

VIRGINIA:  
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by MARSHALL  
Commissioner

**Sept. 11, 2015**

CARLTON MCNEIL v. CARTER MACHINERY COMPANY, INC  
AMERICAN ZURICH INSURANCE COMPANY, Insurance Carrier  
AMERICAN ZURICH INSURANCE COMPANY, Claim Administrator  
Jurisdiction Claim No. VA02000018428  
Claim Administrator File No. 2840181857  
Date of Injury August 19, 2014

Lewey K. Lee, Esquire  
Mingkwan E. Collins, Esquire  
For the Claimant.

Daniel Hall, Esquire  
For the Defendants.

REVIEW on the record by Commissioner Williams, Commissioner Marshall and Commissioner Newman at Richmond, Virginia.

The claimant requests review of the Deputy Commissioner's May 6, 2015 Opinion finding the claimant failed to prove by clear and convincing evidence that his hearing loss is a compensable ordinary disease of life. We AFFIRM.<sup>1</sup>

**I. Material Proceedings**

The claimant filed an August 29, 2014 claim alleging hearing loss as a compensable ordinary disease of life. He sought medical benefits and permanent partial disability benefits. The claimant alleged he last worked for the employer on December 31, 2010. He stated he received a communication that his disease was caused by work on August 19, 2014.

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<sup>1</sup> Considering the issues involved and the complete record developed at the hearing and before the Commission, we find oral argument is unnecessary and would not be beneficial in this case. Va. Workers' Comp. R. 3.4; see Barnes v. Wise Fashions, 16 Va. App. 108, 112, 428 S.E.2d 301, 303 (1993).

The defendants asserted the claimant had no occupational disease or ordinary disease of life arising out of and in the course of the employment. They denied hearing loss or treatment was causally related to the employment. The defendants denied the claimant had injurious exposure to noise with the employer and denied his last injurious exposure was with the employer. They asserted the claim was barred by the statute of limitations.

The Deputy Commissioner found the claimant has hearing loss, based upon reports from Dr. Freida Helbert and Dr. Jeffrey Neal. He noted the claimant also needed to prove “whether the hearing loss arose out of and in the course of the claimant's employment; whether it resulted from causes outside of the employment; and whether it is characteristic of the employment and caused by conditions peculiar to that employment.” The Deputy Commissioner found “the medical evidence supporting the claimant's position in this matter fails to meet the required standard of proof by clear and convincing evidence. “ (Op. 13.)

The Deputy Commissioner did not credit the causation opinion of Dr. Helbert, an audiologist. He stated the Commission has held that audiologists are not qualified to render medical opinions.

The Deputy Commissioner found the statement of Dr. Wheatley, the claimant’s personal physician, that the claimant’s hearing loss “more likely than not” is the result of his occupational exposure, also failed to meet the claimant’s burden of proof. Although Dr. Wheatley is a medical doctor, the Deputy Commissioner explained:

Nevertheless, we find his opinion insufficient to sustain the claimant's burden of proof for the following reasons. Dr. Wheatley states only that it is more probable than not that the claimant's hearing loss was caused by his employment. He does not negative [sic] or discuss other possible causes for the claimant's hearing loss. Additionally, and even more fundamentally, no records from Dr. Wheatley were

submitted beyond the questionnaire drafted by counsel. Thus, we are presented with a bare conclusion without any context or other evidentiary support. We have no way to know the extent of the doctor's experience with the patient. We cannot follow the doctor's reasoning process or understand how the doctor arrived at the stated conclusion. Such a naked and conclusory opinion, even if the same were phrased in terms of more than a probability, would be insufficient in our view to satisfy the requisite burden of proof by clear and convincing evidence.

