BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
JAN 26 2017
WORKERS' COMPENSATION

RORY TAYLOR, Claimant, vs. UNITED AIRLINES, INC., Employer, and NEW HAMPSHIRE INSURANCE COMPANY, Insurance Carrier, Defendants.	File Nos. 5053095, 5053096 ARBITRATION DECISION Head Note Nos.: 1100, 1108, 1400, 1803 2208

STATEMENT OF THE CASE

These are proceedings in arbitration. The contested cases were initiated when claimant, Rory Taylor, filed his original notices and petitions with the Iowa Division of Workers' Compensation. The petitions were filed on April 23, 2015. Claimant alleged he sustained a work-related injury on September 30, 2014 and/or March 30, 2015. (Original notices and petitions)

United Airlines, Inc. was located at the Des Moines International Airport. For purposes of workers' compensation, the employer is insured by New Hampshire Insurance Company. Defendants filed their answers on August 12, 2015. They denied the occurrence of the work injuries. Defendants also asserted certain affirmative defenses.

The hearing administrator scheduled the cases for hearing on August 30, 2016 at 8:30 a.m. The hearing took place in Des Moines, Iowa at the Iowa Workforce Development Building. The undersigned appointed Ms. Ann Louvan as the certified shorthand reporter. She is the official custodian of the records and notes.

Claimant testified on his own behalf. Defendants elected not to call any witnesses to testify at the hearing.

The parties offered exhibits. Claimant offered exhibits marked 1 through 8. Defendants offered exhibit A. All exhibits were admitted as evidence in the case.

Post-hearing briefs were filed on September 23, 2016. The cases were deemed fully submitted on that date.

For File No. 5053095:

STIPULATIONS

The parties completed the designated hearing report. The various stipulations are:

1. There was the existence of an employer-employee relationship at the time of the alleged injury;
2. Claimant sustained an injury on September 30, 2014 which arose out of and in the course of his employment;
3. Temporary benefits are not in dispute;
4. The injury is a cause of permanent disability;
5. Claimant's permanent disability is an industrial disability;
6. The commencement date for any permanent partial disability benefits is September 30, 2014;
7. At the time of the work injury, the parties believe the weekly benefit rate to be $728.62 per week; and
8. The parties agree certain costs that are detailed were paid by claimant and are not in dispute.

ISSUES

The issues presented are:

1. Whether claimant is entitled to permanency benefits;
2. Whether claimant provided timely notice pursuant to Iowa Code section 85.23;
3. Whether claimant is entitled to certain medical benefits pursuant to Iowa Code section 85.27; and
4. Whether claimant is entitled to the payment of an independent medical examination pursuant to Iowa Code section 85.39.

For File No. 5053096:

STIPULATIONS

1. There was the existence of an employer-employee relationship at the time of the alleged work injury;

2. Temporary or healing period benefits are not in dispute;

3. If permanency benefits are awarded, the disability is an industrial disability and the commencement date is March 30, 2015;

4. If weekly benefits are due to claimant, the rate to be paid is $728.62 per week; and

5. The parties are able to agree to the costs paid by claimant prior to the date of the hearing.

ISSUES

The issues before the deputy are:

1. Whether claimant sustained an injury on March 30, 2015;

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

3. Whether claimant is entitled to medical benefits pursuant to Iowa Code section 85.27; and

4. Whether claimant is entitled to the cost of an independent medical examination pursuant to Iowa Code section 85.39.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This deputy, after listening to the testimony of claimant at his hearing, after judging the credibility of the claimant, and after reading the evidence, and the post-hearing briefs, makes the following findings of fact and conclusions of law:

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

Claimant is 56 years old. He holds a Bachelor of Science degree from Iowa State University in history and education. For a very brief period of time, he taught school as a substitute teacher in several public school systems. He did not enjoy teaching and knew his chosen profession was not a proper fit for him.

In 1988 claimant commenced employment with United Airlines, Inc. He worked in customer service and ramp service until September 30, 2014. In the fall of 2013, the

company notified the employees at the Des Moines station, the airline would be closing on September 30, 2014. Claimant informed the company he would accept the company "buyout" in lieu of transferring to another city. (Transcript, page 40) As a consequence, claimant's last day of employment with United Airlines, Inc. was September 30, 2014. After claimant was laid off from the airlines, he filed and received unemployment insurance benefits.

Claimant held a variety of positions at the airport terminal. He worked as a ticket agent, he worked in the bag room behind the ticket counter, he worked at the boarding gate, and he worked at ramp service. The ramp service position required claimant to work on the tarmac near the planes. The ramp service job was the position claimant most often worked during the last ten years of his employment. He was considered a "lead worker" when he worked the ramp service position.

Claimant described his duties as a ramp service worker during the course of his testimony. Claimant testified:

> A. Working the bag room you were involved with sorting luggage for the appropriate flights. Working ramp service you were working around aircraft, dispatching, receiving aircraft, in unloading luggage, deicing aircraft, if it was winter positions; dispatching as far as pushback of aircraft, loading freight if we had any.
>
> Q. My assumption, even though you were in a supervisory position, you were still actively doing those jobs as well?
>
> A. We were not separated from the ramp service crew, we were part of it.
>
> Q. The last ten years of your job in those various roles, what was your noise exposure?
>
> A. Constant exposure during flights. The last ten years United moved in the direction of regional jets.
>
> Regional jets are smaller aircraft. What powers an aircraft is an axillary power unit. On the regional jets, it sits closer to the ground, obviously because the aircraft is smaller. Most of the bins on these type of aircrafts or the pits, as we call them, are at the rear of the aircraft, and that's where the auxiliary power unit was.
>
> If you're working inside the bin of the aircraft, it was right there; just a wall away, and if you're on the ramp side it was just above you.
>
> Q. How is this different than the large aircrafts that you were using before?

A. When I first started working there, we worked a lot of 727s. Axillary power units were near the tail section; on 727s it's quite a bit higher.

The 737 airbuses 757s, they were towards the middle of the aircraft where the main gear of the aircraft is. We worked at opposite ends of that. We had rear bins that we worked in.

Q. With the regional aircraft, did that increase the intensity of the noise of those APU units for the worker?

A. Yes.

Q. How so?

A. Because you're a lot closer to it. You were in direction contact - - not direct contact, but the proximity was a lot closer than the main line aircraft.

Q. How is an APU different or similar to the actual engine that runs the jet as far as the noise?

A. Axillary power units tend to be a higher whining noise. We describe it as a scream sometimes is when they fire up when they're going.

It's similar to a jet engine, just on a smaller scale, but it seems like they're enclosed. The intensity seemed to be more. A jet engine - - you couldn't get close to a jet engine. The front side there's a zone that we had to stay away from. You could hear the jet engine, but you had a stay a certain distance away from a jet engine when it was going full speed, or even taxi up. And that's where we had lines we had to stay outside of, but with an APU you're right up next to it.

Q. So the fact that you could be closer to it may have increased the intensity of that noise as compared to the jet engine, is that what you're saying?

A. Yes.

Q. When you're turning around a jet, is there any time where there's not either an APU or a jet engine running?

A. The only time that would happen would be if we had an extended delay, and they would ask for ground power. But normally it's an hour turn, sometimes 45-minute turn; what we call turns: Getting the aircraft in and out.

> And depending on the time of year if it was cold, if it was extremely hot, the APUs are generally running because they power electrical on the ground and also the cabin as far as cool or heat.

(Transcript, pages 11-15)

Claimant attributed his problems with tinnitus and/or hearing loss to the time when United changed from mainline aircraft to regional jets. (Tr. p. 13) United Airlines, Inc., had a hearing conservation program in existence during the duration of claimant's employment with the company. From 1985 through 2007, management at the airline required employees to obtain annual hearing tests. (Exhibit 1) The company required employees to wear ear plugs or ear muffs whenever they were working as ramp crew service workers. Claimant testified there were occasions when he had to remove his hearing protection in order to converse with a co-employee about the job duties.

Claimant purchased his own hearing protection equipment approximately five years prior to his termination date with United Airlines, Inc. (Ex. 5, p. 8) Claimant determined the hearing protection provided by the airline company was inadequate. As a consequence, claimant wore his own equipment. He deemed it to be more effective than company issued hearing protective equipment. Claimant did not recall telling his supervisors he was having issues with his ears. (Ex. 5, p. 8) For the duration of his employment, claimant testified he did not ask his supervisors for treatment of his hearing loss or for his tinnitus. (Tr., p. 41) Claimant testified he had experienced the ringing in his ears and some hearing loss for approximately nine years prior to the last date of his employment with United. (Tr., pp. 40-41) Claimant testified he realized the hearing loss and tinnitus were part of the job. (Tr., pp. 18-19) In his deposition, claimant testified he did not seek treatment on his own for any hearing loss or for tinnitus while he was employed by the airline. (Ex. 5, p. 32)

Claimant testified he thought the ear ringing and the hearing loss would eventually go away if claimant removed himself from the exposure. (Tr., p. 24) During direct examination, claimant testified:

> Q. (By Mr. Platt) At what point did you realize this ringing and hearing loss was not going to go away?
>
> A. Probably within the first four to six months afterwards when I started looking for other employment.
>
> Q. When you say afterwards, what do you mean?
>
> A. After September 30.
>
> Q. So after your employment ended somewhere in that time frame, you realized that this was not going away?
>
> A. Yes.

Q. Prior to that, what was your thought or hope would happen?

A. That it would slowly, if exposure went away, that the ringing would go away.

(Tr., pp. 24-25)

During cross-examination, claimant testified:

Q. (By Mr. Abbas) Now, you talked to - - talked about supervisors hearing or speaking with supervisor and managers about complaints about the noise levels at United.

And I just want to make sure, was there ever any passing conversations with any supervisors or managers about ringing in ears or hearing loss issues due to this increased noise, or were the complaints always about the increased noise?

A. I think - - as I can recall, probably the increased noise.

Q. It's my understanding the first actual specific written notice you provided to United about your hearing loss or tinnitus was the petitions that you filed in this claim?

A. Yes.

(Tr. p. 42)

On January 30, 2015, claimant presented to Woodward Hearing Center for an audiologic evaluation of both ears. Molly Van Gorp, the audiologist, determined claimant had normal hearing in the right ear with the exception of a mild hearing loss at 4000 Hz. Ms. Van Gorp also determined in the left ear, claimant had normal hearing sloping to a mild hearing loss at 6000 to 8000 Hz. (Ex. 8, p. 1)

On March 19, 2015, claimant had a telephone interview with Richard S. Tyler, Ph.D., an audiologist consultant. Dr. Tyler also reviewed certain medical records belonging to claimant. Dr. Tyler noted high frequency hearing loss was not currently considered by Iowa Code section 85B.9 and 85B.9A. Dr. Tyler opined in relevant portion:

Mr. Taylor's hearing loss is mild in the low frequencies and moderate in high frequencies. The calculation of percent hearing loss is an approximation of the speech communication handicap to be expected. It does not adequately quantify the hearing impairment, including localization or speech perception in noise. This 'percent' hearing loss could grossly underestimate the hearing difficulties that Mr. Taylor experiences.

Ignoring high-frequency hearing is even inconsistent with policies established by the United States government. The Air Force and Military require personal [sic] to have 'Fitness for Duty'. Hearing thresholds must not exceed 45 dB HL at 4000 Hz in each ear. In severe instances of hearing loss, an individual can be removed from active duty completely.

The Navy requires that active duty personal [sic] must have no more than an average hearing threshold of 45 dB for both ears averaged together, averaging frequencies of 3000, 4000 and 6000 Hz. If such a significant hearing loss exists, the individual must be reviewed to determine if they can be retained, reclassified or separated from service. I also note that high frequencies are used by the Veteran's Administration to determine hearing loss disability in our countrymen who have served in our armed forces.

A high-frequency hearing loss prevents him from hearing high-frequency speech sounds, such as 's,' 'z,' 'ch,' and 'sh'. This will make it very difficult to communicate in some situations, and he will miss some important details of conversation. Women and children speak with a higher pitch than men, and this will make it even more difficult to hear and communicate.

Hearing in noise is also influenced by high frequency hearing. He will experience a much greater difficulty communicating in noise because of his hearing loss.

The ability to localize the direction of the source of a sound is also severely influenced by high-frequency hearing. Because of his high-frequency hearing loss he will experience more difficulty knowing the direction of an oncoming car or a warning alarm, for example.

His present noise induced hearing loss will add to his hearing loss due to aging. All of us will acquire a hearing loss due [to] aging later in life. Because of his noise induced hearing loss at United Airlines, he will now probably require hearing aids at age 60 years. If he did not have his present noise induced hearing loss, he might not require hearing aids until age 70 years.

Based on his audiogram, I will assign a % hearing loss of 12%.

(Ex. 3, pp. 5-6)

With respect to claimant's claim for tinnitus, Dr. Tyler opined:

Tinnitus can produce an impairment. I reviewed my own publications, the publications of others, discussed this matter with other professionals knowledgeable in the area, and considered my own clinical experience.

Although other areas exist, I believe the primary ways that tinnitus causes an impairment include:

	Area	Description
1	Concentration	Being able to focus on a task
2	Emotional well being	Anxiety, depression
3	Hearing	Speech understanding and localization
4	Sleep	Getting to sleep, wake up in the night, and being tired during the day

These impairments could obviously lead to many handicaps, including work, social and family interactions, and have a major impact on the quality of life and economic earning potential.

I propose to rate (from 0-100; least to worst) the tinnitus impairment in each of the four areas that I have identified. In the following Table, I asked Mr. Taylor to describe the problems and assign a severity rating for the impairment caused by his tinnitus in each of the four categories. Based on my knowledge and experience and considering all tinnitus patients I have seen, I then assigned my own severity rating for Mr. Taylor. It is to be expected that his numbers are greater than mine are; he is not exaggerating the impairment from his perspective.

	Area	Description	Personal Severity Assigned by Taylor	Comparative Severity Assigned by Tyler
1.	Concentration	When I am trying to read a book it is distracting. Actually, it affects my concentration for multiple things.	30	10
2.	Emotional well being	The tinnitus can be very annoying. It is frustrating when I can hear it getting louder.	10	20
3.	Hearing	I have to ask people to speak louder to hear over the ringing. When the ringing starts up, it is very difficult to hear. Sometimes I have to wait for it to go down.	70	40
4.	Sleep	It affects my sleep at least 1-2 nights a week.	5	15
	Average			21.25

The next step would be to convert his impairment rating to a 'whole body impairment'. Ther [sic] involves a determination of the relative value of different impairments. What should the maximum rating be for each of the different disabilities? In other words, how does total blindness compare to total deafness? Ther [sic] is also a difficult task. Usually

