

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

GARY F. BOUZEK,

Claimant,

vs.

CITY OF CEDAR RAPIDS,

Employer,
Self-Insured,
Defendant.

FILED

JUL 30 2019

WORKERS' COMPENSATION

File No. 5061367

ARBITRATION DECISION

Head Notes: 2208, 2907

STATEMENT OF THE CASE

Gary Bouzek, claimant, filed a petition in arbitration seeking workers' compensation benefits from the City of Cedar Rapids as a result of an injury he sustained on February 19, 2016 that arose out of and in the course of his employment. This case was heard in Des Moines, Iowa and fully submitted on July 22, 2019. The evidence in this case consists of the testimony of claimant, Mike Duffy and Joint Exhibits 1 – 16. Both parties submitted briefs.

The primary issue in this case is the extent of claimant's hearing loss under Iowa Code Chapter 85B.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

ISSUES

1. The extent of claimant's disability.
2. Whether claimant is entitled to payment for the cost of an independent medical examination.
3. Whether the hearing loss is a scheduled or industrial disability.
4. Whether claimant is entitled to additional medical care.

5. Assessment of costs.

FINDINGS OF FACT

The deputy workers' compensation commissioner having heard the testimony and considered the evidence in the record finds that:

Gary Bouzek, claimant was 61 years old at the time of the hearing. Claimant's formal education had claimant completing the ninth grade in school. He does not have a high school diploma.

Claimant began working seasonally for the City of Cedar Rapids (Cedar Rapids or City) in 1993. Claimant became a full-time employee of Cedar Rapids in June 1995. Claimant remained as an employee of Cedar Rapids until his termination on February 19, 2016. Claimant was terminated due to the fact Cedar Rapids was unable to accommodate claimant's restrictions due to an injury that is not part of this claim.

Claimant testified he has significant ringing in his ears, tinnitus. Claimant testified that his ringing was bad and became unbearable when he was exposed to a tire explosion at work in 2006 or 2007. Claimant dismissed any tinnitus claim at the start of the arbitration hearing on June 11, 2019.

Claimant testified that in addition to his tinnitus he has difficulty with his hearing. Claimant has difficulty with the spoken voice. He has to ask people to repeat questions or statements. It is hard for claimant to hear in loud environments such as being in family gatherings. Claimant has to turn up his TV loud to hear it.

Claimant has performed a number of jobs for the City. For most of his career he drove a dump truck. Claimant testified that while working for City he could work up to 16 hours a day when there were natural disasters, like floods or major snow storms. Due to a change in policy as to how long a driver could drive trucks during the last couple of years of employment he would work no more than 12 hours a day.

Most of claimant's career with the City was driving trucks and equipment. In the winter claimant would drive snow plows and work on street patching, depending on weather. In the other seasons he would generally drive dump trucks.

Claimant testified that he was exposed to a number of loud sudden noises while working for the City. Tailgates from dump trucks would bang, plows would be dropped on the cement, and air tools would be in operation. Claimant testified that the service area where the City vehicles were kept would be very loud when all the vehicles were started, especially at the beginning of a shift. Claimant said that up to 80 pieces of equipment could be firing up at one time. Mike Duffy, street operations manager for Cedar Rapids, testified that when the equipment was started the service area was very loud. While Mr. Duffy disagreed with claimant as to the number of vehicles that would be started up at one time; he did testify that the noise was very loud. Mr. Duffy said that

10 to 14 pieces of equipment would be in the bay and that when the equipment was powered up it was louder than normal.

When claimant started working for the City he worked doing street repair. Claimant worked as a cement laborer in 1996 and 1997. The equipment could include jackhammers or a piece of equipment that rips up streets, which was extremely loud. Claimant was not around that machine very often. In all his positions he has been exposed to back-up alarms. Claimant ran a mower for the City lands about a year. Claimant was exposed to constant noise as well as sudden noise while working for the City.

Claimant testified that he has worn hearing protection while working for the City. Claimant testified the City provides hearing protection and it was readily available. Claimant would use the foam protection that he would squeeze and put in his ears. Claimant testified that he never received training on how to insert his ear protection. Claimant acknowledged under cross-examination that the records from the City show that he received training. Claimant said his signature was his agreeing that he had been tested, but he said he did not have any formal training on how to use the hearing protection. At the time of the hearing claimant's employment had been terminated due to a different work injury that the City could no longer accommodate his restrictions. (JE. 11. pp. 3, 4) The termination was not related to his hearing impairment.

