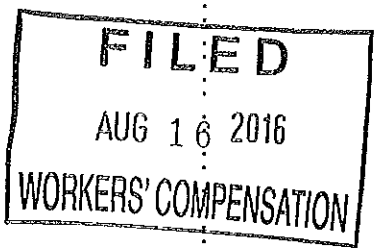
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHAEL MARTIN, Claimant, vs. MIDAMERICAN ENERGY, Employer, Self-Insured, Defendant.		File No. 5055340 ARBITRATION DECISION Head Note Nos.: 1803; 2208

STATEMENT OF THE CASE

Michael Martin, claimant, seeks workers' compensation benefits from defendants, MidAmerican Energy, a self-insured employer, as a result of an alleged injury on March 9, 2014. Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on July 7, 2016, but the matter was not fully submitted until the receipt of the parties' briefs and argument on July 22, 2016. Oral testimony and written exhibits received into evidence at hearing are set forth in the hearing transcript.

Claimant's exhibits were marked with double letters. Defendants' exhibits were marked alphabetically. Joint exhibits were marked numerically. References in this decision to page numbers of an exhibit shall be made by citing the exhibit number or letter followed by a dash and then the page number(s). For example, a citation to claimant's exhibit 1, pages 2 through 4 will be cited as, "Ex 1-2:4" Citations to a transcript of testimony such as "Tr-4:5," either in a deposition or at hearing, shall be to the actual page number(s) of the original transcript, not to page number of a copy the transcript containing multiple pages.

The parties agreed to the following matters in a written hearing report submitted at hearing:

1. An employee-employer relationship existed between claimant and MidAmerican Energy at the time of the alleged injury.

2. At the time of the alleged injury, claimant's gross rate of weekly compensation was $1,817.94. Also, at that time, he was married and entitled to two exemptions for income tax purposes. Therefore, claimant's weekly rate of compensation is $1,082.80

according to the workers' compensation commissioner's published rate booklet for this injury.

3. Prior to hearing, defendants voluntarily paid one week of permanent disability benefits for this work injury in the amount of $1,087.80.

ISSUES

At hearing, the parties submitted the following issues for determination:

I. Whether claimant received an occupational hearing loss and tinnitus arising out of and in the course of employment; and

II. The extent of claimant's entitlement to weekly permanent disability benefits.

FINDINGS OF FACT

In these findings, I will refer to the claimant by his first name, Michael, and to the defendant employer as MidAmerican.

From my observation of his demeanor at hearing including body movements, vocal characteristics, eye contact and facial mannerisms while testifying in addition to consideration of the other evidence, I found Michael credible.

Michael was 65 years of age at the time of the hearing on his petition for benefits. He graduated from high school in 1968. After high school, he completed a three year apprenticeship program sponsored by the Iron Workers union. This program included both on-the-job training and classroom work at Western Iowa Tech for blueprint reading and torch cutting. (Tr-7:8)

Before his employment with MidAmerican, formerly known as Iowa Public Service, Michael was employed in the construction industry. He began working as a cement finisher for about five to six months and then joined the Laborer's union and worked as a general laborer until August 1975. He then entered a three-year apprenticeship program sponsored by the Iron Workers' union which involved both classroom and on-the-job training. After obtaining his journeyman status, he was employed as an iron worker out of the union hall with various employers for about nine years. This work involved erecting steel, tying R-bar, cutting metal with a torch, and welding. Michael testified that he became tired of this type of employment because he was frequently away from home as local jobs were scarce. (Tr-9:11)

On April 24, 1984, he started working for MidAmerican as a plant helper utility initially for less money than he was earning as an iron worker. This job involved work in the power plant 98 percent of his work time and included tasks such cleaning, sweeping and painting along with assisting mechanics, electricians and equipment operators. (Tr-13)

After three years, he bid for and obtained a job called a CAT Man, which was later labeled "fuel handling technician." (Tr-18) This work was located in the coal yard and involved operating and maintaining coal processing machinery. Such machinery unloads chunk coal from the hopper on railroad cars into a pit and feeder underneath the cars and conveys the chunk coal by belts from feeder to high coal towers which dropped the coal into large piles. (Id.) From feeders under the coal piles, chunk coal is then conveyed by belts into large crushers adjacent to the plant which turned the chunks of coal into a powder. (Tr-19:20) This powered coal is then conveyed by belt to large boiler furnaces in the power plant. (Id.) Fuel handling techs also operated a bull dozer to move the piles of coal in the yard as necessary. Occasionally, equipment fails to operate properly and techs must clean up the coal spills using a large vacuum machine suck up the coal. (Tr-24:25) Michael said that he occasionally used a sledge hammer when the hopper doors on a coal car would become stuck.

After two to two and one-half years, Michael bid for and obtained the job of equipment operator (EO). (Tr-26) He remained in that job for the next 25 years until his retirement from MidAmerican on May 9, 2014, the asserted injury date for the alleged hearing loss and tinnitus. The EO job required the operation (opening and closing valves), monitoring gauges, and assisting in the maintenance/repair of the generating units, coal handling equipment, various high pressure pumps, and high pressure steam/chemical pipes inside the plant building. (Tr - 28:29; Ex. B) As an EO, he typically worked long hours during rotating shifts which typically lasted well over 40 hours a week. He also routinely worked 12-hour shifts on weekends and many times worked 30 days straight. (Tr-40-45)

Michael testified that he worked in areas having excessive noise during his entire career at MidAmerican. He said that noise in the plant was three times noisier than his prior construction work. (Tr-61) He stated that except for the years he was in the coal area outside the plant, he was continually performing his work in the power plant. This plant had three generating units. (Tr-12:13) He was assigned to unit 1, the oldest unit for his entire time as an EO. (Id.) The units consist of steam operated turbines. (Id.) Michael described the noise inside the plant from these power generating units and supportive equipment as a constant roar, similar to a jet engine, except at a lower pitch. (Tr-14:17) The noise was so loud that any conversation with another worker had to be face to face after taking off their ear protection devices. (Id.) He would not be able to hear a co-worker six feet away, even if that person was yelling. He said workers usually went to a quieter area to converse such as the lunchroom, the offices or the locker room. (Tr-14, 17. 47)

Michael testified that the noisiest area in the plant was in the fan room containing fans which force air into the boilers. (Tr-29:30) This room had four inches of acoustic insulation in the walls to keep the noise in the fan room because the noise was horrendous in this area. (Id.) Michael stated that his job required him to work in the fan room 30-45 minutes; three times per shift to inspect the equipment and longer if repair work was necessary. (Tr-31)

Michael states that he was also exposed to loud noise when he used a jackhammer when necessary to break up chunks of slag in the boiler and pulling chunks of slag into a loud grinder. (Tr-34:36) He said that in the past, he would use a 12-gauge shot gun and fire 150-200 rounds inside the boiler to loosen the slag on the burners. For the last 12 years, an 8-gauge industrial gun was used which was placed into the boiler with chains. (Tr-38:39) He testified that his noise exposure in the plant also included impulse or sudden, repetitive noise from the machinery in the plant, especially the machine that ground up the slag. (Tr-45:46) Michael added that even when he worked outside in the coal yard, he was exposed to loud noise from falling coal chunks, the moving conveyer belts, the operation of the crusher or hammer mill, operation of the dozer and the vacuum machine. (Tr-19:25)

Michael testified that the noise in the plant necessitated use of earplugs and he wore earplugs constantly while working in the plant. (Tr-14) Although the use of ear protection was mandatory in the plant, he occasionally had to take out the earplugs to talk to co-workers about a problem to perform his job. (Tr-17) MidAmerican had a hearing conservation program which required workers in the plant to wear ear protection, attend training sessions on proper use of hearing protection devices, and submit to regular audiometric testing. (Tr-70:72) Audiometric testing began in 1984, but the testing was not yearly until after 2010. (Ex. C) Michael states that he was offered three types of hearing protection devices, any one of which was acceptable. (Tr-14:15) He chose to use a foam ear plug, because a plastic pre-form plug caused pain (Tr-72) and the muff did not seal up around his safety glasses. (Tr-14) During his last five years, he was required to use two items of hearing protection working in the fan room and he used the muffs in addition to the foam plugs in that area. (Tr-30) He stated that he used ear protection while working in the coal yard. (Tr-82:83)

Michael testified that he wore ear protection when needed when he was doing construction work before working for MidAmerican such as jackhammering, but admitted that there were some instances where he was exposed to noise in such work. (Tr.-68:69) Michael told Douglas Martin, M.D., an occupational medicine physician, that he used ear protection about 75 percent of the time. (Ex. 2-3) He testified at hearing that his use of ear protection in his past construction work would depend on the job, but he wore protection when it was noisy. (Tr-70)

Following receipt of his workers' compensation claim for hearing loss, Michael was evaluated by Dr. Martin in June 2014. Dr. Martin states that audiometric testing done on Michael in January 2014 was invalid due to inconsistent results. Michael testified that he was distracted during this testing due to very cramp quarters (shoulder to shoulder) in the testing booth provided by Dr. Martin's staff. (Tr-55:58) Michael testified that he had no problems with testing by other audiologists who provided larger and more comfortable testing booths. (Tr-53:54) Dr. Martin states that Michael's use of Diclofenac, a NSAID; his past use of firearms, and his work on his vehicles at home; and his age could contribute to hearing loss. (Ex. 2)

Michael admitted having been a pheasant hunter using a shot gun for many years, going about ten times a year, except for the last few years due to lack of pheasants in Iowa. (Tr-51:52; 111:112) He also admitted to target practice with his grandsons using a rifle for about four years. (Id.) During the time he was target shooting and hunting, he estimated he would shoot a gun 150-200 times a year, but only ten times using a 12-gauge and the remaining times, he was using a .22 rifle. (Id.) He stated that he used ear protection when hunting and target practicing. (Tr-111:113) He also admits to working on cars at home, both before and after his retirement, but denies doing any body work. (Tr-99:100)

In October 2014, Michael was evaluated by Thomas Kenny, IV, M.D., an ENT specialist. Another audiogram was taken by an audiologist in Dr. Kenny's clinic. Dr. Kenny states as follows:

> The patient is a 64 year old male who presents with hearing loss. Symptoms include hearing loss and tinnitus. Symptoms are located in the left ear and the right ear. The hearing loss is described as difficulty with all sounds. Onset was gradual year(s) ago. Onset followed loud noise exposure. The symptoms occur constantly. The episodes occur daily. The patient describes this as worsening. Symptoms are exacerbated by crowded room and background noise. The patient is not currently being treated for this problem. Pertinent medical history does not include prior ear surgery. Rick factors include history of loud noise exposure. Pertinent family history does not include early onset hearing loss.

(Ex. 4-1)

Dr. Kenny concludes as follows:

> Today's Impression: We retested his hearing today and had a better test than the last to [sic] tests at MidAmerican where responses were inconsistent. He has normal low and mid frequency SNHL with precipitous drops at 4k consistent with noise exposure. I have reviewed his history of noise exposure both occupational and nonoccupational. In my opinion, working around loud noises daily for this many years at Mid American has contributed to his noise induced hearing loss as there has been progression in the higher frequencies since 1984. It is difficult to say to what degree work versus non work exposures have played a role, but in my opinion, he worked and was exposed to noise MUCH more than has been exposed to recreational non work related noise since 1984. Therefore, I would say that the progreesion [sic] is MOST likely related to his noise exposure day in and day out at Mid American.

(Ex. 4-2)

Using Dr. Kenny's audiogram results in October 2014 to calculate loss of hearing at the frequencies of 500, 1000, 2000, & 3000 Hz as prescribed by the Iowa Code and the age apportionment formula prescribed by this agency's rules, MidAmerican stated that Michael has a .0022 percent of an occupational hearing loss and then paid Michael one week of permanent disability benefits. (Ex. J & K)

Michael testified that his tinnitus which he describes as a hissing sound began about the last two to three years before leaving MidAmerican. (Tr-48,110) He states that his hearing loss and tinnitus is about the same since leaving MidAmerican. (Tr-110) He states his tinnitus impairs his ability to hear in noisy places and he has difficulty sleeping due to the tinnitus. (Tr-49) He admits that he did not report or seek treatment for tinnitus during his employment at MidAmerican. He explains that his tinnitus is a hissing sound and he had always thought that tinnitus was a ringing sound. He did not learn that a hissing sound can also be tinnitus until he talked with an acquaintance after leaving MidAmerican whose hissing sound was diagnosed as tinnitus. (Tr-49:50) Michael also testified that he did not retire due to his hearing loss or tinnitus and was able to fully perform his EO duties at the time he retired. (Tr-97) Michael states that the only time his tinnitus bothers him while working on cars and engaging in hobbies is when he needs to read a manual because he has difficulty concentrating. (Tr-100:101)

Michael does not wear a hearing aid. (Tr-92) He continues to have difficulty hearing in crowds or places with significant background noise. Michael testified that he typically has no problem communicating in quiet settings and had no problem communicating with doctors in this case. (Tr-92, 102) He appeared to hear satisfactorily at hearing, but he did have trouble hearing me a couple of times during the hearing while sitting only a few feet away from me. Michael admitted that his hearing loss and tinnitus has not limited his ability to work and stated you "Just learn to live with it." (Tr-102)

Michael testified that he currently has no interest in seeking employment because he is retired. (Tr-98:99) He is currently receiving his pension and social security retirement benefits. (Tr-98)

In a report dated August 19, 2015, audiologist, Richard Tyler, Ph.D., concludes from his review of a work, family and health history provided by Michael, and his review of the prior audiograms and medical records, that Michael has sensorineural hearing loss and tinnitus which probably is the result of his noise exposure at MidAmerican and this condition is unlikely to improve. (Ex. 6-13) He opines that aging or heredity is not a likely cause of the hearing loss and tinnitus. (Ex. 6-12) He indicates that Michael had to remove his ear protection three to four times per week for about two to three minutes to perform his job such as to converse with a co-work and this aspect reduces the effectiveness of hearing protection. (Ex. 6-2) Using an average of testing results from the last four audiograms, Dr. Tyler opines that claimant has a 25 percent bilateral hearing loss using the Iowa Code which only assesses hearing loss at four frequencies, 500, 1000, 2000 and 3000 Hz. He states that Michael's primary hearing loss is in the

higher frequencies of 1000, 2000, 3000 and 4000 Hz. Using the higher frequency hearing loss testing, the doctor opines that Michael has a binaural hearing loss of 34 percent. (Ex. 6-6)

Dr. Tyler also opines that due to loss of concentration, emotional well-being, disturbance in hearing, and problems sleeping, Michael has suffered a 10 percent permanent partial impairment to the body as a whole from the tinnitus caused by his noise exposure at MidAmerican. (Ex. 6-8:9) He recommends hearing aids for Michael. He recommends counseling and sound therapy for this tinnitus. Due to the hearing loss and tinnitus, Dr. Tyler recommends permanent work restrictions of no work around loud noise or where noise levels are not predictable; no work in dangerous situations where accurate concentration is required; and, no stressful work. (Ex. 6-12)

