

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E317743

LEE EUGENE GARRETT, EMPLOYEE	CLAIMANT
ALUMINUM COMPANY OF AMERICA, A SELF INSURED EMPLOYER	RESPONDENT
COMPENSATION MANAGERS, INC., BENEFITS ADMINISTRATOR	RESPONDENT

**NUNC PRO TUNC
OPINION FILED FEBRUARY 12, 2008**

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

Claimant represented by HONORABLE SILAS H. BREWER, JR.,
Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE PHILLIP CARROLL,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

The Full Commission, on its own motion, finds that a clerical error exists in the Opinion and Order filed February 11, 2008. The Opinion and Order reflects a "draft" or "working copy" version of Commissioner Hood's Dissent. The Full Commission finds that the Opinion and Order should reflect "finalized" and correct version of Commissioner Hood's Dissent and hereby reiterates the February 11, 2008,

Opinion and Order in full reflecting the correct version of the dissent. The Full Commission is authorized to correct clerical errors and this is a proper case for exercise of that authority. Ark. Code Ann. § 11-9-713(d) (Repl. 1996).

The Opinion and Order filed on February 11, 2008, is hereby modified only to include the correct dissent, as reflected herein. In all other respects, the Opinion and Order shall remain the same and shall not be otherwise affected.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed December 11, 2006.

The Administrative Law Judge entered the following 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.

The claimant alleges that he sustained a compensable injury that is governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injury is, indeed, an injury that is covered by the Act; however, the claimant has failed to establish the elements necessary to prove a compensable injury by a preponderance of the evidence.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies

the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority's Opinion. The Majority finds that the claimant did not establish, by a preponderance of the evidence, that job-related noise had caused him to sustain a compensable

hearing loss. The Majority further finds that hearing aids would not be reasonably necessary medical treatment for the claimant's hearing loss. After a de novo review of the record, I find that the claimant has established by a preponderance of the evidence that he sustained a compensable, employment-induced hearing loss. I also find that the claimant is entitled to reasonable and necessary medical treatment in the form of hearing aids prescribed by Dr. Credonna Miller. Furthermore, although not specifically addressed by the Majority, I find that the statute of limitations does not bar this claim. Therefore, I must respectfully dissent.

First, I find that the claimant has established by a preponderance of the evidence that he sustained a compensable, employment-induced hearing loss caused by exposure to high noise levels during his long employment with the respondent. It is undisputed that the claimant suffers from hearing loss and tinnitus. The baseline hearing tests performed on the claimant at the request of the respondent in 1982 and 1999, and the results of the 2001

test performed on the claimant by Dr. Miller satisfy the objective medical findings requirement of Ark. Code Ann. §11-9-102(4) (D). Therefore, the issue for determination is whether or not the claimant's hearing loss is job-related. See Ark. Code Ann. §11-9-102(4) (A) (ii) (c) and Ark. Code Ann. §11-9-102(4) (E) (ii). I find that the evidence is overwhelming that it is.

The claimant and his corroborating witnesses testified that during the normal work day, he would be involved in repairing heavy equipment in extremely noisy conditions. This noise level, according to the respondent's testing data, was often well in excess of 90 decibels, a level which is known to cause noise induced hearing loss. Among the many documents made part of the record were several assessments and reports from the respondent employer's corporate management and various consultants hired to look at ways for correcting an ongoing problem with noise related hearing loss amongst the respondent's employees. In fact, some of the documents indicate that the instance of noise related hearing loss at the respondent's

Arkansas facility was several times higher than at their plants located in other parts of the country. The record also contains considerable testimony regarding the measures taken to reduce the instances of noise related hearing damage at the respondent's Arkansas facility. These steps included signage pointing out the dangers to its employees and requirements to wear hearing protection at all times when working around the noisy equipment. The respondent even went so far as to create a company newsletter to be distributed to its employees encouraging them to comply with hearing protection requirements and take other steps to avoid being exposed to high noise levels. In short, there is simply no question that the claimant was exposed to high levels of noise throughout his long employment career with the respondent.

Furthermore, Dr. Miller's deposition provides a substantial basis for finding that the claimant's hearing problems were noise induced. According to Dr. Miller, the claimant's hearing problems are in the form of tinnitus (a persistent ringing in the ears) and mild to moderate hearing

loss in both ears. A comparison of the claimant's baseline hearing test performed in 1982, 1999, and his 2001 hearing test by Dr. Miller, demonstrated a continuing hearing loss over a nineteen year period. Also, Dr. Miller clearly was of the opinion that the claimant's tinnitus and hearing loss were caused by his job related exposure. Under examination by the respondent's counsel, she stated as follows:

Q. Are you able to say with a reasonable degree of medical certainty that his tinnitus was caused by exposure to noise or is it caused by other things as well as noise?

A. My opinion -- my opinion is that his tinnitus is very probably related to noise more than any other component of hearing loss he might have.

Q. Well, what are the other causes?

A. We tend to see -- in high frequency hearing loss, we tend to see more complaints of tinnitus in people that have been exposed to noise than we do in people that have not, that might have high frequency hearing loss as well.

Q. An then when you break that down as you have previously said, there's no way to determine whether, if it was caused by noise, that that noise was ALCOA's

industrial noise as opposed to other noise that he might have been exposed to during his lifetime?

A. No, there's no way to determine, you know, but you can look at amount of - you know, if you're talking about noise exposure, you can look at the amount of time that he was exposed to noise at ALCOA versus the amount of time he was exposed to noise with his chain saw and such, you know, and we don't have that information. You know, he could possibly provide that information, and you can guess. You can make your best educated guess, but there's really no way to quantify it.

Q. And if it was caused by ALCOA's noise, it was caused as early as 1987, wasn't it?

A. That's when he first certainly complained. I don't know if you have these for 1986, '85, '84, or '83. I don't know.

The Majority appears to find that whatever hearing loss the claimant sustained was the result of non-job related activities. However, the record is devoid of any concrete evidence that the claimant was exposed to inordinately high noises other than at work. While the claimant admits that he occasionally used a lawn mower or a

chain saw, there is no indication that this noise exposure was prolonged or in any way comparable to the high noise levels the claimant was exposed to at work. Additionally, the claimant testified that being on the Safety Committee at his place of employment taught him the importance of hearing protection and that he wore ear plugs or other such devices when using loud equipment at home.

When all the evidence is considered, I find it to be irrefutable that the claimant sustained a hearing loss due to the high noise levels at his place of employment. It is inarguable that the noise at the respondent's Arkansas facility was sufficient to cause noise induced hearing loss in the claimant. In fact, there is no question that large numbers of employees at this facility in the '70's, '80's, and '90's sustained hearing losses as great or greater than that sustained by the claimant. The Majority's finding that occasional exposure to noise from lawn mowers could have caused the claimant's hearing loss, but that exposure to large machinery, which produced much higher noise levels would not, flies in the face of both logic and common sense.

Likewise, the Majority's assertion that some unknown condition, or the claimant's aging process, caused his hearing loss and that the high levels of job-related noise played no role is also unbelievable. Therefore, I find that the claimant has established by a preponderance of the evidence that he sustained a compensable, employment induced hearing loss.

Second, I find that the claimant's injury entitles him to receive additional medical treatment in the form of hearing aids. The Workers' Compensation Act requires employers to promptly provide to injured employees such medical treatment or procedures as may be reasonably necessary in connection with the injury. Ark. Code Ann. §11-9-508 (a). What constitutes reasonably necessary medical treatment is a question of fact for the Commission to decide. Dalton v. Allen Engineering Company, 66 Ark. App. 201, 989 S. W. 2d 543 (1999).

Here, the claimant's treating audiologist, Dr. Miller, stated both in deposition testimony and written reports that the claimant's hearing loss would be improved

by the use of hearing aids. Dr. Miller also stated that not only would the claimant's hearing loss benefit from amplification, but that the use of hearing aids often made the tinnitus, which the claimant is suffering from, less noticeable.

The Majority appears to attach considerable significance to Dr. Miller's statements that the hearing aids should be used for a trial period. However, as Ms. Miller makes clear in her deposition, all hearing aid prescriptions are on a trial period basis. As she stated, some people do well with hearing aids and some do not. However, 100% certainty of success is not a requirement for medical treatment to be reasonable and necessary. I find that Dr. Miller's analysis of the claimant's condition and her recommendation of hearing aids, when considered as a whole, makes it obvious that the claimant would benefit from the use of hearing aids and that this treatment is reasonable and necessary.

The Majority appears to rely almost entirely upon the opinion of Dr. Michael Winston, a Little Rock

audiologist who reviewed the audiometric studies of Dr. Miller, dated August 8, 2001. In his report of August 22, 2003, Dr. Winston stated his belief that hearing aids would not be of any benefit to the claimant for either his hearing loss or his tinnitus.

However, I find that Dr. Miller's opinions in this matter are entitled to greater weight than that of Dr. Winston. Dr. Miller physically examined the claimant and administered the tests to him. As explained by Dr. Miller, being involved in the testing procedure gives her certain insights into the claimant's performance and actual hearing loss that someone such as Dr. Winston would not have. I find that Dr. Miller is in a better position to evaluate the claimant's condition and prescribe appropriate treatment than Dr. Winston, who as stated above, only reviewed the records. Therefore, I find that the claimant has met his burden of establishing that the hearing aids prescribed by Dr. Miller are reasonable and necessary medical treatment.

