IN THE COURT OF APPEALS OF IOWA

No. 3-313 / 12-1824
Filed May 30, 2013

PMX INDUSTRIES and LIBERTY MUTUAL INSURANCE,
Petitioners-Appellants,

vs.

STEVEN J. REICH,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Arthur E. Gamble, Judge.

An employer and its insurer appeal from the district court's affirmance of an award of workers' compensation benefits. **AFFIRMED.**

Sarah W. Anderson and John M. Bickel of Shuttleworth & Ingersoll, P.L.C., Cedar Rapids, for appellants.

Bob Rush of Rush & Nicholson, P.L.C., Cedar Rapids, for appellee.

Heard by Eisenhauer, C.J., and Potterfield and Tabor, JJ.

POTTERFIELD, J.

An employer, PMX Industries, and its insurer, Liberty Mutual Insurance, appeal from the district court's affirmance of an award of workers' compensation benefits to Steven Reich. The commissioner found Reich's tinnitus and hearing loss were work related, he had experienced a thirty percent industrial disability, and the agency awarded benefits accordingly. The district court affirmed on judicial review. On appeal, the employer contends the workers' compensation commissioner misinterpreted the law in rejecting their affirmative defense of untimely notice of tinnitus, erred in finding Reich's hearing loss and tinnitus were caused by his work at PMX, erred in combining the effects of tinnitus and hearing loss in determining industrial disability, and even assuming Reich has suffered compensable hearing loss and tinnitus, the finding of thirty percent industrial disability is excessive. For the reasons that follow, we affirm.

I. Background Facts and Proceedings.

Steven Reich graduated from high school in 1984. He worked and attended community college from 1987-1990, where his instruction included automated systems technology and electronics.

In 1997, Reich started working for PMX Industries (PMX) as a maintenance electrician. Reich was in good health at the time he began his employment at PMX. He underwent a pre-employment physical, including a baseline audiogram, reflecting no ratable hearing loss but showing a slight high-frequency loss in the left ear.

"PMX is generally a noisy work environment." On January 14, 1998, Fremont Compensation Insurance Group regional industrial hygiene manager,

Gary M. Kehoe, provided a detailed report to PMX following a "hazardous noise evaluation" conducted on November 12 and 13, 1997. Kehoe's study detailed sound level and audio dosimeter measurements in the facility. The study noted that most of the workforce was on a rotating twelve-hour shift, which "results in longer daily exposures" than the eight-hour shift OSHA studies normally review. Kehoe pointed out that using the regular OSHA measurement criteria, PMX will "underestimate the risk for hearing loss in your workers." Kehoe adjusted the Permissible Exposure Limits (PEL) for the longer exposure times.

Kehoe summarized his findings:

> Based on the conditions observed and exposure parameters determined, the following conclusions were reached regarding employee exposures to those environmental factors evaluated during this survey.
>
> 1. Essentially all the measurements indicated workers are exposed to average noise levels exceeding the [Occupational Safety and Health Administration] OSHA Action Level and the [American Conference of Governmental Industrial Hygienists Threshold Limit Values] ACGIH TLV.
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> 2. Several areas evaluated had activities that produced high noise levels and resulted in exposures that exceeded the OSHA PEL. The areas included the Cast Shop, Milling Line, Algoma Mill, Descaling Line, and Fork Lift Driver.

Kehoe noted:

> Occupational hearing loss is a slowly induced deafness produced by overexposure to loud noises in the work place over a period of time varying from months to years. . . . Exposure to intense noise for an extended period of time causes hearing loss which is either temporary, permanent or a combination of both.

As a maintenance electrician, Reich worked twelve-hour shifts and averaged over fifty hours per week. He worked throughout the facility performing repair and maintenance tasks. Reich's testimony detailed the locations where he worked in the plant and the noise to which he was exposed. He routinely wore

hearing protection. However, in doing his work, there were times when he needed to be able to communicate with coworkers and supervisors and it was necessary to loosen or remove his hearing protection. "We talk very loud. Sometimes we try to use radios, but sometimes that's impossible to communicate because of how loud it is."

PMX had its employees' hearing tested annually by St. Luke's Hospital. Reich's hearing deteriorated over the years. Reich underwent a hearing test on November 7, 2007, and a repeat hearing test on December 19, 2007. Reich received a letter on December 20, noting hearing problems, baseline changes, and the advisability of consulting with a doctor about the hearing changes.

Reich worked at PMX until March 27, 2008, when he resigned.[1] At the time he left PMX, Reich was earning $22.45 per hour, plus $1.25 per hour for being a team leader.

Because of the hearing loss noted in the November and December hearing tests, PMX referred Reich to Dr. Mark C. Taylor of St. Luke's Hospital, where he underwent a "very limited" examination that "documented" hearing loss on April 3, 2008. Dr. Taylor wrote, "Apparently the only hearing loss that would require any type of impairment rating would be the right ear." Dr. Taylor referred Reich to an occupational audiologist, Christine Pernetti, who conducted the repeat audiogram, to "sit down and speak with him with regard to his findings."

[1] Reich was given the option of resigning after a random urinalysis test indicated the presence of marijuana. Reich disagreed with the test results, but submitted his resignation. Reich obtained employment with ConAgra on June 2, 2008. He left that job on June 19, 2008, to take a job at John Deere, where he was working at the time of the arbitration hearing.

On August 14, 2008, Pernetti wrote a letter to the employer in response to the employer's inquiry to Dr. Taylor. Pernetti wrote:

> Hearing results from 4/3/08 indicated a mild hearing loss at 3000 Hz. sloping to within moderately severe range from 4000-6000 Hz. in the left ear. Normal hearing thresholds were identified from 500-2000 Hz. in this ear. The right ear indicated a mid low to mid frequency loss from 500-3000 Hz. and a moderately severe to severe high frequency hearing loss from 4000-8000 Hz. His last hearing test while still an employee at PMX was done on 12/13/200[7] by St Luke's Hearing Conservation Department's mobile hearing van. Results from that hearing test were not significantly different from results on 4/3/08. When comparing the above mentioned hearing test results with results from Steven's medical baseline hearing test on 10/13/1996, a decrease in hearing is noted in both ears. Results from the baseline hearing test indicated normal hearing thresholds in both ears at all frequencies with the exception of a mild hearing loss at 6000 Hz. in the left ear. A fairly gradual decrease in hearing is noted when examining annual hearing test results between 1998 and 2008 in both ears, which is commonly observed in noisy occupational settings. Hearing loss from long term exposure to noise at or above 85 dB is generally observed to be a high frequency sensorineural hearing loss, which is concurrent with findings for Steven Reich. Even when observing age-adjusted changes from 2000-4000 Hz., significant decreases were noted in both ears from the baseline hearing test when compared to the most current tests in 2007 and 2008.
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> Jennifer Meadows, employed in the Safety Dept. at PMX indicated that noise studies do show that Steven was required to be enrolled in their hearing conservation program, as his workplace noise exposure met or exceeded a Time Weighted Average of 85 dB or greater. Steven did indicate on several hearing test case history forms that he did engage in noisy hobbies, including firearm use and listening to loud music. Hearing loss from exposure to non-workplace noise could also have contributed to Mr. Reich's overall hearing deficit and it is not possible to quantify, based on narrative data regarding non-workplace exposures how much of the loss could have been caused by workplace vs. recreational exposure.
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> lowa law, when determining compensation for hearing loss caused by workplace noise, does not look at the frequencies most typically harmed from exposure, but instead calculates their formula including low to mid frequencies (600, 1000, 2000 and 3000). That formula states "occupational hearing loss means that portion of a permanent sensorineural loss of hearing in one or both ears that

> exceed 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." Averages for the right ear using the formula indicate an individual impairment of 13.1%, and averages for the left ear were at or below 0%. A binaural impairment of 2.2% was noted.
>
> OSHA indicates that cases are work related if an event or exposure in the work environment either caused or contributed to the resulting condition, and or significantly aggravated a preexisting injury or illness. Based on the information available regarding this employee, these conditions cannot be ruled out with regard to Mr. Reich's hearing loss.

Dr. Taylor rated Reich's impairment using the American Medical Association's *Guides to the Evaluation of Permanent Impairment* and reported to PMX that Reich's 2.2% binaural impairment corresponded to a "1% impairment of the whole person."

PMX then referred Reich to Dr. Marlan Hansen of the University of Iowa Hospitals and Clinics (UIHC). Dr. Hansen saw Reich on October 18, 2008, and informed PMX that

> [t]he patient's hearing loss pattern and history are consistent with a noise-induced sensorineural hearing loss. Based on the patient's report, as well as my review of outside records, he worked in a noisy environment. He states that, for the most part, he wore noise protection. He also has had some recreational, noise exposure. It is difficult to quantify how much of his hearing loss is due to occupational versus recreational noise exposure, but his hearing loss pattern is consistent with a noise-induced sensorineural hearing loss.

PMX then sent Reich to Dr. Bruce Plakke, a Waterloo audiologist. On March 3, 2009, counsel for PMX sent selected records for Dr. Plakke to review. Reich saw Dr. Plakke on March 27, 2009, for "evaluation to analyze his alleged occupational hearing loss." Dr. Plakke's letter to PMX's counsel reads, in part,

"When asked if he has tinnitus he reported he has it sometimes." Dr. Plakke writes further,

> The progression of hearing loss over 10 years is quite severe. It is way more change in hearing sensitivity than could be accounted for by even extreme noise exposure.. . . .
>
> Pure tone test results showed Mr. Reich's hearing thresholds have decreased markedly from his last audiogram done 4.03.08. I believe the thresholds are correct due to good reliability with speech thresholds (SRT'S) and repeated testing at four frequencies in each ear. The right ear shows moderate hearing loss in the low and mid-frequencies and moderately severe loss in the higher frequencies. The left ear shows mid-to-moderate loss in the lower frequencies and moderately severe loss in the higher frequencies. The hearing loss is sensorineural bilaterally. Today's audiogram shows 18.28% of binaural hearing impairment, age corrected to 17.08%.
>
> The progression of hearing loss after leaving PMX is further proof that his changes in auditory thresholds are not related to noise exposure. (This assumes that John Deere Waterloo, where Mr. Reich is currently employed, is using good hearing conservation practices and Mr. Reich is wearing his hearing protection as he stated.)

Dr. Plakke concluded, "Reich did not suffer noise-induced hearing loss from working at PMX. It is my opinion that PMX did not expose Mr. Reich to noise levels for long enough durations and intensities to have been a significant contributing factor to his hearing loss . . .".

Reich filed a petition for workers' compensation benefits on August 19, 2009, asserting injuries of "Hearing loss and Tinnitus." He amended his petition to assert a March 27, 2008 date of injury.[2] PMX filed an answer denying the claimed injuries.

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[2] Iowa Code section 85B.8(1)(c) (2007) provides:

> A claim for occupational hearing loss due to excessive noise exposure may be filed beginning one month after separation from the employment in which the employee was subjected to excessive noise exposure. The date of the injury shall be the date of occurrence of any

On June 22, 2010, Reich completed a hearing loss and tinnitus questionnaire for Richard Tyler, Ph.D., an audiologist, professor, and director of audiology at UIHC, where part of his responsibilities include directing the UIHC Tinnitus Clinic. Reich indicated on that questionnaire that he began to experience tinnitus in 2006 or 2007. Reich indicated it was intermittent and answered questions as to how tinnitus affected his concentration, emotional well-being, hearing, and sleep.

On July 28, 2010, PMX sent Reich to see Dr. Doug Hoisington, a board-certified otolaryngologist to "address whether he suffered a noise-induced hearing loss and or tinnitus from working at PMX." On August 10, 2010, Dr. Hoisington wrote to counsel for PMX acknowledging Reich had a hearing loss and that Reich reported tinnitus, "but in asking him how significantly this interfered with his activities of daily living he was not sure." Dr. Hoisington concluded that "[g]iven the pattern of his hearing loss it would be hard to account for this type of injury to be caused by high-frequency noise." As for tinnitus, Dr. Hoisington noted that Reich's did not claim to have tinnitus in his employment record[3] at John Deere. Dr. Hoisington wrote:

> If this is true there is no way that his exposure to noise at PMX could then later on cause tinnitus; therefore if he does have tinnitus it is probably not related to his noise exposure at PMX. Secondly although tinnitus has been associated with hearing loss there are people who have tinnitus who have absolutely no hearing loss. It is unknown what the etiology of tinnitus is; it used to be believed that

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> one of the following events . . . (c) Termination of the employer-employee relationship.

[3] On a May 27, 2008, John Deere occupational health and medical history form Reich apparently answered "no" to the question, "Do you have buzzing or ringing in your ears?" On a July 14, 2010 John Deere hearing questionnaire, Reich notes both "ringing ears" and "buzzing in ears."

> it was related purely to injury to the cochlea. However; there are patients who have had their cochlea totally destroyed and yet still complained of tinnitus; this could very well be related to an abnormality in the auditory cortex. Once again the American Medical Association allows adding a 5% maximum disability for tinnitus but it is related to a SIGNIFICANT interference in the activities of daily living. As noted above this is clearly not the case with Mr. Reich.

On August 20, 2010, Dr. Tyler prepared a report based on Reich's questionnaire, a subsequent telephone interview with Reich, and a documentation review. Dr. Tyler outlined several factors including work history, noise exposure, hearing protection, family history, and recreational noise exposure and concluded, "Based on the information available to me, I conclude that the sensorineural hearing loss and tinnitus experienced by Mr. Reich was probably a result of his work at PMX Industries. His condition is unlikely to improve." He summarized his reasoning:

> **12 Overall Impression of Hearing and Tinnitus**
>
> There are several important points in Mr. Reich's situation:
>
> **12.1 History at PMX Industries**
>
> • Mr. Reich was exposed to high levels of damaging noise during his work at PMX Industries.
> • His post-employment audiograms are consistent with a noise induced hearing loss.
> • He was exposed to impulsive noise, and was not properly shown how to use hearing protection.
> • He was exposed to chemicals while at work.
> • Because of his overtime, he was exposed to excessive noise far greater than 40 hours per week.
>
> **12.2 Other Possible Causes of Hearing Loss**
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> • There is no evidence that suggests he started work at PMX Industries with ill health or tinnitus.
> • It is very unlikely that his hearing loss or tinnitus is due to aging or is hereditary.
>
> **12.3 Functional Impairment Rating**
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> His bilateral hearing impairment is 2%, but I expect him to have more significant difficulty localizing and hearing in noise. As his hearing loss progresses due to aging, he will require more power

hearing aids at an earlier age because of his current noise induced hearing loss.
• His % binaural hearing loss is 2%
• His whole-body tinnitus impairment is 4.5%.

12.4 Restriction on Work

Hearing loss and tinnitus can result in isolation. Loud noise can make people more anxious, irritable, increase in pulse rate, blood pressure and produce stomach acid.
• He should not work around loud noise.
• He should not work in a situation where the noise levels are unpredictable.
• He should not work in dangerous situations where accurate concentration is required.
• He should not work in situations that are stressful.

Dr. Hansen submitted a response to points made by Drs. Plakke, Hoisington, and Tyler. Dr. Plakke criticized Dr. Tyler's analysis, as did Dr. Hoisington. On September 13, 2010, Dr. Tyler wrote a letter detailing the other expert opinions and specifically agreeing or rejecting particular findings and arguments. Dr. Tyler again concluded, "Based on the information available to me, I conclude that the sensorineural hearing loss and tinnitus experienced by Mr. Reich was probably a result of his work at PMX Industries. My opinions do not change following these three letters [from Drs. Hansen, Plakke, and Hoisington]."

The arbitration hearing was held on September 20, 2010. The filed hearing report indicates PMX asserted the affirmative defense of "[u]ntimely notice under [Iowa Code] section 85.23 [(2007)]."

At the time of the arbitration hearing, Reich was forty-four years old, married, and the father of four children. Reich was employed by John Deere, Inc., as an electrician earning $24.15 per hour. He testified about his work

conditions at PMX, his hearing loss, and his tinnitus. Reich stated he reported ringing in his ears at an annual hearing test.

Robert Provencher, Jeff Puffet, Jerry Juergens, and Jennifer Meadows testified for PMX. Provencher, safety engineer for PMX, testified that PMX "does exceed the 85 deci[b]al OSHA action level." The record includes 2001, 2002, and 2004 surveys by senior industrial hygienist, Neil Sherman, of Compliance Services, Inc. Each indicated employee exposure to noise exceeding OSHA PEL's with minor exceptions. PMX conceded the 2004 noise study was the last study done and that noise levels had not changed.

Puffet, a former PMX electrical maintenance supervisor, testified he did not recall Reich telling him he was having any kind of hearing problems or ringing in his ears.

Juergens was a co-worker of Reich. He testified that it was "common practice" to loosen one's ear plugs at PMX. When asked if he was aware of any hearing problems Reich had, Juergens testified, "Not that I'm aware of. I guess we didn't actually talk about that type of thing."

Meadows was PMX's health services supervisor and scheduled annual hearing testing for employees. She explained that PMX provided employees with hearing conservation training and ear protection.

A posthearing brief was submitted by Reich on October 4, 2010. PMX was granted an extension and submitted its brief on October 6. In its brief, PMX wrote:

> A significant conflict in the evidence exists as to when Claimant first started to experience tinnitus.

Claimant's 3/31/08 PMX Incident Report only claims hearing loss in the right ear. Claimant repeatedly states he does not experience tinnitus in questionnaires completed after he terminated his employment at PMX. At the 03/20/09 examination with Dr. Bruce Plakke, audiologist, Claimant reported for the first time that he experienced tinnitus.

Claimant served claimant's 06/23/10 responses to Dr. Tyler's questionnaire and Dr. Tyler's 08/20/09 report on 08/20/09. August 20, 2009, days before hearing,[4] is the first time Respondents were aware that Claimant claimed he began to experience tinnitus in both ears in 2006-2007.

In the 2006-2007 time frame, Claimant received hearing conservation and PPE training as to what tinnitus was, what its causes were—*one of which* is noise exposure, and its serious nature. Claimant testified he knew what tinnitus was while at PMX. Jeff Puffet, Claimant's direct supervisor, testified Claimant had not reported tinnitus to him, it was a PMX policy that such a problem should have been reported, and tinnitus or ringing in the ears was discussed in safety training supported by co-electrician Jerry Juergens' testimony.