In a report dated June 1, 2016, audiologist, Bruce Plakke, Ph.D., opines from a review of Michael's audiograms to date and the reports from Dr. Martin and Dr. Tyler that Michael does not suffer from noise-induced hearing loss or tinnitus while working at MidAmerican. (Ex. 8-5) While he mentions the audiogram done at Dr. Kenny's clinic, he does not mention a review of Dr. Kenny's assessments. He bases his views on the audiogram performed in January 2014 as it was consistent with an earlier audiogram in 2013. This is the report viewed as invalid by Dr. Martin. Dr. Plakke disagrees with Dr. Tylers' hearing loss assessments at higher frequently levels which are contrary to Iowa law. He also rejects the work relatedness of any tinnitus as claimant did not report this until after he left MidAmerican and did not report tinnitus to Dr. Martin. The doctor criticizes Dr. Tyler's methodology for arriving at an impairment rating for the tinnitus.

Both Dr. Tyler and Dr. Plakke issued further reports quibbling with each other's views. (Ex. 7 & 9)

I find most convincing the views of Dr. Kenny, the ENT specialist, given his greater training and experience in his specialty which includes hearing and tinnitus problems. I find the history reported to Dr. Kenny consistent with claimant's credible, un-rebutted testimony concerning exposure to excessive noise at MidAmerican. I also find the audiogram conducted in Dr. Kenny's office to be the most credible as it measure's hearing a few months after leaving MidAmerican and it was done in a spacious, comfortable environment. The prior inconsistent testing was not credible due to the environment of the testing booths. Therefore, claimant has shown an occupational hearing loss arising out of and in the course of his employment at MidAmerican with a date of injury of May 9, 2014, his retirement date.

I also find that Michael's occupational hearing loss is .0022 percent which was correctly calculated by defendants under Iowa Code chapter 85B and our rule 876 IAC 8.10 for apportionment due to age. This is based on the testing and views by Dr. Kenny and his staff. The methods used by Dr. Tyler and Dr. Plakke, the averaging inconsistent testing results or the use of the suspect January 2014 results, were improper. The use of hearing loss at frequencies above 3000 Hz is not allowed to calculate occupational hearing loss in this state.

As I found claimant credible concerning the onset of tinnitus before he left MidAmerican and the reason for his delay in reporting tinnitus, Dr. Plakke's views concerning Michael's tinnitus are not convincing because he was not aware of the reasons for Michael's failure to report tinnitus before his retirement. As a medical specialist, the causation views of Dr. Kenny are more persuasive. Given the views of Drs. Kenny and Tyler, I find that as a result of exposure to excessive noise over many years at MidAmerican, Michael has suffered a cumulative tinnitus injury arising out of and in the course of his employment at MidAmerican with a manifestation date of May 9, 2014, the date of his retirement and that this injury is a cause of a 10 percent permanent partial impairment to the body as a whole. The injury is also a cause of a permanent restriction against work in loud noisy environments or in jobs requiring accurate concentration.

Defendant's expert, Dr. Plakke criticized the methodology utilized by Dr. Tyler in arriving at his permanent impairment rating for tinnitus, indicating it was not explainable or professionally valid. However, a similar methodology to arrive at a functional impairment rating by Dr. Tyler's was ultimately approved by the Supreme Court in the Ehteshamfar. I was the deputy commissioner who awarded industrial benefits for tinnitus in the arbitration decision in Ehteshamfar. Ehteshamfar v. UTA Engineered Systems, File No. 989116 (Arb. February 2, 1994); 1994 WL 16034564. Defendants in that case made very similar arguments about Dr. Tyler's methodology.

Despite claimant testimony that his tinnitus does not impact his ability to work, he is impaired in his ability to concentrate and to learn new information and skills or to communicate in noisy environments. Consequently, he has lost job opportunities that would otherwise be available to him. However, this lost earning capacity appears mild at this time.

I find that the tinnitus injury is a cause of a 15 percent loss of earning capacity.

CONCLUSIONS OF LAW

The claimant has the burden of proving by of 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.

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).

