

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ERNEST MICHAEL HOFER,

Claimant,

vs.

LENNOX INDUSTRIES, INC.,

Employer,

and

INDEMNITY INSURANCE COMPANY
OF NORTH AMERICA,Insurance Carrier,
Defendants.

File No. 20003191.01

ARBITRATION DECISION

Head Note Nos.: 1402.20, 1402.40,
1803, 2208, 2502, 2700, 2907

STATEMENT OF THE CASE

Ernest Michael Hofer, claimant, filed a petition in arbitration seeking workers' compensation benefits from Lennox Industries, Inc., employer, and Indemnity Insurance Company of North America, insurance carrier, as defendants. The hearing was held on August 18, 2022. Pursuant to an order from the Iowa Workers' Compensation Commissioner, this case was heard via videoconference using Zoom with all parties and the court reporter appearing remotely.

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

Ernest Michael Hofer was the only witness to testify live at trial. The evidentiary record also includes joint exhibits 1-4,¹ claimant's exhibits 1-4, and defendants' exhibits A- E. All exhibits were received into the record without objection.

The parties submitted post-hearing briefs on September 23, 2022, at which time the case was fully submitted to the undersigned.

ISSUES

The parties identified the following disputed issues on the hearing report:

¹ At hearing, the parties voluntarily removed pages 91-93 of Joint Exhibit 4 because they were duplicates.

1. Whether claimant sustained an injury that arose out of and in the course of his employment with Lennox Industries on January 2, 2020.
2. Whether the alleged injury resulted in any permanent disability; and if so,
3. The extent of claimant's entitlement to permanent disability benefits.
4. Whether claimant is entitled to alternate medical care.
5. Whether claimant is entitled to recover the cost of an independent medical examination pursuant to Iowa Code section 85.39
6. Assessment of costs.

FINDINGS OF FACT

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

At the time of the hearing the claimant, Ernest Michael Hofer (hereinafter "Hofer"), was 70 years old. (Hearing Tr., pp. 12-13). Hofer resides in Toledo, Iowa with his wife and daughter. (Id. at 12). He graduated from high school in 1970. (Id. at 13). After high school, Hofer drove a delivery truck for Culligan Soft Water for approximately a year and a half. (Id. at 13-14). He also worked as a butcher at Tama Pack, a meat processing plant, for four years. (Id. at 13). Hofer testified his job was eliminated after he participated in a failed attempt to unionize the plant. (Id. at 14).

Hofer started working at Lennox Industries (hereinafter "Lennox") in July 1976. (Tr., pp. 14-15). He voluntarily retired from Lennox on January 2, 2020; he worked there for 43 years. (Id. at 15). Hofer was not working at the time of the hearing, nor had he applied for any jobs since his voluntarily retirement. (Id. at 67). Hofer did a variety of jobs during his tenure at Lennox. (Id. at 16). His answers to interrogatories indicate he worked as a welder, machine operator, and punch press operator. (CI Ex. 3, p. 21; See also Ex. E, p. 28).² Hofer asserts he sustained injuries, including hearing loss and tinnitus, as a result of his work at Lennox.

At the hearing, Hofer introduced a copy of Lennox's hearing conservation program. (See Ex. CI Ex. 2). This document indicates that some plant employees "may be exposed to noise levels at or above 85 decibels for an 8-hour day." (Id. at 16). The printout includes a chart labeled "Hearing Conservation Areas." (Id. at 17). The chart documents work groups at Lennox where noise levels exceed 85 decibels. (Id.). Hofer testified he previously worked in groups A14, B14, C16, C18, C19, and D6, as well as A8 Weld, C13-Spot Weld, and ran a 300-ton press. (Tr., p. 16-19). The chart provides the following information for some of the groups Hofer listed:

² A hearing test from February 2008, also indicates Hofer was working in the Cooling Fabrication Department at that time. (JE 1, p. 5).

Wk. Grp. #	Dept.#	Description	Required 7/29/98 by map (88+ decibels)	Reading (decibels)	Required 1/1/02 (88+ decibels)	Reading (decibels)
A14			X	102/92.3		
B14			X	93		
B14	758	Amadas			X	90
C16			X- should have been	89.3/88.7		
C18	741	Weld Gas Bodies	X	90.2	X	88
C19		Load/Unload	X	99.7	Relocated	

(CI Ex. 2, p. 18).³ Hofer testified Group A8 fabricated heat exchangers. (Tr., p. 18). This involved a lot of hammering, banging, and welding. (Id.). In Group C13 he spot-welded squirrel cages for blower housings. (Id.). Hofer testified this area was quite noisy. (Id.).