01/09/07 a standard threshold shift in the right ear was determined by audiogram testing; 12/19/07 a standard threshold shift in the left ear was determined by audiogram testing. Claimant testified he was provided his hearing test results. Claimant did not report any problems with tinnitus or noises in his ears or head when completing the 2006-2007 health questionnaires[5] at the time of the hearing testing, before, or thereafter, until his March 2009 examination with Dr. Plakke. See Exhibits D-04 (Incident Report), C, A, and B. Claimant's responses to the PMX questionnaires all stated Claimant used his mandated hearing protection at work, there were non-work related noise exposures for which Claimant did not use hearing protection, he had a pre-existing, "known confirmed hearing loss," but Claimant rated his hearing as "Good." There was nothing to alert or notify the employer that Claimant experienced tinnitus.

The evidence is Claimant had significant knowledge regarding tinnitus during his employment at PMX. Claimant acknowledged in cross examination he knew what tinnitus was.

Claimant's various reports on the onset of tinnitus cannot be reconciled. If the Tyler questionnaire is to be accepted, PMX did

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[4] We assume a typographical error was made in this statement because the hearing was held on September 20, 2010, and Dr. Tyler's letter/report is dated August 20, 2010.

[5] PMX repeatedly makes the argument that Reich did not note experiencing tinnitus on the annual hearing testing forms. Whether deliberate or not, this claim is misleading—the form to which PMX refers does not ask about tinnitus, but asks if the patient has "severe ringing." On none of the forms from 1999 through 2008 did Reich circle "severe ringing."

> not have notice within the required 90 days as PMX's first notice was in March 2009 when Dr. Plakke's report was received. If the report to Dr. Plakke is to be accepted, the tinnitus did not occur until well after the Claimant left PMX and lacks a temporal relationship to PMX employment.

(Footnotes omitted.)

Arbitration decision.

On January 11, 2011, an arbitration decision was filed. The presiding deputy commissioner observed that the "question of causal connection is essentially within the domain of expert testimony." The deputy outlined the various expert opinions and found that the

> greater weight will be given to the conclusions of Dr. Tyler and Dr. Hansen. It is found that claimant has carried his burden of proof to show that his hearing loss and his tinnitus were caused by workplace exposure, that he has suffered an injury arising out of and in the course of his employment, and that he has incurred temporary and permanent disability as a result of that work injury.

The deputy observed that Reich had suffered an unscheduled injury, then noted and addressed the various factors to be considered in determining industrial disability. The deputy found "[t]he combination of hearing loss and tinnitus does have an adverse effect on [Reich's] earning capacity," explaining "he may have to limit future job applications to work environments that do not have high noise levels if he does not wish to further damage his hearing, as recommended in his restrictions" and assigned an industrial disability of thirty percent.

The deputy commissioner next addressed PMX's affirmative defense of lack of timely notice under Iowa Code section 85.23, concluding PMX "fail[ed] to address this issue in their post-hearing brief" and did not provide argument to

support the burden of proof. The deputy found "[t]he employer clearly had notice of claimant's hearing loss work injury" and "the fact that his noise exposure work injury also later resulted in tinnitus did not require a second or separate notice to the employer." The deputy concluded the "defendants have failed to carry their burden of proof to show that claimant failed to give notice of his work injury."

Intra-agency appeal.

PMX appealed to the commissioner. PMX contested the deputy's findings of causation and industrial disability. It also asserted the deputy's rejection of its section 85.23 notice defense "is incorrect as a matter of fact and law." It argued that it had addressed the matter in its posthearing brief. PMX then argued that hearing loss and tinnitus required separate notices. PMX next asserted that "even assuming that Claimant experienced tinnitus in 2006 or 2007, . . . there is no evidence that Claimant notified PMX about his tinnitus within ninety days of when he should have recognized the nature, seriousness and compensable character of the tinnitus."

The commissioner affirmed the arbitration ruling, adopting it as the final agency decision without additional comment.

Judicial review.

PMX sought judicial review in the district court, claiming the commissioner erred by "(1) finding it had notice of Reich's tinnitus; (2) relying on the opinions of Dr. Taylor and Pernetti as well as Drs. Hansen and Tyler; (3) disregarding the opinions of Drs. Hoisington and Plakke; (4) granting a single award of industrial disability; and (5) assigning 30% industrial disability." The district court concluded the commissioner found PMX had actual notice of Reich's hearing

loss, which provided sufficient notice of "all hearing injuries including tinnitus." The court found substantial evidence supported the commissioner's findings as to Reich's noise exposure, and deferred to the commissioner's determination as to which of the expert opinions to accept. The district court further affirmed the commissioner's combining of injuries to make a single industrial disability award, citing *Honeywell v. Allen Drilling Co*., 506 N.W.2d 434, 436 (Iowa 1993). Finally, the district court found the industrial disability rating was based upon proper factors and supported by substantial evidence.