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 treating physician's opinions are not to be given more weight than a physician who examines the claimant in anticipation of litigation as a matter of law. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404.408 (Iowa 1994); Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

The extent of claimant's entitlement to permanent disability benefits is determined by one of two methods. If it is found that the permanent physical

impairment or loss of use is limited to a body member specifically listed in schedules set forth in one of the subsections of Iowa Code section 85.34(2)(a-t), the disability is considered a scheduled member disability and measured functionally. If it is found that the permanent physical impairment or loss of use is to the body as a whole, the disability is unscheduled and measured industrially under Iowa Code subsection 85.34(2)(u). Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133; 106 N.W.2d 95, 98 (1960).

Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 593; 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. However, consideration must also be given to the injured worker's medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured worker's qualifications intellectually, emotionally and physically; the worker's earnings before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted, Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616 (Iowa 1995); 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).

A showing that claimant had no loss of his job or actual earnings does not preclude a finding of industrial disability. Loss of access to the labor market is often of paramount importance in determining loss of earning capacity, although income from continued employment should not be overlooked in assessing overall disability. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Bearce v. FMC Corp., 465 N.W.2d 531 (Iowa 1991); Collier v. Sioux City Community School District, File No. 953453 (App. February 25, 1994); Michael v. Harrison County, Thirty-fourth Biennial Rep. of the Industrial Comm'r, 218, 220 (App. January 30, 1979).

Although claimant is closer to a normal retirement age than younger workers, proximity to retirement cannot be considered in assessing the extent of industrial disability. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). However, this agency does consider voluntary retirement or withdrawal from the work force unrelated to the injury. Copeland v. Boones Book and Bible Store, File No. 1059319 (App. November 6, 1997). Loss of earning capacity due to voluntary choice or lack of motivation is not compensable. Id.

Claimant is seeking permanent disability benefits for both occupational hearing loss and tinnitus.

Occupational Hearing Loss (Iowa Code Chapter 85B & Iowa Code section 85.34(2)(r)(2):

Claimants are entitled to compensation for an occupational hearing loss arising out of and in the course of employment. (Iowa Code section 85.34(2)(r)(2) & Iowa Code Section 85B.3) Occupational hearing loss is permanent sensorineural loss of hearing in one or both ears at 500, 1000, 2000 and 3000 Hz caused by prolonged exposure to excessive noise levels. Iowa Code section 85B.4(3). Excessive noise level means sound capable of producing occupational hearing. Iowa Code section 85B.4(2). In evaluating occupational hearing loss in Iowa only average losses in excess of 25 decibels at frequencies of 500, 1000, 2000 and 3000 Hz are considered. Iowa Code section 85B.4(3). Such loss is then apportioned pursuant to our rule 876 IAC 8.10. The use of the retirement date for the injury date of the hearing loss was consistent with Iowa Code section 85B.8.

I found that claimant's occupational hearing loss is .0022 percent. Based such a finding, claimant is entitled to .00385 weeks of permanent partial disability benefits under Iowa Code sections 85.34(2)(r)(2) and 85B.6, which is .0022 percent of 175 weeks, the maximum allowable weeks of disability for occupational hearing loss in those Code sections. Claimant has been paid in excess of his entitlement to permanent disability benefits for his occupational hearing loss.

Other Compensable Hearing Loss (Iowa Code section 85.34(2)(r)(1):

There may be a remaining claim for hearing loss due to noise exposure pursuant to Iowa Code section 85.34(r)(1). That subsection provides scheduled member benefits for hearing loss other than occupational hearing loss as defined in section 85B.4. As noted above, occupational hearing is defined by that section to only include noise induced hearing loss at frequencies of 500, 1000, 2000, and 3000 Hz. A clamant such as Michael in this case who has noise induced hearing loss at higher frequencies, is left uncompensated for such a functional loss if we ignore Iowa Code section 85.34(2)(r)(1). As pointed out by Dr. Tyler, the higher frequency loss is the most debilitating type of hearing loss for carrying on a vocal conversation. Even a small amount of hearing loss at the upper frequencies superimposed on age related loss at these frequencies has a dramatic impact. If the legislature intended by chapter 85B to exclude from workers' compensation coverage sensorineural hearing loss at higher frequency levels than those listed in section 85B.4(3), the statutory language fails to do so. Section 85B.3 states as follows:

All employees as defined in chapter 85 who incur an occupational hearing loss arising out of and in the course of employment are subject to his chapter.

Again the definition of "occupational hearing loss" in section 85B.4 does not include hearing loss at frequencies above 3000 Hz. In cases of ambiguity or unclearness, it has long been the law of Iowa that a statutory provision in the Iowa Workers' Compensation Acts should be interpreted in favor of the injured worker. Ewing v. Allied Constr. Servs., 592 N.W. 2d 689 (Iowa 1999); Myers v. FCE Services, Inc. 592 N.W. 354 (Iowa 1999); Danker v. Wilimek, 577 N.W.2d 634 (Iowa 1998); Haverly v. Union Constr. Co. 18 N.W.2d 629 (Iowa 1945); Conrad v. Midwest Coal Co., 3 N.W.2d 511 (Iowa 1941).

However, in this case I am unable to make a finding of permanent impairment for claimant's loss of hearing at the higher levels. Dr. Tyler provided a rating for the higher frequency level loss of 34 percent, but this included the loss at the lower levels compensated under Chapter 85B. He did not provide an impairment rating for only frequencies above 3000 Hz. Without such a rating by a competent medical expert, I am unable to award benefits for a functional loss under Iowa Code section 85.34(r)(1).

Tinnitus (Iowa Code section 85.34(2)(u)):

Tinnitus arising out of and in the course of employment is a compensable work injury in Iowa and permanent disability caused by such an injury is compensated as an unscheduled body as a whole or industrial disability under Iowa Code section 85.34(2)(u). It is neither a an occupational hearing loss under Code section 85B.4, nor a scheduled hearing loss under Code section 85.34(2)(r). Ehteshamfar v. UTA Engineered Systems, 555 N.W.2d 450 (Iowa 1996).

In this case, I found that claimant carried the burden of proof and demonstrated by the greater weight of the evidence that he suffered a cumulative injury of tinnitus arising out of and in the course of employment with MidAmerica. The proper date of injury for this cumulative or gradual injury is the date of his retirement, or his last injurious exposure to the causative excessive noise levels.

I further found that as a result of his permanent impairment and permanent restrictions claimant suffered a mild 15 percent loss of his earning capacity as a result of the tinnitus work injury. Such a finding entitles claimant to 75 weeks of permanent partial disability benefits as a matter of law under Iowa Code section 85.34(2)(u), which is 15 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in that subsection.

ORDER

THEREFORE, IT IS ORDERED:

1. Defendant shall pay to claimant seventy-five (75) weeks of permanent partial disability benefits at the stipulated rate of one thousand eighty-two and 80/100 dollars ($1,082.80) per week from May 9, 2014. Credit shall be given to defendants for the

point six one five (.615) weeks of benefits paid in excess of claimant's entitlement to occupational hearing loss benefits.

2. Defendant shall pay accrued weekly benefits in a lump sum and shall receive credit against this award for all benefits previously paid.

3. Defendant shall pay interest on unpaid weekly benefits awarded herein pursuant to Iowa Code section 85.30.

4. Defendants shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33, including reimbursement to claimant for any filing fee paid in this matter.

5. Defendant shall file subsequent reports of injury (SROI) as required by our administrative rule 876 IAC 3.1(2).

Signed and filed this 16th day of August, 2016.

LARRY WALSHIRE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Al Sturgeon
Attorney at Law
911 – 6th St.
Sioux City, IA 51101
alsturgeon@siouxlan.net

Sarah K. Kleber
Attorney at Law
1128 Historic 4th St
PO Box 3086
Sioux City, IA 51102
Sarah.kleber@heidmanlaw.com

LPW/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.