

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ERNEST MICHAEL HOFER,

File No. 20003191.01

Claimant,

A P P E A L

vs.

D E C I S I O N

LENNOX INDUSTRIES, INC.,

Employer,

and

INDEMNITY INSURANCE COMPANY
OF NORTH AMERICA,Insurance Carrier,
Defendants.Head Notes: 1402.20; 1402.40; 1803;
2208; 2502; 2700; 2907

Defendants Lennox Industries, Inc., employer, and its insurer, Indemnity Insurance Company of North America, appeal from an arbitration decision filed on January 31, 2023. Claimant Ernest Hofer responds to the appeal. The case was heard on August 18, 2022, and it was considered fully submitted in front of the deputy workers' compensation commissioner on September 23, 2022.

In the arbitration decision, the deputy commissioner found claimant was a credible witness. The deputy commissioner found claimant met his burden of proof to establish he sustained occupational hearing loss and tinnitus arising out of and in the course of his employment. The deputy commissioner found claimant sustained 20 percent industrial disability which entitles claimant to receive 100 weeks of permanent partial disability benefits at the stipulated weekly rate of \$709.58, commencing on the stipulated commencement date of January 2, 2020. The deputy commissioner found claimant is entitled to alternate medical care under Iowa Code section 85.27, including hearing aids and maintenance, and the deputy commissioner ordered defendants to designate an appropriate provider. The deputy commissioner found that pursuant to Iowa Code section 85.39, claimant is entitled to reimbursement from defendants in the amount of \$1,800.00 for the cost of the independent medical examination (IME) of claimant performed by Timothy Simplot, M.D. The deputy commissioner ordered defendants to pay claimant's costs of the arbitration proceeding in the amount of \$1,110.33.

Defendants assert on appeal that the deputy commissioner erred in finding claimant was a credible witness. Defendants assert the deputy commissioner erred in finding claimant proved his hearing loss and tinnitus arose out of and in the course of his employment. Defendants assert the deputy commissioner erred in awarding claimant industrial disability benefits, and defendants assert claimant's recovery should

be limited to his functional loss. Defendants assert the deputy commissioner erred in finding claimant is entitled to reimbursement from defendants for the cost of Dr. Simplot's IME. Defendants assert the deputy commissioner erred in ordering defendants to pay claimant's costs of the arbitration proceeding.

Claimant asserts on appeal that the arbitration decision should be affirmed in its entirety.

Those portions of the proposed arbitration decision pertaining to issues not raised on appeal are adopted as part of this appeal decision.

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 17A.15 and 86.24, the arbitration decision filed on January 31, 2023, is affirmed in part, and is reversed in part, with my additional and substituted analysis.

Some of the findings by the deputy commissioner in the arbitration decision were based on the deputy commissioner's findings regarding claimant's credibility. The deputy commissioner found claimant to be a credible witness. Defendants assert claimant was not credible. I find the deputy commissioner correctly assessed claimant's credibility. While I performed a de novo review, I give considerable deference to findings of fact which are impacted by the credibility findings, expressly or impliedly made, regarding claimant by the deputy commissioner who presided at the arbitration hearing. I find nothing in the record in this matter which would cause me to reverse the deputy commissioner's findings regarding claimant's credibility.

Without further analysis, I affirm the deputy commissioner's finding that claimant proved he sustained occupational hearing loss and tinnitus arising out of and in the course of his employment. I affirm the deputy commissioner's finding that pursuant to Iowa Code Section 85.39, claimant is entitled to reimbursement from defendants for the cost of Dr. Simplot's IME. I affirm the deputy commissioner's order that defendants pay claimant's costs of the arbitration proceeding.

With my additional and substituted analysis, I reverse the deputy commissioner's finding that claimant is entitled to industrial disability benefits, and I find claimant's recovery is limited to his functional loss.

Iowa Code section 85.34(2) (2020) governs compensation for permanent partial disabilities. The law distinguishes between scheduled and unscheduled disabilities. The Division of Workers' Compensation evaluates disability using two methods, functional and industrial. Simbro v. Delong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983). Functional disability is assigned to scheduled disabilities enumerated in the statute. Iowa Code § 85.34(2)(a)-(u).

I affirm the deputy commissioner's finding that claimant proved he sustained occupational hearing loss and tinnitus caused by his employment. Occupational hearing loss is compensable as a scheduled injury under Iowa Code section 85.34(2)(s)(2), as provided in Iowa Code section 85B.4. As correctly noted by the deputy commissioner, tinnitus is an unscheduled injury compensable under Iowa Code section 85.34(2)(v). See Chapa v. John Deere Ottumwa Works, 652 N.W.2d 187 (Iowa 2002); Ehteshamfar v. UTA Engineered Sys. Div., 555 N.W.2d 450 Iowa 1996) Because claimant in this case sustained occupational hearing loss and tinnitus, the claim converts to an unscheduled injury compensable under Iowa Code section 85.34(2)(v), in relation to 500 weeks of permanent partial disability benefits.

Iowa Code § 85.34(2)(v), also provides, in part,

If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment rating resulting from the injury, and not in relation to the employee's earning capacity. Notwithstanding section 85.26, subsection 2, if an employee who is eligible for compensation under this paragraph returns to work with the same employer and is compensated based only upon the employee's functional impairment resulting from the injury as provided in this paragraph and is terminated from employment by that employer, the award or agreement for settlement of benefits under this chapter shall be reviewed upon commencement of reopening proceedings by the employee for a determination of any reduction in the employee's earning capacity caused by the employee's permanent partial disability.

Claimant filed his claim for occupational hearing loss and tinnitus after he retired, alleging an injury date when he retired, January 2, 2020. Claimant was not "terminated from employment" by defendant-employer. There is no allegation in this case that claimant's hearing loss and tinnitus interfered with his employment with defendant-employer. There is no allegation in this case that defendant-employer took any adverse action against claimant which led him to resign as a result of an involuntary discharge attributable to the employer. Claimant retired on his own volition, not due to his hearing loss or tinnitus or any action by the employer. I find claimant's recovery is limited to his functional loss.

For functional loss determinations, Iowa Code Section 85.34(2)(x) states:

... when determining functional disability and not loss of earning capacity, the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American medical association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A. Lay testimony or agency expertise shall not be utilized in determining loss

or percentage of impairment pursuant to paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity.

The Workers' Compensation Commissioner has adopted the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides") for evaluating functional disability. 876 IAC 2.4.

I agree with the deputy commissioner's finding that Dr. Simplot's opinion on causation and extent of permanent impairment is the most persuasive. Dr. Simplot is the only expert who provided a tinnitus rating. Dr. Simplot assigned claimant three percent whole person impairment for tinnitus. (Ex. 1, p. 10)

Under Iowa Code section 85B.6, the maximum compensation payable for a total occupational hearing loss is 75 weeks. "For partial occupational hearing loss, compensation is payable for a period proportionate to the relation which calculated binaural, both ears, hearing loss bears to one hundred percent, or total loss of hearing." Iowa Code § 85B.6. Dr. Simplot assigned claimant 26.25 percent permanent impairment for claimant's work-related binaural hearing loss. (Ex. 1, p. 10) Under Table 11-3, of the AMA Guides, a 26.25 percent binaural hearing impairment converts to a nine percent whole person impairment. Using the combined values chart on page 604 of the AMA Guides, claimant has established he sustained 12 percent permanent impairment as a result of his combined occupational hearing loss and tinnitus, entitling claimant to receive 60 weeks of permanent partial disability benefits.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on January 31, 2023, is affirmed in part, and is reversed in part, with my additional and substituted analysis.

Defendants shall pay claimant 60 weeks of permanent partial disability benefits, at the stipulated weekly rate of seven hundred nine and 58/100 dollars (\$709.58), commencing on the stipulated commencement date of January 2, 2020.

Defendants shall pay accrued benefits in a lump sum with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as the date of injury, plus two percent.

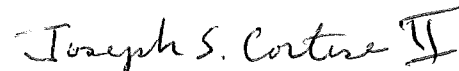
Defendants shall promptly select and authorize a medical provider to furnish claimant additional treatment for his occupational hearing loss and tinnitus, including bilateral hearing aids. Defendants shall retain the right to select and authorize a medical provider of their choosing to provide the above ordered medical care provided defendants authorize the care promptly.

Pursuant to Iowa Code section 85.39, defendants shall reimburse claimant one thousand eight hundred and 00/100 dollars (\$1,800.00) for the cost of Dr. Simplot's IME.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding in the amount of one thousand one hundred ten and 33/100 dollars (\$1,110.33), and the parties shall split the costs of the appeal, including the cost of the hearing transcript.

Pursuant to rule 876 IAC 3.1(2), defendants shall file subsequent reports of injury as required by this agency.

Signed and filed on this 20th day of June, 2023.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

James Ballard (via WCES)

Robert Gainer (via WCES)