

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM E317743

**LEE EUGENE GARRETT,
EMPLOYEE**

CLAIMANT

**ALUMINUM COMPANY
OF AMERICA,
SELF-INSURED EMPLOYER**

RESPONDENT

**COMPENSATION MANAGERS, INC.,
BENEFITS ADMINISTRATOR**

RESPONDENT

OPINION FILED DECEMBER 11, 2006,

Pursuant to a hearing conducted September 12, 2006, before Administrative Law Judge Richard B. Calaway in Little Rock, Pulaski County, Arkansas, with

Mr. Silas H. Brewer, Attorney at Law, Little Rock, Arkansas, appearing for the claimant, and

Mr. Phillip Carroll, Attorney at Law, Little Rock, Arkansas, appearing for the respondents.

STATEMENT OF THE CASE

This was a hearing to consider the issues of compensability of the claimant's hearing condition and his related request for a hearing aid.

The claimant contended that from December, 1991, until August 13, 2001, he was exposed to excessive levels of noise, which caused him to suffer compensable high-frequency hearing loss, for which he should be awarded hearing aids, as recommended by Dr. Credonna Miller. An attorney's fee for controversion was also requested. Other possible issues were reserved.

The respondents contended that the claimant's hearing problems are not the result of a compensable injury; that the claim is barred by the statute of limitations; and that hearing aids are not reasonably necessary in connection with the claimant's subjective tinnitus.

Specifically, they contended that evidence is not sufficient to show a causal connection between the claimant's hearing problems and a compensable injury at work, as opposed to non-work-related activities, the aging process, or conditions at work arising more than two years before the claim was filed and which are barred by the statute of limitations. They further contended that any injury that occurred after July 1, 1993, is subject to the increased requirements of proof pursuant to Act 796 of 1993, such as medical proof that the major cause of his hearing problem is noise at work, to a reasonable degree of medical certainty.

The respondents also specifically contended that any alleged injury resulting from the employment occurred more than two years before the claim was filed on December 1, 1993, and is barred by the statute of limitations.

Finally, as noted above, they contended that, even assuming a compensable injury, hearing aids are not compensable within the meaning of Ark. Code Ann. §11-9-508, because they are not reasonably necessary in connection with the claimant's subjective tinnitus.

The record, which included ample documentary evidence and the testimony of the claimant, Edward Daven, and Randall Sullivan, was closed at the conclusion of the hearing, consistent with the Prehearing Order and Ark. Code Ann. §11-9-715(c).

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.

2. Pursuant to the stipulations of the parties and the record, the employment relationship existed at all pertinent times, including the period from March 18, 1968 until January 1, 2002; the claimant was off work, on sick leave, from July 11, 2000, through February 13, 2001; the last period the claimant actually performed employment services at the employer's facility was from February 14, 2001, through August 13, 2001; and that the claim for benefits was filed December 1, 1993.

3. The preponderance of the evidence fails to show that the claimant sustained compensable hearing loss induced by noise arising out of and in the course of his employment or that hearing aids are reasonably necessary for the alleged compensable noise induced hearing loss that he may have suffered as the result of his employment.

DISCUSSION

The claimant, 61 years of age at the time of the hearing, developed high-frequency hearing loss and tinnitus, or ringing in the ears, over the period of his work in the noisy environment of the employer's aluminum manufacturing facility in Saline County where he worked from March, 1968, through 2001.

When he went to work there in 1968, he spent his first three or four months in the chemical products labor pool and then, in 1969, transferred to the mechanical labor pool. He also worked in the digestion department until 1979 or 1980 and later went into mechanical maintenance. He was off work on sick leave from July 11, 2000, through February 13, 2001, returning to work activity beginning February 14, 2001, continuing through August 13, 2001, and finally retiring January 1, 2002. He testified that he worked in the general maintenance classification until retiring.

During this employment, his duties as a millwright, pipe fitter, and certified welder were various and included attention to equipment throughout the plant, providing scheduled maintenance and repair work where equipment had broken down. He was also involved in constructing steel buildings and installing new equipment. During this time, he was exposed to noise from several sources. For example, the claimant testified that there was a lot of noise from using impact wrenches and grinders to overhaul air compressors in a small enclosed building with a very high noise level. He testified that the plant generally operated 24 hours a day, seven days a week, and it was not unusual for him to repair equipment that was adjacent to or in between other equipment which was still operating and producing a lot of noise. The problem of noise exposure and its possible effects were also developed by the testimony of Dr. Thomas Rimmer, an industrial hygienist and UALR professor, and the testimony of Dr. Daniel J. Orchik, the Chief of Audiology at the Shay Clinic in Memphis, as well as other evidence of record.

The claimant was an active member of the United Steel Workers of America, Local 4880, and served as a grievance steward from the beginning of the 1970's forward. Beginning in the late 1970's, the employer began a program of annual audiograms. In addition, after noise monitors recorded the noise levels around the plant, signs were placed warning employees to wear ear protection, sometimes after a certain period of exposure to noise. Later, the signs were changed simply to require hearing protection when in the area.

As an officer in the union and a member of the Safety & Health Committee, the claimant began to hear a lot of complaints about noise in the plant in the late 1980's. After grievances had been filed, the employer agreed to allow the union to arrange for hearing loss testing by an outside

firm and eventually over 250 employees were notified that they had been identified as having hearing problems.

At least since the 1980's, the claimant has experienced tinnitus, as he admitted on cross-examination. Tr. at 49, 50. A respondent exhibit shows that the claimant signed a form in 1987 indicating that he had "ringing in your ears." In the 1990's, the claimant, as well as his wife, noticed that his hearing was changing and he filed a claim. In 2001, the claimant asked for an audiogram and was sent to Dr. Credonna Miller who evaluated him on August 8, 2001.

Dr. Miller, whose deposition appears in the record, provided a full evaluation of the claimant's hearing. She found that in some respects the claimant's hearing was normal. For example, he had normal eardrum mobility, as shown by impedance testing, as well as normal acoustic reflexes.

Because the claimant was suspected of having noise induced hearing loss, he was placed in a sound booth and underwent pure tone testing which showed that he had normal to borderline normal hearing through the mid-frequencies and "what appears to be at least in part some noise induced hearing loss in the higher frequencies past that point at a mild to severe level in the right ear and a mild to moderate level in the left ear." Dep. at 11. Later, Dr. Miller pointed out that with a true "only noise induced" hearing loss, hearing tested at 8,000 hertz is back up into the normal hearing range, but that the claimant did have hearing loss at that level. For that reason, Dr. Miller testified that the claimant had "the look of a little bit of a noise induced hearing curve there." Dep. at 18. She also stated that she would say that "there is some noise induced hearing loss overlay here probably, but there may be some other hearing loss that's come along as well added to that." Dep. at 19. She believed that his condition, whatever its cause, warranted a trial period with hearing aids

bilaterally. However, she stated, “I cannot say if the largest - - I have no idea if the largest percentage of that is noise induced or not, and if it is noise induced, what percentage of that comes from the chainsaws and the stuff he did at home, as opposed to what he did at work. There’s no way - - there’s no way to calculate that.... I can say he does have a degree of hearing loss, some of which is noise induced that - - that would warrant a trial period with amplification.” Dep. at 19. She also testified that the claimant was “rather borderline for amplification.” Dep. at 19, 20.

Dr. Miller also testified that some hearing loss is “just basic hearing loss” and not considered to be pathology. For example, presbycusis, or hearing loss due to aging, may not always be considered pathology. Dep. at 6. Dr. Miller also acknowledged that when the claimant’s 2001 testing was compared with his baseline testing that had been performed when he was 39 years of age, the appropriate AAO formula for determination of hearing handicap shows zero percent hearing loss for the claimant. Dep. at 24 - 26.

Dr. Miller also testified that she agreed with Dr. Michael Winston’s opinion that a person with noise induced hearing loss is likely also to suffer tinnitus. Dep. at 31, 32. She further testified that the claimant first had hearing loss in 1968 and that, generally, one does not complain of tinnitus without some degree of hearing loss and he did have hearing loss when first employed in 1968. Dep. at 32. Her testimony also indicated that there was no objective way of testing for tinnitus or to see if tinnitus was becoming worse. Dep. at 41, 42. She also agreed that there was no way to determine whether, if the claimant’s hearing loss was caused by noise, that the noise was Alcoa’s industrial noise, as opposed to other noise that he might have been exposed to during his lifetime. She stated that after reviewing the claimant’s history of noise exposure, “You can guess. You can make your best educated guess....” Dep. at 43. Finally, on redirect examination, Dr. Miller was asked if she

saw a sufficient level of hearing loss to warrant the use of hearing aids, if it can be established that that level of loss is noise induced and job related, to which she replied, “Okay. Hard to establish that, but, yes, there certainly enough hearing loss to warrant the use of hearing aids or a trial period with hearing aids.” Dep. at 53.

It is well established that the claimant has the burden of proving entitlement to benefits, generally by a preponderance of the evidence and without the benefit of any presumption of compensability or entitlement to benefits.

Under prior law, it was the duty of the Commission to draw every legitimate inference possible in favor of the claimant, and to give the claimant the benefit of the doubt in making factual determinations. However, current law requires that evidence as to meeting the burden of proof be weighed impartially and without giving the benefit of the doubt to any party, including the claimant. Act 10 of 1986, §10(2nd Ex. Sess.), Ark. Code Ann. §11-9-704(c)(4), effective July 1, 1986; Fowler v. McHenry, 22 Ark. App. 196 (1987). Even under prior law, when the claimant was entitled to the benefit of the doubt, conjecture and speculation, however plausible, were not permitted to supply the place of proof. Dena Construction Co. v. Herndon, 264 Ark. 791 (1979).

The respondents have specifically noted that Act 796 of 1993 applies to this claim to the extent that it arose from injuries suffered after the effective date of that Act. One of Act 796's requirements is that hearing loss, not caused by a specific incident, is compensable if it is the major cause of disability or need for treatment. Ark. Code Ann. §11-9-102(4)(A)(ii)(c) and Section 11-9-102(4)(E)(ii). The Act also provides that a compensable injury be established by medical evidence, supported by objective findings. Ark. Code Ann. §11-9-102(4)(D). Moreover, the law

prior to Act 796 required proof that the claimant's injury or condition was causally related to the employment and arose out of and in the course of the employment.

In this case, the claimant has alleged that he suffered high frequency hearing loss because of noise exposure at work from December 19, 1991, until August 13, 2001, and that he should be awarded hearing aids for this condition. The record shows that the work environment was capable of causing hearing loss and that the claimant's hearing is diminished. However, Dr. Miller noted that the claimant had hearing loss in 1968, long before the alleged work-related hearing loss. Dr. Miller's testing also called into question the contention that the alleged hearing loss is noise induced. As stated above, she noted that hearing loss that was only noise induced is accompanied by normal hearing when tested at the 8,000 hertz range, although the claimant had hearing loss at that level. She also was unable to say if the "largest percentage" of the hearing loss was noise induced or attributable to the claimant's employment, within a reasonable degree of medical certainty. She also made the comment, as noted above, that the claimant was "rather borderline for amplification." The claimant also testified that he was conscientious in the use of hearing protection at work and elsewhere.

Thus, on this record, it cannot be found that the claimant suffered compensable hearing loss as the result of noise at his employment, without either impermissibly giving him the benefit of the doubt or resorting to conjecture and speculation on his behalf.

For the foregoing reasons, this request for benefits should be, and it is hereby, respectfully, denied and dismissed.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge