

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F208606

MARTY POWERS, Employee	CLAIMANT
CITY OF FAYETTEVILLE, Employer	RESPONDENT
MUNICIPAL LEAGUE WCT, Carrier	RESPONDENT

OPINION FILED DECEMBER 18, 2003

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by AARON MARTIN, Attorney, Fayetteville, Arkansas.

Respondents represented by J. CHRIS BRADLEY, Attorney, North Little Rock, Arkansas.

STATEMENT OF THE CASE

On November 19, 2003, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on March 26, 2003, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The relationship of employee-employer-carrier existed among the parties at all relevant times.

At the time of the hearing the parties agreed that in addition to their prior stipulation regarding jurisdiction of the claim to agree to the following stipulations:

1. The relationship of employee-employer-carrier existed from September 24, 1996 through September 5, 2001.
2. Claimant earned sufficient wages to be entitled to the maximum compensation rate.
3. Claimant has a bilateral anatomical impairment of 9.4% or 18.852 weeks of benefits as a result of his hearing

loss.

4. Claimant's claim for compensation benefits was filed with the Commission on July 31, 2002.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensability of hearing loss.
2. Medical bills.
3. Permanent partial disability benefits.
4. Attorney fee.

Subsequent to the pre-hearing conference the respondent also raised as an issue the statute of limitations.

The claimant's contentions are set out in his Amended Pre-Hearing Questionnaire as follows: "The claimant will contend that he sustained a gradual onset injury, namely hearing loss, and the major cause of this injury was his exposure to occupational noises arising from and in the course of employment with the respondent. The claimant will also contend that as a gradual onset injury, the statute of limitations did not begin to run until February 5, 2001. In support, the claimant will contend that from the original audiological test on September 14, 1992, the claimant's hearing loss deteriorated from his continued exposure to occupational noises. The claimant will also contend that his hearing loss was not severe enough to entitle him to an anatomical impairment until February 5, 2001. The claimant will further contend that his hearing loss did not become a compensable injury until his hearing had deteriorated enough to entitle him to an anatomical rating on February 5, 2001. Finally, the claimant will contend that this claim was filed on July 31, 2002, within the two-year statute of limitations for initial benefits."

The respondents contend that claimant did not sustain any hearing loss as a consequence of his employment. Respondent also contends that claimant's claim is barred by the statute of limitations.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The stipulations agreed to by the parties at the time of the hearing which are set forth above are hereby accepted as fact.
3. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury in the form of hearing loss as a result of his employment with the respondent.

FACTUAL BACKGROUND

The claimant is a very nice 43-year-old college graduate who began working for the respondent as a firefighter in September 1986. Claimant was promoted to captain in 1992 and continued working for respondent until September 2001.

Claimant testified that as a fireman he was around various loud noises while at the station and while performing his job duties. This included the testing of loud pumping equipment, engines, pump panels, generators, ventilation fans, horns, and sirens. Claimant also testified that at one point he was assigned to the station which provided fire coverage to the University of Arkansas. Claimant testified that there were frequent false alarms at the University which resulted in exposure to loud alarms.

Claimant first sought medical treatment for his hearing from Dr. Thermon Crocker in 1992. Claimant testified that his symptoms at that time included ringing in his ears and

a slight difficulty understanding people during conversations. Dr. Crocker performed testing and diagnosed claimant as suffering from high frequency hearing loss. Claimant returned to Dr. Crocker again in 1995, 1998, and in 2001.

Claimant filed this claim on July 31, 2002 alleging that he suffered a compensable injury in the form of hearing loss as a result of his employment with respondent. He seeks payment of medical benefits and permanent partial disability benefits based upon a bilateral anatomical impairment rating of 9.4 percent.

ADJUDICATION

A.C.A. §11-9-102(4)(A)(ii)(c) recognizes as a compensable injury hearing loss which is not caused by specific incident or which is not identifiable by time and place of occurrence. Here, claimant contends that his hearing loss is a gradual onset injury resulting from continued exposure to loud noises as a fireman.

Pursuant to A.C.A. §11-9-102(4)(D) a compensable injury must be established by medical evidence supported by objective findings. Objective findings are defined as those findings which cannot come under the voluntary control of the patient. A.C.A. §11-9-102(16)(A)(i).

In *Jarrett v. Sol Alman Company*, Full Commission Opinion filed May 30, 2003 (E904563), the Commission stated:

With regard to the medical findings other than those which are specifically precluded by the amended law, a medical finding is not objective if it is the product of a diagnostic procedure which comes under the voluntary control of the patient. *Department of Parks and Tourism v. Helms*, 60 Ark. App. 110, 959 S.W. 2d 749 (1998). (Emphasis added.)

Here, the tests performed on claimant have included audiograms and speech discrimination tests which have been performed by an audiologist in Dr. Crocker's office and also by Lewis McGrail, an audiologist who works as a consultant for Key Audiometrics.

While both Drs. Crocker and McGrail conceded that it is difficult to fake these tests, both of them conceded that the testing was dependent upon the responses of the person being tested.

Deposition of Dr. Crocker:

Q. But nonetheless, it's dependent upon the responses of the person being tested, isn't it?

A. Right.

Deposition of Lewis McGrail:

Q. Okay. Are audiometry tests objective, or do they come under the voluntary control of the person taking the test?

A. It is under a voluntary control. We - - everything has to match up for them.

A compensable injury must be established by medical evidence supported by objective findings. By statute, objective findings are findings which cannot come under the voluntary control of the patient. Both Drs. Crocker and McGrail acknowledged that it would be difficult for an individual to control the results of the audio testing; however, whether or not a test is actually controlled by a particular patient is not the relevant issue. Indeed, I find no evidence which would suggest that claimant did not give maximum effort during the testing procedure. What is relevant is that Arkansas law requires medical evidence supported by findings which cannot come under the voluntary control of the patient. Here, according to both Drs. Crocker and McGrail, the testing is within the control of the patient. Given evidence that these tests are within the control of the patient, the testing cannot be considered an objective finding which would satisfy the statutory requirement for compensable injuries.

In summary, while claimant may indeed suffer from a hearing loss, I find that claimant has failed to prove by a preponderance of the evidence that he has suffered a compensable injury in the form of hearing loss as a result of his employment with

respondent. In order to be compensable, medical evidence supported by objective findings must be presented. Here, the audiological testing performed on claimant cannot be considered objective since this testing is within the control of the patient.

Having found that claimant did not suffer a compensable injury, it is not necessary to address the remaining issues raised in this claim.

ORDER

_____ Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury in the form of a hearing loss as a result of his employment with respondent. Therefore, this claim for compensation benefits is hereby denied and dismissed.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE