2015. Claimant alleged he sustained a work-related injury on February 2, 2015. (Original notice and petition)

MidAmerican Energy for purposes of workers' compensation is self-insured. Defendant filed its answer on December 17, 2015. The employer admitted the occurrence of a hearing loss but denied the presence of any tinnitus. Defendant also asserted the claim for tinnitus was barred by the statute of limitations.

The hearing administrator scheduled the case for hearing on October 11, 2016 at 8:00 a.m. The hearing took place in Sioux City, Iowa at the Iowa Workforce Development building. The undersigned appointed Ms. Teri Lea Autry as the certified shorthand reporter. She is the official custodian of the records and notes.

Claimant testified on his own behalf. Defendant elected not to call any witnesses to testify at the hearing.

The parties offered joint exhibits 1 through 21. All exhibits were admitted as evidence in the case.

Post-hearing briefs were filed on October 28, 2016. The case was deemed fully submitted on that date.

STIPULATIONS

The parties completed the designated hearing report. The various stipulations are:

1. There was the existence of an employer-employee relationship at the time of the alleged injury;
2. Claimant sustained an injury on February 2, 2015 which arose out of and in the course of his employment;
3. Temporary benefits are not in dispute;
4. At the time of the work injury, the parties believe the weekly benefit rate to be \$907.25 per week;
5. Medical benefits are no longer in dispute;
6. Defendant will stipulate they will reimburse claimant's office for the cost of the independent medical examination;
7. Prior to the hearing, claimant was paid two weeks of compensation at the rate of \$907.25 per week for occupational hearing loss; and
8. The parties agree certain costs that are detailed were paid by claimant and are not in dispute.

ISSUES

The issues presented are:

1. Whether claimant is entitled to permanency benefits;
2. If so, the commencement date for the permanent partial disability benefits;
3. Whether claimant's claim for tinnitus is barred by Iowa Code section 85.26;
4. If claimant's claim is not barred by Iowa Code section 85.26, what is the extent of claimant's permanent partial disability? and
5. Is the two-week credit applicable to the claim for tinnitus?

This deputy, after listening to the testimony of claimant at his hearing, after judging the credibility of the claimant, and after reading the evidence, and the post-hearing briefs, makes the following findings of fact and conclusions of law:

Claimant is 63 years old. He graduated from high school in 1972. He attended Western Iowa Technical College for a year and received a certificate in auto body repair. The certificate was recognized by the U.S. Department of Labor. Claimant is a certified electrician. He holds a Class A Commercial Driver's License, (CDL) to drive tractor-trailers within the state of Iowa.

On January 16, 1979, claimant commenced employment with MidAmerican Energy. He was 24 years old. Claimant started as a utility worker at the Port Neal Complex. He worked in other capacities such as Cat operator, maintenance man in the fleet maintenance center, tree trimmer, cable slicer, garage maintenance worker, and substation electrician. Claimant testified he wore foam plugs or ear muffs as hearing protection. He stated he wore the hearing protection 98 to 99 percent of the time when he knew he was going to be in a noisy work environment.

Claimant worked as a substation electrician for approximately ten years. Claimant assisted in the building of the substation. The environment was noisy. Claimant used an impact wrench to bolt together steel beams. The noise was similar to the sound of a jackhammer. He was also exposed to the noise from running digger derricks. Claimant testified he was exposed to "impulsive noise." Periodically, devices called "pneumatic breakers" would be switched on and off whenever it was necessary to switch a line. According to claimant's direct testimony, the breakers sounded like a shotgun going off when the breakers were switched. Claimant only wore hearing protection in the substation when he was operating the impact wrench.

Claimant testified he first noticed ringing in his ears when he was working in fleet maintenance. He had to sleep with the radio playing to tune out the ear ringing. Claimant still sleeps with the radio playing.

MidAmerican instituted a hearing conservation program. Claimant's baseline hearing was obtained via a test conducted in 1991. Thereafter, hearing tests were administered on an annual basis. Claimant filled out forms on a regular basis. The forms requested relevant health-related information.

On April 21, 2011, claimant completed a "Hearing Health History" form. On the form, claimant indicated he had severe ringing in both his right and left ears. (Exhibit 2, page 2) Claimant also reported he had average hearing in both ears. (Ex. 2, p. 2) Claimant wrote whenever he was exposed to noise at work, he usually wore formable plugs in his ears. (Ex. 2, p. 2)

The results of the hearing test taken in 2011 were sent to claimant on May 10, 2011. (Ex. 3, p. 3) The results indicated in relevant portion:

Your recent air conduction test, administered by MICHAEL L. BLOCK, NREMT-B, COHC, CST St. Luke's Occupational, showed an average greater than 25 decibels (dB) for the speech frequencies in the right ear. An average greater than 25 dB is considered a significant hearing loss.

Your average hearing levels for the test frequencies of 500, 1000, 2000, 3000 Hz was 22.5 in the left ear and 30 in the right ear. Further results are discussed below.

This test did not indicate any major change in your hearing compared to your baseline for the three frequencies related to the OSHA STS (Standard Threshold Shift) at 2, 3 and 4KHz.

The QUESTIONS you answered about your hearing indicated the following conditions. You may want to check with your doctor or audiologist for more information.

-Persistent ringing in one or both ears was indicated on your medical history form.

Please discuss actions which should be taken with your medical department (i.e., doctor or audiologist visits, forms to be completed, etc.).

You should continue to wear hearing protection when exposed to loud noise as required in the workplace. Hearing protection usage is strongly encouraged, as needed, at home.

(Ex. 3, p. 3)

Claimant completed another report in 2012. He again referenced persistent ringing in one or both ears. (Ex. 4, p. 5) Claimant was advised to seek advice from a physician or an audiologist. (Ex. 4, p. 5)

On April 9, 2013, claimant completed another hearing health history form. He reported he continued to experience severe ringing in both ears. (Ex. 5, p. 7) Claimant indicated he wore hearing protection for 90 percent of the time when exposed to noise at work. (Ex. 5, p. 7) Claimant also reported he heard better with his left ear than with his right one. (Ex. 5, p. 7)

Ms. Ann Anhalt from MidAmerican Energy sent a Notification of Annual Hearing Test Results to claimant on July 26, 2013. The notification stated:

Your annual hearing test reflected an average hearing level in one or both ears in excess of 25dB for the test frequencies of 500, 1000, 2000, and 3000 Hertz.

Enclosed is a copy of your hearing test which describes the type of test conducted, the results, the name and qualifications of the examiner, and the site of the exam. The report is your copy and you do not need to sign or return it to me.

Since you are in a hearing conservation program, you are not eligible at this time for benefits under workers' compensation. If a medical referral was recommended, you should do so under your group health insurance. Guidelines for submitting a hearing loss claim under the Iowa Workers' Compensation statute is enclosed.

(Ex. 15, p. 79)

On February 2, 2015, claimant retired from MidAmerican Energy. He was 61 years old at the time. His tinnitus had nothing to do with the fact claimant was retiring. He just wanted to retire at an early age. Since his retirement, he has not pursued any employment, nor does he intend to pursue employment. He testified he will collect his Social Security retirement benefits when he reaches the age of 65.

A Comprehensive Hearing Test Report was prepared on February 24, 2015. (Ex. 7, pp. 9-10) The hearing report demonstrated claimant complained of ringing in the ears as early as the May 9, 2006 evaluation. (Ex. 7, p. 9) Thereafter, claimant noted ringing in his ears on a rather consistent basis. For example, he complained of ringing during the evaluations on August 12, 2009, April 21, 2010, April 21, 2011, April 13, 2012, and April 21, 2014. (Ex. 7, p. 9) For the reported ringing in 2011, 2012, and 2014, the ringing was designated as "severe." (Ex. 7, p. 9) This reporting triggered MidAmerican to suggest claimant see his personal physician or audiologist in 2011 and 2012. (Ex. 3, p. 3 and Ex. 5, p. 5) Several letters were also generated. (Ex. 14, p. 78 and Ex. 15, p. 79)

On March 9, 2015, defendant sent claimant to Douglas W. Martin, M.D., at the Occupational Medicine Department at Unity Point Clinic for claims of hearing loss and tinnitus due to occupational exposure. (Ex. 8) Dr. Martin reviewed claimant's previous audiology test results. (Ex. 8, p. 11) The HEENT examination was within normal limits and the ear canals were without evidence of ceruminosis. (Ex. 8, p. 12) Dr. Martin ordered audiology tests to be performed. The results were as follows:

Left Ear:

500 Hz	20dB
1,000 Hz	25dB
2,000 Hz	30 dB
3,000 Hz	25 dB
4,000 Hz	30 dB
6,000 Hz	40 dB
8,000 Hz	50 dB

Right Ear:

500 Hz	20dB
1,000 Hz	30 dB
2,000 Hz	35 dB
3,000 Hz	35 dB
4,000 Hz	30 dB
6,000 Hz	20 dB
8,000 Hz	50 dB

(Ex. 8, p. 12)

Dr. Martin interpreted the results as showing:

This evaluation today establishes there is no standard threshold shift. The interpretation is mild hearing loss bilaterally, at the mid and high frequencies, and mild loss of the low frequencies on the right ear, but mostly normal in the left ear.

