

VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

02/21/2007

MARK T. MACUDZINSKI, Claimant

Opinion by DIAMOND
Commissioner

v. VWC File No. 218-73-91

OMNIPLEX WORLD SERV., INC., Employer
HARTFORD INSURANCE COMPANY OF THE MIDWEST, Insurer.

Mark T. Macudzinski
613 Stribling Court
Leesburg, Virginia 20175
pro se claimant.
(Copy sent by Priority Mail)

Anne E. Dobson, Esquire
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for the defendants.
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REVIEW on the record by Commissioner Tarr, Commissioner Diamond, and Commissioner Dudley at Richmond, Virginia.

This case is before the Commission at the employer's request for Review of the Deputy Commissioner's Opinion issued September 28, 2006. The employer assigns error to the finding that the claimant's hearing loss was compensable and to the award of benefits. We AFFIRM as MODIFIED.

The claimant filed a claim for benefits on February 9, 2006, alleging an occupational disease, hearing loss, as diagnosed by Dr. Michael Mellis on February 24, 2004. The claimant also alleged an injury by accident on February 11, 2004 when he heard gunshots which resulted in hearing loss. The claimant sought lifetime medical benefits and temporary total disability benefits beginning February 12, 2004.

At the hearing held on September 11, 2006, the employer defended on the grounds that the claimant did not sustain a compensable ordinary disease of life or occupational disease, that the July 20, 2006 document from George Washington University Hospital improperly overstates the amount of the claimant's hearing loss, and that the medical records do not support the disability alleged.

The claimant testified that, in February 2004, he was training at Omniplex, which provides security services. The program required training in handguns and shotguns. As part of the training, he went to a shooting range and started training on a semi-automatic handgun. While he was at the firing range, he was provided ear protection in the form of earmuffs. He stated that, on the last session of his first day at the shooting range, he heard gunshots with his ears unprotected. His ears were unprotected because he had taken the ear protection off to adjust his hearing aids. He described the two gunshots as "getting an icepick shoved in each of your ears." He could barely hear after that and then developed severe tinnitus. The next day, he returned to work and, when he could no longer hear the directions, was released from his employment.

He stated that the audiologist who examined him at Cosco informed him that the gunshots had caused the hearing aids to be on an incorrect setting which resulted in the sound being amplified.

The claimant testified he told Sergeant Frank Washington that he was having problems with his hearing after hearing the unprotected shots.

The claimant further stated he received medical treatment with Dr. Michael Mellis and Dr. Kim at George Washington University. He stated he had a hearing aid test in October 2003, which, upon comparison, indicates a loss of hearing attributable to the gunshots. He had his hearing aids fitted a week before the training started.

He stated that, since 2004, he had been unable to do the type of job he held before Omniplex, which was working in a call center, because of hearing loss. Shortly after the gunshot incident, he declined a job because he was no longer qualified due to his hearing loss. A few weeks after the accident, he began working for Home Depot as a sales associate.

He stated he has some hearing loss in high frequencies since he was a child but it did not require hearing aids.

On cross-examination, he testified he had an audiogram on February 5, 2004. He agreed that during that testing he had a loss of 48.75 decibels in his left ear and 47.5 decibels in his right ear which was partially corrected with his hearing aids. He agreed he had an audiogram in October 2003. He also recalled being advised he could have autoimmune inner ear disease by Dr. Mellis and Dr. Kim at Georgetown but this was never finally determined. He agreed Dr. Fox speculated he may have Meniere's disease but his primary care physician, Dr. Coe, and Dr. Kim disagreed with that opinion.

He stated he started working with Home Depot on April 17, 2004.

The medical records indicate Dr. Michael G. Mellis of the Otolaryngology group performed an audiogram and read the October 2003 and September 2005 testing as stated below. Also, an audiology report from Kelly Wooten-Pilson from February 5, 2004 indicated the claimant had 48.75-decibel hearing loss in his left ear and 47.5-decibel hearing loss in his right ear. These results are summarized below. Using a formula provided by Dr. Mellis, the percent hearing loss for the October 2003, February 5, 2005 and the September 2005 audiograms is provided below.

The claimant's pre-injury testing found the following:

PRE-TRAUMA (October 8, 2003)

Audiogram (Hz)	500	1000	2000	3000	4000
Left Ear (dB)	30	20	40	70	
Right Ear (dB)	30	25	35	75	

	Left Ear	Right Ear
Average of 500, 1000, 2000, 3000	40 dB	41.25 dB
Percent Hearing Loss	22.5%	24.4%

PRE-TRAUMA (February 5, 2004)

Audiogram (Hz)	500	1000	2000	3000	4000
Left Ear (dB)	40	30	50	75	105
Right Ear (dB)	35	30	50	75	95

	Left Ear	Right Ear
Average of 500, 1000, 2000, 3000	48.75 dB	47.5 dB
Percent Hearing Loss	35.6%	33.75%

The claimant's post-injury testing found the following:

POST-TRAUMA (February 24, 2004)

An audiogram was taken February 24, 2004 at the Hearing Centers of Fairfax and Loudon. On that date, the claimant was also examined by Dr. Mellis. The raw findings of the February 24, 2004 audiogram were available but an interpretation of these results was not available for review. In a letter dated September 12, 2005 from Dr. Mellis he stated:

[The claimant] had been seen by our practice on 10/8/03 when we documented a baseline sloping mild to profound bilateral sensorineural hearing loss. He experienced an acoustic trauma during a job interview (shooting range) and immediately noticed a worsening of his hearing which

is documented in the audiogram of 2/24/04. We repeated his audiogram on 9/7/05. Based on the formula on the following page, his hearing has deteriorated -20.5% in his left ear and 24% in his right ear with his current impairment rating at 43% left ear and 48.8% right ear.

POST-TRAUMA (September 2005)

Audiogram (Hz)	500	1000	2000	3000	4000
Left Ear (dB)	45	55	45	70	
Right Ear (dB)	40	55	60	75	

	Left Ear	Right Ear
Average of 500, 1000, 2000, 3000	53.75 dB	57.5 dB
Percent Hearing Loss	43%	48.75%

On March 26, 2004, Dr. Hung Jeffrey Kim, in a letter to Dr. Mellis noted:

[The claimant] has a history of chronic hearing loss with recent deterioration of hearing from acoustic trauma from shooting guns. ... He returned to our clinic with a repeat hearing test. It showed he has a mild to profound sensorineural hearing loss bilaterally. When I compared this with the previous audiogram that was done on February 24, pure-tone threshold has not changed significantly, however, the SRT score did decrease in the left side by approximately 12 dB. ...

Because he experienced significant deterioration of his pre-existing hearing loss from a recent acoustic trauma, we recommend him to try prednisone if there is no contraindication. He should repeat a hearing test once he has completed a course of prednisone. His hearing loss is most likely due to a longstanding history of acoustic trauma...

On January 10, 2005, Dr. Sean Whelton, in a letter to Dr. Kim, noted he initially evaluated the claimant in November 2004 and again on the date of his letter. He stated the claimant's "hearing loss either started or dramatically accelerated after he went out shooting" and diagnosed the claimant, in relevant part, with "hearing loss related to acoustic trauma, although he could have a cofactor of autoimmune inner ear disease."

Another audiologist, Sara Webber, M.S., C.C.C.-A, stated, in letters dated June 8, 2005 and July 20, 2006, that the claimant had a 63.3% compensable hearing loss in his right ear, with an average decibel loss of 65 decibels, and a 56.7 % compensable hearing loss in his left ear, with an average decibel loss of 61 decibels. However, the calculation for such loss was not incorporated in her correspondences.

The Deputy Commissioner found the claimant received a diagnosis and communication of hearing loss, intensified by the firing range incident, on September 5, 2005. She further found the claimant sustained hearing loss in February 2004 at the firing range. Given the claimant's hearing loss prior to that date, she awarded 20.5 percent hearing loss to the left ear and 19.65 percent hearing loss in his left ear, pursuant to Code § 65.2-503, as a result of the incident in the firing range.

We affirm the Deputy Commissioner's finding that the claimant sustained a compensable injury by accident when his unprotected ears were exposed to gunshots on February 11, 2004. At dispute is whether the claimant proved that the hearing loss attributable to the accident rose to the level of compensability under Rule 12 of the Rules of the Virginia Workers' Compensation Commission. The calculation of compensable hearing loss is governed by Virginia Code § 65.2-503 which provides for 50 weeks of compensation for total loss of hearing in an ear. Calculating benefits for partial hearing loss is governed by Rule 12. While we agree with the Deputy Commissioner that the claimant is entitled to compensation for partial loss of hearing under the Act, we amend her calculations as stated below.

We find here that the schedule of hearing loss in Commission Rule 12 quantifies a decibel loss between 0 and 26 as a normal loss, or a loss that does not significantly impact an employee's "overall ability to use" his hearing. Therefore, any hearing loss between 0 and 26

decibels does not rise to a ratable level. However, decibel hearing loss above 27 is quantifiable and ratable, and therefore, is a level that would “materially affect the employee’s overall ability to use the organ.” The claimant’s pre-existing decibel hearing loss, per the February 5, 2004 audiology report, in the left ear was 48.75, from which the normal or non-material 26 decibel loss is subtracted. This leaves a 22.75 decibel pre-existing hearing loss in the left ear for which the employer is entitled to benefit. The claimant’s pre-existing decibel hearing loss in the right ear was 47.5, from which the normal or non-material 26 decibel loss is subtracted. This leaves a 21.5 decibel pre-existing hearing loss in the right ear for which the employer is entitled to benefit.

The claimant’s total post-injury decibel hearing loss, as measured in the September 2005 audiology report,¹ is 53.75 in the left ear, from which we subtract 22.75, giving him a total decibel loss of 31.00 attributable directly to the accident. The claimant’s total post-injury decibel hearing loss is 57.5 in the right ear, from which we subtract 21.5, giving him a total decibel loss of 36 attributable directly to the accident. According to Rule 12, a 31.00 decibel hearing loss in the claimant’s left ear is a 6.7-percent loss and a 36 decibel hearing loss in the claimant’s right ear is a 15-percent loss. See, Virginia Fibre Corp. v. Moore, 17 Va. App. 691, 692-93, 440 S.E.2d 432, 433 (1994).

Accordingly, for the reasons stated above, the Opinion of the Deputy Commissioner is AFFIRMED as MODIFIED.

¹ The September 2005 audiology report is utilized in light of the following facts: (1) the February 24, 2004 report does not contain substantial similar statements of hearing loss for utilization in pre- and post- injury hearing loss determination and (2) the claimant was undergoing treatment in 2004 which attempted to improve his hearing loss. However, in his September 12, 2005 report, Dr. Mellis rated the claimant’s permanent hearing loss, a “repeat” of the February 24, 2004 testing. Based upon the September 12, 2005 testing, Dr. Mellis issued ratings for permanent hearing loss.

The following amended award shall enter:

AWARD

An award is hereby entered in favor of Mark T. Macudzinski, employee, against Omniplex World Service, Inc., employer, and Hartford Insurance Co. of the Midwest, insurer, for permanent partial disability benefits of \$373.34 per week for the 6.7% loss [loss of use/disfigurement] of his left ear, based on a pre-injury average weekly wage of \$560.00, payable beginning September 5, 2005, and continuing for 3.48 weeks; and for permanent partial disability benefits of \$373.34 per week for the 15.0% loss [loss of use/disfigurement] of his right ear, based on a pre-injury average weekly wage of \$560.00, payable beginning September 5, 2005, and continuing for 7.8 weeks. Because the periods covered by this award have passed, the awarded benefits may be paid in a lump sum.

Medical benefits are awarded pursuant to § 65.2-603 for all reasonable, necessary, and related medical treatment for as long as necessary.

This matter is removed from the Review docket.

APPEAL

This Opinion shall be final unless appealed to the Virginia Court of Appeals within thirty (30) days of receipt.

cc: Omniplex World Serv., Inc.
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