

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

EUGENE ASWEGAN,

Claimant,

vs.

CITY OF DES MOINES,

Employer,
Self-Insured,
Defendant.

File No. 1665235.01

ARBITRATION DECISION

Head Notes: 2208; 2907

STATEMENT OF THE CASE

Eugene Aswegan, claimant, filed a petition in arbitration seeking workers' compensation benefits from the City of Des Moines, self-insured employer as defendant. Hearing was held via Zoom in the Des Moines, Iowa venue on May 24, 2023.

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. The parties are now bound by their stipulations.

Claimant, Eugene Aswegan, was the only witness to testify live at trial. The evidentiary record also includes Joint Exhibits 1-3, Claimant's Exhibit 1 and Defendant's Exhibits A-C. All exhibits were received without objection. The evidentiary record closed at the conclusion of the arbitration hearing.

The parties were given an opportunity to submit post-hearing briefs. Claimant did not submit a post-hearing brief. Defendant submitted a post-hearing brief on June 12, 2023, at which time the case was fully submitted to the undersigned.

ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant should be compensated for his hearing loss under Iowa Code section 85.34(2)(s) or under chapter 85B.
2. Assessment of costs.

FINDINGS OF FACT

The undersigned, having considered all the evidence and testimony in the record, finds:

Claimant, Eugene Aswegan, was 67 years old at the time of the arbitration hearing. Through this proceeding he seeks benefits for hearing loss.

For the past 22 years Mr. Aswegan has worked as a painter for the City of Des Moines at the water treatment plant. His duties included sandblasting. Mr. Aswegan ran a sandblasting machine for approximately 6 hours per day during sandblasting season. He described sandblasting season during times of moderate weather because sandblasting could not be performed when it was cold. While he was sandblasting, he held the large sandblasting hose on his left shoulder, near his left ear. (Testimony)

Mr. Aswegan stated that his "hearing loss was caused from long term exposure to loud noise from my 21 years at the City of Des Moines." (Def. Ex. B, p. 6) The City does not dispute that Mr. Aswegan's hearing loss is due to long-term exposure to excessive noise at work. I find Mr. Aswegan's hearing loss is causally related to his work and due to long-term exposure to excessive noise at work.

CONCLUSIONS OF LAW

Defendant does not dispute that claimant's hearing loss is causally related to his work. The dispute in this case is how claimant should be compensated for his hearing loss. Claimant asserts that he should be compensated under Iowa Code section 85.34(2)(s). Defendant contends that section 85.34(2)(s) does not apply to the facts of this case and claimant should be compensated under chapter 85B.

Iowa Code section 85.34(2)(s)(2018) states:

1. For the loss of hearing, other than occupational hearing loss as defined in section 85B.4, weekly compensation during fifty weeks, and for the loss of hearing in both ears, weekly compensation during one hundred seventy-five weeks.
2. For occupational hearing loss, weekly compensation as provided in chapter 85B.

Thus, section 85.34(2)(s) only applies when loss of hearing does not fall under occupational hearing loss as defined in section 85B.

Section 85B.3 states, "[a]ll employees as defined in chapter 85 who incur an occupational hearing loss arising out of and in the course of employment, are subject to this chapter." Occupational hearing loss is measurable hearing loss arising out of and in the course of employment caused by excessive noise exposure. Iowa Code section 85B.4. Defendant does not dispute that claimant was exposed to excessive noise exposure at work. Rather, defendant argues Iowa Code section 85.34(2)(s) does not

apply because claimant sustained an occupational hearing loss. Defendant argues chapter 85B applies because claimant has alleged hearing loss due to excessive noise exposure over a period of time. Claimant argues that he should be compensated under section 85.34(2)(s) but fails to cite any authority to support his contention. I find defendant's argument to be persuasive.

Because the parties agree that claimant's hearing loss is causally related to his work and due to long-term exposure to excessive noise, I conclude that claimant sustained an occupational hearing loss. Thus, claimant should be compensated pursuant to chapter 85B.

The parties have stipulated that if it is determined that claimant should be compensated under Iowa Code chapter 85B then he is entitled to compensation for 8.51 percent binaural hearing loss under section 85B.9. (Transcript) The parties stipulated that prior to the hearing defendant paid claimant 8.51 percent binaural hearing loss at the stipulated weekly workers' compensation rate. (Hearing Report; Def. Ex. C, p. 8) As such, claimant is not entitled to any further indemnity benefits as the result of this proceeding.

Claimant is seeking an assessment of costs. Costs are to be assessed at the discretion of the Iowa Workers' Compensation Commissioner or at the discretion of the deputy hearing the case. 876 IAC 4.33. I conclude that claimant was not successful in his claim. Therefore, I exercise my discretion and do not assess costs against the defendant. Each party shall bear their own costs.

ORDER

THEREFORE, IT IS ORDERED:

Claimant shall take nothing further from these proceedings.

Each party shall bear their own costs.

Defendant shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1 (2) and 876 IAC 11.7.

Signed and filed this 13th day of September, 2023.

A handwritten signature in black ink, appearing to read "E. Pals", written over a horizontal line.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Jerry Jackson (via WCES)

Luke DeSmet (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.