(Ex. 8, p. 12)

Dr. Martin opined claimant had “just barely abnormal hearing at the decibel sum hearing loss averages of 500, 1,000, 2,000 and 3,000 Hz of the right ear, and normal values of the left ear.” (Ex. 8, p. 13) Dr. Martin related the hearing loss to claimant’s age rather than to any type of occupational exposure. (Ex. 8, p. 13)

On July 30, 2015, Richard S. Tyler, Ph.D., an audiologist and consultant in hearing loss, tinnitus, hyperacusis and acoustics, held a telephone interview with claimant for purposes of conducting an independent medical examination pursuant to Iowa Code section 85.39. (Ex. 9) Dr. Tyler is employed at the University of Iowa Hospitals and Clinics in the Department of Otolaryngology-Head and Neck Surgery. Claimant completed a questionnaire prepared by Dr. Tyler about the impact tinnitus had on claimant’s life. Four topics were covered in the questionnaire. The topics were: concentration, emotional well-being, hearing, and sleep. (Ex. 9, p. 20) Dr. Tyler opined claimant had a permanent impairment to the body as a whole due to tinnitus in the amount of 10 percent. (Ex. 9, p. 25) Dr. Tyler also opined claimant had a bilateral hearing impairment in the amount of 1 percent. (Ex. 9, p. 25) The audiologist related both the tinnitus and the bilateral hearing loss to claimant’s employment at MidAmerican Energy.

Dr. Tyler imposed work restrictions too. They were:

1. Claimant should not work around loud noise;
2. Claimant should not work in a situation where the noise levels are unpredictable;
3. Claimant should not work in dangerous situations where accurate concentration is required; and
4. Claimant should not work in situations that are stressful.

(Ex. 9, pp. 25-26)

Pursuant to a request from defendant, claimant underwent an evaluation with Marlan R. Hansen, M.D., at the University of Iowa Hospitals and Clinics. Dr. Hansen is also employed in the Department of Otolaryngology-Head and Neck Surgery. He is a colleague of Dr. Tyler. Dr. Hansen's examination occurred on August 11, 2016. (Ex. 10, p. 30) Prior to the examination, Megan Asklof, M.A., Audiologist II, administered appropriate hearing tests. (Ex. 10, p. 33) The results showed, "Mild sensorineural hearing loss bilaterally." (Ex. 10, p. 33) Ms. Askof determined claimant had excellent discrimination bilaterally. (Ex. 10, p. 33)

Dr. Hansen issued a report for defense counsel on September 7, 2016. (Ex. 11, p. 35) The report stated in relevant portion:

Mr. Lukken has mild bilateral sensorineural hearing loss and subjective tinnitus. His age-adjusted binaural hearing loss as defined under Iowa Code 85B is 4.6%. To a reasonable degree of medical certainty, Mr. Lukken's hearing loss is due to age and genetic factors. Based on the pattern of his hearing loss and to a reasonable degree of medical certainty, excessive noise exposure from any source (employment, recreational activities) is not a contributive factor to Mr. Lukken's hearing loss. In other words, he does not appear to have a noise-induced hearing loss due to his work at MidAmerican Energy. I apportion 85% of his overall hearing loss to aging and 15% to genetic or other personal factors.

Mr. Lukken describes tinnitus in both ears that gradually developed over many years. It is fairly constant. He listens to a radio at night and is able [to] sleep. It does not interfere otherwise significantly interfere [sic] with his activities of daily living. The tinnitus is most likely consequent to his age related hearing loss and is not due to excessive noise exposure at work. Specifically, to a reasonable degree of medical certainty, Mr. Lukken's employment at MidAmerican Energy did not cause tinnitus. Based on the AMA Guides 5th edition and my personal experience in

treating thousands of patients with hearing loss, tinnitus, and other disabilities I would assign a 1% whole body impairment based in the patient's subjective tinnitus.

Mr. Lukken should avoid excessive noise exposure including the use of adequate noise protection any time he is in a loud environment. Otherwise I would not place any permanent restrictions on Mr. Lukken based in the extent of his hearing loss and tinnitus.

(Ex. 11, p. 35)

At the arbitration hearing, claimant testified he did not have trouble speaking with Dr. Martin during the examination. He also had no difficulty speaking with Dr. Tyler during the telephone interview for the independent medical evaluation. This deputy did not detect any communication problems on behalf of the claimant during his in-person hearing.

Claimant has suffered no mental or psychological problems as a result of his tinnitus. He does sleep with the radio running. He encounters some challenges in social situations when he is conducting a conversation with an individual and there is background chatter. However, he does his best to deal with the situation at hand.

RATIONALE AND CONCLUSIONS OF LAW

When an expert's opinion is based upon an incomplete history it is not necessarily binding on the commissioner or the court. It is then to be weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the fact. Musselman v. Central Telephone Company, 154 N.W.2d 128, 133 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 521, 522, 133 N.W.2d 867 (1965).

The weight to be given an expert opinion may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. St. Luke's Hospital v. Gray, 604 N.W.2d 646 (Iowa 2000).

Expert testimony may be buttressed by supportive lay testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 380; 101 N.W.2d 167, 170 (1960).

The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire and Casualty Co., 526 N.W.2d 845 (Iowa 1995).

Claimant has not carried his burden to show the condition was caused by his employment. The party who would suffer loss if an issue were not established has the burden of proving the issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

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

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

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

With respect to medical causation, both Dr. Tyler and Dr. Hansen provided expert opinions regarding the cause of claimant's tinnitus. Greater weight is accorded to the opinion of Dr. Hansen than to the opinion of Dr. Tyler. Both are in the same department at the University of Iowa Hospitals and Clinics. Dr. Hansen opined claimant's tinnitus was the result of age-related hearing loss and was not work related. Dr. Hansen is a medical doctor. He is board certified in otolaryngology and certified by the National Board of Medical Examiners. Dr. Hansen personally met with claimant and conducted his own testing with the assistance of other professionals in his department.

Dr. Hansen opined claimant's hearing loss and tinnitus were age related and not work related. His opinion was consistent with the opinion held by Dr. Martin. Dr. Martin initially assessed claimant's hearing loss as something other than the result of excessive exposure to noise from any source. Dr. Martin and Dr. Hansen indicated the pattern of hearing loss was not due to noise exposure. Dr. Hansen was emphatic; the hearing loss was attributable to aging, genetic or other personal factors. (Ex. 11, p. 35) Dr. Hansen opined the tinnitus was also attributable to claimant's age.

Dr. Tyler held a contrary opinion to those opinions held by Dr. Hansen and Dr. Martin. However, Dr. Tyler is an audiologist. He is not a medical doctor. He did not hold an in-person examination nor did he conduct his own independent audiometric testing. Dr. Tyler also had some glaring errors in his written report. There was one portion of the report where Dr. Tyler misstated claimant's name. The name used was "Mr. Jayne." (Ex. 9, p. 18) Dr. Tyler was also commenting upon the effects of chemical exposure in the workplace. (Ex. 9, p. 18) Claimant admitted during cross-examination that he and Dr. Tyler never discussed the use of chemicals at MidAmerican Energy. The undersigned does question whether there are any other inaccuracies in Dr. Tyler's report. Dr. Tyler's report did not carry the sound reasoning the other two medical reports carried. As a consequence, the undersigned determines; claimant has not met his burden of proof. Claimant does not have a hearing loss or tinnitus which is causally connected to his employment at MidAmerican Energy. Claimant takes nothing from these proceedings.

The final issue to discuss is the matter of costs. Iowa Code section 86.40 states:

Costs. All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

Costs. Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers'

compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010) The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

Each party shall pay his/its/their own costs to litigate.

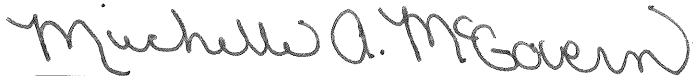
ORDER

THEREFORE, IT IS ORDERED:

Claimant takes nothing additional from these proceedings.

Each party shall pay his/its own costs.

Signed and filed this 4th day of October, 2017.



MICHELLE A. MCGOVERN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.