BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

GERALD SCHISSEL,

Claimant,

vs.

JOHN DEERE DUBUQUE WORKS OF DEERE & COMPANY,

Employer,
Self-Insured,
Defendant.

File No. 5046690

ARBITRATION

DECISION

Head Note Nos.: 1100; 2208; 2907; 4000

STATEMENT OF THE CASE

Gerald Schissel, claimant, filed a petition in arbitration seeking workers' compensation from John Deere Dubuque Works of Deere & Company, self-insured defendant employer, as a result of an injury he allegedly sustained on April 30, 2012, that allegedly arose out of and in the course of his employment. The case was heard in Des Moines, Iowa and considered fully submitted on April 27, 2015. The evidence in the case consists of the testimony of claimant as well as Claimant Exhibits 1 through 21 and Defendant's Exhibits A through H. The argument of the parties in their briefs was also considered.

ISSUES

The parties presented the following issues for resolution in the case:

1. Whether claimant sustained an occupational hearing loss on April 30, 2012, which arose out of and in the course of his employment;

2. Whether the alleged hearing loss is the cause of permanent disability, and if so, the extent of claimant's binaural hearing loss; and

3. Whether defendant is liable for the cost of Dr. Richard Tyler's independent medical examination pursuant to Iowa Code section 85.39.

4. Whether penalty should be assessed.

5. Assessment of costs.

FINDINGS OF FACT

The deputy workers' compensation commissioner, having heard the testimony of the witness and considered the evidence in the record, finds that:

Gerald Schissel, claimant, was 62 years old at the time of the hearing. Claimant testified he graduated from high school and completed one year at Loras College.

Claimant worked for Flex-Steel for a couple of years before his work for John Deere Dubuque Works. Claimant began working for John Deere Dubuque Works (hereinafter Deere) on April 18, 1972. (Exhibit B, page 6) He retired from Deere on April 30, 2012.

The records show that claimant's hearing was first tested on April 15, 1972 and showed no hearing loss. (Ex. E, p. 38) Beginning in 1979 claimant's hearing was tested every year. The first year that showed a significant hearing loss was 1996 and in every year but one since then, he has shown a hearing loss. (Ex. B, p. 61; Ex. E, p. 38)

In 1984 Deere instituted a mandatory hearing protection program. (Ex. 18, p. 122) Claimant testified that he complied with the hearing protection program. Claimant received training in how to use the hearing protection. (Ex. 5, p. 24) Claimant would use the hearing protection provided by his employer. He also used the hearing protection at home for some tasks like weed wacking. Claimant said he started using hearing protection at home about 10 to 12 years ago. Claimant has some limited exposure to gun shots from hunting. In the early 70's he would go out on opening day of pheasant season and he has also done some deer hunting. He testified that over the last seven years he did not think he fired his gun more than eight times.

Claimant testified that the hearing protection he was offered helped to block out the work noise, but did not block it out entirely. Further, there were occasions when he had to take the earplugs out in order to communicate with another employee and the engineers when they were testing engines.

For most of his career at Deere claimant worked as a utility worker on the crawler line. He worked 28 years in that position. Claimant's work place was extremely noisy. The claimant used large power impact wrenches, sledge hammers on metal. For a while he worked in Zone Five, where they would test engines and have them run at full RPM to conduct tests. Claimant, for about a year, operated a fastening device that used .22 caliber shells to attach a tag on the machines he was building. Claimant would fire these shells 20 to 40 times a day.

Claimant, at times, worked substantial amounts of hours of overtime while working for the employer. Claimant, depending on demand, would work a lot of overtime and in some years no overtime. Claimant was not laid-off while he was employed at Deere.

Jill Hunt, M.D., testified at the hearing. She is Board Certified in Emergency Medicine. She is the Medical Director for Occupational Health at Deere. (Ex. F, p. 81) She testified that hearing loss shows up quickly after excess noise exposure. Dr. Hunt said claimant's exposure would be below 84dB. She agreed with Peter Alt, M.D., that

claimant's hearing loss was not related to work. On cross examination, Dr. Hunt was not aware of the noise exposure claimant received by firing the .22 caliber fastener for a year.

On September 27, 1996, John Gschwendtner, M.D., examined the claimant's hearing. Dr. Gschwendtner, wrote:

> Gerald Schissel, a John Deere employee, was seen for otological evaluation. A copy of our audiogram and accumulative record is included. This type of hearing loss is consistent with previous noise exposure. Our audiogram is slightly better than that what was recently obtained at John Deere. Mr. Schissel is getting close to needing a hearing aid, but is not recommended yet.

(Ex. 2, p. 16) On October 8, 1996, a note indicates that Deere had determined that claimant's hearing loss was not work related.

In November 1999 hearing testing showed a threshold shift of 40.0 dB in the left ear and 33.3 dB in the right. The hearing loss committee at Deere determined that the hearing loss was not a work related loss. (Ex. 7, p. 32) On February 5, 2001, another determination was made by Deere that claimant's hearing loss was not work related. The comments to this report stated:

> Employee has history of left-handed hunting/shooting and the majority of his hearing loss occurred after MHP [Mandatory Hearing Protection]. Therefore, hearing loss is considered not work-related, non-recordable and non-compensable under WC.

(Ex. 7, p. 35)

Claimant had an exit audio examination by Dr. Alt, on March 21, 2012. (Ex. A, p. 1) Dr. Alt found:

> The patient has had previous audiograms at Medical Associates since 1996. There has been some gradual progression since then. The cumulative audiometric record dates back to 1972. The patient had a slight hearing loss in 1972. Between 1972 and 1984, there was a slight progression in the high frequencies. Since 1984, there has been additional slight increase in the high-frequency sensorineural hearing loss.
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> IMPRESSION: Bilateral symmetric high-frequency sensorineural hearing loss. It is medically unlikely that the losses since 1984 are related to workplace noise exposure to the John Deere Hearing Protection. The patient does, as mentioned, have amplification.

Dr. Alt concluded that the claimant's hearing loss since 1984 was not from a workplace noise exposure. (Ex. A, p. 1) The records submitted into evidence do not show when this opinion was provided to claimant. I find that this was an evaluation of permanent disability by a physician retained by the employer.

Richard Tyler, Ph.D., was retained by claimant's attorney to offer an opinion as to claimant's hearing loss and the probable cause of it. Dr. Tyler provided a questionnaire for claimant to fill out; however, Dr. Tyler did not actually see claimant nor did Dr. Tyler perform any audiograms prior to issuing his report on July 10, 2014.

Dr. Tyler noted that claimant was exposed to impulsive noise at work and noted the use of .22 caliber fastener shots he would do 20 - 40 times a day for a year as well as pounding of large hammers. (Ex.12, p. 56) Dr. Tyler also noted claimant was exposed to chemicals which can exacerbate noise induced hearing loss. (Ex. 12, pp. 56, 57) Dr. Tyler did not agree that Dr. Luke as to the matter the hearing loss after 1984 was not work-related due to the mandatory hearing protection program. Dr. Tyler opined that the hearing protection plan at Deere was inadequate and that claimant was unprotected and exposed to noise from 1972 through 1984. (Ex. 12, p. 59)

Dr. Tyler determined that claimant had a 15.30 percent bilateral hearing loss. (Ex. 12, pp. 60, 68) Dr. Tyler noted claimant was exposed to high levels of damaging noise at Deere, he was exposed to impulsive noise and due to his overtime he was exposed to noise far greater than 40 hours per week. (Ex. 12, p. 63) Dr. Tyler recommended treatment of bilateral hearing aids, which will need to be replaced every three to four years and that claimant was a candidate for short-electrode cochlear implant. (Ex. 12, p. 64)

The last hearing examination of claimant's hearing by Medical Associates Clinic on March 21, 2012 showed a 15.56 age corrected binaural hearing loss. (Ex. E, p. 80) I find this to be claimant's hearing loss caused by his work place exposure.

Noise level studies done for the departments claimant worked in are set forth in Exhibit G and H. Exhibit G was a study conducted in 2002 and Exhibit H was a noise level study conducted in 2014. Claimant retired in 2012 so the 2014 study is not as relevant to claimant's noise exposure. The 2002 noise study found:

Department: 187 **H SERIES ASSEMBLY**

Job Code	Job Class	Job Function	1st	2nd	3rd	TWA	Lmax	Lpk	NRR
K008	ASSEMBLER	ASSEMBLER	34	0	0	83.9	111.3	131.3	0
K008	ASSEMBLER	ASSEMBLERS > 85 dB(A)	7	0	0	92.3	103.0	0.0	14
L005	PAINTER	PAINTER	1	0	0	83.9	111.3	131.3	0
V020	PRODUCTION SUPPORT	FORK TRUCK DRIVER	3	2	0	88.4	99.3	123.4	10

(Ex. G, p. 83) [TWA means time weighted average; Lmax means maximum exposure; Lpk means peak exposure].

Dr. Hart testified that the hearing program was to protect exposure above 85 decibels.[1] She also testified the ear plugs and other hearing protection devices generally provide a 27 to 33 decibel maximum protection if installed correctly. She would generally assume that the ear protection was not always providing maximum protection and would assume that the hearing protection was at best 5 points lower than maximum and at worse, half of the maximum protection. (Transcript, p. 53) Dr. Tyler noted that from 1988 through 2005, Deere used ear protection that would provide on 20 decibels noise reduction. (Ex. 12, p. 60) The 2002 Sound Survey shows that employees in Department 187 were exposed to peak noise up to 131.3 decibels.

Dr. Tyler noted that the claimant was exposed to impulse noise when he fired the .22 caliber shells and that impulse noise should have been measured. (Ex. 13, p. 71)

On March 22, 2010, claimant was examined by Thomas Benda, Jr. M.D., for decreased hearing. Dr. Benda's assessment was:

> A: Audiogram is consistent with high tone sensorineural hearing loss. He has an SRT of 15 on the right and 20 on the left. Speech discrimination 76% on the right, 84% on the left. That is a significant high tone hearing loss leading to decreased speech discrimination.
> P: He is a good candidate for an open fit BTE hearing aid.

(Ex. 3, p.18)

Claimant purchased hearing aids and was billed a total of $3,095.00. Part of the costs was paid with insurance and part of the costs was paid directly by the claimant. (Ex. 4, pp. 20 – 23)

REASONING AND CONCLUSIONS OF LAW

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

> *"Occupational hearing loss"* means that portion of a permanent sensorineural loss of hearing in one or both ears that exceeds an average hearing level of twenty-five decibels for the frequencies five hundred, one thousand, two thousand, and three thousand Hertz, arising out of and in the course of employment caused by excessive noise exposure. *"Occupational hearing loss"* does not include loss of hearing attributable to

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[1] OSHA regulations require this standard. See.29 CFR 1910.85

age or any other condition or exposure not arising out of and in the course of employment.

Iowa Code section 85B.9A provides:

> Apportionment of the total hearing loss between occupational and nonoccupational loss, for purposes of determining occupational hearing loss, may be made by an audiologist or physician with qualifications set forth in section 85B.9. In determining occupational hearing loss, consideration shall be given to all probable employment and nonemployment sources of loss. The apportionment of age-related loss shall be made by reducing the total binaural percentage hearing loss as calculated pursuant to section 85B.9, subsection 3, by the same percentage as the decibels of age-related loss occurring during the period of employment bears to the total decibel hearing level in each ear. The decibels of age-related loss shall be calculated according to tables adopted by the workers' compensation commissioner consistent with tables of the national institute for occupational safety and health existing on July 1, 1998, and consistent with section 85B.9, subsection 3.

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

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 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.

Dr. Alt and Dr. Hunt have opined that claimant's hearing loss was not work related, but was related to age or non-work exposure. Both physicians rely upon the fact that Deere and the claimant used a mandatory hearing protection program. Certainly the program helped, but claimant was exposed to excessive noise when he would have to remove his protection to talk to other employees. Both physicians did not comment on chemical exposure and noise exposure of greater than 40 hours per week. Neither of these physical has the qualifications of Dr. Tyler. As such, their opinions are not given as much weight as Dr. Tyler.

Defendant argues that in prior arbitration decisions Dr. Tyler's opinion was not given weight. While that is certainly true, it is also true that his opinions have been found convincing on a number of cases before this agency. [See Ament v. Quaker Oats, File Nos. 5044299, 5044298 (Arb. December 30, 2014); Johnson v. John Deere Ottumwa Works, File No. 5026101, App. March 10, 2010; Schueller v. John Deere Dubuque Works, File No. 5022959, (App. November 4, 2009)]. What matters is how the evidence from all the experts stack up in this case. I find his report to be the most convincing. I base this upon reviewing the various reports for thoroughness, Dr. Tyler's credentials and position at the University of Iowa Hospital and Clinics and his consideration and expiation's as to the types of noise exposure claimant experienced while working for Deere.

Dr. Tyler has concluded the claimant's hearing loss was work related. Dr. Tyler has determined that the noise levels to which claimant was subjected to were sufficient to cause the hearing loss that is shown on claimant's audiograms. Even though claimant may have worn hearing protection while working for this employer, claimant, at times, did have to take off the hearing protection to communicate with other employees while doing his job. At times, claimant worked in excess of 40 hours per week. Claimant was subjected to impulse noise from hammering and .22 caliber shots. Claimant was exposed to chemicals that in combination of noise exposure increased his susceptibility to hearing loss.

