BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DAVID MENTER, Claimant, vs. LENNOX INDUSTRIES, INC., Employer, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier, Defendants.	:	File No. 20003192.01 ARBITRATION DECISION Head Note Nos.: 1402.20, 1402.40, 1803, 2208, 2502, 2700, 2907

STATEMENT OF THE CASE

David Menter, claimant, filed a petition for arbitration against Lennox Industries, Inc., as the employer and Indemnity Insurance Company of North America, as the insurance carrier. This case came before the undersigned for an arbitration hearing on February 10, 2022. Pursuant to an order from the Iowa Workers' Compensation Commissioner, this case was heard via videoconference using CourtCall.

The parties filed a hearing report prior to the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no findings or decisions on factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 3, Claimant's Exhibits 1 through 7, as well as Defendants Exhibits A through E. Claimant testified on his own behalf. No other witnesses testified live at the hearing. The evidentiary record closed at the conclusion of the arbitration hearing.

Counsel for the parties requested an opportunity to file post-hearing briefs. This request was granted and both parties filed briefs on March 4, 2022. The case was considered fully submitted to the undersigned on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury, which arose out of and in the course of his employment, on January 2, 2020;

2. Whether the alleged January 2, 2020, work injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent disability benefits;

3. Whether the alleged injury should be compensated as a hearing loss or with industrial disability;

4. Whether claimant is entitled to reimbursement of his independent medical evaluation pursuant to Iowa Code section 85.39;

5. Whether claimant is entitled to alternate medical care; and

6. Whether costs should be assessed against either party and, if so, in what amount.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

David Menter is a 68-year-old individual, who lives in Marshalltown, Iowa. (Hearing Transcript, page 7) Mr. Menter obtained an eleventh-grade education before entering the workforce. (Hr. Tr., p. 8) His first job out of high school was with Cooper Manufacturing. (Id.) At Cooper Manufacturing, Mr. Menter worked full-time in the lawn mower division loading trucks and sweeping floors. (Hr. Tr., p. 9) Unfortunately, Cooper Manufacturing did away with the lawn mower division in 1976 and, as a result, Mr. Menter was laid off. (Id.)

Mr. Menter then sought and obtained employment with Lennox in June 1976, at the age of twenty-two years. (Hr. Tr., p. 10) After approximately 43.5 years, Mr. Menter formally retired from Lennox on January 2, 2020. (Exhibit 4, page 41) Mr. Menter acknowledges that his retirement did not have anything to do with the hearing loss or tinnitus injury claims involved in this case. (Exhibit D, Deposition page 12) He did not have any work restrictions at the time of his retirement, and he did not complain of an inability to perform work because of hearing loss or tinnitus. (Ex. D, Depo. pp. 27-28)

Since his retirement from Lennox, claimant has not sought out or applied for alternative employment. (Ex. B, p. 21) He testified that he is still capable of completing every job he ever held at Lennox. He is not motivated to return to work and is not likely to do so. Claimant certainly could return to work at his age and given his physical

abilities. However, he does not appear to have any desire or intention to return to work at this time. Mr. Menter considers himself retired.

Mr. Menter asserts that he sustained injuries that include hearing loss and tinnitus as a result of his work at Lennox. Over the course of 43.5 years, Mr. Menter worked in a number of different positions for the defendant employer. The majority of his employment was spent working on a "komatsu press." (See Hr. Tr., pp. 11-12) He spent his last eight years running a corner post machine. (Ex. D, Depo. p. 14)

Lennox has implemented a Hearing Conservation Program. (Exhibit 2, page 16) Mr. Menter estimated that the hearing conservation program was implemented in the late 1980s. (See Hr. Tr., p. 18) The program provided for noise level monitoring and mandatory hearing protection for all employees working in elevated noise areas or around equipment that generated elevated noise. (Ex. 2, p. 17) Claimant testified that he did not consistently wear hearing protection while working for the defendant employer until the hearing conservation program was implemented. (See Hr. Tr., p. 19)

Excerpts from the hearing conservation program can be found in Exhibit 2. According to the excerpts, noise level monitoring revealed that some employees "may be exposed to noise levels at or above 85 decibels for an 8-hour work day." (Ex. 2, p. 17)

The hearing conservation program excerpts include a chart that lists the work groups at Lennox and the highest noise levels recorded for each. Claimant testified that he worked in the C-9 and C-16 groups. In 1998, Lennox recorded 90.3 and 90.5 decibels in the C-9 group, and 89.3 and 88.7 decibels in the C-16 group. In 2000, the C-9 group produced recordings of 96 and 98 decibels, while the C-16 group produced recordings of 92 and 88. (Ex. 2, p. 19)

An additional noise analysis survey was conducted by Lennox in December 2000 to evaluate and measure worker exposure levels throughout the plant. (Ex. 2, pp. 20-22) Mr. Menter is specifically referenced in the report as one of the individuals monitored. (Ex. 2, p. 21) Peak noise levels were obtained for each of the monitored employees. (Id.) All monitored employees peaked at or above 117 decibels. (See id.) Mr. Menter recorded a peak level of 123. (Id.) The report notes that caution should be given to the value of the peak levels as they reflect instantaneous levels of very short duration. (Id.) That being said, the report also provides that the press claimant operated for approximately 30 of his 43 years generated an 8-hour time weighted average exposure above the 90 decibel level established by OSHA. (Ex. 2, p. 22)

Mr. Menter introduced documentation from noise testing performed at Lennox, which demonstrated significant noise exposures occurring throughout the facility. Additionally, Mr. Menter provided unrebutted testimony regarding the noise levels inside the Lennox plant. I find that claimant was exposed to significant noise throughout his employment with Lennox.

Lennox regularly performed hearing tests on Mr. Menter. (Joint Exhibit 1) According to Mr. Menter, the tests were administered annually starting in the late 80s. (Ex. D, Depo. p. 21; Hr. Tr., p. 20) The hearing conservation program provides that all employees exposed to 85 decibels average noise exposure had to receive audiometric testing on an annual basis. (Ex. 2, p. 17) Unfortunately, the parties only submitted the results from a select few audiometric hearing tests into evidence. The earliest test is dated April 24, 1978 and is labeled as claimant's baseline test. (JE1, p. 1) According to the test results, claimant had normal hearing on the left between 500 and 2,000 Hz, and from 4,000 Hz and up. (Id.; see Ex. 1, p. 8) On the right, claimant had normal hearing through 2000 Hz, and from 4,000 Hz and up. (Id.; see Ex. 1, p. 8)

On January 7, 1980, approximately 3.5 years after his date of hire, Mr. Menter completed a health history form in conjunction with his hearing exam. (Ex. C, p. 31) On the form, Mr. Menter had the option of characterizing his hearing ability as "Excellent," "Good," "Fair," or "Poor." (Id.) Mr. Menter selected "Fair." (Id.) When presented with this form, Mr. Menter stated that his hearing loss could have started before 1980. (Ex. D, Depo. p. 22; see Hr. Tr., p. 46) The form also indicates claimant had worked around loud machines for the past six to seven years, and he had been exposed to gunshots. (Id.)

Claimant submitted to audiometric testing on August 1, 2002. (Ex. C, p. 27) The test revealed a mild loss for speech sounds in the left ear, and a moderate loss for high pitch sounds in both ears. (Id.) Claimant demonstrated bilateral high frequency hearing loss in March 2008. (Ex. C, p. 26) Records show claimant also submitted to audiometric testing on December 5, 2016, November 21, 2017, June 26, 2018, and December 18, 2019. (JE1, pp. 2, 3; Ex. C, pp. 24-25) On the prescreening questionnaires, claimant noted his belief that he had sustained hearing loss; however, he consistently denied experiencing ringing in his ears. (Id.)

Mr. Menter did not seek any treatment for hearing loss or tinnitus outside of the employer's annual audiometric testing. He did, at times, discuss his hearing loss with Maria Olberding, M.D., his personal physician. (JE2, pp. 4-9) Claimant did not mention any symptoms of tinnitus to Dr. Olberding between 2008 and 2019 (See JE2, pp. 4-9) and he specifically denied experiencing ringing in his ears on his health history forms at Lennox in 2016, 2017, 2018, and 2019. (Ex. C, pp. 22-25; Hr. Tr., pp. 34-35) It appears the first time Mr. Menter described ringing in his ears to any physician was when he presented for his independent medical examination in April 2021, or approximately 15 months after his date of retirement. (Ex. 1, p. 3)

There is little evidence Mr. Menter experienced significant noise exposures outside of working for the defendant employer. That being said, Mr. Menter has acknowledged that he was exposed to loud machinery at Cooper Manufacturing. He has also indicated that he previously hunted and was exposed to gunshots. (Ex. C, pp. 29-31) Given the multiple exposures to loud noises over the course of claimant's life, expert testimony is needed to determine whether the noise exposure he experienced at Lennox was a substantial factor in the development of his hearing loss and/or tinnitus.

Matthew Brown, M.D., was the first physician to evaluate claimant's hearing loss and address causation. At the request of defendants, Dr. Brown reviewed claimant's audiograms and evaluated Mr. Menter on March 25, 2020. (JE3, pp. 10-14) The earliest audiogram Dr. Brown reviewed was from 1982. (See JE3, p. 13) Dr. Brown opined that claimant was already exhibiting mild hearing loss in the higher ranges of 3,000, 4,000, and 6,000 Hz at the time of the 1982 audiogram. (JE3, p. 13) He also noted that claimant had partial loss of word recognition, which he explained is normally associated with a genetically predetermined pattern of hearing loss as opposed to a noise-induced hearing loss. (Id.) Given the fact claimant started out with some loss in 1982, had a loss of word discrimination, and had worn hearing protection for the majority of his tenure at Lennox, Dr. Brown did not believe that claimant's work environment was a major contributing factor to his hearing deficit. (JE3, p. 14)

Mr. Menter introduced the expert opinions of Timothy Simplot, M.D., of Iowa Ear, Nose, and Throat (ENT) Center. (Exhibit 1) Dr. Simplot reviewed claimant's medical records and conducted an examination of Mr. Menter on April 26, 2021. (Ex. 1, p. 3) The examination included an audiogram. (Ex. 1, pp. 5-7) Dr. Simplot explained, "In evaluating hearing loss problems over the course of 43 years it is necessary to take into account the degree to which occupational and environmental noise exposure has contributed to an individual's hearing loss versus the natural progression of hearing decline with time." (Ex. 1, p. 8) After calculating claimant's expected and actual hearing changes, Dr. Simplot opined that claimant's work environment played a substantial role in his accelerated hearing loss. (Ex. 1, p. 9)

Based on the April 26, 2021, audiogram, Dr. Simplot opined that claimant's age-corrected hearing loss is 38.1 percent in the left ear and 46.8 percent in the right ear, resulting in a binaural age corrected hearing loss of 39.7 percent. (Id.) He recommended the use of hearing amplification devices, but did not believe that claimant's condition required any permanent work restrictions. (Id.)

Dr. Simplot also diagnosed claimant with bilateral tinnitus and causally related the same to the noise exposure claimant experienced while working at Lennox. Importantly, Dr. Simplot is the first physician to discuss and diagnose claimant with tinnitus. Mr. Menter testified that he did not understand what the ringing in his ears was until he presented to Dr. Simplot. (Hr. Tr., p. 27) Dr. Simplot opined that claimant has sustained permanent impairment and permanent disability as a result of the tinnitus. Utilizing the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Dr. Simplot assigned 3 percent whole person impairment for tinnitus. (Ex. 1, p. 9)

Dr. Simplot concluded his report by critiquing the causation opinion of Dr. Brown. Dr. Simplot correctly points out that Dr. Brown's opinion was, in part, based on the 1982 audiogram, which showed more issues than claimant's 1978 baseline audiogram. (Ex. 1, pp. 9-10) Dr. Simplot further opined that Dr. Brown did not adequately consider the substantial effect noise exposure can have on an individual's hearing loss over the span of 43 years. (Ex. 1, p. 10)

Defendants subsequently obtained an independent medical evaluation from Douglas Hoisington, D.O. (Exhibit A) Dr. Hoisington reviewed the medical records and evaluated Mr. Menter on October 6, 2021. (Ex. A, p. 1) Dr. Hoisington obtained an updated audiogram as part of his evaluation. (Ex. A, p. 12) Dr. Hoisington found that claimant has moderate sloping to a profound sensorineural hearing loss with an 84 percent speech discrimination in the right ear and 80 percent speech discrimination in the left ear. (Ex. A, p. 2) He assessed 53.8 percent age-corrected binaural hearing loss; however, Dr. Hoisington did not feel as though claimant's hearing loss was causally related to noise exposures at Lennox. (Id.) Dr. Hoisington explained that claimant's pattern of hearing loss – significant loss in the low frequencies – is not consistent with noise-induced hearing loss. (Id.) Dr. Hoisington further explained that claimant continued to experience progressive hearing loss despite wearing hearing protection, which is also inconsistent with noise-induced hearing loss. (Id.)

