BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DANIEL HANEY, Claimant, vs. ARCONIC, INC., Employer, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier, Defendants.	:	File No. 5067358 A P P E A L D E C I S I O N Head Notes: 1108.50; 1402.30; 1402.40; 1403.30; 1803; 2208; 2402; 2501; 2907

Defendants Arconic, Inc., employer, and its insurer, Indemnity Insurance Company of North America, appeal from an arbitration decision filed on October 5, 2021. Claimant Daniel Haney cross-appeals. The case was heard on March 9, 2020, and it was considered fully submitted in front of the deputy workers' compensation commissioner on April 30, 2020.

In the arbitration decision, the deputy commissioner found defendants failed to establish claimant's claims are untimely under Iowa Code section 85.26. The deputy commissioner found claimant's occupational hearing loss claim was not ripe for adjudication. The deputy commissioner found claimant met his burden of proof to establish he sustained occupational hearing loss caused by his employment. The deputy commissioner found claimant proved he sustained tinnitus caused by his employment, but found claimant failed to establish he sustained permanent functional impairment for his tinnitus. The deputy commissioner found claimant was entitled to be reimbursed $120.00 from Audiology Consultants and $4,900.00 for hearing aids, and the deputy commissioner found defendants are responsible for future care for claimant's hearing loss and tinnitus. The deputy commissioner found the parties should pay their own costs of the arbitration proceeding.

On appeal, defendants assert the deputy commissioner correctly found claimant's occupational hearing loss claim is not ripe. Defendants assert the deputy commissioner erred in finding defendant-employer initiated claimant's transfer within the plant. Defendants assert the deputy commissioner erred in finding claimant proved he sustained occupational hearing loss caused by his employment because the claim is not

ripe for adjudication. In the alternative, defendants assert if it is appropriate to determine causation, the deputy commissioner erred in finding claimant proved he sustained occupational hearing loss caused by his employment. Defendants assert the deputy commissioner erred in finding claimant established he sustained tinnitus caused by his employment. Defendants assert the deputy commissioner correctly found claimant failed to prove he sustained permanent functional impairment as a result of his tinnitus. Defendants assert the deputy commissioner erred in finding defendants are responsible for the $120.00 charge from Audiology Consultants and for the $4,900.00 charge for the hearing aids, and in finding defendants are responsible for future care related to claimant's hearing loss and tinnitus.

On cross-appeal, claimant asserts the deputy commissioner erred in failing to award him industrial disability benefits for his tinnitus claim. Claimant asserts the remainder of the arbitration decision should be affirmed.

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

I 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, the arbitration decision filed on October 5, 2021, is affirmed in part, modified in part, and reversed in part.

I affirm the deputy commissioner's finding that the parties should pay their own costs of the arbitration proceeding. I affirm the deputy commissioner's finding that defendants failed to establish claimant's claims are untimely under section 85.26. I affirm, in part, and I modify the deputy commissioner's finding that claimant's occupational hearing loss claim is not ripe. I reverse the deputy commissioner's finding that claimant met his burden to prove he sustained occupational hearing loss caused by his employment. I reverse the deputy commissioner's finding that claimant met his burden to prove he sustained tinnitus caused by his employment. I reverse the deputy commissioner's finding that claimant is entitled to recover $120.00 for the charge from Audiology Consultants and $4,900.00 for the cost of the hearing aids. I reverse the deputy commissioner's finding that defendants are responsible for future care for claimant's hearing loss and tinnitus. I affirm in part, modify in part, and reverse in part, the deputy commissioner's decision with the following additional analysis.

I. Occupational Hearing Loss

Iowa Code chapter 85B (2018) governs occupational hearing loss claims. As with the general statute governing workplace injuries, Iowa Code chapter 85, a claimant who alleges he or she has sustained occupational hearing loss must establish he or she sustained an occupational hearing loss "arising out of and in the course of employment." Iowa Code §85B.3.

Iowa Code section 85B.4(3) states:

> "Occupational hearing loss" means that portion of a permanent sensorineural loss of hearing in one or both ears that exceeds an average hearing level of twenty-five decibels for the frequencies of five hundred, one thousand, two thousand, and three thousand Hertz arising out of and in the course of employment caused by excessive noise exposure. "Occupational hearing loss" does not include loss of hearing attributable to age or any other condition or exposure not arising out of and in the course of employment.

The statute provides a chart of excessive noise exposure levels based on A-weighted decibels ("dBA") for certain durations per day. Id. §85B.5.

A claimant may file a claim for occupational hearing loss due to excessive noise exposure one month after separation from employment. Id. §85B.8. The statute provides:

> The date of injury shall be the date of occurrence of any one of the following events:
>
> a. Transfer from excessive noise exposure employment by an employer.
>
> b. Retirement.
>
> c. Termination of the employer-employee relationship. . . .

The deputy commissioner correctly found at the time of the hearing claimant was an employee of defendant-employer. Claimant alleged he established a qualifying transfer under the statute.

In John Deere Dubuque Works of Deere & Co. v. Weyant, 442 N.W.2d 101, 105 (Iowa 1989), the Iowa Supreme Court adopted a four-part test to be used by the agency in analyzing transfers. Under the test, a "transfer" occurs when there is:

> (1) A clearly recognizable change in employment status
>
> (2) which provides a reduction of noise exposure to a level that is not capable of producing an occupational hearing loss and
>
> (3) which is permanent or indefinite in the sense that there is no reasonable expectation that the worker will be returned to a position with excessive noise level exposure in the ordinary course of operations in the employer's business.
>
> (4) It must also actually continue for at least six months.

Weyant, 442 N.W.2d at 105.

In finding the test provided a reasonable framework for making the decision, the court noted the "test provides that the change in employment must be a specific change to a low noise area which is not part of a normal or periodic rotation of employees." Id. The court further noted the test also "takes into account the prevailing view that a permanent hearing loss cannot be validly measured until approximately six months' separation from the noisy environment." Id.

Weyant retired on September 1, 1983. On September 3, 1985, following Labor Day, Weyant filed a petition in arbitration alleging he sustained occupational hearing loss while working for John Deere. John Deere argued Weyant's claim was untimely because Weyant had transferred from an inspector position to a tool crib attendant position on November 15, 1982, which it argued was the "date of occurrence" or date of injury. Id. at 103. The court affirmed the industrial commissioner's finding that Weyant's move from the inspector position to the tool crib attendant position was not a transfer within the meaning of Iowa Code section 85B.8 because it was merely a reassignment within the same work force and was subject to change, noting Weyant had been reassigned many times during his employment, and concluding the date of occurrence or date of injury was September 1, 1983, the date of Weyant's retirement. Id. at 105.

Defendants in this case assert the deputy commissioner correctly found claimant failed to establish a qualifying transfer under the four-part test but assert the deputy commissioner erred in finding the transfer was initiated by defendant-employer. The deputy commissioner found:

> As an initial matter, Arconic contends it did not transfer Haney so his job change cannot qualify under section 85B.1(a). The evidence establishes it is more likely than not Arconic agreed to a seniority-based bidding system for jobs at the facility where Haney works. Haney transferred using this system. Thus, while Haney may have initiated the transfer and obtained it due to his seniority status, he did so via a system Arconic is at least in part responsible for putting in place and administering. Haney's transfer is therefore of a type that constitutes a transfer "by an employer," under the statute because it occurred using a system to which Arconic agreed and helps administer.

(Arb. Dec., p. 16)

There is no evidence in this case defendant-employer initiated claimant's transfer to the new position. Claimant elected to bid on the new position and he received the position pursuant to the seniority system. Claimant has not established defendant-employer initiated the transfer.

The deputy commissioner found claimant's claim was not ripe under the statute because the date of occurrence or date of injury has not occurred yet. Defendants

assert because there has been no date of occurrence or date of injury under the statute, the deputy commissioner erred in finding claimant sustained occupational hearing loss caused by his employment with defendant employer.

"A case is ripe for adjudication when it presents an actual, present controversy, as opposed to one that is merely hypothetical or speculative." Barker v. Iowa Dep't of Pub. Safety, 992 N.W.2d 581, 590 (Iowa 2019) (quoting State v. Bullock, 638 N.W.2d 728, 734 (Iowa 2002)). "If a claim is not ripe for adjudication, a court is without jurisdiction to hear the claim and must dismiss it." Iowa Coal Mining Co., Inc. v. Monroe Cty., 555 N.W.2d 418, 432 (Iowa 1996).

Given claimant is still working for defendant-employer, and he failed to prove a qualifying transfer, the date of occurrence or date of injury for his occupational hearing loss claim has not yet occurred. The statue requires a claimant to establish he or she sustained occupational hearing loss arising out of and in the course of employment. Iowa Code § 85B.3. A claimant must first establish he or she has sustained an injury. Because the date of injury has not occurred yet under the statute, claimant's occupational hearing loss claim is not ripe for adjudication and it is improper to determine whether causation exists.

II. Tinnitus

Defendants next assert the deputy commissioner erred in finding claimant established he sustained tinnitus caused by his employment. Claimant contends the deputy commissioner correctly found he sustained tinnitus caused by his employment, but asserts the deputy commissioner erred in failing to award permanency benefits.

The Iowa Supreme Court has held that tinnitus claims are compensated as unscheduled claims under Iowa Code section 85.34(2)(v), formerly Iowa Code section 85.34(2)(u). Ehteshamfar v. UTA Engineered Sys. Div., 555 N.W.2d 450, 453 (Iowa 1996) (finding tinnitus claims do not qualify under occupational hearing loss, Iowa Code section 85B.4, or under scheduled hearing loss, Iowa Code section 85.34(2)(s), formerly Iowa Code section 85.34(2)(r)).

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of and in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment, and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held an injury occurs "in the course of employment" when:

> it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the

> course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of his employer.

Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174, 177 (Iowa 1979).

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997). When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

Two expert witnesses have provided opinions in this case as to whether claimant's tinnitus was caused by his employment. Richard Tyler, Ph.D., an audiologist, conducted an independent examination for claimant, and Mark Zlab, M.D., a board-certified otolaryngologist, conducted an independent medical examination for defendants. Dr. Tyler opined claimant did sustain tinnitus caused by his employment. Dr. Zlab opined claimant did not sustain tinnitus caused by his employment.

The deputy commissioner found Dr. Tyler's opinion on the issue of causation to be more persuasive than Dr. Zlab's opinion because the deputy commissioner found Dr. Tyler's opinion to be more thorough than Dr. Zlab's opinion in that regard. However, the deputy commissioner did note Dr. Tyler did not use the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), in rendering his opinion and in assigning claimant a 19 percent whole body impairment. The deputy commissioner therefore found claimant failed to establish he sustained permanent functional impairment relating to his tinnitus, even though the deputy commissioner found claimant's tinnitus was caused by his employment.

I find Dr. Zlab's opinion on causation to be the most persuasive. Dr. Zlab is a board-certified otolaryngologist whose training and experience are superior to Dr. Tyler. Dr. Tyler is an audiologist, not a medical doctor. Dr. Tyler did not personally examine claimant or perform any testing on him. In contrast, Dr. Zlab personally examined

claimant and conducted his own testing in addition to reviewing the available records. Dr. Zlab used the AMA Guides when rendering his opinion, Dr. Tyler did not.

The Division of Workers' Compensation has adopted the AMA Guides for determining extent of loss or impairment for permanent partial disabilities under Iowa Code section 85.34(2). 876 IAC 2.4 See also Iowa Code § 85.34(2)(x) (requiring the Division to follow the AMA Guides when determining extent of functional loss for employees earning the same or greater wages since the injury). As noted by defendants, this agency has previously discounted Dr. Tyler's methods because his methods have not been validated or adopted by any medical or occupational health boards, or subject to peer review. Ament v. Quaker Oats Co., File Nos. 5044299, 5044298, 2016 WL 1109106 (Iowa Workers' Comp. Comm'n March 17, 2016). For these reasons I find Dr. Zlab's opinion on causation more persuasive than Dr. Tyler's opinion. Claimant has not established he sustained tinnitus caused by his employment.

III. Audiology Test, Hearing Aides, and Ongoing Treatment

Defendants allege the deputy commissioner erred in finding defendants are responsible for the $120.00 charge from Audiology Consultants, $4,900.00 for the cost of claimant's hearing aids, and for future care for claimant's hearing loss and tinnitus.

An employer is required to furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, hospital services and supplies, and transportation expenses for all conditions compensable under the workers' compensation law. Iowa Code § 85.27(1). The employer has the right to choose the provider of care, except when the employer has denied liability for the injury. Id. "The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee." Id. § 85.27(4). If the employee is dissatisfied with the care, the employee should communicate the basis for the dissatisfaction to the employer. Id. If the employer and employee cannot agree on alternate care, the commissioner "may, upon application and reasonable proofs of the necessity therefor, allow and order other care." Id. The statute requires the employer to furnish reasonable medical care. Id. § 85.27(4); Long v. Roberts Dairy Co., 528 N.W.2d 122, 124 (Iowa 1995) (noting "[t]he employer's obligation under the statute turns on the question of reasonable necessity, not desirability"). The Iowa Supreme Court has held the employer has the right to choose the provider of care, except when the employer has denied liability for the injury, or has abandoned care. Iowa Code § 85.27(4); Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010).

As discussed above, I found claimant's occupational hearing loss claim is not ripe for adjudication. I also found claimant failed to prove he sustained tinnitus caused by his employment. Given these findings, claimant is not entitled to recover the charge from Audiology Consultants and the cost of the hearing aids. Defendants also are not responsible for future care for claimant's hearing loss or tinnitus.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on October 5, 2021, is affirmed in part, modified in part, and reversed in part, with the above-stated additional and substituted analysis.

Claimant shall take nothing from these proceedings

Pursuant to rule 876 IAC 4.33, the parties shall pay 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 on this 25th day of March, 2022.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Brian Fairfield (via WCES)

Jane Lorentzen (via WCES)