

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F208606

MARTY POWERS,
EMPLOYEE

CLAIMANT

CITY OF FAYETTEVILLE,
EMPLOYER

RESPONDENT

MUNICIPAL LEAGUE WCT,
INSURANCE CARRIER

RESPONDENT

OPINION FILED APRIL 6, 2006

Upon review before the FULL COMMISSION in Little Rock,
Pulaski County, Arkansas.

Claimant represented by the HONORABLE AARON MARTIN, Attorney
at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE J. CHRIS BRADLEY,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The Arkansas Court of Appeals has reversed the
Commission in the above-styled matter and has remanded "for
a determination of fact concerning a causal relationship
between the appellant's hearing loss and his employment, as
well as a determination of all other issues raised by the
parties." *See, Powers v. City of Fayetteville Municipal
League WCT*, CA05-297 (Oct. 12, 2005). Pursuant to the Court
of Appeals' remand and our *de novo* review of the entire

record, the Full Commission finds that the statute of limitations bars the claimant's claim. We also find that the claimant did not prove he sustained a compensable injury.

I. HISTORY

The parties' stipulations indicate that the employment relationship existed beginning September 24, 1986. Marty Powers, age 45, testified that he began working as a firefighter for the City of Fayetteville beginning September 24, 1986. Mr. Powers testified that his job duties involved testing equipment and that he worked around fire engines. The claimant testified that he did not wear hearing protection. The claimant also testified that he occasionally went hunting with a shotgun.

The claimant testified on direct examination:

Q. Marty, you saw Dr. Crocker -

A. Yes.

Q. - in 1992. Is that correct?

A. Yes.

Q. What symptoms were you having back in 1992?

A. I was starting to have some ringing in the ears and slight difficulty understanding people.

Q. What did you think it was?

A. I really wasn't - I wasn't sure. I knew that there were times that my ears would be ringing, you know, after certain exposures, but I just went to get them checked, and I thought maybe they were dirty....

The claimant testified on cross-examination that he "suspected" at that time that his hearing loss was occupationally-related. The record indicates that Dr. Thermon R. Crocker, an ear, nose and throat specialist, saw the claimant in September 1992: "Marty Powers has had problems of not being able to hear well in noisy situations and particularly in the area where there are some speakers in the fire station where he works....Audiometrically he has a high tone SN loss which has an abrupt dropoff after 2000 cycles per second. We talked about options and he will return here in 2 years for another audiogram. I do not think he is at a point where he needs a hearing aid."

Dr. Crocker noted in September 1995, "Martin Powers is having trouble hearing but his exam is normal and his hearing has not changed since the test that we did in 1992. I have talked about some alternatives work (sic) but I don't think that an aid has a real good chance of working. He will return here as needed."

The claimant saw Dr. Crocker in February 1998: "Martin Powers comes in having more trouble with hearing, particularly in his work as far as recognizing house numbers, etc....We did an audiogram which showed a slight increase in hearing loss at 2000 cycles. Ms. Bowden will work with him towards a trial with programmable hearing aids. This would be the only choice that he would have and this may or may not work."

Dr. Crocker noted on February 5, 2001, "Marty Powers is a 40 year old fireman who comes in for a recheck and with a feeling that he is not hearing well....Audiogram shows that his high tone SN hearing loss is somewhat worse than 2 years ago. He is a fireman and he is noticing that in certain situations he has some difficulty. There is a certain type of hearing headset that he is interested in and he will try to get this information so that we could communicate with the fire department about helping with securing this to see if it would work."

The parties' stipulations indicate that the employment relationship existed through September 5, 2001.

Dr. Crocker wrote to the Chief of the Fayetteville Fire Department on September 5, 2001:

Marty Powers has requested that I write you concerning his hearing problem. We have seen Mr. Powers going back to 1992 when a hearing test was done that showed a significant amount of hearing loss. We followed him at intervals since in 1995, 1998, and again in 2001 and have watched this hearing loss progress to the level that he is not communicating well enough to be in a position as a fireman from the viewpoint of communication.

On October 1, 2001, Dr. Crocker filled out an Attending Physician's Statement Of Disability. Dr. Crocker diagnosed Bilateral Sensorineural Hearing Loss, and he indicated that the claimant had first consulted with him for this injury on September 14, 1992.

Dr. Glen Fincher reported on January 23, 2002:

This 41 year old patient enters because of hearing loss that began to show up several years ago.... The patient has a history of noise exposure from several sources. He works with the fire department and says that he has been exposed to loud siren sounds on duty. I don't have any measurements of that sound from when he was riding on the truck. He also has a history of exposure to gunfire, including shotguns and rifles. He has a past history of sometimes listening to music that is loud. He runs a chain saw occasionally....

An audiogram was done by Sherrie L. Norbash on 1-23-02 which shows a bilateral high frequency sensorineural hearing loss (see copy of audiogram).

Dr. Fincher assessed, "Sensorineural Hearing loss #389.11 bilaterally. AMA formula calculates 15% binaural

hearing impairment. I recommend he use hearing aids." Dr. Fincher did not schedule a return appointment.

John Dornhoffer, an Associate Professor at UAMS Department Of Otolaryngology, wrote to David Clark on February 25, 2002:

I recently saw your patient in my clinic for evaluation of sensorineural hearing loss. He is a 41 y/o firefighter who has been on the job now for almost fifteen years. He had an increasing complaint with ringing in his ear and difficulty understanding in a noisy environment. He has had a documented sensorineural hearing loss in the high tones in the past. He obtained a hearing check from my office today and it shows a 70 dB high frequency sensorineural hearing loss with 96% discrimination in both ears.

This type of hearing loss is almost certainly noise induced and with this degree of loss in the high tones, this will cause difficulty for him to communicate with background noise. I have dealt with situations like this with firefighters and police officers before and in my opinion, this degree of hearing loss could put him or others at risk if he cannot hear a command in a noisy environments (sic). For these reasons I do recommend that he be considered disabled as a firefighter.

The second issue deals with the cause of the hearing loss. I discussed with him the types of loud exposures he has had in the past and he has had some significant noise exposure as a firefighter. Specifically, he mentioned an earlier truck they used that had an open jump seat that had a very close proximity to the air-horn and siren. He noticed his ears ringing after riding in his truck. Ringing in the ears is a

sign of noise trauma and more than likely this contributed significantly to his hearing loss.

It is my opinion that on the job exposure to noise is the cause of his sensorineural hearing loss....

The parties stipulated that the "claimant's claim for compensation benefits was filed with the Commission on July 31, 2002."

Elizabeth G. Bowden, an Audiologist, wrote to counsel for the claimant on August 6, 2002 and assigned a 9.4% monaural impairment based on the AMA Guidelines, 4th Edition. The parties stipulated that the claimant "has a bilateral anatomical impairment of 9.4% or 14.852 weeks of benefits as a result of his hearing loss."

The record contains the following report from another Audiologist, Louis J. McGrail:

Mr. Powers was seen by me on November 11, 2002 for an evaluation of his hearing. Mr. Powers reports a fifteen year history of noise exposure while working as a firefighter in Fayetteville, Arkansas. He has been followed by Dr. Crocker's office in Fayetteville since 1992. His previous test shows a progressive, bilateral, high frequency, sensory-neural hearing loss. At this time Mr. Powers was evaluated with pure tone air conduction, bone conduction, speech audiometry, and tympanometry. The results of the evaluation are as follows: Pure tone air conduction shows a bilateral, moderate to severe, high frequency loss, with pure tone averages for 2, 3, 4KHz,

of 48dB in the left ear and 58dB in the right ear. This represents a change of 12dB in the left ear and 13dB in the right ear from his previous test....

Mr. McGrail's clinical impression was, "Bilateral, moderate to severe, high frequency, sensory neural hearing loss. This type of loss is common with exposure to noise over 90dB SPL over time."

A pre-hearing order was filed on March 26, 2003. The claimant contended that he "developed a high frequency hearing loss as the result of the occupational exposure to sirens, horns, institutional fire alarms, generators, and other occupational noises. As a result of this exposure, the claimant has sustained permanent hearing loss in both ears. The claimant will contend that his hearing loss was caused by physical harm to his body and arising out of and in the course of employment. The claimant will further contend that the treatment of the hearing loss was reasonable and necessary, and that he is entitled to permanent partial disability benefits."

The respondents contended that the claimant did not sustain any hearing loss as a consequence of his employment.

According to the March 26, 2003 pre-hearing order, the parties agreed to litigate the following issues: "1. Compensability of hearing loss. 2. Medical bills. 3. Permanent partial disability benefits. 4. Attorney fee."

Dr. Crocker wrote to the claimant's attorney on August 27, 2003:

I initially saw Marty R. Powers on 9/14/02 with his complaint being of difficulty hearing in noisy situations. At that time an audiogram showed a bilateral high tone sensorineural hearing loss. He was again seen on 9/18/95 with the same complaint and an audiogram still showed a significant high tone sensorineural hearing loss. We again repeated his audiological testing on 2/4/98 and the sensorineural loss pattern remained. Retesting audiological on 2/5/01 showed some worsening of his high tone sensorineural hearing loss. On 7/29/02 he was fitted with bilateral hearing aids to help him with his loss of hearing.

The impairment rating assigned to Mr. Powers was based upon objective audiological findings and used the AMA guidelines as they pertain to hearing loss.

There is no specific treatment that will make a sensorineural hearing loss go away. Limitations of noise exposure can often keep the loss from worsening. Use of hearing aids, which he has done, often can aid much as glasses do for vision loss.

I feel that Mr. Powers' exposure to occupational noise as a fire fighter is the major cause of his hearing loss. This is based upon his history and also careful evaluations of the noise levels that he was subjected to during his work career.

The parties deposed Dr. Crocker on October 8, 2003. Dr. Crocker agreed that he first saw the claimant in September 1992 for problems related to hearing loss. Dr. Crocker agreed that by September 1995, the claimant knew there was a connection between his hearing loss and his job. Dr. Crocker also agreed that by February 1998, there had been "no significant change" in the claimant's hearing loss. The respondents' attorney questioned Dr. Crocker:

Q. Is - are - is hearing loss due to age reflected in - in these analyses that have been done?

A. You can't separate - hearing loss is hearing loss. And on analyses, it's hearing loss. You can't separate it from noise versus age or ...

Q. With the dosimeter, you can attach sound testing device to the firefighter and capture the sound energy that he's exposed to during an eight-hour day.

A. Yeah. Right.

Q. What we have here with the sound testing level of a passing fire truck, for example, that test result doesn't mean that the firefighter was exposed to that sound energy for any appreciable length of time.

A. Right. It does not. There's one factor that is very difficult to figure into this objective equations (sic). The most dangerous type of sound that will injure an ear is sudden abrupt sounds, because there's some muscles in the middle ear -

Q. Uh-huh.

A. - that on continued sound, contract and protect the ear. Sudden sounds, these muscles don't have a - the time to contract, and, therefore, even though it may be just a transient loud sounds (sic), it may be more damaging than a continuous sound.

Q. Well, that would be like a gunshot.

A. A gunshot, yes....

Q. Based on what you've seen, was Mr. Key exposed to sounds greater than 85 decibels per an eight-hour work period during the course of his work as a firefighter?

A. On a consistent basis?

Q. Yes, sir.

A. No.

Q. Now, I think I know that you're going to tell me, but could we not, then say that since he was not exposed to levels in excess of 85 decibels over an eight-hour day, that he should - we should not say that any hearing loss he has is attributable to his employment?

A. I don't - I don't think I could agree with that. And - and it's hard to be emphatic, because things like this are very complicated. But his exposure to sudden noises, many times more intense than 85 decibels, for shorter periods of time, even though it's not 85 decibels for eight hours, can also cause damage....

Q. When the tests are done under the audiogram, is that an objective finding there, the result that you get, that "I can't hear at this level"?

A. With a trained audiologist, and Miss Bowden has a master's degree in the field, people - theoretically, you can fake a hearing test, but with their skills, they do it - if they test the frequency, they come at it in one direction and come back at another direction where it would - it would be almost impossible to consistently fake a hearing test.

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

A. Right....But in a properly done audiogram, particularly if you have a repetitive situation, with a well-trained, qualified person, you can't fake this.

The claimant's attorney questioned Dr. Crocker:

Q. How do you know when somebody is faking one of these hearing tests?

A. As I mentioned before, when the audiologist does - she will, or he will do the test, and will get a pure tone average. And then these different tones are checked. You come back at a different direction to double-check each time. It's very, very unlikely that this test has been faked.

Q. Okay. So you've had experiences where people have tried to fake these tests in the past?

A. Oh, yes.

Q. And you've been able to catch them?

A. I think we have. I don't know of any that we've missed....But, again, a good audiologist who knows their stuff, because all this has to balance out as far as the different factors, and there's many red lights that will tell you if something is off.

Q. Sure. And the records don't indicate any red lights in Mr. Powers' case?

A. No, absolutely no red lights.

Q. Okay.

A. He's been consistent. When you look through his whole hearing test, all the tests that he's done, there's been a consistency here, which would be almost unheard of or impossible to fake the different types.

Q. I want to talk about Mr. Powers' treatment, and I can guess we can go back to, again, the '92 audiogram. So we have an audiogram from '92, we have another one in '95, and then another one in '98....Then another one in 2001.

A. Yes.

Q. Okay. Dr. Crocker, we've kind of already gone over these things, so there's no need to give me specifics, but, obviously, there's been a deterioration of his hearing. Is that correct?

A. Yes.

Q. From the first time you saw him up until 2001?

A. Yes.

Q. It's been progressively getting worse. Is that correct?

A. A slow progression, yes....

Q. Okay, Dr. Crocker, I know you cannot be 100 percent sure about these things, but to a reasonable degree of medical certainty, is it your professional opinion that Marty Powers, the hearing loss that he has suffered, is - well,

the major cause of his hearing loss was his exposure to occupational noise as a firefighter?

A. I think when you review all this and you look at all the multiple parameters, I think this, in my opinion, has been the major thing. Not the only thing, but the major thing.

Q. Sure. We know that he's been hunting.

A. Yeah.

Q. He's been exposed to gunshots and other things, but it is your opinion, to a reasonable degree of medical certainty, that the major cause has been his exposure to occupational noise. Is that correct?

A. Yes.

The parties deposed Jimmy L. Key on October 8, 2003. Mr. Key testified that Key Audiometrics, Inc. provided annual hearing testing, baseline testing, and noise surveys for industry. Mr. Key's testimony indicated he had performed sound testing at the City of Fayetteville Fire Department. The respondents' attorney questioned Mr. Key:

Q. Did you get an opportunity to come to a conclusion as to what type - what firefighters, generally, in Fayetteville, are exposed to during the course of an eight-hour period?

A. Going off of their - the worst case scenario, say 15 minutes at a hundred decibels, five of them a day, you know, you know, I believe any type of hearing protection, they would be covered, they would be below the 90 db, and be protected.

We found no one - everyone we talked to said that the worst they - you know, rare was everything going at one time. That was very, very rare, that it was, you know, something that happened, but, you know, they said the biggest problem they have is the alarms at the University, false alarms going off. And they said that's an average of four to five minutes to get in there and turn them off, you know, make sure there's not a fire and get them turned off. Now, we did not take readings at the University....

The parties deposed Lewis McGrail on October 8, 2003.

The respondents' attorney questioned Mr. McGrail:

Q. He definitely, according to your findings, did have a - does have a noise-induced hearing loss. Is that right?

A. Well, he has a loss that is - is typical of what we would see with noise-induced hearing loss. There are other things that can cause that type of loss; circulation problems, things like that, medications.

Q. All right. But do you - do you believe it to be a noise-induced hearing loss?

A. I think he had exposure to noise and - and this has been a progressive loss, at least since 1992, which was the first test in Dr. Crocker's office that was given to me to review as well....

Q. Did Marty give you a history of his exposures to loud sounds?

A. The main history that he presented to me was his exposure to noise while in the fire department.

Q. Okay. I'm understanding that testimony will be that Marty has an experience with - well, and

uses weapons and has listened to loud music, and I also understand that he works with some power tools and things like that. Did - did you reach a conclusion as to whether or not you believed that his hearing loss was attributable to his work as a firefighter or not?

A. At the time that I evaluated him, you know, he did indicate that he worked around loud noise at the fire department and around the engine noise. At that time, I had no idea of the exact level of those noises, whether it be contributory to his hearing loss or not....

Q. And what is your opinion as to whether he sustained a loss as a result of being a firefighter?

A. If he were exposed for long periods of time to these levels without any ear protection, then I would believe that he could have sustained some substantial hearing loss. He did have, again, tests from 1992 that I reviewed and tests up through - tests that I did showed only about a 12 percent change in, I believe, his right ear - or left ear and his - I think that's right here. A 12 db average change in his left ear and 13 db average change in his right ear over a ten-year period of time. That isn't a great deal....

Q. 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.

Q. Now, Doctor, that's was Dr. Crocker was suggesting, that you can't fake.

A. Yeah, it's difficult to fake the test....

Q. So you have - do you have certain counterchecks that you can use?

A. Yes, we do.

A hearing was held on November 19, 2003. At that time, the parties amended their contentions, to wit: "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 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 contended that the 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."

The administrative law judge found, "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."

The claimant appealed to the Full Commission. The Full Commission affirmed and adopted the administrative law judge's decision. The claimant appealed to the Arkansas Court of Appeals. The Court of Appeals has reversed the Commission's decision and has remanded "for a determination of fact concerning a causal relationship between the appellant's hearing loss and his employment, as well as a determination of all other issues raised by the parties."

II. ADJUDICATION

A. Statute of Limitations

Because the alleged permanent injury suffered by the claimant affects only his hearing, the permanent injury may be reduced to a *scheduled* injury. *Federal Compress &*

Warehouse Co. v. Risper, 55 Ark. App. 300, 935 S.W.2d 279 (1996). Ark. Code Ann. §11-9-521 provides:

(a) An employee who sustains a permanent compensable injury scheduled in this section shall receive, in addition to compensation for temporary total and temporary partial disability benefits during the healing period or until the employee returns to work, whichever occurs first, weekly benefits in the amount of the permanent partial disability rate attributable to the injury, for that period of time set out in the following schedule:

...

(16) Loss of hearing of both ears, one hundred fifty-eight (158) weeks[.]

Ark. Code Ann. §11-9-702(Repl. 2002) provides:

(a)(1) A claim for compensation for disability on account of injury, other than an occupational disease and occupational infection, shall be barred unless filed with the Workers' Compensation Commission within two (2) years from the date of the compensable injury....

The burden of filing a claim within the statute of limitations is on the claimant. *Plunkett v. St. Francis Valley Lumber Co.*, 25 Ark. App. 195, 755 S.W.2d 240 (1988). A work-related noise-induced hearing loss injury does not become compensable until (1) the injury develops or becomes apparent and (2) the claimant suffers a loss in earnings on account of the injury, which loss is conclusively presumed.

See, *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999). Because the statute of limitations does not begin to run until both elements of the rule are met, and because of the conclusive presumption as to loss of earnings, which satisfies the second element, the statute of limitations with respect to work-related noise-induced hearing loss begins to run when the hearing loss becomes apparent to the claimant. *Baker, supra*. In *Smith v. Aluminum Co. of Am.*, 78 Ark. App. 15, 76 S.W.3d 909 (2002), the Court of Appeals affirmed the Commission's finding that the statute of limitations began running when the claimant was given information of his hearing loss, not when the claimant "became aware of the work-related nature of the hearing loss."

In the present matter, the Full Commission finds that the statute of limitations bars the claimant's claim. The parties stipulated that the employment relationship existed beginning September 24, 1986. The claimant began treating for hearing loss with Dr. Crocker beginning in September 1992. Dr. Crocker noted in September 1995 that the claimant was still having trouble hearing, but that "his hearing has not changed since the test that we did in 1992." The record

therefore demonstrates that the claimant's hearing loss became apparent to him no later than September 1995. Pursuant to Ark. Code Ann. §11-9-702(a)(1), the claimant was required to file a claim for compensation no later than two (2) years from the date the claimant's hearing loss became apparent to him, in this case no later than September 1995. The parties stipulated that the claim for compensation was filed with the Commission on July 31, 2002. This filing was well outside two years from time the claimant's hearing loss "became apparent" to him. See, *Pina v. Wal-Mart Stores, Inc.*, CA04-1045 (Ark. App. 5-11-2005); *Cottage Café, Inc. v. Collette*, CA05-734 (Ark. App. 2-1-06).

The Full Commission finds that the statute of limitations bars the instant claim.

B. Compensability

The parties implicitly agree that this claim should be adjudicated pursuant to the provisions of Act 796 of 1993. Act 796, as codified at Ark. Code Ann. §11-9-102(4)(A), defines "compensable injury":

(ii) An injury causing internal or external physical harm to the body and arising out of and in the course of employment if it is not caused by a specific incident or is not identifiable by time and place of occurrence, if the injury is:

(c) Hearing loss which is not caused by a specific incident or which is not identifiable by time and place of occurrence[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4) (D). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16). The claimant's burden of proof shall be by a preponderance of the evidence, "and the resultant condition is compensable only if the alleged compensable injury is the major cause of the disability or need for treatment." Ark. Code Ann. §11-9-102(4) (E) (ii).

In the present matter, the Full Commission finds that the claimant did not prove he sustained a compensable injury pursuant to Ark. Code Ann. §11-9-102(4) (A) (ii) (c) *et seq.* The claimant did not demonstrate that his hearing loss arose out of and in the course of his employment with the respondents. The claimant testified that he began working as a firefighter for the City of Fayetteville beginning in September 1986. The claimant testified that he began having symptoms related to loss of hearing in September 1992, and that he "suspected" these symptoms were related to his work

as a firefighter. The claimant began occasionally treating with Dr. Crocker for these symptoms. Dr. Crocker diagnosed Bilateral Sensorineural Hearing Loss in October 2001.

In January 2002, Dr. Fincher described a "history of noise exposure from several sources." These sources of noise exposure included the claimant's work as a firefighter, but Dr. Fincher additionally noted that the claimant's hearing was affected by shotguns, rifles, loud music, and a chain saw. The Full Commission recognizes Dr. Dornhoffer's opinion in February 2002, *i.e.*, that "the job exposure to noise is the cause of his sensorineural hearing loss." The Commission is authorized to accept or reject medical opinions. *Estridge v. Waste Management*, 343 Ark. 276, 33 S.W.3d 167 (2000). When we consider the claimant's exposure so many varied sources of loud noise other than his work, the Full Commission is unable to attach significant weight to Dr. Dornhoffer's causation opinion.

The Full Commission likewise attaches minimal weight to Dr. Crocker's deposition testimony, *viz.*, that "occupational noise" was "the major cause" of the claimant's hearing loss. We instead determine from Mr. McGrail's deposition testimony that the claimant was not exposed to occupational noise for

long enough periods of time to suffer from hearing loss which arose out of and in the course of the claimant's employment with the respondents. The testimony of Jimmy L. Key corroborated the testimony of Lewis McGrail in this regard. The Full Commission finds that the claimant did not prove his bilateral sensorineural hearing loss arose out of and in the course of his employment with the respondents. Nor did the claimant prove that the alleged compensable injury was the major cause of his disability or need for treatment. The claimant therefore did not prove he sustained a compensable injury pursuant to the provisions of Act 796 of 1993.

Pursuant to the remand from the Court of Appeals and our *de novo* review of the entire record, the Full Commission finds that the statute of limitations bars the claimant's claim. Nevertheless, even if the statute of limitations did not bar the claimant's claim, the claimant did not prove he sustained a compensable injury. The claimant did not prove that his bilateral sensorineural hearing loss arose out of and in the course of his employment with the respondents. Nor did the claimant prove that the alleged compensable injury was the major cause of his disability or need for

treatment. The decision of the administrative law judge is affirmed, and this claim is denied and dismissed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____ I must respectfully dissent from the Majority's opinion. There is no dispute that the parties stipulated to the degree of the permanent physical impairment as a result of the claimant's hearing loss, but they did not stipulate to the compensability of the claimant's hearing loss. Also in dispute is whether this claim is barred by the statute of limitations. Based upon my de novo review of the record, it is my opinion that this claim is not barred by the statute of limitations and the claimant has met his burden of proving the compensability of his hearing loss.

At the time of the hearing, claimant was a 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 to work for the 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 for the University of Arkansas. Claimant testified that there were frequent false alarms at the University, which resulted in exposure to loud alarms.

In 1992 claimant sought care from Dr. Thermon Crocker, an otolaryngologist. Claimant presented with complaints of difficulty hearing in noisy situations. Dr. Crocker noted a high tone sensorineural loss that had a high drop off after 2000 cycles a second. Claimant returned to Dr. Crocker on September 18, 1995 with continued hearing difficulties and again on February 4, 1998 with complaints of additional hearing problems, particularly while working. An audiogram taken in 1998 showed a slight increase in hearing loss. Claimant's next visit was February 5, 2001. The audiogram again showed an increase in sensorineural

hearing loss. Claimant was assigned the stipulated impairment rating of 9.4% or 14.852 weeks in January 2002.

Arkansas Code Ann. §11-9-702(a) (1) provides the following:

Time for Filing. (1) A claim for compensation for disability on account of injury, other than an occupational disease and occupational infection, shall be barred unless filed with the Commission within two (2) years from the date of injury.

In Minnesota Mining & Manufacturing v. Baker, 337 Ark. 94, 989 S.W.2d 151 (1999), the court addressed the issue of whether the statute of limitations applies to scheduled injuries. Referring to the two-pronged test set forth in Halls Cleaners v. Wortham, 311 Ark. 103, 842 S.W.2d 7 (1992), the court stated that the rule for determining when the statute of limitations runs for gradual onset scheduled injuries, specifically hearing loss injuries, is as follows:

... a work-related noise-induced hearing-loss injury does not become compensable until (1) the injury develops or becomes apparent and (2) the claimant suffers a loss of earnings on account of the injury, *which loss is conclusively presumed.*

Further ...

Because the statute of limitations does not begin to run until both elements of

the rule are met, and because of the conclusive presumption as to loss of earnings, which satisfies the second element, the statute of limitation with respect to work-related noise-induced hearing loss begins to run when the hearing loss becomes apparent to the claimant.

The claimant in Baker first became aware of his hearing loss through a baseline hearing test administered some twelve years prior to his making a claim for benefits. Subsequent hearing tests demonstrated no significant change in the claimant's hearing from the time of his first test in February of 1978 up until the time he filed his claim in February of 1992. The appellee argued that the Commission could not find that the claimant's hearing loss was work related because his hearing remained stable after his baseline test. The Court disposed of this argument by stating that the opinion of the claimant's physician, combined with other evidence, including the claimant's credible testimony that he had no prior hearing problems, constituted substantial evidence to support the Commission's finding that the claimant proved that his hearing loss was caused by his employment. However, the Court denied the claimant's claim because it found that the statute of limitations had run, thus barring the claim, even though the

claimant's claim might have well been meritorious. More particularly, the court stated:

Here, the appellee [claimant] became aware of his hearing loss in February 1978. The statute of limitation began to run in February 1978, *and because his hearing did not continue to deteriorate, appellee's claim became time-barred in February 1980, pursuant to Arkansas Code Annotated §11-9-702(a)(1) (1987).* Although appellee's claim may well be meritorious, we cannot extend the time for him to file his claim by some twelve years. The burden of filing a claim within the statute of limitation is on the claimant. Plunkett v. St. Francis Valley Lumbar Co., 25 Ark. App. 278, 651 W.S.2d 104 (1983). The court cannot extend the period of the statute of limitation on appeal, despite the fact that a claim may be meritorious. Miller v. Everett, 252 Ark. 824, 481 S.W.2d 335 (1972). (Emphasis added).

There are similarities between the above case and the present claim. However, there are many things that distinguish the present claim from Baker. The main distinguishing factor in the present claim is that claimant's hearing difficulties continued to deteriorate. Claimant was first seen for hearing difficulties by Dr. Thermon Crocker in September of 1992. The clinic notes from September 14, 1992 state:

Marty Powers has had problems of not being able to hear well in noisy situations and particularly in the area

where there are some speakers in the fire station where he works.

ENT exam is normal. Audiometrically he has a high tone SN loss which has an abrupt drop off after 2000 cycles per second. We talked about options and he will return here in 2 years for another audiogram. I do not think he is at a point where he needs a hearing aid.

He was next seen by Dr. Crocker on September 18, 1995. The clinic notes from that date indicated that claimant's hearing had not changed since the test that was done in 1992. The clinic notes from February 2, 1998, set forth that the claimant "comes in having more trouble with hearing, particularly in his work as far as recognizing house numbers, etc. We did an audiogram which showed a slight increase in hearing loss at 2000 cycles." An audiogram taken on February 5, 2001, shows that "his high tone SN hearing loss is somewhat worse than 2 years ago." As is clear from the above notes, claimant's hearing loss continued to deteriorate during the years from 1992 until 2001.

The claimant continued to work as a firefighter until 2001. A letter from Dr. Crocker dated September 5, 2001 summarizes the claimant's progression:

We have seen Mr. Powers going back to 1992 when a hearing test was done that showed a significant amount of hearing

loss. We followed him at intervals since 1995, 1998, and again in 2001 and have watched this hearing loss progress to the level that he is not communicating well enough to be in a position as a fireman from the viewpoint of communication.

Prior to 2001, the claimant's hearing loss was not significant enough to warrant an impairment rating.

The court recently addressed the issue of the statute of limitations as it specifically applies to gradual onset scheduled injuries in Pina v. Wal-Mart Stores, Inc., ___ Ark. App. ___, ___ S.W. ___, (May 11, 2005; CA04-1045). In Pina, the claimant was denied benefits for a gradual onset carpal tunnel injury because it was barred by the statute of limitations. Of interest to this claim is the reference in Pina to the Baker dicta which specifically references hearing-loss claims:

The initial claim in Baker was for permanent disability benefits. Therefore, in order to be entitled to permanent disability benefits, the hearing loss had to reach a point of stability. Accordingly, it is our view that the requirement that the injury stabilize is limited to hearing-loss claims, and the Baker dicta supports only a narrow view of the stabilization requirement. Further, in hearing-loss claims the annual hearing tests quantify the amount of loss experienced by the claimant. Such annual testing objectively demonstrates the amount of loss and the time period in which the

loss occurred, removing all elements of subjectivity as to time and amount of loss from the fact finding. Pina, supra. (Emphasis added).

Baker states many times that the main reason for holding that the statute of limitations began to run in February 1978, was because the claimant's hearing loss did not continue to deteriorate. In the present claim, the claimant's hearing continued to deteriorate to the point where he was no longer capable of performing his job duties. As of September of 2001, the claimant's hearing loss had stabilized as indicated by the deposition testimony of Dr. Crocker:

- Q. ...
Have - do you know whether - or have an opinion as to whether his hearing loss has plateaued?
- A. Well, you have to refer back to his audiograms, and from, you know, the audiograms we're seeing, it's certainly not going down rapidly.
- Q. So it would be, at worst, slowly progressive -
- A. Yes.
- Q. - at worst? With him being removed from the firefighting environment and the sounds that he's exposed to there, would we expect that his hearing loss would definitely plateau, no more to be expected except those related to age?

A. In general, yes.

Dr. Crocker opines in his deposition testimony as to the onset of the claimant's anatomical impairment:

Q. . . .Okay, Doctor, Miss Bowden brought in the - her analysis of the audiogram, and it shows a binaural impairment of 0 percent in 1998?

A. Yeah.

Q. Okay. So we would expect to see - the 9.4 percent impairment that you've adopted, we would have seen develop after 1998?

A. Based upon that formula.

It is my opinion, that because of the continued deterioration of his hearing-loss, the statute of limitations in this claim did not begin to run until his hearing-loss stabilized in September of 2001. For the foregoing reasons, it is my opinion that this claim is not barred by the statute of limitations.

I must respectfully dissent from the Majority's opinion that the claimant failed to prove his bilateral sensorineural hearing loss arose out of and in the course of his employment with the respondent. Nor did the claimant prove that the alleged compensable injury was the major cause of his disability or need for treatment.

The majority attaches minimal weight to the causation opinions of Drs. Crocker and Dornhoffer, and attaches more significance to the report from Dr. Fincher and his description of a "history of noise exposure from several sources." These sources of noise exposure according to Dr. Fincher included the claimant's work as a firefighter, but Dr. Fincher additionally noted that the claimant's hearing was affected by shotguns, rifles, loud music, and a chain saw.

The majority also attaches significant weight to the deposition testimony of Mr. McGrail, which states that in his opinion the claimant was not exposed to occupational noise for long enough periods of time to suffer from hearing loss. Mr. McGrail's testimony was corroborated by a co-worker, Jimmy L. Key.

The findings of the Administrative Law Judge on the issue of credibility are not binding on the Commission. Roberts v. Leo-Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983); Linthicum v. Mar-Bax Shirt Co., 23 Ark. App. 26, 741 S.W.2d 275 (1987). It is the exclusive function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. Johnson v. Riceland Foods, 47 Ark. App. 71, 884 S.W.2d 626 (1994). Furthermore,

the Commission is not required to believe the testimony of the claimant or other witnesses, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. Morelock v. Kearney Co., 48 Ark. App. 227, 894 S.W.2d 603 (1995). Although the Commission is not bound by medical testimony, it may not arbitrarily disregard any witnesses's testimony. Reeder v. Rheem Mfg. Co., 38 Ark. App. 248, 832 S.W.2d 505 (1992). Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991); Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1970); Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

Even though claimant's hearing loss has been established through the stipulation of the parties, claimant must still prove that there is a causal connection between the hearing loss and his employment as a firefighter.

It appears that the Arkansas appellate courts, in particular the Supreme Court, have discussed objective findings in two distinct and separate contexts. These are: (1) medical evidence supported by objective findings is necessary to establish the existence and extent of the

physical injury; and (2) objective findings are also defined in part as medical opinions concerning causation that are stated within a reasonable degree of medical certainty.

Wal-Mart Stores, Inc. v. VanWagner, 337 Ark. 443, 990 S.W.2d 522 (1999); Freeman v. Con-Agra Frozen Foods, 344 Ark. 296, 40 S.W.3d 760 (2001). As noted above, medical opinions regarding causation must be stated within a reasonable degree of medical certainty.

A letter from Dr. Crocker dated August 27, 2003, states:

I feel that Mr. Powers' exposure to occupational noise as a fire fighter is the major cause of his hearing loss. This is based upon his history and also careful evaluations of the noise levels that he was subjected to during his work career.

Another indication that the claimant's job as a firefighter was the major cause of his hearing-loss is Dr. Crocker's opinion that since the claimant has been removed from the firefighting environment any further hearing-loss would be expected to be related to age.

The February 25, 2002 letter from Dr. Dornhoffer sets forth that "[i]t is my opinion that on the job exposure to noise is the cause of his sensorineural hearing loss." Drs. Crocker and Dornhoffer clearly opined that claimant's

hearing loss is causally related to his exposure to noise while performing his duties as a firefighter. The deposition testimony of Dr. Crocker clarifies that the claimant's hearing-loss was noise induced.

Q. Is this type of pattern caused by any other type of hearing loss, such as ototoxic drugs or a nerve damage or anything like that?

A. With any of this, you can't speak absolutely, but if you see a notch where it goes down and comes up, in the - almost all cases, that type of loss is indicative of some type of noise induced.

...

Q. . . . Okay, Dr. Crocker, I know you cannot be 100 percent sure about these things, but to a reasonable degree of medical certainty, is it your professional opinion that Marty Powers, the hearing loss that he has suffered, is - well, the major cause of his hearing loss was his exposure to occupational noise as a firefighter?

A. I think when you review all this and you look at all the multiple parameters, I think this, in my opinion, has been the major thing. Not the only thing, but the major thing.

Q. Sure. We know that he's been hunting.

A. Yeah.

Q. He's been exposed to gunshots and other things, but it is your opinion, to a reasonable degree of medical certainty, that the major cause has been his exposure to occupational noise. Is that correct?

A. Yes.

Lewis McGrail, an audiologist and certified occupational hearing conservationist, also opined as to the causation of claimant's hearing-loss in his deposition.

Q. All right. But do you - do you believe it to be a noise-induced hearing loss?

A. I think he had exposure to noise and - and this has been a progressive loss, at least since 1992, which was the first test in Dr. Crocker's office that was given to me to review as well.

The following was written in a letter from Chris Bosch, Director/Fire Chief to Mr. David Clark with Arkansas Fire & Police Pension Review Board in reference to the claimant's hearing loss and his right to disability retirement from the fire department.

"On January 24, 2002 the Fayetteville Fire Department sent Capt. Powers to the office of Dr. Glen Fincher, M.D. for a second opinion regarding this matter. Dr. Fincher's report also concurs with the finding of Dr. Crocker in that Capt. Powers has experienced a significant hearing loss."...

"... I would like to recommend that Capt. Powers be granted disability retirement based on his hearing loss, as documented by Drs. Crocker and Fincher respectively."

It is my opinion, that the claimant has shown within a reasonable degree of medical certainty that his hearing-loss was caused by his exposure to occupational noise as a firefighter. As such, it is my opinion that the claimant proved that his employment as a firefighter was the major cause of his hearing loss and need for treatment.

In my opinion, the present claim is not barred by the statute of limitations. Based upon the dicta in Baker, which was reiterated in Pina, the statute of limitations would not begin to run until the claimant's hearing-loss has stabilized. As was shown, through medical documentation, the claimant's hearing continued to deteriorate until February 2001. Claimant filed his claim with the Commission in July of 2002, which is well before the statute of limitations would have run.

There is no indication in the record that claimant suffered from any hearing-loss prior to becoming a firefighter. Drs. Cocker and Dornhoffer both opine that the claimant's exposure to the firefighting environment was the major cause of his hearing-loss. In my opinion, the claimant

has proved that his job as a firefighter was the major cause of his hearing loss.

For the foregoing reasons, it is my opinion, that this claim is not barred by the statute of limitations and the claimant's job as a firefighter is the major cause of his hearing-loss.

SHELBY W. TURNER, Commissioner