PMX appeals, contending the workers' compensation commissioner misinterpreted the law in rejecting its affirmative defense of untimely notice of tinnitus; erred in finding Reich's hearing loss and tinnitus were caused by his work at PMX; erred in combining the effects of tinnitus and hearing loss in determining industrial disability; and,even assuming Reich has suffered compensable hearing loss and tinnitus, the finding of thirty percent industrial disability is excessive.

II. Scope and Standards of Review.

Iowa Code chapter 17A governs our review of the decisions of the workers' compensation commissioner. Iowa Code § 86.26 (2013); *Midwest Ambulance Serv. v. Ruud*, 754 N.W.2d 860, 864 (Iowa 2008). The factual findings of the commissioner are reversed only if they are not supported by substantial evidence. Iowa Code § 17A.19(10)(f) *Midwest*, 754 N.W.2d at 864. Evidence is substantial if a reasonable mind would accept it as adequate to reach a conclusion. *Heartland Specialty Foods v. Johnson*, 731 N.W.2d 397, 400 (Iowa Ct. App. 2007).

"When an agency has been clearly vested with the authority to make factual determinations, it follows that application of the law to those facts is likewise vested by a provision of law in the discretion of the agency." *Burton v*. *Hilltop Care Center*, 813 N.W.2d 250, 256 (Iowa 2012) (citation and internal quotation marks omitted). "[W]e may reverse the commissioner's application of the law to the facts only if it is irrational, illogical, or wholly unjustifiable." *Ruud*, 754 N.W.2d at 864).

In reviewing the district court's decision, we apply the standards of chapter 17A to determine whether our conclusions are the same as those reached by the district court. *Clark v*. *Vicorp Rests*., *Inc*., 696 N.W.2d 596, 603 (Iowa 2005).

III. Discussion.

***A*. *Notice*.[6]**

PMX contends here that the "commissioner misinterpreted the law in holding that Claimant's notice of hearing loss also doubled as notice of tinnitus

[6] PMX's notice defense is based upon Iowa Code section 85.23, which 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.

Where the injury complained of is not traumatic but cumulative, as it is with respect to hearing loss and tinnitus, "the worker is entitled to the benefit of the discovery rule. In such a case, the statute of limitations does not begin to run until the worker recognizes, or should recognize, the 'nature, seriousness and probable compensable character' of the disability." *Chapa v. John Deere Ottumwa Works*, 652 N.W.2d 187, 189 (Iowa 2002) (citation omitted) (discussing the scope of the ruling in *Ehteshamfar v. UTA Engineered Systems Division*, 555 N.W.2d 450, 453 (Iowa 1996), and stating, at 188-89, "In *Ehteshamfar*, this court held that tinnitus should be compensated as an injury to the body as a whole, rather than as a hearing loss, because the condition arises, not from an inability to hear, but from the perception of sounds that do not exist."); *see also John Deere Dubuque Works v*. *Caven*, 804 N.W.2d 297, 301-02 (Iowa Ct. App. 2011) (discussing the finding that tinnitus is a cumulative injury).

even though Claimant did not inform PMX of his alleged tinnitus." The hearing report filed before the September 20, 2010 arbitration hearing indicates PMX asserted the affirmative defense of "[u]ntimely notice under [Iowa Code] section 85.23." No further specification of the affirmative defense is in the record prior to or at the arbitration hearing. PMX did not assert at the arbitration hearing that separate notices were required.

Nor did the deputy commissioner rule that notice of hearing loss was sufficient to give notice of tinnitus. In the arbitration decision, the deputy commissioner concluded PMX "fails to address this [section 85.23 notice] issue in their post-hearing brief. So did Claimant. Defendants bear the burden of proof on this affirmative defense, yet they have provided no argument to support that burden."

On appeal, Reich argues the claim that separate notices are required was not made to the agency and is thus not preserved. PMX argues that its post-hearing brief "revealed PMX's position that notice of the hearing loss did not provide notice of tinnitus, as PMX clearly conceded that it had notice of the hearing loss." PMX's posthearing brief raised only factual issues and offered no legal arguments.

The district court addressed this issue as follows, and we adopt its ruling as our own:

> As an initial matter, the Petitioners claim the Commissioner erroneously found they waived their notice argument. However, the Commissioner did not find the Petitioners waived this argument. Instead, the Commissioner found the Petitioners presented no argument addressing whether notice of hearing loss provides notice of tinnitus. A review of the Petitioners' agency brief and the hearing transcript show no argument on this issue. Instead, the agency

> brief addresses when Reich discovered his tinnitus under the discovery rule.[1] Therefore the Petitioners' agency brief and the hearing transcript provide substantial evidence to support the Commissioner's decision that the Petitioners presented no argument on the issue of whether notice of hearing loss also provides notice of tinnitus. Iowa Code § 17A.19(I0)(f).
>
> [1] The parties' briefs before this Court continue to argue when Reich discovered his tinnitus under the discovery rule. The Commissioner found the Petitioners had notice of Reich's hearing injury and made no finding on when Reich discovered his tinnitus. This Court can only review the findings made by the Commissioner. *See Office of Consumer Advocate*, 432 N.W.2d at 156. To the extent the Petitioners ask for an original determination under the discovery rule, this Court has no authority to do so. *See id.*

(Citations to the administrative record omitted.)

On the narrow question of whether PMX provided argument to support its claim that separate notices were required for hearing loss and tinnitus, we agree with the deputy's statement, adopted by the commissioner and affirmed by the district court, that "Defendants bear the burden of proof on this affirmative defense, yet they have provided no argument to support that burden." PMX did provide argument on intra-agency appeal, but not before. PMX asserts this was its earliest opportunity to make such an argument.

"Generally, our review is limited to questions considered by the agency. Even issues of constitutional magnitude may be deemed waived on appeal if not raised before the administrative tribunal." *Office of Consumer Advocate v*. *Iowa State Commerce Comm'n*, 465 N.W.2d 280, 283 (Iowa 1991) (citations omitted). The *Consumer Advocate* court noted an exception, "an issue not raised in the initial pleading before the agency may be preserved for appeal if raised for the agency's consideration in a motion for rehearing." *Id.* The *Consumer Advocate* court ruled that the "exception" applied because the Office of Consumer

Advocate "raised its claim of procedural unfairness at the earliest possible opportunity" and the opposing parties "were given the opportunity to address the issue in response." *Id.*

PMX did not raise its argument of separate notices at the earliest opportunity, and consequently, Reich did not have the opportunity to address the issue before the deputy. PMX clearly had the incentive and ability to raise the claim of the necessity of separate notices before the deputy. The employer has the burden of proving the affirmative defense of lack of notice. *See DeLong v. Iowa State Hwy. Comm'n*, 295 N.W. 91, 92 (Iowa 1940); *cf. Markey v. Carney*, 705 N.W.2d 13, 21 (Iowa 2005) (noting the proponent of an affirmative defense has the burden of proof). It was for PMX to assert and support its affirmative defense. It made no argument before the deputy that separate notices of tinnitus and hearing loss were required. We will not reverse a ruling based on a defense not asserted below. *See Foods, Inc. v. Leffler*, 240 N.W.2d 914, 919 (Iowa 1976) ("Any defense on the merits of the controversy should have been raised in the proceedings in which the merits were considered."). PMX thus failed to carry its burden to prove its affirmative defense.

We also note PMX's factual assertions in its notice arguments are inaccurate. In its appeal to the commissioner, PMX asserted:

> [E]ven assuming that Claimant experienced tinnitus in 2006 or 2007 while at PMX . . . there is no evidence that Claimant notified PMX about his tinnitus within ninety days of when he should have recognized the nature, seriousness and compensable character of the tinnitus. Claimant repeatedly failed to report tinnitus on the questionnaires completed in connection with annual hearing evaluations.

Reich testified he noticed ringing in his ears in the last year or two of working for PMX. He further testified he informed a person doing a hearing test, "what's all this ringing I hear in my ears all the time." PMX sent Reich for annual hearing testing to St. Luke's and those test results were to be reported to the employer. "Notice to an agent is effective if the agent has a duty to receive that knowledge and report it to the principal." *Meredith Outdoor Advertising*, *Inc*. *v*. *Iowa Dep't of Transp*., 648 N.W.2d 109, 114 (Iowa 2002) (citing and quoting *Tonelli v*. *United States*, 60 F.3d 492, 495 (8th Cir. 1995)). Moreover, PMX's repeated assertion that Reich "failed to report tinnitus on the questionnaires" is misleading at best. The questionnaires do not ask whether the employee is experiencing tinnitus, but rather "severe ringing." That Reich did not experience "severe ringing" does not show he did not experience or report tinnitus.

B. Battle of the experts. PMX next argues that the commissioner erred in finding Reich's hearing loss and tinnitus were caused by his employment at PMX, arguing the commissioner did not state valid reasons for rejecting the opinions of Drs. Hoisington and Plakke.