Claimant testified that he currently does not have hearing aids and that he would like to have hearing aids provided to him. Claimant did not request of the City hearing aids before this testimony at the hearing.

Mike Duffy, street operations manager was claimant's overall supervisor, but not his direct supervisor. Mr. Duffy testified the City had a hearing protection program. The City provided ear muff and foam protection. Employees were free to use either type of protection or even combine the protection. Mr. Duffy said that use of hearing protection and other safety topics was part of the "Tool Box Talk" the City provided employees.

When claimant began his employment with the City in 1993 he reported that he had difficulty hearing due to ringing in his ears. (JE 1, p. 2) A hearing test in April 1993 by the City showed claimant had a mild impairment in high frequency in his right ear and no impairment in his left ear. (JE. 1. p. 3) Claimant acknowledged on his annual hearing test forms 1996 through 2006 and, 2011 through 2015 records that he had been trained in fitted hearing protection. (JE. 1, pp. 7 – 43)

On February 10, 2017 Ryan Dempewolf, M.D. examined claimant's hearing. Dr. Dempewolf's testing showed,

TESTS

Audiometry:

Comprehensive audiometry revealed normal hearing 250-2000Hz then the left ear has a moderate-severe sensorineural notch at 4000hz. Right ear slopes to a moderate to severe high frequency SNHI. Speech understanding is 100% AU. Tympanometry revealed normal volume with shallow peak in both ears.

ASSESSMENT

Left pulsatile tinnitus- we did review the images and findings of his recent MRI. It does show a vascular loop on the left that could be causing some of his issues with pulsatile tinnitus. No other masses or lesions of concern.

Bilateral sensorineural hearing loss

Left temporomandibular joint pain- there does appear to be a history consistent with TMJ pain. I did talk to him about soft diet and ibuprofen. He will talk with his dentist about this further.

(JE. 3, p. 6)

Richard Tyler, Ph.D. provided an evaluation of the claimant's hearing and tinnitus on January 20, 2019. Dr. Tyler wrote,

Mr. Bouzek's hearing loss is mostly in higher frequencies. The calculation of percent hearing loss is in an approximation of the speech communication handicap to be expected. It does not adequately quantify the hearing impairment, including localization or speech perception in noise. This 'percent' hearing loss could grossly underestimate the hearing difficulties that Mr. Bouzek experiences.

The Air Force and Military require personnel to have 'Fitness for Duty'. Hearing thresholds must not exceed 45 Db hl AT 4000 Hz in each ear. In severe instances of hearing loss, an individual can be removed from active duty completely.

The Navy requires that active duty personnel must have no more than an average hearing threshold of 45 Db for both ears averaged together, averaging frequencies of 3000, 4000 AND 6000 Hz. If such a significant hearing loss exists, the individual must be reviewed to determine if they can be retained, reclassified or separate from service.

A high-frequency hearing loss prevents him from hearing high-frequency speech sounds, such as 's', 'z', 'ch', and 'sh'. This will make it very difficult to communicate in some situations, and he will miss some important details of conversation. Women and children speak with a higher pitch than men, and this will make it even more difficult to hear and communicate.

Hearing in noise is also influenced by high frequency hearing. He will experience a much greater difficulty communicating in noise because of his hearing loss.

The ability to localize the direction of the source of a sound is also severely influenced by high-frequency hearing. Because of his high-frequency hearing loss he will experience more difficulty knowing the direction of an oncoming car or a warning alarm, for example.

I have issued the frequencies of 2000, 3000, 4000 and 6000 Hz in the calculation for the % binaural hearing loss. I have done that and the high-frequency binaural hearing loss is 26.3% (see attached). This value excludes any previous Hearing Loss (Code 85B.11) (this has been reduced by an average 'expected' age-related hearing loss). I believe this is appropriate.

