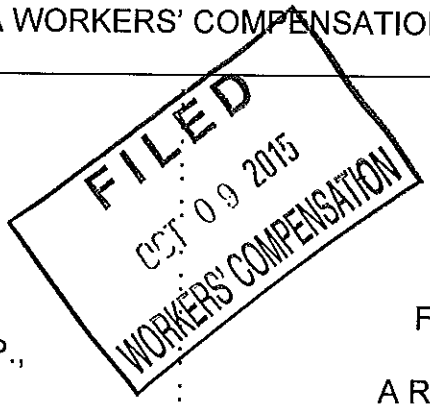
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



KENNETH HAZEN,

Claimant,

vs.

GRAIN PROCESSING CORP.,

Employer,

and

ZURICH NORTH AMERICA,

Insurance Carrier,
Defendants.

File No. 5048836

ARBITRATION

DECISION

Head Note Nos.: 1108.30, 1402.30, 1803, 2502

STATEMENT OF THE CASE

Claimant, Kenneth Hazen, filed a petition in arbitration seeking workers' compensation benefits from Grain Processing Corp. (GPC), employer, and Zurich North America, insurer, both as defendants. This case was heard in Des Moines, Iowa on July 16, 2015 with a final submission date of August 7, 2015.

Defendants moved to exclude claimant's exhibit 1, pages 22-26 as being prejudicial and not in compliance with rule 876 IAC 4.19(3)(d). The records were not received in compliance with rule 876 IAC 4.19(3)(d) and were found to be prejudicial. As a result they were excluded from the record.

The record in this matter consists of claimant's exhibit 1, pages 1-21, and exhibits 2-10; defendants' exhibits A through E, and the testimony of claimant.

ISSUES

1. Whether claimant sustained an injury arising out of and in the course of employment on August 1, 2012.

2. Whether an employer-employee relationship existed at the time of injury.

3. Whether the alleged injury is a cause of permanent disability; and if so

4. The extent of claimant's entitlement to permanent partial disability benefits.

5. Whether claimant's claim is barred for failure to give timely notice under Iowa Code section 85.23.

6. Whether claimant's claim is barred as untimely under Iowa Code section 85.26.

7. Whether claimant is due reimbursement for an independent medical evaluation (IME) under Iowa Code section 85.39.

FINDINGS OF FACT

Claimant was 54 years old at the time of hearing. Claimant graduated from high school.

Claimant began employment with GPC in October of 1979. (Exhibit B, page 2) Claimant testified that approximately the first 11 years of his employment at GPC he worked in the boiler room at the plant. Claimant worked in maintenance at the plant after that time until a labor lockout occurring in August of 2008.

Claimant testified while in the boiler room he was exposed to loud noise approximately seven hours per day. He said everything in the boiler room was loud and large. Claimant said he had to wear hearing protection the entire time he worked in the boiler room.

Claimant testified when he was transferred to maintenance, he continued to work around loud noises. Claimant said while in maintenance, he had to wear hearing protection equipment.

In November of 2005 claimant underwent a hearing test. It showed in the left ear claimant had an average hearing level of 17.5 decibels for the frequencies of 500, 1k, 2k, and 3k Hz. Claimant also had an average hearing level of 20 for the same frequency levels on the right. (Ex. D, p. 1) [1]

In December of 2006 claimant underwent a hearing test. It showed claimant had an average hearing level on the left of 17.5 and an average hearing level on the right of 20. (Ex. D, p. 1) See footnote number two. [2]

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[1] On the left 500 Hz was 10, 1k Hz was 5, 2k Hz was 5, and 3k Hz was 50 for a total of 70. 70 divided by 4 equals 17.5. On the right at 500 Hz claimant's hearing level was 10, 1k Hz was 10, 2k Hz was 5, and 3k Hz was 55, for a total of 80. 80 divided by 4 is 20.

[2] For the left ear at 500 Hz the level was 10, 1k Hz was 5, 2k Hz was 5, and 3k Hz was 55, for a total of 75. 75 divided by 4 equals 18.75. On the right, 500 Hz was 10, 1k Hz was 10, 2k Hz was 5, and 3k Hz was 55, for a total of 80. 80 divided by 4 equals 20.

On October 19, 2007 claimant had a hearing test. The average hearing level on the left was 18.75 decibels. Claimant also had an average hearing level on the right of 20 decibels. (Ex. D, p. 1) [3]

Claimant testified that on August 27, 2008 he was locked out as part of a labor dispute between GPC and the union. Claimant testified he believed he was still formally employed with GPC from August 22, 2008 until April of 2012. Claimant testified he intended to work for GPC until his retirement. He testified he received unemployment insurance benefits during the lockout of approximately $400.00 a week until June of 2012. Claimant testified he retired from GPC in August of 2012. At that time he began to receive a pension of approximately $1,500.00 per month. Claimant testified that to the best of his knowledge, at the time of the hearing, the lockout was still occurring.

In April of 2012 claimant began employment with the Central Iowa Power Cooperative (CIPCO). Claimant testified he worked around boiler turbine engines for CIPCO. Claimant said the noise at CIPCO was the same as at GPC. He said he believed the hearing protection given by CIPCO was better than that provided by GPC.

In a March 20, 2012 form for CIPCO claimant indicated he was not experiencing any ringing or buzzing in his ears. He indicated he did not have any rapid or sudden hearing loss. (Ex. C, p. 5) Claimant testified at hearing he was dishonest in completing this form, as he did have ringing in his ears in approximately March of 2012. He said he believed he had hearing loss at that time.

On an audiology form, dated August 2, 2012, regarding his employment with CIPCO, claimant did not indicate he had ringing in his ears. (Ex. C, p. 4) Claimant testified at hearing he lied when completing this document. He testified at hearing he was dishonest on his CIPCO job application regarding his ringing and hearing loss, as he wanted to get the job.

Claimant underwent a hearing test at CIPCO on March 20, 2012. The test indicates the average hearing for the left ear was 22 decibels. Claimant's average hearing for his right ear was 22.5 decibels. (Ex. C, pp. 1, 5) [4]

In July of 2013 claimant underwent a second hearing test for CIPCO. Claimant's average hearing level for the left ear was 22 decibels. For the right ear his average hearing level was 21.25 decibels. (Ex. C, pp. 1-2) [5]

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[3] 500 Hz was 10, 1k Hz was 5, 2k Hz was 5, and 3K Hz was 55, for a total of 75. 75 divided by 4 equals 18.75. 500 Hz was 10, 1K Hz was 10, 2k Hz was 5, and 3k Hz was 55, for a total of 80. 80 divided by 4 equals 20.

[4] For the left ear claimant had a hearing level at 500 Hz at 10, 1k Hz was 5, 2k Hz was 5, and 3k Hz was 60, for a total of 75. 75 divided by 4 equals 18.75. For the right ear hearing level at 500 Hz was 10, at 1k Hz was 10, 2k Hz was 10, and 3k Hz was 60, for a total of 90. This resulted in an average hearing level of 22.5.

Claimant testified he left CIPCO, as CIPCO was shutting down. Claimant then began employment with Muscatine Power and Water (MPW) in September of 2013. (Ex. E, p. 3) Claimant testified he works as an auxiliary operator with MPW. He said the job requires him to be around loud noises. Claimant said he wears hearing protection for his job with MPW.

On September 16, 2013 claimant underwent a hearing evaluation for MPW. That evaluation found claimant had an average hearing level on his left ear of 21.25 decibels and an average hearing level on the right of 23.75 decibels. (Ex. B, p. 6) [6]

At the time of hearing claimant was still employed with MPW.

In an April 4, 2014 report, Richard Tyler, Ph.D. gave his opinion of claimant's hearing difficulty following an interview and evaluation. Dr. Tyler is a professor of audiology at the University of Iowa. Claimant indicated he was between 47 to 48 years old when he first began noticing symptoms of tinnitus. He indicated, in a rating with Dr. Tyler, tinnitus impacted his concentration. Claimant also indicated tinnitus caused him sleeping problems. Dr. Tyler found claimant had high frequency hearing loss at 1k to 4k Hz. He opined claimant had an 8.4 percent permanent impairment to the body as a whole for the tinnitus. He also found claimant had an 11 percent high frequency binaural hearing loss. (Ex. 1, pp. 1-14)

Claimant testified at hearing his tinnitus did not impact his concentration.

Claimant testified he was given hearing tests at GPC. He was told at the test he had a loss of hearing. He said no one at GPC told him what caused the loss. Claimant testified it was not until he met with Dr. Tyler that he was told his hearing loss and tinnitus were due to his work at GPC.

Bruce Plakke, Ph.D. gave his opinions of claimant's hearing issues following an interview and evaluation. Dr. Plakke reviewed claimant's audiology reports and Dr. Tyler's opinion. Dr. Plakke opined claimant did not have an occupational hearing loss as defined by Chapter 85B. He also opined claimant's tinnitus did not affect his life to any appreciable extent. (Ex. A, pp. 3-7)

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[5] On the left claimant's hearing level was 500 Hz at 10, 1k Hz was 5, 2k Hz was 5, and 3k Hz was 60, for a total of 80. 80 divided by 4 equals 20. For the right ear 500 Hz was 10, 1k Hz was 10, 2k Hz was 5, and 3k Hz was 60, for a total of 85. 85 divided by 4 equals 21.25.

[6] For the left ear 500 Hz was 10, 1k Hz was 5, 2k Hz was 5, and 3k Hz was 65, for a total of 85. 85 divided by 4 equals 21.25. On the right 500 Hz was 10, 1k Hz was 10, 2k Hz was 10, and 3k Hz was 65, for a total of 95. 95 divided by 4 equals 23.75.

In a report dated July 4, 2014, Dr. Tyler indicated he had reviewed Dr. Plakke's report. Dr. Tyler found fault with Dr. Plakke's opinions. Dr. Tyler opined that the AMA Guides were inadequate for determining hearing impairment. He indicated his review of Dr. Plakke's report did not change his opinions, and he believed claimant's hearing loss and tinnitus was probably a result of claimant's work with GPC. (Ex. 1, pp. 15-21)

In a July 25, 2014 report, Dr. Plakke indicated he had reviewed Dr. Tyler's critique of his report. He reiterated claimant had a zero percent binaural hearing impairment when he left GPC. He opined that to a reasonable degree of medical certainty claimant did not acquire a noise-induced hearing loss or tinnitus from working with GPC. (Ex. A, pp. 10-11)

Claimant testified he was offered a job with MidAmerican Energy in maintenance, but turned down the job, as he did not believe he could hear well enough for the position. He said his hearing loss has not been problematic in his current job with MPW.

Claimant testified he has continued ringing in his ears. He said the ringing is quieter than conversation levels. He says he does not know when the ringing started. He said he knows it was present before he began employment with CIPCO. Claimant says he tries to avoid places with crowds or loud noises, as it makes it difficult for him to hear in these types of environments.

Claimant testified he has never missed work due to hearing loss or ringing in his ears. He testified he does not use a hearing aid. (Ex. 6, Deposition p. 27)

Claimant testified he earned $28.00 an hour with CIPCO. At the time of hearing claimant testified he earned approximately $31.00 an hour with MPW. He testified this is greater than the $23.00-$25.00 an hour he earned while working at GPC. (Ex. 6, Depo. p. 13)

CONCLUSION OF LAW

The first issue to be determined is if claimant sustained an injury arising out of and in the course of his employment on August 1, 2012. Claimant alleges he sustained an occupational hearing loss and tinnitus caused by his employment with GPC. Defendants contend claimant has failed to carry his burden of proof he sustained an occupational hearing loss or tinnitus that arose out of and in the course of his employment with GPC.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

Iowa Code section 85B.3 provides:

> All employees as defined in chapter 85 who incur an occupational hearing loss arising out of and in the course of employment, are subject to this chapter.

As stated above Iowa Code section 85B.4(3) provides:

> 3 *"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 five hundred, one thousand, two thousand, and three thousand Hz, arising out of and in the course of employment caused by excessive noise exposure.

Hearing tests performed on claimant in 2005 showed claimant had an average level of 17.5 decibels in the left ear, and 20 decibels on the right. (Ex. D, p. 1)

Hearing testing performed on claimant in 2006 showed claimant had an average hearing level of 17.5 decibels on the left ear, and 20 decibels on the right. (Ex. D, p. 1)

Hearing testing performed on claimant in 2007 showed claimant had an average hearing level of 18.75 decibels on the left, and 20 decibels on the right. (Ex. D, p. 1)

On August 22, 2008 claimant was locked out of the plant at GPC due to a labor dispute. The record indicates after August 22, 2008 claimant was not physically in the GPC plant. Claimant testified he believed he was a GPC employee from August 22, 2008 until his retirement in April of 2012.

Hearing testing performed on claimant in 2012, in his employment with CIPCO, showed claimant had an average hearing level of 20 decibels on the left, and 22.5 decibels on the right. (Ex. C, pp. 1, 5)

Hearing testing performed on claimant in 2013 in his employment with MPW showed he had an average hearing level of 21.25 decibels on the left, and 23.75 decibels on the right. (Ex. B, p. 6)

Testing performed on claimant during a three-year period before the union lockout shows claimant had no compensable hearing loss under Iowa Code section 85B.4(3) before leaving GPC. Testing performed on claimant in 2012 and 2013, over seven years after he physically left the GPC plant, also show claimant had no compensable hearing loss under Iowa Code section 85B.4(3). As noted above, claimant has the burden of proof to show he has a hearing loss in one or both ears that exceeds an average hearing level of 25 decibels for the hearing frequencies of 500, 1000, 2000, and 3000 Hz. The record indicates claimant sustained no compensable hearing loss under Iowa Code section 85B.4(3). For this reason, claimant is not entitled to occupational hearing loss benefits under Iowa Code section 85B.

As noted, claimant also makes a claim for a tinnitus injury occurring on August 1, 2012 that arose out of and in the course of employment with GPC.

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).

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 and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include

missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does 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. 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).

Regarding his tinnitus claim, claimant testified he did not know when the ringing in his ears began. (Ex. 6, Depo. p. 16) He testified he had ringing in his ears before he began employment with CIPCO. Claimant was physically not in the GPC plant beginning in late August of 2008. He began employment with CIPCO in approximately May of 2012. (Ex. 3, p. 32) In a form regarding his hearing, dated March of 2012, claimant indicated he had no ringing in his ears. (Ex. C, p. 5) In a hearing test for CIPCO dated August of 2012, claimant did not indicate he had any ringing in his ears. (Ex. C, p. 4) Claimant testified he falsified these records, as he did not want to jeopardize his job with CIPCO. However, a hearing record for CIPCO, which appears to be dated July of 2013, indicates claimant did tell CIPCO he had ringing in his ears. (Ex. C, p. 2) It is unclear why claimant would lie in March and August of 2012 to retain a job with CIPCO, but suddenly tell the truth regarding his hearing loss and ringing in his ears in July of 2013.

Claimant testified he did not know when the ringing in his ears began. His testimony is credible, as the record indicates claimant's tinnitus is a gradual, cumulative type of injury. However, claimant testified he knows he had tinnitus by the time he began employment with CIPCO. Claimant was physically not in the GPC plant from August 22, 2008. He began employment with CIPCO in approximately April of 2012. This is a 3-1/2-year gap in time when claimant was physically not in the GPC plant. In brief, the record suggests claimant cannot identify an onset of his tinnitus until he was physically out of the GPC plant. Arguably, claimant's onset of tinnitus could of occurred 3-1/2 years after he left GPC. As noted, there is also an inconsistency with claimant's testimony in his employment records with CIPCO.

Claimant testified he had ringing in his ears before he began with CIPCO. Claimant was not in the GPC plant for 3-1/2 years when he began his employment with CIPCO. CIPCO records, made in March and August of 2012, indicate claimant had no ringing in his ears. Claimant testified at hearing, that he falsified these records at CIPCO. Given the inconsistencies in the record, claimant has failed to carry his burden of proof he sustained tinnitus on August 1, 2012 that arose out of and in the course of employment with GPC.

As claimant has failed to carry his burden of proof he had an occupational hearing loss, or tinnitus injury, that arose out of and in the course of employment, all other issues, except for the reimbursement of the IME costs from Dr. Tyler, are moot.

The final issue to be determined is if claimant is due a reimbursement for the IME.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

In Des Moines Area Regional Transit Authority v. Young, No. 14-0231, filed June 5, 2015 (Iowa), the Iowa Supreme Court ruled that only the portion of the IME expenses incurred in the preparation of the written report could be taxed under rule 876 IAC 4.33.

Dr. Tyler issued his IME opinion in a report dated April 5, 2014 and July 4, 2014. His report dated June 23, 2015 was excluded from the record and is not considered for reimbursement in this decision.

Dr. Tyler's report of April 5, 2014 was prior to the report of Dr. Plakke, and is therefore not reimbursable under Iowa Code section 85.39. There is no indication in Dr. Tyler's billings, regarding the April 5, 2014 or the July 14, 2014 report, which portion of the costs was incurred in the preparation of the written report. For this reason, claimant is not due reimbursement for any of the charges associated with Dr. Tyler's IME reports.

ORDER

THEREFORE IT IS ORDERED:

That claimant shall take nothing from these proceedings.

That each party shall pay their own costs.

Signed and filed this 9th day of October, 2015.

JAMES F. CHRISTENSON
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.