As acknowledged by PMX, medical causation presents a question of fact vested in the discretion of the commissioner. *Cedar Rapids Sch*. *Dist*. *v*. *Pease*, 807 N.W.2d 839, 844 (Iowa 2011). We thus will disturb those findings if they are not supported by substantial evidence. *Id.*

> Evidence is not insubstantial merely because different conclusions may be drawn from the evidence. To that end, evidence may be substantial even though we may have drawn a different conclusion as fact finder. Our task, therefore, is not to determine whether the evidence supports a different finding; rather, our task is to determine whether substantial evidence, viewing the record as a whole, supports the findings actually made.

Id. at 845 (citations omitted).

Several experts provided opinions as to causation. Dr. Taylor and occupational audiologist Pernetti—both of whom were selected by PMX—determined Reich experienced noise-induced hearing loss. Pernetti reported that "OSHA indicates that cases are work related if an event or exposure in the work environment either caused or contributed to the resulting condition, and or significantly aggravated a preexisting injury or illness"; she was unable to rule out that the hearing loss was caused at least in part, to noise exposure at PMX. *See Miller v. Lauridsen Foods, Inc.*, 525 N.W.2d 417, 420 (Iowa 1994) ("For workers' compensation purposes a cause is proximate if it is a cause; it need not be the only cause."). Dr. Hansen concluded Reich's hearing loss pattern is consistent with a noise-induced sensorineural hearing loss. Dr. Tyler attributed Reich's hearing loss and tinnitus to his work at PMX and discussed the reasons given by Drs. Plakke and Hoisington for their findings.

In this "battle of the experts," the deputy gave greater weight to the conclusions of Drs. Tyler and Hansen, and that determination was adopted by the commissioner. As emphasized in *Pease*,

> the commissioner, as fact finder, is responsible for determining the weight to be given expert testimony. *Sherman v. Pella Corp.*, 576 N.W.2d 312, 321 (Iowa 1998). The commissioner is free to accept or reject an expert's opinion in whole or in part, particularly when relying on a conflicting expert opinion. *Id.; see Huwe v. Workforce Safety & Ins.*, 746 N.W.2d 158, 161–62 (N.D. 2008) ("When confronted with a classic 'battle of the experts,' a fact-finder may rely upon either party's expert witness."). The courts, in their appellate capacity, "are not at liberty to accept contradictory opinions of other experts in order to reject the finding of the commissioner."

807 N.W.2d at 850. Based on the record before us, we are satisfied that the commissioner's findings as to causation are supported by substantial evidence.

C. Combined effects of tinnitus and hearing loss. PMX takes issue with the agency's award of industrial disability resulting from the combined effect of Reich's hearing loss and tinnitus. In *Ehteshamfar*, 555 N.W.2d at 453, the supreme court held that tinnitus should be compensated as an injury to the body as a whole, rather than as a hearing loss, "because tinnitus does *not* cause a person to be unable to hear; instead tinnitus causes a person to perceive sounds that do not exist." However, when an employee suffers both scheduled and unscheduled injuries and the injuries developed over the same period of time and share the same cause, we find no error in the commissioner combining them as one industrial disability. *See Miller*, 525 N.W.2d at 420 ("If an employee suffers both an injury to a scheduled member and also to part of the body not included in the schedule, then the resulting injury is compensated on the basis of an unscheduled injury.").

D. Industrial disability finding. Finally, PMX argues that the assignment of thirty percent industrial disability is excessive. Because the commissioner's finding of industrial disability involves the application of law to the facts, we will only disturb the commissioner's ruling if "irrational, illogical, or wholly unjustifiable." *Larson Mfg. Co., Inc. v. Thorson*, 763 N.W.2d 842, 857 (Iowa 2009).

Much of PMX's argument here is based on its continued complaint that there is no evidence that Reich experienced tinnitus until after leaving its employ. The commissioner found otherwise. PMX also complains that Reich's earnings

are similar to when he worked for PMX, and thus, he has suffered no loss of earning capacity. The deputy discussed Reich's age, education, current employment and earnings, work history, the restrictions Dr. Tyler recommended on future employment, and the difficulties tinnitus caused in Reich's communication abilities. Reich was forty-four at the time of the hearing. He has limited education. While he has found similar employment and his hourly wage is similar to his wage at PMX, he works fewer hours, and it has been recommended that he find work where noise levels are lower. The deputy found that the combination of hearing loss and tinnitus may limit Reich's future ability to work. We cannot say the agency's finding of thirty percent industrial disability is irrational, illogical, or wholly unjustifiable under the circumstances.

IV. Conclusion.

PMX failed to carry its burden of proving lack of timely notice pursuant to Iowa Code section 85.23. There is substantial evidence to support the finding of causation. The commissioner did not err in compensating the scheduled and unscheduled injuries as industrial disability. The finding of thirty percent disability was not irrational, illogical, or wholly unjustifiable. We therefore affirm the district court's ruling on judicial review upholding the commissioner's ruling.

AFFIRMED.