(JE. 4, p. 4) Dr. Tyler stated claimant needs powerful hearing aids that will need to be replaced every four to five years and claimant will be a candidate in the future for short-electrode cochlear implants. (JE. 4, p. 9)

Dr. Tyler charged \$450.00 for his interview with claimant and \$1,000.00 for his report. (JE. 15, pp. 1, 2)

Patrick Collison, M.D. provided a report concerning claimant's hearing and tinnitus on March 15, 2019. Dr. Collison noted Dr. Tyler provided a 26.3 high frequency hearing impairment and a whole body rating of 24 percent. (JE. 6, p. 2) Dr. Collison found that claimant's work for the City was the proximate cause of claimant's hearing loss. (JE. 6, p. 2) Dr. Collison recommended strict noise protection and avoidance where possible and that hearing aids would be helpful. (JE. 6, p. 2) Dr. Collison provided a rating based upon the AMA Guides 5th Ed. of a binaural hearing loss of 1.94 percent and a 1 percent whole person impairment. (JE. 6, p. 3)

Claimant has requested costs of \$1,450.00 for Dr. Tyler's report and interview and \$100.00 filing fee. (JE. 16, p. 1)

Cedar Rapids has paid claimant the 1.94 percent binaural hearing loss calculated by Dr. Collison in the amount of \$1,826.17. (JE. 14, p. 2)

CONCLUSIONS OF LAW

The parties have stipulated that claimant has a hearing loss that arose out of and in the course of his employment with Cedar Rapids. The parties dispute the extent of claimant's disability.

EXTENT OF DISABILITY FOR OCCUPATIONAL HEARING LOSS.

Occupational hearing loss is governed by Iowa Code Chapter 85B.

Iowa Code 85B.6 provides;

Compensation is payable for a maximum of one hundred seventy-five weeks for total occupational hearing loss. For partial occupational hearing loss compensation is payable for a period proportionate to the relation which the calculated binaural, both ears, hearing loss bears to one hundred percent, or total loss of hearing.

In calculating how to determine the extent of hearing loss Iowa Code 85B.9(3) provides:

3. In calculating the total amount of hearing loss, the hearing levels at each of the four frequencies, five hundred, one thousand, two thousand, and three thousand Hertz, shall be added together and divided by four to determine the average decibel hearing level for each ear. If the resulting average decibel hearing level in either ear is twenty-five decibels or less, the percentage hearing loss for that ear shall be zero. For each resulting average decibel hearing level exceeding twenty-five decibels, an allowance of one and one-half percent shall be made up to the maximum of one hundred percent which is reached at an average decibel hearing level of ninety-two decibels. In determining the total binaural percentage hearing loss, the percentage hearing loss for the ear with better hearing shall be multiplied by five and added to the percentage hearing loss for the ear with worse hearing and the sum of the two divided by six.

Hearing loss is a scheduled injury that is calculated under 85B.6(3).

In this case, Dr. Collison utilized the four frequencies listed in section 85B.9(3), 500, 1,000, 2,000, and 3,000 Hz, in determining claimant's occupational hearing loss. Dr. Tyler used some different frequencies, 2,000, 3,000, 4,000 and 6,000 Hz. Dr. Tyler offered a compelling argument as to why he chose the frequencies. The frequencies chosen by Dr. Tyler may better reflect claimant's occupational hearing loss from a functional standpoint. As Dr. Tyler did not issue an impairment rating based upon Iowa law his opinion as to the extent of claimant's occupational hearing loss is not convincing.

Iowa law is clear that the frequencies used by Dr. Collison are the proper measurement under Chapter 85B. I find that Dr. Collison's hearing loss of 1.94 percent is claimant's occupational hearing loss under Chapter 85B.

Claimant in his hearing brief stipulated to a commencement date for indemnity benefits of March 21, 2016.

MEDICAL CARE

Claimant has requested alternate medical care.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27.

Both Dr. Collison and Dr. Tyler have recommended that claimant be provided hearing aids. Claimant testified at the hearing he wanted hearing aids. No request for hearing aids was presented to the City before the hearing. The City shall provide appropriate reasonable medical care and hearing aids to claimant if requested by claimant.

COSTS

The final issue is costs. Claimant has not shown that defendant received an impairment rating from a physician it retained before Dr. Tyler's report. As such, the claimant is not entitled to the full cost of an IME pursuant to Iowa Code 85.39. Claimant is entitled to the \$1,000.00 cost of the report under the holding of Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015).

Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33 Exercising my discretion, I assess costs against the defendant in this matter in the sum of \$100.00 for the filing fee and \$1000.00 for the cost of Dr. Tyler's report.

Claimant is awarded a total of \$1,100.00 in costs.

ORDER


Claimant shall take nothing further in indemnity benefits.

Defendant shall pay claimant one thousand one hundred and 00/100 dollars (\$1,100.00).

Defendant shall provide medical care as set forth in this decision.

Defendant shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Signed and filed this 30th day of July, 2019.


JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JFE/sam

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.