It is concluded that the noise levels that are noted in Exhibit 12 in the departments in which claimant worked for several years are of such intensity that they did offer a substantial proximate cause to claimant's demonstrated hearing loss on the audiograms. Dr. Tyler's indication of claimant being subjected to impulsive noise, which in Dr. Tyler's opinion is more damaging than constant noise, even with hearing protection, is deemed to be more likely than not to be the reason for claimant's continued hearing loss as demonstrated on the audiograms. I find that claimant was exposed to excessive noise as found in Iowa Code 85B.5.

I also find that claimant has also shown that he was exposed to prolonged noise exposure below the table in 85B.5 that has caused a permanent hearing loss. Muscatine County v. Morrison, 409 N.W.2d 685 (Iowa 1987).

> When the tables are not implicated, the claimant must prove the loss of hearing was due to exposure at work to sound capable of producing that loss. Duration and intensity of exposure will be helpful to prove the necessary link between noise at work and the hearing loss. Other causes of the hearing loss may be explored by the employer or its insurer in defense of the claim.

(Id. p. 688) I base this finding on Dr. Tyler's report and claimant's testimony about his noise exposure.

I find that claimant has a proven by a preponderance of the evidence that he has suffered a work-related hearing loss. I find that claimant has a binaural hearing loss of 15.56 percent. This entitles claimant to an award of 27.23 weeks of benefits pursuant to Iowa Code 85B.6. [15.56% x 175 = 27.23]

Claimant has argued that a 30 percent hearing loss should be awarded as the hearing test used in occupational hearing loss matter do not fully measure an employee's hearing loss. Claimant provided no authority for such an award. There is no mention in Iowa Code section 85B.4 (3) about compensation for additional hearing loss. No additional award is made.

The next issue to be resolved is whether defendant will be responsible for the cost of Dr. Tyler's independent medical evaluation pursuant to Iowa Code section 85.39. As I previously found that the March 2012 report by Dr. Alt was an examination of permanency by a physician retained by the employer, Dr. Tyler's costs are eligible for reimbursement pursuant to Iowa Code 85.39. Dr. Tyler charged $2,112.00 for his IME and medical report. Defendant did not argue that Dr. Tyler's costs were unreasonable.

I find that based upon the facts of this case, Dr. Tyler's fee is reasonable and order the defendant pay this cost.

Iowa Code section 85B.12 provides in part:

> An employer who is liable for occupational hearing loss of an employee is required to provide the employee with a hearing aid for each affected ear unless it will not materially improve the employee's ability to communicate.

Claimant has proven his hearing loss arose out of and in the course of his employment. Defendant shall reimburse claimant the costs of the hearing aids in the amount of $3,095.00. Defendant shall pay claimant directly any out of pocket expenses he paid and reimburse any insurance carrier any payments it made.

Claimant has also requested reimbursement of the cost of the filing fee of $100.00 and service fee of $6.48. I find these costs allowable under 876 IAC 4.33 and I award these costs to claimant.

Claimant seeks an award of penalty benefits pursuant to Iowa Code section 86.13. Claimant's penalty claim essentially relies upon the assertion that benefits for the hearing loss were unreasonably denied. Claimant did not allege the defendant failed to notify him of the reason for the denial of benefits.

Iowa Code section 86.13(4) provides:

> a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits

in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.

b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:

(1) The employee has demonstrated a denial, delay in payment, or termination in benefits.

(2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996). Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Iowa Code section 86.13(4)(b); Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

In this case defendant had the opinion of Dr. Alt and Dr. Hart that the claimant's hearing loss was not work related. Dr. Alt examined and provided an opinion based upon an exit audio exam of the claimant on March 21, 2012 that claimant's hearing loss was not work related. While I found that his hearing loss was work related, defendant had a good faith and reasonable and probable excuse for not paying benefits. No penalty is awarded.

ORDER

THEREFORE, IT IS ORDERED:

Defendant is to pay claimant twenty-seven point twenty-three (27.23) weeks of benefits for occupational hearing loss based on the agreed upon weekly rate of compensation of nine hundred fifty and 93/100 dollars ($950.93) commencing on April 20, 2012.

That defendant shall pay accrued weekly benefits in a lump sum.

That defendant shall pay interest pursuant to Iowa Code section 85.30.

Defendant shall reimburse claimant the cost of his hearings aids of three thousand ninety-five and 00/100 dollars ($3,095.00) as set forth in the decision.

Defendant will pay the cost of Dr. Tyler's independent medical examination and report in the amount of two thousand one hundred twelve and 00/100 dollars ($2,112.00).

Defendant shall pay costs of one hundred six and 48/100 dollars ($106.48) pursuant to rule 876 IAC 4.33.

That defendant shall file subsequent reports of injury as required by the agency.

Signed and filed this 18th day of May, 2015.

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JFE/kjw

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.