Furthermore, and although not specifically addressed by the Majority, I must address the respondent's

contention that the statute of limitation contained in Ark. Code Ann. §11-9-702 acts as a bar to this claim. Ark. Code Ann. §11-9-702 provides, in essence, that a claim for benefits must be filed within two years of the date of the injury. The respondent contends that since the claimant filed his claim on December 1, 1993, he is not entitled to benefits on any hearing loss which may have occurred prior to December 1, 1991. The respondent cites the Arkansas Supreme Court case of Minnesota Mining and Manufacturing v. Baker, 334 Ark. 94, 989 S. W. 2d 151 (1999). In that case, the claimant was asserting a claim for job related hearing loss and the respondent raised the statute of limitations defense. They argued that the claim would have been begun to run when the claimant first discovered he had sustained a hearing loss which they contend was in 1982. Since the claim was filed more than two years after that date, they conclude that the statute of limitation acted as a bar to his claim. The Judge ruled in the respondent's favor and held that since the claimant learned that his hearing loss had occurred several years before the filing of his claim, he

could not assert a claim for any benefits based upon a job related hearing loss.

I find the respondent's statute of limitation argument to be without merit. While the Court in Baker did deny the claim based upon the statute of limitation, they also set out a two prong test which must be used to determine whether a claim for a hearing loss was timely filed. Specifically, the Court held that the statute of limitation would begin to run:

1. When the injury developed or became apparent and,
2. The claimant suffered a loss in earnings on account of the injury.

In Baker the claimant argued that the statute of limitation did not begin to run because he had never missed any work or otherwise received any loss in his earnings. The Court disagreed with this argument and held that since Mr. Baker was requesting permanent partial disability benefits based upon the measurable anatomical impairment as a result of his hearing loss, he had sustained a loss of earnings. The Court reached that conclusion based upon their finding

that the injury schedule which provided for permanent partial disability benefits was a reflection on the amount of occupational impairment caused by a particular injury. Therefore, a loss of earnings was conclusively presumed when a claimant became eligible to receive permanent partial disability benefits.

In the present case, it is not disputed that the claimant did not sustain any measurable anatomical impairment under the applicable rating system used in hearing loss cases. As Dr. Miller explained in her deposition, the rating system provided by the American Academy of Otolaryngology (AAO) measures hearing loss in a range of decibel frequencies. While the claimant did sustain some hearing loss in those frequencies, as well as those in higher frequencies, under the AAO rating system his impairment rating is zero. Therefore, he is not entitled to receive any permanent partial disability benefits. Since the claimant did not sustain any impairment or accrue any permanent disability benefits, the conclusive presumption

relied upon by the Supreme Court in the Baker case is not present here.

I also note that it does not appear that the claimant became fully aware of his hearing loss until he came under the treatment of Dr. Miller in 2001. At that time, Dr. Miller compared the results of her exam of the claimant's hearing with those he had previously had done in 1982 and 1999. Not until then did the claimant learn that his hearing had deteriorated from his baseline tests. I find that the respondent simply cannot establish either the first or the second prong of the statute of limitation tests set out by the Arkansas Supreme Court in Baker. Therefore, the statute of limitation had not begun to run in this case.

Additionally, another reason for denying the application of the statute of limitation is based upon the specific language of Ark. Code Ann. §11-9-702 (a) (1). That section, in relevant part, reads as follows:

"A claim for compensation for *disability* on account of an injury. . . shall be barred unless filed with the Workers' Compensation Commission within two years from the date of the compensable injury." (Emphasis added).

In this claim, which is an original claim for benefits and therefore controlled by the above quoted section, the claimant is not asserting any claim for disability benefits. Instead, he is asking only for medical treatment in the form of hearing aids as prescribed by Dr. Miller. Since this is not a claim for disability, there does not appear to be any applicable statute of limitation. In contrast, I note that under the section of the Act dealing with claims for additional benefits, (Ark. Code Ann. §11-9-702 (b)) the word compensation is used instead of disability and the statutory section goes on to state that compensation includes *disability or medical*. As has been pointed out on numerous occasions, this Commission is required to strictly construe the revisions of the Workers' Compensation Act. Here, the act specifically provides in one situation that the statute of limitation would begin to run in regard to a claim for disability or medical expenses. However, in the section dealing with original claims, which is applicable here, the statute only provides a limitation period on claims for disability benefits. The statute does not set out a

limitation for claims seeking only medical benefits, as is the case in the present claim. Therefore, even if the criteria for the statute of limitation effects set out in the Baker case were to apply, the statute of limitation defense still would not be a bar to this claim.

In conclusion, I find that the claimant has established by a preponderance of the evidence that he sustained a compensable, employment induced hearing loss. I also find that the claimant is entitled to reasonable and necessary medical treatment in the form of hearing aids prescribed by Dr. Miller. Furthermore, although not specifically addressed by the Majority, I find that the statute of limitations does not act as a bar to this claim.

For the aforementioned reasons, I must respectfully dissent.

PHILIP A. HOOD, Commissioner