According to Dr. Hoisington, Mr. Menter, "did not complain about any tinnitus or tinnitus causing problems with his activities of daily living" during his examination. (Ex. A, p. 13) Claimant confirmed the same at hearing. (Hr. Tr., p. 33) However, claimant did report intermittent bilateral tinnitus to the audiologist that conducted the audiogram for Dr. Hoisington. (Ex. A, p. 12; Hr. Tr., p. 47)

In a supplemental report, dated November 23, 2021, Dr. Simplot addressed Dr. Hoisington's findings. (Ex. 1, p. 13) Dr. Simplot disagreed with the assertion that noise induced hearing loss only involves high frequencies. Dr. Simplot noted that the Iowa Workers' Compensation guidelines, the AMA Guides, Fifth Edition, and Occupational Safety and Health Administration (OSHA) all utilize both high and low frequencies when calculating degree of hearing loss. (Ex. 1, pp. 13-14)

Dr. Simplot also addressed Dr. Hoisington's comments regarding the progression of Mr. Menter's hearing loss despite wearing hearing protection. (Ex. 1, p. 14) Essentially, Dr. Simplot noted that claimant did not wear hearing protection for several years, there is no way of measuring the effectiveness of the hearing protection claimant wore between 1980 and 2020, and there is no way of knowing whether the hearing protection fit properly or offered enough protection against hearing loss. (See id.) Dr. Simplot concluded his supplemental report by reiterating his prior causation opinion with respect to claimant's hearing loss. (Ex. 1, p. 15)

When comparing the expert opinions in this matter, I note that all three physicians agree that claimant has mild sloping to profound sensorineural hearing loss in both ears; however, only Dr. Simplot causally relates claimant's hearing loss to the work environment. (JE3, p. 11; Ex. 1, p. 8; Ex. A, p. 15)

With respect to claimant's bilateral hearing loss, I find the causation opinion of Dr. Simplot to be more convincing than the opinions of Dr. Brown and Dr. Hoisington. Dr. Simplot had a more complete understanding of claimant's medical records when compared to Dr. Brown. Dr. Simplot's evidence-based approach and ultimate conclusion are reasonable and logical. Comparatively, Dr. Hoisington's opinion that

noise induced hearing loss should only involve higher frequencies is inconsistent with several authoritative sources. I accept Dr. Simplot's causation opinion and find claimant's bilateral hearing loss is causally related to his consistent exposure to loud noises within his work environment.

While I found Dr. Simplot's opinions regarding claimant's bilateral hearing loss to be thorough and persuasive, I did not reach the same conclusion with respect to his opinions relating to tinnitus.

Dr. Simplot was the first and only physician to diagnose claimant with tinnitus. (Ex. 1, p. 9) According to his report, Mr. Menter complained of experiencing noticeable, nonpulsatile tinnitus for the past 15 years. Dr. Simplot's understanding of when claimant's tinnitus symptoms began is not supported by the evidentiary record. At hearing, claimant did not recall providing this information to Dr. Simplot. (Hr. Tr., p. 38) Moreover, he did not know why he would have told Dr. Simplot that he had ringing in his ears for at least 15 years. (Hr. Tr., pp. 38-39)

Mr. Menter could not pinpoint when his symptoms began, only that the ringing in his ears became more noticeable after he retired from Lennox. (Hr. Tr., p. 47; see Ex. D, Depo. p. 16; Hr. Tr., pp. 38-39) Such testimony implies claimant noticed ringing in his ears prior to his date of retirement; however, there is little evidence in the record to support the same.

While claimant discussed bilateral hearing loss with his primary care physician, there is no evidence claimant described ringing in his ears between 2008 and 2019. (See JE2, pp. 4-9) At hearing, claimant confirmed that he never reported ringing in his ears to the defendant employer prior to retiring in January 2020. (Hr. Tr., p. 27) Indeed, claimant specifically denied ringing in his ears on his health history forms at Lennox in 2016, 2017, 2018, and 2019. (Ex. C, pp. 22-25; Hr. Tr., pp. 34-35) Additionally, there is no evidence claimant reported ringing in his ears when he presented for his evaluation with Dr. Brown in March of 2020. Despite testifying that he became concerned when he continued to experience the ringing in his ears after removing himself from the work environment, Mr. Menter did not seek treatment or describe the ringing in his ears to any physician between January 2, 2020, and April 26, 2021. While possible, it seems unlikely that Mr. Menter would not understand or appreciate what the ringing in his ears was until after speaking with Dr. Simplot. (Hr. Tr., p. 27)

Generally speaking, claimant presented as a credible witness, and his hearing testimony is largely consistent with the medical records in evidence and his deposition testimony. That being said, based on the above inconsistencies, I find it difficult to accept claimant's testimony regarding his claim of tinnitus. With these credibility concerns in mind, and the fact Dr. Simplot's understanding of claimant's medical history is not corroborated by other contemporaneous evidence, I find claimant provided insufficient evidence to support his claim that he developed tinnitus as a result of his employment.

CONCLUSIONS OF LAW

The initial dispute in this case is whether claimant sustained an injury that arose out of and in the course of his employment. Mr. Menter asserts that he sustained occupational hearing loss, as well as tinnitus, from repeated exposures to excessive noise during his employment.

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" refer 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 Elec. 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 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).

Under Iowa Code section 85B.4(3), "occupational hearing loss" is defined as that portion of permanent sensorineural loss that exceeds an average hearing level of 25 decibels at the frequencies of 500, 1000, 2000 and 3000 Hz when "arising out of and in the course of employment caused by excessive noise exposure." "Excessive noise exposure" is defined as exposure to sound capable of producing occupational hearing loss. Iowa Code section 85B.4(1).

Iowa Code section 85B.5 provides a table establishing presumptive "excessive noise exposure" at various decibel levels tied to duration of exposure; for example, 8

hours per day at 90 dBA. There is no presumptive excessive noise exposure at levels below 90 dBA. The longest duration identified in the table is 8 hours. The table in section 85B.5, is not the minimum standard defining an excessive noise level in section 85B.4(2). The table in section 85B.5 lists noise level times and intensities which, if met, will be presumptively excessive noise levels of which the employer must inform the employee. See Muscatine County v. Morrison, 409 N.W.2d 685 (Iowa 1987).

Claimant provided evidence that his noise exposure exceeded the levels identified by the table in section 85B.5.

Claimant also introduced an opinion from a well-qualified audiologist, Dr. Simplot, which established a causal connection between claimant's work exposures to excessive noise levels and the development of his hearing loss. Having accepted the causation opinion of Dr. Simplot, I found that claimant proved by a preponderance of the evidence that his hearing loss arose out of and in the course of his employment with Lennox. Accordingly, I conclude that claimant has established a compensable work injury.

With respect to the tinnitus claim, claimant relied upon the expert medical opinions of Dr. Simplot. I found that Dr. Simplot did not have a complete understanding of claimant's medical history with respect to tinnitus. As such, I did not accept his causation opinion regarding tinnitus. Additionally, I found claimant's testimony regarding when his symptoms of tinnitus began lacked credibility. Therefore, I found claimant failed to carry his burden of proving the alleged tinnitus condition arose out of and in the course of his employment.

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).

In this case, the parties introduced hearing tests that clearly demonstrated hearing loss. Claimant introduced the opinions of Dr. Simplot, who opined claimant sustained a permanent injury and permanent functional impairment. Again, Dr. Simplot's opinion was accepted as credible and accurate in this regard.

With respect to the extent of permanent impairment due to hearing loss, Dr. Hoisington and Dr. Simplot were the only two experts to calculate an impairment rating. Both experts factored in claimant's age, and both experts provided an impairment rating pursuant to Iowa Code section 85B; however, Dr. Hoisington is the only expert physician to show exactly how he calculated claimant's age corrected hearing loss pursuant to Iowa Code section 85B. Therefore, it is Dr. Hoisington's rating that is adopted for the purposes of assessing permanency.

Occupational hearing loss is compensated as a percentage of 175 weeks by use of a formula set forth in Iowa Code section 85B.9. Having accepted Dr. Hoisington's assessment showing claimant has 53.8 percent age-corrected binaural hearing loss, I find claimant is entitled to 94.15 weeks of permanent partial disability benefits. Benefits shall commence on the stipulated commencement date of January 2, 2020. (Hearing Report)

In addition to permanent disability, claimant asserts a claim for alternate medical care moving forward. 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.

In this case, Mr. Menter's hearing loss was caused by his employment with the defendant employer. All three expert opinions in this case establish that claimant could benefit from bilateral hearing aids. The hearing aids and maintenance of the same are related to the work injury.

Mr. Menter has established by a preponderance of the evidence that there is reasonable and necessary treatment that can and should be offered to claimant. Claimant has proven he is entitled to alternate care, including bilateral hearing aids. Defendants retain the right to select the authorized provider for this treatment provided they authorize a provider promptly. Iowa Code section 85.27(4). Defendants shall designate an appropriate provider to evaluate claimant for hearing aids, and defendants shall be responsible for payment of devices recommended by the provider.

Mr. Menter also seeks reimbursement of the independent medical evaluation charges from Dr. Simplot. 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).

Defendants assert that Dr. Simplot's evaluation was not in response to an evaluation of permanent disability made by a physician retained by defendants.

The Court of Appeals recently addressed a similar issue in Kern v. Fenchel, Doster & Buck. P.L.C., No. 20-1206, 2021 WL 3890603 (Iowa Ct. App. Sept. 1, 2021). In Kern, defendants' expert found there was no causation. Kern disagreed with the opinion and sought an IME at defendants' expense. The commissioner found Kern was not entitled to recover the cost of the IME. The Iowa Court of Appeals reversed, finding the "opinion on lack of causation was tantamount to a zero percent impairment rating," which is reimbursable under Iowa Code section 85.39.

In the matter at hand, Dr. Brown offered a no causation opinion on June 3, 2020. Claimant disagreed with Dr. Brown's opinion and sought an IME with Dr. Simplot, which was conducted on April 26, 2021. The report was issued after Dr. Brown's June 3, 2020, opinion. Under Kern, claimant is entitled to recover the cost of Dr. Simplot's IME by way of Iowa Code section 85.39.

The final issue is costs. Costs are assessed at the discretion of the agency. Iowa Code section 86.40. In this case, claimant recovered permanent partial disability benefits and future medical care. Exercising the agency's discretion, I conclude it is appropriate to assess claimant's costs in some amount.

Claimant identifies his requested costs in Exhibit 7. The first cost is a request for reimbursement of claimant's filing fee. This is a permitted cost pursuant to 876 IAC 4.33(7) and is assessed against defendants.

The second cost request asserted by claimant is for reimbursement of the service fees associated with the Original Notice and Petition. This is a permitted cost pursuant to 876 IAC 4.33(3) and is assessed against defendants.

Next, claimant requests reimbursement of the costs associated with Dr. Simplot's April 26, 2021, report. This cost was already assessed pursuant to Iowa Code section 85.39.

Claimant also requests reimbursement of the fees associated with Dr. Simplot's November 23, 2021, report ($750.00). This is a permitted cost pursuant to 876 IAC 4.33(6) and is assessed against defendants.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant ninety-four and 3/20 (94.15) weeks of permanent partial disability benefits commencing on January 2, 2020. Weekly benefits are payable

at the stipulated weekly rate of seven hundred seventy-six and 30/100 dollars ($776.30).

Defendants shall pay accrued weekly benefits in a lump sum together with interest 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.

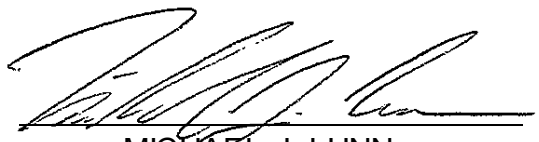
Defendants shall promptly select and authorize a medical provider to provide claimant additional treatment for his occupational hearing loss, including bilateral hearing aids. Defendants shall retain the right to select and authorize a medical provider of their choosing to provide the above ordered medical care provided defendants authorize this care promptly.

Pursuant to Iowa Code section 85.39, defendants shall reimburse claimant in the amount of one thousand six hundred and 00/100 dollars ($1,600.00) for the cost of Dr. Simplot's IME.

Defendants shall reimburse claimant's costs in the amount of eight hundred fifty-nine and 96/100 dollars ($859.96).

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 15th day of August, 2022.



MICHAEL J. LUNN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

James Ballard (via WCES)

Robert Gainer (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.