BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHAEL SIGLIN,

Claimant,

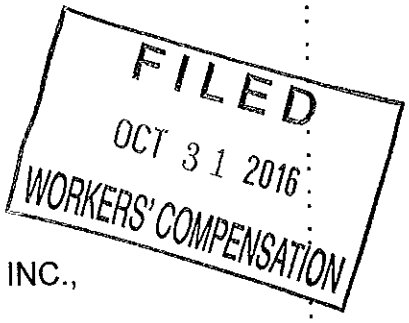
vs.

UNITED AIRLINES, INC.,

Employer,

NEW HAMPSHIRE INSURANCE COMPANY,

Insurance Carrier,
Defendants.




File Nos. 5053170, 5053171

ARBITRATION

DECISION

Head Note No.: 1402.30

## STATEMENT OF THE CASE

Michael Siglin, claimant, filed a petition for arbitration against United Airlines, Inc., as the employer and New Hampshire Insurance Company as the insurance carrier. An in-person hearing occurred on July 14, 2016, in Des Moines, Iowa.

The evidentiary record includes claimant's exhibits 1 through 6. Claimant also filed a copy of Richard S. Tyler, Ph.D.'s, curriculum vitae after the conclusion of the evidentiary hearing. Dr. Tyler's curriculum vitae is not prejudicial to defendants and is received into the evidentiary record. The undersigned has marked Dr. Tyler's curriculum vitae as exhibit 7. Defendants submitted a separate set of exhibits labeled as exhibits A through D. All exhibits were received without objection, including Dr. Tyler's curriculum vitae.

Claimant testified on his own behalf. No other witnesses testified live. The evidentiary record closed upon the undersigned's receipt of Dr. Tyler's curriculum vitae on the afternoon of July 14, 2016. However, counsel for the parties requested the opportunity to file post-hearing briefs. The parties were given until July 29, 2016 to file and serve their post-hearing briefs, at which time the case was considered fully submitted to the undersigned.

## STIPULATIONS

The parties submitted hearing reports for each of the alleged injury dates at the commencement of the arbitration hearing. In the order section of the hearing reports,

the undersigned found the hearing reports "to be a correct representation of disputed issues and stipulations and the report was approved and accepted into the record of this case." Those stipulations and the disputed issues were discussed by counsel and the undersigned at the commencement of hearing. However, for clarity sake, the parties have entered into the following stipulations:

In File No. 5053170 (Date of Injury: September 30, 2014):

1. The parties stipulate to "[t]he existence of an employer-employee relationship at the time of the alleged injury." (Hearing Report, page 1)

2. With respect to the claim for permanent disability, the parties stipulate that "[t]he commencement date for permanent partial disability benefits, if any are awarded, is the 30th day of September, 2014." (Hearing Report, p. 1)

3. With respect to rate of compensation, the parties have stipulated, "[a]t the time of the alleged injury, ... claimant was married." (Hearing Report, p. 1)

4. With respect to the rate of compensation, the parties have stipulated, "[a]t the time of the alleged injury, ... claimant was entitled to 2 exemptions." (Hearing Report, p. 1)

5. With respect to the request for specific taxation of costs, the parties stipulate that "[t]he costs listed in the attachment have been paid." (Hearing Report, p. 2)

In File No. 5053171 (Date of Injury: April 18, 2015):

6. The parties stipulate to "[t]he existence of an employer-employee relationship at the time of the alleged injury." (Hearing Report, page 1)

7. With respect to rate of compensation, the parties have stipulated, "[a]t the time of the alleged injury, ... claimant was married." (Hearing Report, p. 1)

8. With respect to the rate of compensation, the parties have stipulated, "[a]t the time of the alleged injury, ... claimant was entitled to 2 exemptions." (Hearing Report, p. 1)

9. With respect to the request for specific taxation of costs, the parties stipulate that "[t]he costs listed in the attachment have been paid." (Hearing Report, p. 2)

The parties' stipulations are accepted. The undersigned will not enter any findings of fact or conclusions of law pertaining to any of the parties' stipulations. The parties are expected to and ordered to comply with stipulations that have been accepted.

## ISSUES

In File No. 5053170, the parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury on September 30, 2014, which arose out of and in the course of his employment with United Airlines, Inc.

2. Whether any claim for benefits is barred for claimant's failure to give timely notice of the work injury.

3. Whether the alleged injury is the cause of permanent disability.

4. Whether the alleged injury should be compensated as a scheduled injury or with industrial disability benefits.

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

6. The applicable average weekly wage, or gross earnings, immediately preceding the alleged date of injury and the corresponding weekly rate at which benefits should be paid.

7. Whether costs should be assessed against either party.

In File No. 5053171, the parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury on April 18, 2015, which arose out of and in the course of his employment with United Airlines, Inc.

2. Whether the alleged injury is the cause of permanent disability.

3. Whether the alleged injury should be compensated as a scheduled injury or with industrial disability benefits.

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

5. The applicable average weekly wage, or gross earnings, immediately preceding the alleged date of injury and the corresponding weekly rate at which benefits should be paid.

6. Whether costs should be assessed against either party.

## FINDINGS OF FACTS

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

Michael Siglin began employment with United Airlines, Inc., in 1985. (Claimant's testimony; Exhibit 5, page 4; Ex. 6, p. 3) At the beginning of his employment with United Airlines, Inc., Mr. Siglin worked part-time. Initially, he worked at the airline's ticket counter, boarding gate, bag room, and performed some ramp service work. (Claimant's testimony; Ex. 5, p. 5)

During approximately the last decade of his employment with United Airlines, Inc., Mr. Siglin performed mainly ramp service work. In this capacity, he worked outside near the planes as they arrived and departed. In his ramp service work, claimant was exposed to loud noise, including running jet engines, auxiliary power units, heaters, and generators. Mr. Siglin worked full-time and described being exposed to these noises for more than 40 hours per week often. (Claimant's testimony)

Claimant testified that hearing protection was provided by the employer. Mr. Siglin complied with the employer's hearing protection program and generally wore ear plugs during summer months and ear muffs during winter months. He testified that his hearing protection was removed from time to time throughout his shifts to be able to communicate with co-workers. He indicated that he began experiencing hearing loss and tinnitus three to five years before his employment with United Airlines, Inc., ended. In fact, he noted that he and co-workers would even joke about their hearing loss. (Claimant's testimony)

United Airlines, Inc., required annual hearing testing for its employees during the early part of claimant's employment. However, annual hearing testing ceased in 2007 and claimant did not receive additional hearing testing between 2007 and the termination of his employment on September 30, 2014. (Claimant's testimony; Ex. 1)

After claimant's employment was terminated, he obtained a hearing test at Woodard Hearing Centers on February 3, 2015. (Ex. 2) That audiogram demonstrated "R normal hearing 250-2000 Hz sloping to a mild to moderate hearing loss 4000-8000 Hz" and "L normal hearing 250-4000 Hz sloping to a mild to moderate loss 6000-8000 Hz." (Ex. 2)

Claimant then sought consultation with Richard S. Tyler, Ph.D. (Ex. 3) Dr. Tyler has a master's degree in audiology and received his doctoral degree in psychoacoustics in 1978. Dr. Tyler is a licensed audiologist in the State of Iowa and has been a certified audiologist by the American Speech-Language-Hearing Association since 1985. (Ex. 7)

Dr. Tyler has held various research positions and most recently has served as a professor and as the Director of Audiology at the University of Iowa Hospitals and Clinics' Department of Otolaryngology—Head and Neck Surgery in the Department of

Speech Pathology and Audiology. Dr. Tyler has extensive experience and has taught classes and published numerous articles pertaining to tinnitus as well as other subjects related to hearing loss. (Ex. 7)

Dr. Tyler was provided the hearing evaluation records from Examinetics while claimant was employed and received annual hearing tests at United Airlines, Inc., as well as the hearing evaluation record from Woodard Hearing Centers in February 2015. Dr. Tyler performed telephonic interviews of claimant on March 19, 2015 and again on April 6, 2015. (Ex. 3, p. 1) Following his records review and interviews of claimant, Dr. Tyler opined, "I conclude that the sensorineural hearing loss and tinnitus experienced by Mr. Siglin was probably a result of his work at United Airlines." (Ex. 3, p. 11)

Dr. Tyler has never personally examined or even seen claimant to understand the significance of his healing loss or tinnitus during inter-personal communications. Dr. Tyler's record's review and telephonic interview of an individual with hearing loss and tinnitus in both ears is less than convincing or reassuring as to its accuracy.

Dr. Tyler's report also contains sections that seem to have little or no relevance to claimant's situation. For instance, Dr. Tyler's report discusses exposure to chemicals as a potential risk. (Ex. 3, pp. 2-3) Neither claimant nor Dr. Tyler identified any specific toxins or chemicals to which claimant was actually exposed during his employment at United Airlines, Inc., that were alleged to have caused or increased claimant's risk of hearing loss. Instead, this appears to be a standard or stock portion of Dr. Tyler's report that has little or no bearing in this case.

Dr. Tyler's report also references the employer as being MidAmerican Energy in this chemical exposure section of his report. (Ex. 3, p. 3) Claimant has never worked for MidAmerican Energy. (Ex. 6, pp. 2-3) I suspect that Dr. Tyler used a prior report form and failed to modify the name of the employer for this case. This error suggests that Dr. Tyler was likely using a standard, or stock, report with minimal revisions made for this particular case. The error damages Dr. Tyler's credibility in this particular case.

Dr. Tyler notes a history in which claimant describes intermittent tinnitus, primarily in the right ear. (Ex. 3, p. 6) However, according to his personal physician's records from 2010 through 2014, claimant denied any tinnitus during medical examinations. (Ex. D, pp. 21, 23, 25, 26, 27) Similarly, according to the Woodard Hearing Centers' audiologist, claimant denied tinnitus during his February 2015 audiogram. (Ex. 2) It seems odd to the undersigned that claimant's personal physician as well as an audiologist selected by claimant would both record denial of tinnitus (particularly only a month before the interview with Dr. Tyler).

Dr. Tyler also disregards the applicable statutory standards. While Dr. Tyler may not agree with the standards established by the Iowa legislature (even if he has good reason to disagree with the standards), the undersigned is obligated to apply the statutory standards as duly exacted by the Iowa legislature. Dr. Tyler's variance from

the applicable statutory standards leaves the undersigned with an uneasy feeling about Dr. Tyler's motivations and conclusions as they pertain to this case and Iowa law.

After Dr. Tyler's report was generated, defendants scheduled claimant to be evaluated by Mark Zlab, M.D., on May 17, 2016. (Ex. A) Dr. Zlab is a practicing otolaryngologist. He is a diplomat of the American Board of Otolaryngology and has medical licensure in both Iowa and Nebraska. Dr. Zlab served for a year as a clinical instructor at the University of Nebraska Medical Center in the Department of Otolaryngology, but has been in private practice since 1991. (Ex. A, p. 8)

Dr. Zlab appears to have been provided the hearing test results from at least 2005 as well as the audiogram performed at Woodard Hearing Centers in February 2015. Dr. Zlab also ordered and obtained hearing testing on the date of his physical examination of claimant on May 17, 2016.

One concern I have with Dr. Zlab's report is that he notes twice that claimant terminated his employment with United Airlines, Inc., in 2007. (Ex. A) Claimant clearly continued to be employed with United Airlines, Inc., through September 30, 2014. This erroneous understanding or notation by Dr. Zlab causes some concern and lessens the credibility of his report and opinions.

On the other hand, Dr. Zlab is the only medical professional offering an opinion that has physically examined claimant. Dr. Zlab is a practicing and board certified otolaryngologist that presumably evaluates and treats numerous patients each day, week, and/or month. Dr. Zlab had a better opportunity than Dr. Tyler to observe claimant's ability to hear and understand during an interpersonal communication. He had a better opportunity to observe claimant's necessity and ability to read lips, understanding higher pitch sounds, and Dr. Zlab performed hearing testing on the same day as his evaluation.

When comparing the licensures, experience, ability to personally observe claimant, compliance with duly enacted legal standards for occupational hearing loss claims, and the information available to each of the medical professionals, the evidence is very close to being in equipose. However, I find one piece of evidence that tips the balance of credibility.

At hearing, claimant testified that he has constant buzzing (tinnitus). Claimant testified that his symptoms became more noticeable after he left his employment at United Airlines, Inc. I will accept claimant's trial testimony as accurate and assume that he has constant tinnitus. I will also accept claimant's trial testimony that he does not recall ever talking with his personal physician or the audiologist at Woodard about tinnitus. Nevertheless, claimant offered no explanation why he told Dr. Tyler that his symptoms were intermittent. (Ex. 3, p. 6) Dr. Tyler obtained an erroneous history in this regard.

Dr. Zlab appears to have recorded a history consistent with claimant's sworn testimony at trial and in his deposition. (Claimant's testimony; Ex. 5, p. 8 (deposition transcript, p. 31)) Dr. Tyler did not get this important piece of information correct in his history and report. Given that tinnitus is one of the specific issues being asserted and evaluated by both Dr. Zlab and Dr. Tyler, it was important to get the history correct and it was incumbent upon claimant to explain or correct any discrepancy between his actual symptoms and those recorded by Dr. Tyler. Ultimately, Dr. Tyler's erroneous history regarding the very injury claimed is damaging to his credibility.

I find Dr. Zlab's opinions to be more convincing in this case. Although claimant was clearly exposed to loud noises at United Airlines, Inc., he bore the burden to establish by a preponderance of the evidence that his hearing loss and tinnitus are causally related to his work. I find that Dr. Zlab had the better opportunity to evaluate claimant personally. Dr. Zlab had the benefit of having performed a hearing test in his office on the date of his evaluation. Dr. Zlab had a more accurate history of claimant's tinnitus symptoms and complaints.

Dr. Zlab opines, "Mr. Siglin is demonstrating bilateral sensorineural hearing loss which has a configuration consistent with aging. I do no [sic] see evidence of hearing loss secondary to noise.... The tinnitus is casually [sic] related to the hearing loss." (Ex. A, p. 4)[1] Having found Dr. Zlab to be the most convincing medical expert in this file, I accept his opinions as accurate. I find that claimant failed to prove his bilateral hearing loss and tinnitus are causally related to his noise exposures at United Airlines, Inc.

## 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.

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[1] It should be noted that defendants' Exhibit A starts at page three. The page referenced in this citation is the second page of Exhibit A, but is labeled in the bottom right hand corner of the document as Exhibit A, page "4."

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).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

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. No evidence was introduced establishing conclusively that claimant was exposed to noise levels at United Airlines, Inc., that were presumptively excessive noise exposure. Therefore, it is necessary to determine whether the actual noise exposure experienced by claimant at United Airlines, Inc., was actually a cause of his alleged hearing loss and/or tinnitus.

Having found the opinions of Dr. Zlab to be most convincing in this case, I also found that claimant failed to prove his occupational hearing loss and/or his tinnitus were caused by his exposure to noise during his employment at United Airlines, Inc. Claimant's failure to establish a causal connection between his work noise exposures and his hearing loss and/or his tinnitus results in a conclusion that he is not entitled to workers' compensation benefits under either of the petitions he has filed.

Claimant requests a specific assessment of costs. Assessment of costs is a discretionary function of the agency. Iowa Code section 86.40. In this case, I concluded that claimant failed to prove entitlement to an award of any benefits. Therefore, exercising my discretion, I conclude that an assessment of claimant's costs is not appropriate.

The remainder of the disputed issues are moot given the factual findings and conclusions noted above.

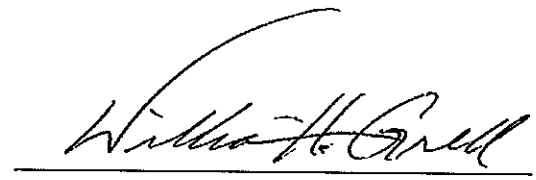
ORDER

THEREFORE, IT IS ORDERED:

Claimant takes nothing.

The parties shall pay their own costs.

Signed and filed this 31st day of October, 2016.



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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.