> health care providers have a great deal of experience with one injury, but only limited experience with others. For example, someone might have a lot of experience with deafness but no experience with blindness. The public can gain some insight into blindness by closing their eyes and trying to move around. Blindness is a mobility disorder. However, using earplugs temporarily does not help one appreciate deafness, because deafness is a communication disorder. The inability to communicate and interact with other humans is not captured by using ears [sic] for a few minutes. Helen Keller, both deaf and blind, was adamant that his [sic] deafness was the greater impairment...
>
> ...
>
> I have some experience with disabilities, handicaps and quality of life measurements in individuals with hearing loss, and this is a very complicated process. Rating across disabilities is particularly difficult. In reviewing the above guidelines, I find the ratings across disabilities somewhat unreasonable. For example, although not being able to use upper extremities would create serious handicaps, in my mind being completely unable to care for oneself with a mental impairment represents a greater handicap.
>
> I would like to suggest that the maximum whole-body impairment could be 60% for tinnitus. Ther [sic] suggestion is based on my personal judgment of the worst instance of tinnitus I have seen, and my understanding of the impairment that can be caused by tinnitus and other types of injuries. Eventually, scientific studies will be needed to determine a maximum rating for tinnitus. The most severe patients with tinnitus demonstrate symptoms that can include severe depression and anxiety, extreme fatigue and can even lead to suicide in rare situations)[sic].
>
> Mr. Taylor's situation:
>
> Whole body impairment = 21.3/100* 60= 12.8%
>
> Thus, my assessment of the effect of tinnitus on Mr. Taylor is that he has 13% whole-body impairment based on reasonable audiological certainty.

(Ex. 3, pp. 6-9)

Pursuant to a request from United Airlines, Inc., claimant presented to Mark Zlab, M.D., a specialist who treats the ear, nose and throat. The examination occurred on May 31, 2016 at the Iowa Clinic in Des Moines. Dr. Zlab noted both tympanic membranes of the ear were scarred. (Ex. 2, p. 1) The physician ordered and reviewed an audiogram and a tympanogram. (Ex. 2, p. 2) Dr. Zlab opined:

> Audio today shows mild hi frequency sensorineural hearing loss with 400 Htz notch suggesting noise trauma. Percent loss however calculates to zero percentage loss. Calculation sheet enclosed.
>
> Audio available to me today which is closest to his release from United is dated 5/24/2001. Right ear is normal. Left ear show [sic] mild loss at 4K and 6K.
>
> **Assessment**
>
> Sensorineural hearing loss of both ears.
>
> Tinnitus of both ears.
>
> ...
>
> **Notes**
>
> His configuration of his hearing loss suggests noise trauma. [S]ince his only apparent noise is related to his work at United, one would assume causality. His tinnitus would be associated with his hearing loss. Both are permanent. His percentage hearing loss (age corrected) is zero. Allowable for bothersome tinnitus is 5% per federal guidelines. He is not yet a candidate for hearing aids. Work around noise would be allowable as long as OSHA approved hearing protection is observed.

(Ex. 2, p. 2)

Dr. Zlab did not believe non-occupational noise contributed significantly to claimant's hearing loss and tinnitus. (Ex. 2, p. 7) The physician could not predict whether claimant would ever need to wear hearing aids.

RATIONALE AND CONCLUSIONS OF LAW

When an expert's opinion is based upon an incomplete history it is not necessarily binding on the commissioner or the court. It is then to be weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the fact. Musselman v. Central Telephone Company, 154 N.W.2d 128, 133 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 521, 522, 133 N.W.2d 867 (1965).

The weight to be given an expert opinion may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. St. Luke's Hospital v. Gray, 604 N.W.2d 646 (Iowa 2000).

Expert testimony may be buttressed by supportive lay testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 380; 101 N.W.2d 167, 170 (1960).

The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire and Casualty Co., 526 N.W.2d 845 (Iowa 1995).

In both of these cases, the correct manifestation date is September 30, 2014, the date, claimant last worked for United Airlines, Inc. 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).

Under Tasler, the Court determined:

> The date of injury is an important determination given that "a number of important questions cannot be answered unless a date of injury or accident is fixed, such as which employer and carrier is on the risk, whether notice of injury and claim are within the statutory period, whether statutory amendments were in effect, which wage basis applies, and many others." (citing 1B A. Larson, Workers' Compensation Law, Section 39.10 (1991)).

The Court in Tasler, adopted the "manifestation" rule. The date of injury is the date on which "a disability manifests itself." Id. at 829. (citing 1B A. Larson Workers' Compensation Law, Section 39.50 (1991)). "Manifestation is best characterized as "the date on which both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person." Id. at 829 (citing Bellwood, 106 Ill. At 238, 505 N.E.2d at 1029).

In Herrera, the Court details how to determine the date of injury in a cumulative injury situation. Id. at 288. The Court stated clearly:

> The preferred analysis is to first determine the date the injury is deemed to have occurred under the Tasler test, and then to examine whether the statutory period commenced on that date or whether it

> commenced upon a later date based upon application of the discovery rule.
>
> To summarize, a cumulative injury is manifested when the claimant, as a reasonable person, would be plainly aware (1) that he or she suffers from a condition or injury, and (2) that this condition or injury was caused by the claimant's employment. Upon the occurrence of these two circumstances, the injury is deemed to have occurred. Nonetheless, by virtue of the discovery rule, the statute of limitations will not begin to run until the employee also knows that the physical condition is serious enough to have a permanent adverse impact on the claimant's employability, i.e., the claimant knows or should know the "nature seriousness, and probable compensable character" of his injury or condition. (citing Orr, 298 N.W.2d at 257).

Claimant testified he attributed his hearing loss and his tinnitus to the time when United Airlines, Inc., changed from mainline aircraft to regional jets. In fact, claimant was so concerned about developing hearing loss he purchased his own hearing protection, as he did not believe the company was providing adequate equipment. Claimant admitted he had experienced ringing in his ears and some hearing loss for nine years prior to the last day of his employment with United. Claimant testified he thought hearing loss and ear ringing just came with the job of ramp service worker. It is true no professional told claimant his condition was permanent until March of 2015; nevertheless, the facts that existed on September 30, 2014 were sufficient for claimant to recognize the permanency of the condition at the time. Claimant was plainly aware of the fact of the injury and the causal relationship of the injury well before his last day of exposure on September 30, 2014. For purposes of these two claims, the date of injury in each file is September 30, 2014.

Claimant has failed to comply with Iowa Code section 85.23. The statute provides:

> Unless the employer or the employer's representative shall have actual knowledge of the occurrence of an injury received within ninety days from the date of the occurrence of the injury, or unless the employee or someone on the employee's behalf or a dependent or someone on the dependent's behalf shall give notice thereof to the employer within ninety days from the date of the occurrence of the injury, no compensation shall be allowed.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to investigate in a timely fashion the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work related. Dillinger v. City of Sioux City, 368

N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

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

Claimant admitted the first notice he tendered in each case was the filing of the original notice and petition on April 23, 2015. The petitions were filed 206 days after the alleged injuries manifested on September 30, 2014. Claimant attempted to rectify his notice problem by claiming management at United Airlines, Inc., had actual notice of claimant's injuries. However, claimant repeatedly testified he never discussed his condition with any supervisor or manager. At best, the employees and managers would generally discuss the noisy environment in staff meetings. There was no specific conversation directed at claimant's individual condition. Moreover, claimant never asked any members of management for medical treatment or for audiometric testing after 2007. Claimant failed to comply with Iowa Code section 85.23. He takes nothing from these proceedings.

The final issue to discuss is the matter of costs. Iowa Code section 86.40 states:

> **Costs.** All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

> **Costs.** 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, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the

party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010). The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

Each party shall pay his/its/ their own costs to litigate.

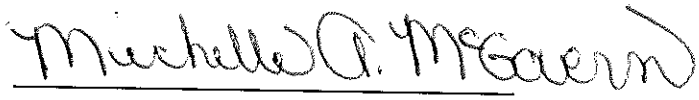
ORDER

THEREFORE, IT IS ORDERED:

Claimant takes nothing from these proceedings.

Each party shall pay his/its/their own costs to litigate.

Signed and filed this 26th day of January, 2017.



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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.