BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



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| JEFFREY J. SPAHN,<br><br>Claimant,<br><br>vs.<br><br>DEERE & COMPANY,<br><br>Employer,<br>Self-Insured,<br>Defendant. | File No. 5057512<br><br>A R B I T R A T I O N<br><br>D E C I S I O N<br><br>Headnotes: 1402.30, 1803, 1803.1, 2208, 2209, 2401, 2401, 2501, 2907 |

## STATEMENT OF THE CASE

Jeffrey Spahn, claimant, filed a petition in arbitration and seeks workers' compensation benefits from defendant, Deere & Company, as the self-insured employer. Hearing occurred before the undersigned on September 28, 2017, in Waterloo, Iowa.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision. No factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 2, Claimant's Exhibits 1 through 8, and Defendant's Exhibits A through H.

Claimant testified on his own behalf. No other witnesses testified live. The evidentiary record closed at the end of the arbitration hearing.

However, counsel for the parties requested an opportunity to submit post-hearing briefs. Their request was granted. The parties filed post-hearing briefs on October 31, 2017, at which time this case was considered fully submitted.

## ISSUES

1. Whether claimant sustained a hearing loss and/or tinnitus injuries that arose out of and in the course of his employment and manifesting on November 28, 2014.

2. Whether the alleged tinnitus injury is barred by Iowa Code section 85.26's statute of limitations.

3. Whether the alleged tinnitus injury is barred for failure to give timely notice of the injury pursuant to Iowa Code section 85.23.

4. Whether the alleged injury(ies) caused permanent disability and, if so, whether the injury(ies) should be compensated via a hearing loss claim pursuant to Iowa Code chapter 85B or via Iowa Code section 85.34(2)(u), as an unscheduled, industrial disability injury resulting from the alleged tinnitus injury.

5. The extent of claimant's entitlement to permanent disability benefits, if any.

6. Whether claimant is entitled to future medical care for his alleged injuries.

7. Whether either party's costs should be assessed.

## FINDINGS OF FACT

Having considered all of the evidence in this record, and recognizing that there may be competing evidence within the record, I find the following facts:

Jeffrey Spahn is a 63-year old gentleman. He worked at Deere & Company for a period of 42 years. During the early part of his career with Deere & Company, Mr. Spahn had some extended periods of lay-off. However, during the later couple of decades of his employment, Mr. Spahn worked full-time and without lay-off for Deere & Company.

Claimant has held numerous positions with Deere & Company, including positions as welder, assembler, machinist, and an inspector. Each of these jobs required him to work in areas that were loud. Although he would remove his hearing protection to communicate with others throughout the workday, claimant wore hearing protection offered by Deere & Company throughout his employment.

Mr. Spahn voluntarily retired from Deere & Company and last worked in the company's plant on November 28, 2014. This represents the first break in claimant's employment and exposure to loud occupational noises during the latter two decades of his employment.

Claimant argues that he sustained both tinnitus and occupational hearing loss as a result of his occupational noise exposures. There is some evidence in this record suggesting that claimant may have been exposed to noise levels above 90 decibels. However, there was not definitive evidence to establish a presumption of occupational hearing loss. Instead, the parties introduced expert opinions, which contradicted each other, on the issue of whether the noise exposure at Deere & Company was actually the cause of claimant's hearing loss and tinnitus.

Mr. Spahn produced expert reports from Richard S. Tyler, Ph.D., an audiologist with extensive research and experience dealing with healing loss and tinnitus. Dr. Tyler interviewed claimant twice telephonically. Dr. Tyler opines that the noise exposures to which claimant was exposed at Deere & Company caused both his hearing loss and his tinnitus. As will be discussed below, I accept Dr. Tyler's causation opinion and find that claimant has proven that he sustained both hearing loss and tinnitus as a result of noise exposures he experienced at Deere & Company during his employment.

Dr. Tyler offers two methodologies for calculating permanent hearing loss. (Claimant's Exhibit 1, pages 12-13) Although he disagrees with its methodology, Dr. Tyler noted claimant's bilateral hearing loss pursuant to Iowa Code chapter 85B to be two percent. (Claimant's Ex. 1, p. 12) I accepted this rating as most convincing and consistent with Chapter 85B.

Dr. Tyler has also generated his own methodology for rating permanent impairment related to tinnitus. Dr. Tyler opines that Mr. Spahn sustained a 24.6 percent, or 25 percent, permanent impairment related to his tinnitus. (Claimant's Ex. 1, pp. 14-18) Dr. Tyler's methodology and resulting impairment rating are not consistent with the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Dr. Tyler's methodology is one expert's analysis of the issue and its ramifications on an individual's functional abilities. However, I do not find it convincing. I reject Dr. Tyler's permanent impairment rating related to claimant's tinnitus as being inflated and unreliable.

Nevertheless, I do find that claimant's tinnitus is permanent. Claimant testified that the tinnitus is constant and his testimony was credible. There is no evidence in this record to suggest that the tinnitus will improve or resolve with time or treatment. Therefore, claimant's tinnitus is found to be permanent in nature.

Defendants put forth the expert opinion of Robert A. Dobie, M.D., a well-qualified, board certified otolaryngologist, who is also fellowship trained in otoneurosurgery. Dr. Dobie is licensed in Texas and has held medical licensure in four other states. (Defendant's Ex. H, p. 39) Dr. Dobie assisted with development of the Sixth Edition of the AMA Guides chapter related to the ear, nose, throat and related structures. (Defendant's Ex. H, p. 52) I find no reason to dispute Dr. Dobie's credentials or qualifications to offer an opinion in this case.

However, I do note that Dr. Dobie never evaluated claimant. In fact, he did not even interview the claimant over the telephone, as Dr. Tyler did. Dr. Dobie's involvement was solely based upon a record review of claimant's allegations of hearing loss and tinnitus. While it may be possible to render a causation opinion based upon a record review, I am also troubled by the fact that Dr. Dobie performed his record review and then had additional questions he desired be answered before rendering his opinion.

Unfortunately, defendant was not able to provide a substantive response to Dr. Dobie's inquires. Despite having less than complete evidence and despite not

having evidence he deemed necessary to inquire about before rendering his opinion, Dr. Dobie nevertheless rendered a causation opinion without the evidence he sought. Having never interviewed claimant to conduct his own history and ask the questions he deemed necessary and having not received substantive responses to those inquiries, I find that Dr. Dobie had less than a complete history and understanding of the facts of this case. Therefore, I find Dr. Dobie's causation opinions difficult to accept.

When considering and comparing the opinions of Dr. Tyler and Dr. Dobie in this case, I find the causation opinions offered by Dr. Tyler to be more convincing and credible. Therefore, I find that claimant has proven by a preponderance of the evidence that he sustained both hearing loss as well as tinnitus as a result of the noise exposures he experienced while working at Deere & Company.

As noted above, I found the 2 percent binaural hearing loss, as opined by Dr. Tyler to be most credible. Although I did not accept Dr. Tyler's permanent impairment rating related to the tinnitus injury, I note that Dr. Dobie also describes permanent impairment related to tinnitus and he confirms that permanent impairment is permitted to be awarded for tinnitus pursuant to the AMA Guides. Therefore, I find claimant has proven he sustained permanent impairment and permanent disability related to the tinnitus injury.

Defendant asserted that Mr. Spahn actually sustained the tinnitus injury long before the asserted November 28, 2014 injury date. Deere & Company argued that claimant was actually barred from recovery for the tinnitus claim because he failed to give timely notice of the injury and failed to file the tinnitus claim within the applicable statute of limitations.

With respect to the notice defense asserted by defendant, I find that Mr. Spahn appropriately responded to inquiries on his annual hearing testing performed at Deere & Company and notified defendant that he experienced tinnitus as early as May 1996. (Joint Ex. 2, p. 15) Certainly, claimant's notation of ringing in his ears during an annual hearing test performed by the employer would give the employer notice of the potential work injury. At a minimum, this would put the employer on inquiry notice of a potential work injury claim for tinnitus. I find that Mr. Spahn provided notice several times on annual hearing tests between 1996 and 2009.

Between 1996 and 2009, claimant's hearing tests demonstrate occasional ringing in the ears and no major complaints. However, on February 25, 2009, claimant reported that he had ringing in both ears and that it was increasing. He reported that his hearing had changed in the past year and that he had "more ringing." (Joint Ex. 2, p. 39) By at least February 25, 2009, I find that claimant knew he had ringing in his ears, which is known medically as tinnitus, and that claimant knew or should have known that it may be causally related to his employment given that he was asked this question on annual hearing tests administered by the employer.

However, Mr. Spahn testified that he did not know the tinnitus was permanent. He testified that he believed the tinnitus would resolve after he terminated his employment with Deere & Company. Claimant's testimony was reasonable and credible in this respect. There is no medical evidence, or other medical evidence, to demonstrate that claimant knew or should have known that the tinnitus was permanent in nature or that it would not resolve when he quit working at Deere & Company. I find that both subjectively and reasonably objectively claimant did not know that his tinnitus was a compensable injury or that it would have a permanent adverse impact on his employability since he continued to work at Deere & Company without incident and since he reasonably believed that the condition would resolve after he left employment at Deere & Company.

Mr. Spahn is a high school graduate, but has no additional education or formalized training, other than on-the-job training offered at Deere & Company. (Claimant's Ex. 5, p. 5) Mr. Spahn has a long work history at Deere & Company and demonstrated that he could perform that work even with his tinnitus. If forced to continue employment, I find that claimant could have continued to work at his Deere & Company positions even with his tinnitus.

Claimant also voluntarily retired from his employment at Deere & Company. He testified that he had planned to seek part-time employment after his retirement. However, he also testified that he was enjoying his retirement and had not looked for alternate employment since his retirement. If he pursued part-time employment, Mr. Spahn may have difficulties with jobs that require inter-personal communications in noisy environments. Dr. Tyler suggested claimant would have difficulties localizing sounds or voices, and that seems reasonable.

However, Dr. Tyler opined that claimant may also have difficulties with concentration. This does not appear to have been the case while claimant was working for Deere & Company. He worked as an inspector, and there is no evidence that he was under disciplinary action for poor performance.

Considering claimant's age, educational background, employment history, ability to continue at Deere & Company until his voluntary retirement, his lack of motivation to return to the workforce at the present time, as well as his permanent tinnitus, likely permanent impairment, and residual abilities, as well as all other factors of industrial disability outlined by the Iowa Supreme Court, I find that claimant has only proven a minor reduction of his future earning capacity. Specifically, I find that claimant has proven a ten percent loss of future earning capacity as a result of his tinnitus.

## CONCLUSIONS OF LAW

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or

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

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

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

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.

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).

Tinnitus is an unscheduled injury that is considered as a personal injury under Chapter 85 of the Iowa Code and is compensated industrially, if it causes permanent disability. Ehteshamfar v. UTA Engineered Systems Div., 555 N.W. 2d 450 (Iowa 1996).

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," but does not include loss attributable to age or any other condition or exposure that is not job related. "Excessive noise exposure" is exposure to sound capable of producing occupational hearing loss. Iowa Code section 85B.4(1).

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 table in section 85B.5 then, 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).

Some evidence was introduced suggesting claimant may have been exposed to noise levels exceeding the excessive noise exposure threshold. However, the evidence did not establish conclusively that claimant was exposed to noise levels at Deere & Company that were presumptively excessive noise exposure. Therefore, it is necessary

to determine whether the actual noise exposure experienced by claimant at Deere & Company was actually a cause of his alleged hearing loss and/or tinnitus.

Having considered the two competing expert opinions, I accepted the causation opinions of Dr. Tyler as most credible and convincing in this case. Dr. Tyler had the opportunity to interview claimant twice and provided a reasonable and articulate explanation of how claimant's work activities caused both hearing loss and tinnitus.

By contrast, Dr. Dobie did not interview or evaluate claimant. His opinions were generated solely on the review of written records. Dr. Dobie posed specific inquiries of defendant to clarify pieces of evidence (i.e., claimant's total hours worked by year, whether claimant shoots a gun right or left handed). Defendant was not able to answer Dr. Dobie's inquiries. Yet, Dr. Dobie went ahead and rendered an opinion without the information he felt was necessary to inquire about.

Having weighed the competing expert opinions and having accepted Dr. Tyler's causation opinion in this case, I conclude that claimant has established that he sustained occupational hearing loss as well as tinnitus as a result of his work exposures at Deere & Company.

With respect to the occupational hearing loss claim, I accepted Dr. Tyler's calculation of a two percent binaural hearing loss as accurate. A binaural hearing loss is compensated on a 175-week schedule. Having found a two percent binaural hearing loss, I conclude that claimant has proven entitlement to 3.5 weeks of permanent disability for his occupational hearing loss. Iowa Code section 85B.6. The parties stipulated that permanent disability for the November 28, 2014 injury date (hearing loss) commences on November 29, 2014. (Hearing Report)

With respect to the tinnitus claim, defendant asserted two affirmative defenses challenging claimant's tinnitus claim. First, Deere & Company asserted that claimant failed to give timely notice of his tinnitus. The Iowa Workers' Compensation Act imposes time limits on injured employees both as to when they must notify their employers of injuries and as to when injury claims must be filed.

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

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

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

The time period both for giving notice and filing a claim does not begin to run until the claimant as a reasonable person, should recognize the nature, seriousness, and probable compensable character of the injury. The reasonableness of claimant's conduct is to be judged in light of claimant's education and intelligence. Claimant must know enough about the condition or incident to realize that it is work connected and serious. Claimant's realization that the injurious condition will have a permanent adverse impact on employability is sufficient to meet the serious requirement. Positive medical information is unnecessary if information from any source gives notice of the condition's probable compensability. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Orr v. Lewis Cent. Sch. Dist., 298 N.W.2d 256 (Iowa 1980); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Interestingly, defendant asserted the Iowa Code section 85.23 notice defense at the hearing but did not raise or argue the notice defense in its post-hearing brief. Having found that Mr. Spahn clearly noted ringing in his ears on numerous audiograms obtained by the employer, I conclude that Deere & Company did not prove that claimant failed to give timely notice. Defendant's notice defense fails.

Deere & Company also asserted a statute of limitations defense pursuant to Iowa Code section 85.26. Iowa Code section 85.26(1) requires an employee to bring an original proceeding for benefits within two years from the date of the occurrence of the injury if the employer has paid the employee no weekly indemnity benefits for the claimed injury. If the employer has paid the employee weekly benefits on account of the claimed injury, however, the employee must bring an original proceeding within three years from the date of last payment of weekly compensation benefits.

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

In this case, Deere & Company argued that claimant knew he had ringing in his ears, or tinnitus, many years before his employment ended. I concur with defendant and I found that Mr. Spahn clearly knew that he had tinnitus many years before he filed his original notice and petition. I specifically found that claimant necessarily knew by at least February 25, 2009 that he had ringing in his ears, or tinnitus. Therefore, Deere & Company has established the first prong of its statute of limitations defense.

The second prong of the statute of limitations defense is whether the claimant knew or should have known that the tinnitus was work related. Again, Deere & Company made a very convincing argument. It argued that Mr. Spahn believed that his tinnitus was "part of his hearing loss, and the Claimant felt that it was caused by noise

exposure at John Deere." (John Deere Post-Trial Brief, p. 15) Again, I concur with Deere & Company. Claimant, both objectively and subjectively, believed that the ringing in his ears was caused by his working environment and noise exposures at work. Given that he was asked this question on hearing tests administered annually by the employer, claimant objectively should have at least suspected that his tinnitus was causally related to his noise exposure at Deere & Company on or before February 25, 2009. Therefore, I found that claimant's tinnitus was known by claimant and was believed by claimant to be work related by at least February 25, 2009. I conclude that the proper date of injury for the tinnitus claim is February 25, 2009. Chapa v. John Deere Ottumwa Works, 652 N.W.2d 187, 189 (Iowa 2002); Tasler, 483 N.W.2d at 829-830; McKeever, 379 N.W.2d at 374. I conclude that Deere & Company has established the second prong of its statute of limitations defense and that the proper injury date for the tinnitus claim is February 25, 2009.

The statute of limitations runs from the occurrence of the injury. McKeever, 379 N.W.2d at 375. However, the third prong of the statute of limitations defense requires that defendant establish the claimant knew or should have known that the cumulative injury (tinnitus in this case) was serious enough to have a permanent, adverse impact on his employment. Chapa v. John Deere Ottumwa Works, 652 N.W.2d 187, 189 (Iowa 2002); Tasler, 483 N.W.2d at 829-830; McKeever, 379 N.W.2d at 374. The statute of limitations is tolled until claimant knew or should have known that the tinnitus was serious enough to have a permanent adverse impact on his employment.

Defendant contends that the tinnitus never had an adverse impact on claimant's employment or his employability. Therefore, Deere & Company concedes, if their argument is accepted, its statute of limitations defense should fail. However, Deere & Company argues that, if the undersigned finds the tinnitus has had a permanent adverse impact on claimant's employment, then the statute of limitations defense should prevail.

Deere & Company makes a compelling argument on its face. However, it does not factor in Mr. Spahn's unrebutted testimony on this issue. Mr. Spahn testified that he believed the ringing in his ears would go away once he ended his employment with Deere & Company. There is no evidence that Deere & Company's nurses, any audiologists, or other medical personnel ever told claimant something to the contrary.

Therefore, I found Mr. Spahn credible in this testimony and found that Mr. Spahn did not know and reasonably should not have known prior to ending his employment with Deere & Company that the ringing in his ears was permanent or that it would not subside after his employment ended. In other words, I found that Mr. Spahn did not know, until after his employment ended with Deere & Company and his tinnitus did not improve, that it was a serious condition and that it would have a permanent adverse impact on his employment or future employability.

Having reached this finding of fact, I conclude that defendant failed to establish that claimant knew that the tinnitus was a serious condition that would have a

permanent adverse impact on his employment before he left his employment at Deere & Company in 2014. As a result, I conclude that Deere & Company failed to prove the third prong of its statute of limitations defense. Defendant's statute of limitations defense fails.

Having found that the proper date of injury for Mr. Spahn's tinnitus was February 25, 2009, I note that the parties' stipulations pertaining to the commencement of permanent disability and weekly rate are likely not applicable for the February 25, 2009 date of injury. The parties' stipulations pertaining to the hearing loss date of injury of November 28, 2014, were accepted at the time of the arbitration hearing. Those stipulations remain accepted and binding for the November 28, 2014 hearing loss injury. However, for the tinnitus injury date on February 25, 2009, the parties neither offered stipulations nor evidence on the proper commencement date for permanent disability nor the proper weekly rate.

Parties' stipulations are binding unless legally inaccurate. In this instance, the stipulations entered into by the parties were accepted at the time of hearing. However, having reviewed the evidence, entered findings of fact, and now conclusions of law, it is apparent that the parties' stipulations pertaining to claimant's weekly worker's compensation rate are inaccurate for the tinnitus injury date on February 25, 2009. Similarly, it is apparent that the parties' stipulations pertaining to commencement of permanent disability benefits for the tinnitus injury claim, with a February 25, 2009 injury date, are not legally accurate.

Therefore, notice is given to the parties that the undersigned rejects the parties' stipulations pertaining to commencement of permanent disability and weekly rate. See Drake University v. Davis, 769 N.W.2d 176, 181 (Iowa 2009); Robinson v. City of Des Moines, File No. 5035076 (Appeal January 2013). No findings or conclusions will be entered pertaining to the commencement of permanent disability or weekly rate pertaining to the tinnitus injury date of February 25, 2009. Instead, the parties will be ordered to confer and to report to the undersigned within 30 days of entry of this decision whether legally appropriate stipulations can be reached as to these issues or if additional evidence is required.

Nevertheless, both Dr. Tyler and Dr. Dobie opine that the tinnitus injury is permanent in nature. Neither suggests that future treatment can resolve or improve the tinnitus, though treatment may help claimant mask or live more functionally with the tinnitus. Therefore, the issue of the extent of claimant's permanent disability related to the tinnitus is ripe for determination.

As the parties stipulated, tinnitus is compensated as an unscheduled injury with industrial disability pursuant to Iowa Code section 85.34(2)(u). Having found that the tinnitus caused only a minor loss of future earning capacity equivalent to ten percent (10%), I conclude that claimant is entitled to a ten percent (10%) industrial disability award. Pursuant to Iowa Code section 85.34(2)(u), industrial disability is paid as a percentage of 500 weeks. Having concluded that claimant sustained a ten percent

(10%) industrial disability, I conclude that he is entitled to an award of 50 weeks of permanent partial disability benefits for his tinnitus injury.

In addition to award of permanent disability, Mr. Spahn also seeks award of future medical treatment for his injuries. The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Mr. Spahn is not requesting specific alternate medical care at this time. However, given that I found these injuries to have arisen out of and the course of claimant's employment, he is entitled to treatment of his hearing loss and tinnitus moving forward. Iowa Code section 85.27. Defendant shall provide future medical care for both the hearing loss and tinnitus conditions.

Finally, claimant also seeks assessment of his costs. Assessment of costs is a discretionary function of the agency. Iowa Code section 86.40. Claimant prevailed on the majority of the disputed issues. I conclude it is appropriate to assess claimant's costs in this case.

Mr. Spahn seeks assessment of his filing fee totaling $100.00. This is an appropriate cost and is assessed pursuant to 876 IAC 4.33(7). Mr. Spahn also seeks assessment of the cost of Dr. Tyler's two reports. Agency rule 876 IAC 4.33(6) permits the award of costs related to obtaining no more than two practitioners' reports. However, the Iowa Supreme Court recently held that only the expense related to drafting a report may be taxed as a cost. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 846-847 (Iowa 2015).

In this instance, Dr. Tyler's charges are not broken down between his work reading documents, interviewing claimant, and preparing his report. Claimant bore the burden to establish entitlement to his costs. Dr. Tyler's billing statements are not sufficiently detailed to permit an accurate assessment of costs. Therefore, claimant's request to tax Dr. Tyler's expenses is denied.

## ORDER

THEREFORE, IT IS ORDERED:

As a result of claimant's occupational hearing loss, with an injury date of November 28, 2014, defendant shall pay claimant three point five (3.5) weeks of permanent partial disability benefits commencing on November 29, 2014 at the rate of seven hundred eleven and 15/100 dollars ($711.15) per week.

As a result of the claimant's tinnitus, defendant shall pay claimant fifty (50) weeks of permanent partial disability benefits.

Defendant shall pay all accrued weekly benefits in lump sum with interest pursuant to Iowa Code section 85.30.

However, the appropriate commencement date for permanent partial disability benefits related to the tinnitus claim cannot be determined at this time.

The appropriate weekly rate at which permanent partial disability benefits for the tinnitus injury cannot be determined at this time.

Within thirty (30) days of the filing of this arbitration decision, the parties shall confer and determine if appropriate stipulations can be reached pertaining to the claimant's weekly rate of compensation for the February 25, 2009 tinnitus injury date and the proper commencement date for permanent partial disability benefits for the tinnitus injury.

If the parties reach appropriate stipulations, they may file those stipulations, in writing, for consideration and hopeful acceptance by the undersigned to enable a proper award of the permanent disability benefits due claimant for the tinnitus injury.

If the parties cannot reach stipulations pertaining to the tinnitus claim relative to the commencement of permanent disability and/or the weekly rate of compensation, counsel for the parties shall notify the undersigned within thirty (30) days of entry of this decision and a new hearing date will be established to receive additional evidence on these two issues.

Defendant shall be responsible for claimant's future medical treatment related to both his occupational hearing loss as well as his tinnitus.

Defendant shall reimburse claimant's costs totaling one hundred and 00/100 dollars ($100.00).

Defendant 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 29th day of January, 2018.

WILLIAM H. GRELL
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.