Fadden v. New England Telephone Co. (NYNEX) (March 13, 1995)

VERMONT DEPARTMENT OF LABOR AND INDUSTRY

MAXWELL FADDEN	*)*	*File No. F-23565*
	)	
	)	*By: Frank E. Talbott, Esq.*
v.	*)*	*Contract Hearing Officer*
	)	
	)	*For: Mary S. Hooper*
NEW ENGLAND TELEPHONE	*)*	*Commissioner*
COMPANY (NYNEX)	*)*	
	)	*Opinion No: 4-95WC*

Hearing held at Montpelier, Vermont, on December 12, 1994.

APPEARANCES

Maxwell Fadden, pro se
Steve Gottsche, for the defendant

ISSUES

1. Whether the claimant's hearing loss is a result of an accident arising out of and in the course of his employment with the defendant.

2. Whether the claimant's claims are barred for lack of sufficient notice.

THE CLAIM

Medical and hospital benefits under 21 V.S.A. § 640, specifically, the cost of a hearing aid.

STIPULATIONS

1. The claimant was employed by New England Telephone Company until December 29, 1989, when he retired.

2. The defendant was an employer within the meaning of the Workers'

Compensation Act.

3. During the times relevant to this claim New England Telephone Company was self insured.

4. On June 10, 1993, the defendant filed a first report of injury.

5. On July 8, 1994, the claimant filed a Notice and Application for Hearing.

6. Judicial Notice may be taken of the following documents in the Department's file:

Form 1 : Employer's First Report of Injury
Form 6 : Notice and Application for Hearing

7. The following documents are offered into evidence without objection:

Claimant's Exhibit 1: Medical reports by Dr. John M. McGinnis, Jr., dated February 14, 1990 and September 2, 1993.

Claimant's Exhibit 2: Statement for cost of hearing aid from Better Hearing Service

Defendant's Exhibit A: Medical report of Dr. J. Oliver Donegan, dated February 10, 1994.

FINDINGS

1. The claimant began working for NYNEX in 1954, after he retired from the military service. Between the time he started working for NYNEX and the time that he retired, he worked with various power tools, including power augers, jack hammers, impact wrenches, chain saws, bucket trucks, generators and other power equipment, on a daily basis.

2. This power equipment was very noisy. He did not wear hearing protection because he was never given hearing protection devices by his employer. Towards the end of his career, he started wearing hearing protection devices that he purchased himself, but they were not high quality devices as he could not afford high quality.

3. When the claimant began wearing hearing protection, he had already suffered a hearing loss. He was not aware at the time that his hearing loss was related to his job.

4. After his retirement, he began noticing a ringing in his ears.

5. In February, 1990, the claimant had his hearing tested by John M. McGinnis, Jr., M.D. who found that the claimant suffered from a high-tone hearing loss, which is related to excessive noise rather than simply aging. Dr. McGinnis verbally informed the claimant that his hearing loss was most likely related to his work history.

6. In February, 1990, when the claimant was told by his physician that he had a hearing loss due to noise levels, he informed NYNEX. This was done in a telephone conversation. The person spoken to at NYNEX said that the claim would not be paid by NYNEX, and that the claim had to be documented by a written doctor's opinion.

7. After the claimant spoke to his son-in-law, who is familiar with workers' compensation laws, he learned that he could make a written claim to NYNEX to cover the cost of his hearing aid. At that time he requested a written opinion from Dr. McGinnis that his hearing loss was related to his work at NYNEX. He made a written report to this effect on September 2, 1993.

8. Dr. McGinnis reviewed the claimant's history, both in his personal life and his work at NYNEX, and concluded that the claimant's hearing loss was most probably related to the noise levels he was exposed to on the job at NYNEX.

9. During the years that the claimant was employed at NYNEX, he had routine medical examinations by the company physician. However, the company never tested the claimant for hearing loss.

10. NYNEX never provided the claimant with any hearing protection devices.

11. During the course of these proceedings, the defendant sent the claimant to see Dr. J. Oliver Donegan to be tested for his hearing loss. Dr. Donegan also concluded that the claimant's suffered from a moderate to severe high frequency, bilateral hearing loss due to exposure to noise levels. Dr. Donegan concluded that the noise levels the claimant had been exposed to included noise while working at NYNEX, noise at home, noise in the service,

and while hunting.

12. The claimant's experience in the service is not relevant. His service in the military was prior to 1954 when he started at NYNEX. Furthermore, the claimant did not notice hearing loss until after 20 years of employment at NYNEX.

13. The claimant also testified that he did not hunt much, and he could not remember the last time he discharged his rifle. There was no evidence that the claimant's activities hunting contributed in any significant way to the claimant's hearing loss.

14. There was no evidence that the claimant engaged in any activities at home that would produce unusual noise levels.

15. The defendant has not suffered any prejudice because of any delay in notice that the claimant suffered a hearing loss due to his work duties while employed. Indeed, any delay was due to the Defendant's verbal denial of the claim when the claimant first learned that his hearing loss was related to his job.

CONCLUSIONS

1. In workers' compensation actions, the claimant has the burden of establishing all facts essential to his claim. McKane v. Capital Hill Quarry Co., 100 Vt. 45 (1929); Goodwin v. Fairbanks, Morse, and Co., 123 Vt. 161 (1962). The claimant must establish by sufficient competent evidence the extent and nature of his injury as well as the causal connection between the injury and the employment.

2. Where the causal connection between an accident and injury is obscure, and a lay-person would have no well grounded opinion as to causation, expert medical testimony is necessary. Lapan v. Berno's Inc., 137 Vt. 393 (1979). There must be created in the mind of the trier of fact something more than a mere possibility, suspicion, or surmise that the incident complained of was the cause of the injury, and the inference from the facts proved must be at least the more probable hypothesis. Burton v. Holden & Martin Lumber Co., 112 Vt. 17 (1941).

3. The claimant sustained his burden of proof that his hearing loss was due to his exposure to excessive noise levels while employed at NYNEX.

4. The Claimant is obligated to notify the Defendant within 6 months of

discovery of his claim. 21 V.S.A. §656. The claimant did this verbally. Written notification was delayed because the claimant did not know his rights
under the laws and the Defendant had verbally denied the claimant's verbal claim. The Defendant has not been prejudiced in any way by the delay in written notification of the claim.

5. The defendant is obligated to pay all medical expenses that are reasonable, necessary and related to the treatment of the compensable injury.
21 V.S.A. §640.

ORDER

It is therefore ORDERED, that the defendant immediately pay to the claimant:

1. All medical and hospital benefits relating to the claimant's hearing loss, including all medical bills and the cost of any prescribed hearing aid.

2. All other compensation and benefits to which the claimant is entitled under the Workers' Compensation Act, consistent with this order.

DATED in Montpelier, Vermont this 13th day of March, 1995.

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Paul Harrington, Deputy Commissioner
as designee for Mary Hooper, Commissioner