

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Sean Gregorek

Opinion No. 03-21WC

v.

By: Stephen W. Brown
Administrative Law Judge

Dynapower Corporation

For: Michael A. Harrington
Commissioner

State File No. GG-62023

OPINION AND ORDER

Hearing held via Skype on October 5, 2020
Record closed on November 16, 2020

APPEARANCES:

Christopher McVeigh, Esq., for Claimant
William Blake, Esq., for Defendant

ISSUE PRESENTED:

What is the extent, if any, of Claimant's permanent partial disability attributable to his work-related hearing loss and/or tinnitus?

EXHIBIT:

Joint Medical Exhibit ("JME")¹

FINDINGS OF FACT:

1. I take judicial notice of all relevant forms in the Department's file for this claim, and of the AMA Guides to the Evaluation of Permanent Impairment, 5th ed. (the "AMA Guides").
2. Claimant is a 58-year-old man residing in Milton, Vermont.
3. Defendant is a manufacturer of industrial products with a factory in South Burlington, Vermont.
4. Between approximately June 1990 and October 2018, Defendant employed Claimant in multiple capacities involving electrical and mechanical subassembly work in its

¹ During the formal hearing, I sustained objections to the admissibility of the handwritten annotations on page 16 of the JME and the portions of the hand-written annotations following the asterisk on page 21 of the JME. Except for those limited exclusions, the remainder of the JME was admitted.

South Burlington factory. Over the course of his employment with Defendant, he rose through the ranks and took on more managerial duties.

5. The location of Claimant's workstation in the factory varied over the years. Sometimes, he worked near a high-noise area where other employees would test Defendant's finished products. At other times, he worked near an area where workers would cut sheet metal, which resulted in high levels of noise exposure. Claimant wore hearing protection when he knew that his coworkers would begin cutting sheet metal, but the cutting often began with no advance warning. In such instances, Claimant put on hearing protection after the cutting began.
6. Defendant began a hearing testing program in the late 1990s, after which there was a significant lull in workplace hearing tests for approximately a decade. Claimant's workplace hearing test results were as follows:
 - a. On November 1, 1997, Claimant's hearing test was normal;
 - b. On April 21, 1998, Claimant showed some loss in his left ear for high pitches;
 - c. On July 22, 2009, Claimant demonstrated mild hearing loss; and
 - d. On September 8, 2010, Claimant demonstrated mild hearing loss.

(JME 1-9).

7. In March 2015, at Defendant's request, Claimant saw audiologist Jessie Cassada, Au.D, who found that his thresholds in both ears were within normal limits for low to mid frequencies; however, she found "sloping to moderate high frequency sensorineural hearing loss in the right ear and moderately severe high frequency sensorineural hearing loss in the left ear." (JME 50). She recommended binaural amplification. (*Id.*).
8. Defendant subsequently accepted Claimant's hearing loss claim as related to his workplace noise exposure and provided him with hearing aids.
9. In December 2018, Claimant underwent another hearing test with Stephanie Maloney, Au.D. at Northwestern Medical Center. Dr. Maloney concluded that Claimant had sustained more significant hearing loss than documented in Dr. Cassada's 2015 findings. Her specific findings were in relevant part as follows:

Ear canals are clear and dry bilaterally. Jerger Type A tympanograms bilaterally indicating normal middle ear pressure. DPOAEs [Distortion Product Otoacoustic Emissions] present in right ear at 1.5-2kHz, absent at all other frequencies 1.5-6kHz bilaterally. Speech Reception Threshold appropriate for hearing levels bilaterally. Word Recognition Score 92% at 30dB SL (re SRT) for right ear and 94% at 40dB SL (re SRT [speech reception threshold]) for left

ear. Normal hearing sensitivity falling to moderately-severe sensorineural hearing loss bilaterally.

(JME 83).

10. The results of Dr. Maloney's hearing test are the most recent clinical data concerning Claimant's hearing capabilities in evidence.
11. Claimant credibly acknowledged at the formal hearing that he has had some non-work-related noise exposure throughout his life, such as from hunting and gun use at practice ranges. He has not been hunting in several years, and credibly testified that he does not go to the shooting range often. He also credibly testified that after learning of his hearing loss, he has become more cognizant of the need to protect his hearing, leading him to be more conscientious about using ear protection. There is no evidence of the extent, if any, to which these sources of noise contributed to the decline of his hearing capacity.
12. Currently, Claimant's hearing is such that he can function in his environment and can understand conversations in close quarters in quiet environments. However, he misses words in conversations, particularly in group settings, and often must read lips. He also has tinnitus, a high ringing sensation in his ear, which increases with earmuffs or ear plugs. Hearing aids do not significantly affect his tinnitus, but they help his hearing in group situations.
13. Although the parties do not dispute the fact of Claimant's work-related hearing loss, they dispute whether he has any ratable permanent impairment under the AMA Guides related to that hearing loss, and if so, the extent of such impairment. Both parties presented expert medical testimony in support of their respective contentions.

Phillip Davignon, MD's IME and Testimony

14. Claimant presented Phillip Davignon, MD, as an expert witness. Dr. Davignon is an occupational medicine physician who currently dedicates most of his practice to independent medical examinations ("IMEs"), medical records reviews, and permanent impairment evaluations. He has performed approximately 5,000 IMEs in his career.
15. Dr. Davignon performed an IME of Claimant in January 2019. As a part of that IME, he physically examined Claimant, interviewed him, and reviewed his medical records.
16. Dr. Davignon is not an audiologist and did not perform a formal hearing test. During his examination and interview, however, he noticed that Claimant had some difficulty with speech recognition and had to be looking directly at him to understand his questions.

17. In computing Claimant's permanent impairment related to hearing loss under the AMA Guides, Dr. Davignon relied primarily on the data from Dr. Maloney's 2018 hearing test.²
18. The AMA Guides provide for assessing separate ratings for hearing loss and tinnitus; they specify formulas to determine a permanency rating for hearing loss based on a hearing test and allow up to 5 percent in additional permanent impairment based on tinnitus. The specific assessment is left to the examiner's discretion based on the impact of the tinnitus on activities of daily living, such as communication. (*See* AMA Guides, p. 246-251).
19. Following Tables 11-1, 11-2, and 11-3 in the AMA Guides, Dr. Davignon concluded that Claimant's whole person impairment rating for hearing loss, irrespective of tinnitus, was 2 percent.
20. With respect to the additional impairment rating that the AMA Guides allow for tinnitus, Dr. Davignon testified that his observations of Claimant's apparent difficulty understanding speech warranted some additional permanency, but less than the maximum of 5 percent. Exercising his clinical judgment, he assessed a 2 percent permanent impairment rating for Claimant's tinnitus.
21. Therefore, Dr. Davignon assessed Claimant with a permanency rating of 4 percent related to Claimant's hearing loss and tinnitus. I find his analysis credible, well-supported, and persuasive.

Verne Backus, MD's IME and Testimony

22. Defendant presented Verne Backus, MD, as an expert witness. Dr. Backus is an environmental and occupational medicine physician who, like Dr. Davignon, currently focuses his practice on IMEs, and has performed more than 5,000 IMEs in his career. Also like Dr. Davignon, he is not an audiologist.
23. At Defendant's request, Dr. Backus performed two medical records reviews—one in August 2016 and another in April 2019—to assess Claimant's permanent impairment attributable to hearing loss and tinnitus. He did not perform a physical examination or interview of Claimant as a part of either of these assessments, because Defendant did not hire him to do so.³
24. Like Dr. Davignon, Dr. Backus applied the formulas in Tables 11-1, 11-2, and 11-3 of the AMA Guides to the results of Dr. Maloney's 2018 hearing test of Claimant and

² Based on his training and experience, the proper practice is to use the most recent clinical data available of hearing loss to perform permanent impairment evaluations.

³ Although Dr. Backus had previously performed a physical examination of Claimant for a back-related claim and did not recall any difficulties communicating with him during that examination, the purpose of that back evaluation was not related to Claimant's hearing.

found that Claimant's whole person impairment rating attributable to hearing loss was 2 percent. I find this aspect of Dr. Backus's analysis credible and well-supported.

25. However, unlike Dr. Davignon, Dr. Backus did not attribute that 2 percent impairment to Claimant's employment. He thought that Claimant's 2018 hearing levels could be normal, age-related hearing loss or related to non-occupational noise exposure. His suggestion of age-related changes stemmed from the fact that Claimant's 2018 hearing test showed worse results than his 2015 test, and one would expect hearing capabilities to decline as a person ages. He also noted that Claimant wore hearing protection at work. However, he was unaware whether Defendant had a hearing protection program or what it involved.
26. Regarding his suggestion that some of Claimant's hearing loss could be attributable to non-occupational sources, Dr. Backus credibly acknowledged that he did not know what those sources might be because he was not hired to interview Claimant.
27. Dr. Backus also had questions about the verifiability of Dr. Maloney's 2018 hearing test. He credibly testified that the test's verifiability would depend on noise exposure within the 16-24 hours before the test. However, there is no evidence concerning Claimant's noise exposure during the day before that hearing test, and Dr. Backus credibly acknowledged that he had no basis to assume that Claimant was exposed to particularly high noise levels during that period. I therefore find this concern too speculative to undermine the validity of Dr. Maloney's 2018 hearing test.
28. With respect to tinnitus, Dr. Backus testified that Claimant's speech recognition scores from the 2018 hearing test were too close to normal for him to assess any additional permanent impairment. He credibly acknowledged that Dr. Davignon did not do anything wrong by assessing additional permanent impairment, as that assessment is discretionary, but Dr. Backus did not see a reason to assess any impairment for that condition. I find Dr. Backus's exercise of discretion in this regard to be less informed as Dr. Davignon's, particularly given that Dr. Davignon personally spoke with Claimant in the context of an IME intended to assess hearing-related impairment.

CONCLUSIONS OF LAW:

1. Claimant has the burden of proof to establish all facts essential to the rights he presently asserts. *Goodwin v. Fairbanks Morse & Co.*, 123 Vt. 161, 166 (1962); *King v. Snide*, 144 Vt. 395, 399 (1984). He must establish by sufficient credible evidence the character and extent of the injury, see *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17, 20 (1941), as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367, 369 (1984). There must be created in the mind of the trier of fact something more than a possibility, suspicion or surmise that the incidents complained of were the cause of the injury and the resulting disability, and the inference from the facts proved must be the more probable hypothesis. *Burton, supra*, 112 Vt. at 20; *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).

2. Where expert medical opinions are conflicting, the Commissioner traditionally uses a five-part test to determine which expert's opinion is the most persuasive: (1) the nature of treatment and the length of time there has been a patient-provider relationship; (2) whether the expert examined all pertinent records; (3) the clarity, thoroughness and objective support underlying the opinion; (4) the comprehensiveness of the evaluation; and (5) the qualifications of the experts, including training and experience. *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (Sept. 17, 2003).
3. In this case, Drs. Davignon and Backus both demonstrated impressive qualifications and credentials, reviewed all the pertinent medical records, and were retained as forensic experts rather than as treating providers. Although neither is an audiologist, both have extensive experience conducting IMEs. The first, second, and fifth factors weigh substantially equally as between the two experts.
4. However, the third and fourth factors favor Dr. Davignon's analysis. Dr. Davignon physically examined and interviewed Claimant in person for the purposes of evaluating his permanent impairment related to hearing loss, and he personally observed Claimant's communication during his examination and took his observations into account in forming his opinions. His computations and analysis are based on Dr. Maloney's 2018 hearing tests, which are the most recent data in the record, and are well-supported by the relevant portions of the AMA Guides.
5. By contrast, Dr. Backus based his opinions only on a medical records review. Although he had examined Claimant for the purpose of evaluating a back condition, he did not examine Claimant to assess his hearing. Dr. Backus's opinions were also based in part on assumptions about the extent of Claimant's non-occupational noise exposure and unanswered questions he had about the validity of Dr. Maloney's hearing test. Dr. Backus could have obtained greater clarity regarding his questions and assumptions by interviewing Claimant but did not do so because that was outside the scope of what Defendant hired him to do.
6. For these reasons, I credit Dr. Davignon's opinions over Dr. Backus's.
7. Defendant has accepted liability for Claimant's hearing loss. While it is *possible* that some of Claimant's hearing loss may have been caused by non-occupational noise exposure from gun use or from the normal aging process, there is no evidence beyond the realm of speculation concerning the specific extent, if any, of those sources' effects on his present aural capacity. Accordingly, there is no basis to conclude that any cause other than Claimant's work resulted in his clinically documented hearing loss and tinnitus.
8. Claimant is entitled to permanent partial disability benefits consistent with a 4 percent whole person disability rating attributable to his hearing loss and tinnitus. 21 V.S.A. § 648.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendant is ORDERED to pay:

- 1) Permanent partial disability benefits consistent with a 4 percent whole person impairment referable to Claimant's hearing loss and tinnitus; and
- 2) Attorneys' fees and costs pursuant to 21 V.S.A. § 678.

DATED at Montpelier, Vermont this 28th day of January 2021.

Michael A. Harrington
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.