When Hofer started working at Lennox in 1976, the plant did not require employees to wear hearing protection. (Tr., p. 17). Sometime in the late 1980s Lennox instituted a hearing conservation program. (Ex. E, p. 31; Tr., p. 22). Prior to that, Hofer did not wear hearing protection at work. (Ex. E, p. 31). Hofer testified that he worked in the above listed groups before Lennox instituted its hearing protection program. (Tr., pp. 17-19). After Lennox adopted the hearing conservation program, employees were encouraged, but not required, to wear hearing protection in high noise areas. (Id. at 22). Lennox posted a diagram of the plant on a bulletin board, highlighting all the high noise areas in the plant. (Id. at 22-23). In the 1990s, Lennox also taped off the floor around high noise areas, to further warn workers. (Id. at 23). Hofer testified he worked in “virtually every place” that was taped off and designated as a high noise area. (Id.).

After Lennox instituted the hearing conservation program, Hofer occasionally wore yellow foam ear plugs when in high noise areas of the plant. (Tr., p. 25). He testified the ear plugs did not work well, that they fit poorly, and kept slipping out of his ears, especially when it was hot. (Id. at 26). Hofer also had to remove the ear plugs when he needed to hear his co-workers. (Id.). In 2000, Lennox changed its policy and made wearing ear plugs mandatory. (Id.).

Lennox performed hearing testing on Hofer. The first test was performed on April 24, 1978. (JE 1, p. 1). It showed some moderate hearing loss in his right ear and

³Work Groups A8, C13, and D6 are not included in the chart. (See CI Ex. 2, p. 18).

normal levels in his left ear. (Id.) Hofer testified he did not know the cause of the prior hearing loss in his right ear. (See Ex. E, p. 30-31). From 1979 through 2008, Lennox continued to test Hofer's hearing once a year. (JE 1, pp. 1-5). The record also contains hearing tests from 2014 and 2019. (Id. at 6-9). The tests show some progression of hearing loss in his right ear and a greater progression of hearing loss in his left ear. (Id. at 1-9). For example, in 1978, Hofer's hearing test results were as follows:

LEFT EAR	RIGHT EAR
500 1000 2000 3000 4000 6000 8000	500 1000 2000 3000 4000 6000 8000
20 15 25 15 20 5 15	50 55 50 30 40 50 55

(Id. at 1). In contrast, his test results from 2019 were,

LEFT EAR	RIGHT EAR
500 1000 2000 3000 4000 6000 8000	500 1000 2000 3000 4000 6000 8000
40 40 55 50 55 60 70	65 60 60 55 70 90 95

(Id. at 9).

Hofer had other noise exposures throughout his life. He regularly plays the acoustic guitar and sometimes plays an electric guitar. (Ex. E, p. 27). He occasionally does woodworking and owns a table saw. (Id.) He wears earmuffs when using the table saw. (Id. at 28). He has deer hunted every year for the last twenty years, using a 50-caliber muzzleloader. (Id.) He does not wear hearing protection when deer hunting. (Id.) He has owned two Gold Wing motorcycles—one from 1984 to 1996 and a second from 2016 to the present. (Id.) He wears a motorcycle helmet but no hearing protection when he rides. (Id.) He also owns a 40-acre farm. (Id.) Every four years he disks his CRP ground with a TS110 New Holland tractor. (Id. at 29). He does not wear hearing protection when driving the tractor. (Id.) He also hauls grain to town every fall with his tractor and a gravity wagon. (Id.) Hofer mows the lawn of his acreage and a rental property, but he wears earmuffs. (Id.)

Hofer began experiencing tinnitus in the mid-2000s. (Tr., p. 44). He described his symptoms as a constant ringing or buzzing in his ears. (Id.) He attributed the symptoms to the "constant noise at work with all the machines running and things banging," but figured the symptoms would improve once he retired and was no longer exposed to the factory noise. (Id. at 44-45). Between 2012 and 2018, Hofer saw his family physician, Jerry Wille, M.D., for impacted wax in his ears, both left and right. (See JE 2, pp. 21-82). He, however, did not seek treatment for tinnitus symptoms at any of those visits. (Id.) According to the medical records, Hofer first sought treatment for his hearing loss and tinnitus on April 10, 2020, three months after his retirement from Lennox. (JE 3, p. 85). On that date, he saw Matthew Brown, M.D, and Courtney Thayer, Au.D., at Iowa Head and Neck, P.C., complaining of bilateral hearing loss and constant ringing in his ears. (JE 3, p. 85). He was diagnosed with bilateral sensorineural hearing loss. (Id. At 86). His tinnitus was not addressed. (Id.)

The record is clear that Hofer sustained hearing loss in both ears. He also experiences tinnitus in both ears. Given the various exposures to loud noise over the course of Hofer's life, expert testimony is needed to determine whether the noise exposures at Lennox are a substantial factor in the development of his hearing loss and tinnitus. The record contains three different expert opinions. Hofer has introduced the opinion of Timothy Simplot, M.D. (CI Ex. 1, pp. 1-14). Defendants offer the opinions of Douglas Hoisington, D.O., and Matthew Brown, M.D. (Ex. B, pp. 5-14; JE 3, pp. 89-90).

In late May 2020, an adjuster working for the defendants asked Dr. Brown for his opinion on the cause of Hofer's bilateral hearing loss. (JE 3, p. 88). Dr. Brown sent a response on June 3, 2020. (Id. at 89). His response stated as follows:

I have reviewed the records you sent regarding Ernest Hofer and evaluated the audiograms throughout his time at Lennox. As early as 10/27/1980 he was documented as having moderate hearing loss in the left ear which really has not changed in the ensuing decades. The right ear was borderline in 1980 and has changed minimally over the years, mostly at an age-appropriate rate. If there was any noise exposure hearing loss, there would have been a change from his baseline in the worse hearing left ear over that period. Overall, I do not believe that noise exposure at Lennox was a contributing factor in his hearing loss.

(Id. at 89-90).

At the behest of his attorney, Hofer attended an independent medical exam (IME) with Dr. Simplot at Iowa ENT Center on August 17, 2021. (CI Ex. 1, p. 1). Dr. Simplot performed audiometric testing at this exam. (Id. at 3-6). The tests showed asymmetrical sensorineural hearing loss. (Id.). The test results were as follows:

LEFT EAR	RIGHT EAR
500 1000 2000 3000 4000 6000 8000	500 1000 2000 3000 4000 6000 8000
30 40 55 50 55 55 70	65 65 60 65 75 80 90

(CI Ex. 1, p. 5). According to Dr. Simplot, Hofer's right ear showed moderately severe sloping to profound loss and his left ear had borderline normal sloping to severe high frequency loss. (Id.). Dr. Simplot opined that Hofer's employment at Lennox played a substantial role in his hearing loss. (Id. at 9). Dr. Simplot also compared Hofer's actual percentage of hearing loss with the age-related hearing loss figures contained in Iowa Administrative Rule 876—8.10. (Id. at 8-9). Based on his age at retirement, Dr. Simplot expected the following loss figures due to aging alone,

6 dB loss at 1000 Hz
 10 dB loss at 2000 Hz
 18 dB loss at 3000 Hz
 26 dB loss at 4000 Hz
 28 dB loss at 6000 Hz

(Id. at 8). However, Hofer's actual hearing loss figures were as follows:

<u>Left Side</u>	<u>Right Side</u>
25 dB at 1000 Hz	10 dB at 1000 Hz
30 dB at 2000 Hz	10 dB at 2000 Hz
35 dB at 3000 Hz	35 dB at 3000 Hz
35 dB at 4000 Hz	35 dB at 4000 Hz
50 dB at 6000 Hz	30 dB at 6000 Hz

(Id. at 8-9). Based upon these figures, Dr. Simplot opined Hofer likely had some congenital nerve loss in his right ear when he started working at Lennox, but the noise level inside the plant played a substantial role in accelerating his hearing loss. (Id. at 9). Dr. Simplot also diagnosed Hofer with bilateral tinnitus. (Id. at 9). He stated the tinnitus also had "a work-related causation." (Id.). Dr. Simplot assigned Hofer 26.25 percent permanent impairment for his work-related binaural hearing loss. (Id. at 10). He assigned an additional 3 percent permanent impairment for his tinnitus. (Id.). Dr. Simplot indicated Hofer would greatly benefit from hearing aids for both ears. (Id.).

At the request of defendants, Hofer underwent a second IME with Dr. Hoisington at ENT Clinic of Iowa, P.C., on June 6, 2022. (Ex. B, pp. 5-14). An audiologist from Dr. Hoisington's office also performed a hearing test. (Id. at 8). A chart mapping the results of that test is contained in Dr. Hoisington's report. (Id.). His report also contains a copy of the age-related hearing loss figures contained in Iowa Administrative Rule 876-8.10 and his calculations utilizing those figures. (Id. at 9-14). According to Dr. Hoisington's report, Hofer's hearing test results in June 2020 were as follows:

<u>LEFT EAR</u>	<u>RIGHT EAR</u>
500 1000 2000 3000	500 1000 2000 3000
25 40 55 55	60 60 60 65

(Id. at 12-14).⁴ Based on these test results, Dr. Hoisington diagnosed Hofer with asymmetric bilateral sensorineural hearing loss and assigned him 25.7 percent permanent impairment for this loss after correcting for his age. (Id. at 6, 14). Dr. Hoisington, however, opined that Hofer's hearing loss was not related to his employment at Lennox because his pattern of loss was more consistent with presbycusis and the Lennox hearing test questionnaires indicate Hofer always wore hearing protection at work, so he should not have any high-frequency hearing loss.⁵ (Id. at 6). Dr. Hoisington did not assign any additional impairment for Hofer's tinnitus complaints. (Id. at 7). His report indicates Hofer did not mention tinnitus symptoms at all during his examination. (Id.). Dr. Hoisington further states that there is no objective

⁴ Per Administrative Rule 876-8.10, Dr. Hoisington's calculations only provide test results through 3000 Hz. (Ex. B, p. 12-14). His hearing chart, however, shows Hofer's results at 4000 Hz and 6000 Hz to be 65 and 75 for his left ear and 75 and 105 for his right ear. (Id. at 8). 8000 Hz was not tested by Dr. Hoisington. (Id.).

⁵ The test results show Hofer has hearing loss at high frequencies. (JE 1, p. 9; Ex. B, pp. 12-14).

way to measure tinnitus, that is it a “purely subjective” condition and used for “significant secondary gain.” (Id.).

Of the three experts presented, I find Dr. Simplot to be the most convincing. Dr. Brown mixed up Hofer’s right and left ears in his causation report. (See JE 3, pp. 89-90). Additionally, he relied upon a hearing test from 1980 in determining noise exposure at Lennox did not contribute to Hofer’s hearing loss. (Id.). Hofer started working at Lennox four years earlier—in 1976. (Tr., pp. 14-15). The weight of the evidence supports Hofer’s assertion that he did not consistently wear hearing protection at Lennox until the 1980s when Lennox introduced its hearing conservation program. (Tr., pp. 14-15; 17, 22; Ex. E, p. 31). Dr. Brown’s opinion does not account for Hofer’s initial noise exposure. Hofer had a previous hearing test performed in 1978. (JE 1, p. 1). The results of that test do not match the results of the test taken in 1980. (Id.). Finally, Dr. Brown states that there has been minimal change in Hofer’s hearing over the last forty years. (Id.). That statement is not supported by the evidence. Hofer has undergone numerous hearing tests. Those tests show accelerated hearing loss in both ears. (Ex. B, pp. 12-14; CI Ex. 1, p. 5; See also JE 1, p. 9).

The hearing tests results from Dr. Hoisington and Dr. Simplot’s exams are fairly similar. Both show a decline in Hofer’s bilateral hearing. The physicians also provided comparable impairment ratings after calculating and accounting for age-related hearing loss. The major difference is that Dr. Simplot believes the remaining hearing loss is causally related to Hofer’s work at Lennox and Dr. Hoisington does not. Dr. Hoisington provides two arguments to support his conclusion that Hofer’s hearing loss is not causally related to his work at Lennox. Those arguments are: 1) that his pattern of hearing loss is more consistent with presbycusis, and 2) that the hearing test questionnaires Hofer filled out at Lennox indicated he always wore hearing protection, so he should not have any high-frequency hearing loss. (Ex. B, p. 6). I do not find these arguments persuasive. First, Dr. Hoisington provides no explanation for why he believes Hofer’s hearing loss pattern is more consistent with presbycusis than noise exposure. Second, Dr. Hoisington’s opinion relies upon the presumption that Hofer always wore hearing protection when working at Lennox. This assumption is not supported by the weight of the evidence. Hofer convincingly testified that he did not consistently wear hearing protection while working at Lennox from 1976 through at least some time in the 1980s, when Lennox instituted its hearing conservation program. (See Tr., p. 22; Ex. E, p. 31). Even after the hearing conservation program was enacted, Hofer only occasionally wore foam ear plugs when in high noise areas of the plant. (Tr., p. 25). These ear plugs did not work very well—they fit poorly and kept slipping out. (Id. at 26). Additionally, even after hearing protection was mandated by Lennox, Hofer still had to take his ear plugs out to communicate with co-workers while inside the plant. (Id.). Dr. Simplot provided a supplemental report on June 27, 2022. (CI Ex. 1, pp. 11-14. In it he specifically addressed Dr. Hoisington’s ear protection rationale. The report states, it is “well known that despite the use of hearing protection devices they can vary significantly in their protective effect and that one can still have hearing loss issues.” (Id. at 12). Dr. Simplot notes that most hearing protection devices only provide 20 to 40 dB of protection, if used correctly. (Id.). Hofer testified the foam ear plugs provided by

Lennox did not work well. (Tr., p. 26). Given this, it is unlikely he received optimum protection from them. The evidence supports Hofer's assertion that he was exposed to high noise levels while working at Lennox.

The evidence also supports Hofer's assertion that he suffers from tinnitus, and it is work-related. In their exhibits, defendants included Hofer's past hearing test questionnaires. (See Ex. D). According to these documents, starting in 2006, Hofer complained of ringing or buzzing in his ears, which he felt was caused by the noise in the plant. (Id. at 23). His questionnaires from 2017 and 2019 also mention ringing in his ears.⁶ (Id. at 24-25).

Dr. Simplot's opinion is supported by Lennox's documentation, Hofer's testimony, and Hofer's hearing tests results over a forty-plus-year period.⁷ I accept Dr. Simplot's opinions as accurate with respect to the diagnosis of Hofer's conditions, his noise exposures,⁸ causation to his work exposures, and the level of compensable hearing loss pursuant to Iowa Code chapter 85B, as well as permanent impairment from tinnitus.

Hofer continued to work full duty for Lennox until his retirement in 2020. He did not have any work restrictions at the time of his retirement, and he did not complain of any inability to perform his work because of either hearing loss or tinnitus. Dr. Simplot's only recommended work restriction was that Hofer wear hearing protection when in loud environments. (Cl Ex. 1, p. 10). At the hearing, Hofer testified his hearing loss and tinnitus make it harder to drive because he cannot hear oncoming traffic or his turn signal beeping. (Tr., p. 43). The conditions also make it difficult for him to communicate with his grandkids or with other adults when in a loud environment. (Id. at 43-44). He also indicated the tinnitus symptoms can interfere with his sleep. (Tr., p. 47). Neither these symptoms, nor Dr. Simplot's suggested work restriction would prevent Hofer from performing his prior job at Lennox.

Although Hofer is not currently working, he has the ability to return to work if he desires or needs to do so. Therefore, considering his educational background, employment history, permanent restrictions, permanent impairment, lack of healing period, lack of motivation, and retirement, as well as all other factors of industrial disability outlined by the Iowa Supreme Court, I find Hofer proved a 20 percent loss of future earning capacity as a result of the combined effects of his bilateral hearing loss and tinnitus.

⁶ Defendants did not assert a notice defense under Iowa Code section 85.23. (See Hearing Report).

⁷ The chart produced by defendants shows that several of the areas Hofer worked in had noise levels above 90 decibels. (Cl Ex. 2, p. 18).

⁸ In their brief defendants argue Hofer's hearing loss was likely caused or accelerated by his exposure to non-work-related environmental factors such as hunting without ear protection and riding motorcycles. (See defendant's brief, p. 15). However, no medical provider or expert has opined that Hofer's hearing loss was caused by exposure to non-work-related noise.

CONCLUSIONS OF LAW

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

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

Hofer also introduced numerous hearing tests that clearly demonstrated hearing loss, as well as an opinion from a well-qualified audiologist, Dr. Simplot, which established a causal connection between his work exposure to excessive noise levels at Lennox and the development of his accelerated hearing loss and tinnitus. Having accepted the opinion of Dr. Simplot, I found Hofer proved by a preponderance of the evidence that his hearing loss and tinnitus arose out of and in the course of his employment with Lennox. Hofer has established compensable work injuries. Dr. Simplot also opined that Hofer sustained permanent injury and permanent impairment. Again, Dr. Simplot's opinion is accepted as credible and accurate in this regard. Hofer is entitled to permanent disability benefits.

Tinnitus is an unscheduled injury that is compensable under Iowa Code section 85.34(2)(v). See Chapa v. John Deere Ottumwa Works, 652 N.W.2d 187 (Iowa 2002); Ehteshamfar v. UTA Engineered Systems Div., 555 N.W.2d 450 (Iowa 1996). When an injury claim involves both an occupational hearing loss and tinnitus, the claim converts to an unscheduled injury compensable under Iowa Code section 85.34(2)(v). Ehteshamfar v. UTA Engineered Systems Div., 555 N.W.2d 450 (Iowa 1996). If the claimant no longer works for the employer at the time of the hearing, unscheduled injuries are not limited to the functional impairment rating but are compensated with industrial disability. Iowa Code § 85.34(2)(v).

In this case, Hofer retired from the employer and was not working at the time of the hearing. He has proven both industrial hearing loss and tinnitus caused by noise exposure while working at Lennox. Accordingly, I conclude that his claim is compensable pursuant to Iowa Code section 85.34(2)(v) using an industrial disability method.⁹ Industrial disability was defined in Diederich v. Tri-City Ry. Co. of Iowa, 219

⁹In their brief, defendants argue Hofer should be compensated utilizing the functional method under Iowa Code section 85.34(2)(v), because he voluntarily retired. (Defendants' post hearing brief, pp. 16-17). Defendants contend Hofer was offered work which would pay the same or greater wages than he was earning at the time of the injury, but he turned that offer down to retire. (*Id.*). In support of their argument, defendants cite to Barry v. John Deere Dubuque Works, File No. 21003269.01 (App. April 28, 2022). In Barry, the Commissioner held the claimant's recovery was "limited to his functional loss under Iowa Code § 85.34(2)(v) because the earnings he received after he returned to work following the injury were greater than the earnings he received at the time of the injury." *Id.* While the Commissioner cited to the claimant's voluntary retirement, it does not appear to be the main factor he relied upon in determining the claimant should be compensated functionally under the statute. *Id.* In this case, Hofer is alleging hearing loss—thus he did not return to work after the date of injury, nor is there any evidence in the hearing record that he was "offered work for which [he] . . . would receive the same or greater . . . wages" Iowa Code § 85.34(2)(v). Given this, it is not clear Hofer meets the statutory requirement to be compensated functionally under

Iowa 587, 258 N.W. 899 (1935) as follows: “It is therefore plain that the Legislature intended the term “disability” to mean ‘industrial disability’ or loss of earning capacity and not a mere ‘functional disability’ to be computed in the terms of percentages of the total physical and mental ability of a normal man.”

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee’s age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer’s offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Iowa Code § 85.34.

Having considered Hofer’s age, his proximity to retirement (having already retired), his educational and employment backgrounds, his permanent restrictions, his permanent functional impairment, his lack of motivation to return to work, and all other factors of industrial disability outlined by the Iowa Supreme Court, I find Hofer proved a 20 percent loss of future earning capacity as a result of the combined effects of his occupational hearing loss and tinnitus. Iowa Code § 85.34(2)(v). Dr. Simplot only gave Hofer one permanent work restriction, and it does not affect his ability to perform his prior job at Lennox. But for his voluntary retirement, Hofer could still be working full-time for Lennox. Given these facts, Hofer is entitled to 20 percent industrial disability. Id.

Industrial disability benefits are paid proportional to 500 weeks. Accordingly, a 20 percent industrial disability entitles Hofer to 100 weeks of permanent partial disability benefits. Iowa Code § 85.34(2)(v). The parties stipulated permanent disability benefits should commence on January 2, 2020 and be paid at the stipulated weekly rate of \$709.58. (Hearing Report).

Hofer also asserts a claim for alternate medical care. Specifically, he seeks hearing aids as recommended by both Dr. Simplot and Dr. Hoisington. (See CI Ex. 1, p. 10; Ex. B, p. 7). 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

the statute. See also, Sallis v. City of Waterloo, File No. 1643953.01 (App. August 29, 2022) (affirming the deputy commissioner’s determination that claimant should be compensated industrially even though she voluntarily retired from her employment with defendant).

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.

Id. In this case, Hofer's hearing loss and tinnitus were caused by his employment at Lennox. Both Dr. Simplot and Dr. Hoisington opined that he could benefit from bilateral hearing aids. The hearing aids and maintenance of the same are related to the work injury.

Hofer has established by a preponderance of the evidence that there is reasonable and necessary treatment that can and should be offered to him. Hofer 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 § 85.27(4). Defendants shall designate an appropriate provider to evaluate Hofer for hearing aids, and defendants shall be responsible for payment of devices recommended by the provider.

Hofer is seeking reimbursement for the IME performed by Dr. Simplot. Iowa Code section 85.39 permits an employee to be reimbursed for a subsequent examination by a physician of the employee's choice where an employer-retained physician 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 (Iowa App. 2008).

Regarding the IME, the Iowa Supreme Court has provided a literal interpretation of the plain language of Iowa Code section 85.39, stating that section 85.39 only allows the employee to obtain an independent medical evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839 (Iowa 2015). Under Young, an employee can only obtain an IME at the employer's expense if an evaluation of permanent disability has been made by an employer retained physician. In June 2020, Dr. Brown opined that Hofer's hearing loss was not related to his work at Lennox. (JE 3, pp. 89-90). An "opinion on lack of causation [is] tantamount to a zero impairment rating," which is reimbursable under Iowa

Code section 85.39. Kern v. Fenchel, Doster & Buck, P.L.C., 966 N.W.2d 326 (Table) (Iowa Ct. App. 2021). Given this, Hofer is entitled to reimbursement for the cost of Dr. Simplot's August 2021 IME report in the amount of \$1,800. (CI Ex. 4, p. 27).

Hofer also seeks an award of the costs outlined in claimant's exhibit 4. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. See 876 IAC 4.33; Iowa § Code 86.40. Administrative Rule 4.33 provides as follows:

Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, including convenience fees incurred by using the WCES payment gateway, and (8) costs of persons reviewing health service disputes.

Id.

Hofer incurred costs for the filing fee for his petition and service of that petition upon defendants. (CI Ex. 4, pp. 25-26). He also seeks the cost Dr. Simplot's supplemental report issued on June 27, 2022. (Id. at 28). Hofer was successful in this action. Therefore, I conclude that it is reasonable to assess his filing fee and service costs pursuant to 876 IAC 4.33(3) and 876 IAC 4.33(7). I found Dr. Simplot's supplemental report to be helpful and cited to it in my decision. Given this, I also assess the cost of Dr. Simplot's supplemental report in the amount of \$1,000 pursuant to 876 IAC 4.33(6). See also Young, 867 N.W.2d at 846. Therefore, I assess costs totaling \$1,110.33.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay Hofer one hundred (100) weeks of permanent partial disability benefits at the stipulated rate of seven hundred nine and 58/100 dollars (\$709.58) per week commencing on January 2, 2020.

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 furnish Hofer additional treatment for his occupational hearing loss and tinnitus, 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

Defendants shall reimburse claimant for the IME conducted by Dr. Simplot in August 2021 in the amount of one thousand eight hundred dollars (\$1,800.00).

Defendants shall pay costs of one thousand one hundred ten and 33/100 dollars (\$1,110.33).

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 31st day of January, 2023.

A handwritten signature in black ink that reads "Amanda Rutherford". The signature is fluid and cursive, with the first name "Amanda" being more prominent than the last name "Rutherford".

AMANDA R. RUTHERFORD
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.