We must also consider that the defendants have opposed Dr. Wheatley's opinion with that of Dr. Neal. Dr. Neal's reasoning is readily apparent and articulated in his report. He states that the results of the claimant's hearing tests do not show the pattern of responses that are typical for hearing losses caused by industrial noise exposure. Dr. Neal is an otolaryngologist. Dr. Wheatley is a primary care physician. Under the circumstances, where we are presented with an opposing opinion from a specialist, we cannot assign enough evidentiary weight to Dr. Wheatley's opinion to conclude that the same rises high enough to satisfy the claimant's burden of proof by clear and convincing evidence. Therefore, the present claim must fail.

(Op. 13-14.)

The Deputy Commissioner denied the claim,<sup>2</sup> explaining:

As the medical evidence fails to establish all of the elements for the claimant's hearing loss to be considered a compensable ordinary disease of life by the requisite standard of clear and convincing evidence, the present claim must be, and it hereby is, denied.

(Op. 15.)

## **II. Findings of Fact and Rulings of Law**

We have carefully reviewed the claim, exhibits, testimony, deposition, medical evidence, the Opinion, the Request for Review, and the parties' Written Statements. We incorporate and adopt the Deputy Commissioner's summary of the medical evidence and testimony as if our own.

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<sup>2</sup> For completeness, the Deputy Commissioner also addressed the other defenses. He found the claim was not barred by the statute of limitations, as neither Dr. Roger Neal's office note from 2006 nor Dr. Helbert's 2012 audiogram report indicated the claimant received a communication his hearing loss was related to his work. The Deputy Commissioner found it was more probable than not that the claimant was exposed to noise during his employment with this employer. He relied upon the claimant's testimony, which he found credible.

If the employee suffers from a disease which the general public is exposed, then the disease may be treated as an ordinary disease of life under Va. Code § 65.2-401. Hearing loss is an ordinary disease of life. Va. Code § 65.2-400(C).

To be compensable, the employee must establish by clear and convincing evidence that an ordinary disease of life arose out of the employment and did not arise from causes outside the employment and that the disease either: (1) follows as an incident of occupational disease; (2) is an infectious or contagious disease contracted by workers in the health care industries; or (3) is characteristic of the employment and was caused by conditions peculiar to such employment. Va. Code § 65.2-401. The elements required to prove a compensable ordinary disease of life must be established by clear and convincing evidence, and not a mere probability. *Id.*

The claimant has the burden to prove all the elements of Va. Code § 65.2-401 including that the disease did not result from causes outside his employment. *Steadman v. Liberty Fabrics*, 41 Va. App. 796, 806, 589 S.E.2d 465, 470 (2003).

The claimant has a documented hearing loss at a compensable level. His 23-year employment at Carter Machinery exposed him to loud noises when he operated heavy equipment used in the mining and construction industries. The employer did not provide hearing protection<sup>3</sup> to the claimant. The claimant credibly testified he did not have occupational noise exposures at the jobs he held after leaving the employer on December 31, 2010.

Neither his primary care physician, Dr. Wheatley, nor the audiologist, Dr. Helbert, commented about any role the claimant's exposure to loud noises outside employment may have had in his hearing loss. The claimant candidly testified he formerly rode motorcycles, a dirt bike,

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<sup>3</sup> Defendants' Ex. 2, the employer's Hearing Conservation Program, did not include the Norton, Virginia facility where the claimant worked among the places where the program was applicable.

occasionally shot pistols and operated a chainsaw, and operated his lawnmower and weed eater on a monthly basis during the growing season. Neither commented about other potential causes of hearing loss other than noise exposure.

Dr. Jeffrey Neal, an otolaryngologist, examined the claimant at defendants' request on April 17, 2015. Dr. Neal diagnosed mild to moderate sensorineural hearing loss in the right ear and mild to severe sensorineural hearing loss in the left ear. Claimant's 2006 and 2015 audiograms were consistent, showing gradual hearing loss. The claimant denied a family history of hearing loss, rock concert attendance, a history of hunting, previous ear surgery, earaches, or significant ear infection. The claimant admitted shooting pistols and using a chainsaw occasionally. He had a history of riding motorcycles. Dr. Neal opined that because of the claimant's history of loud noise exposure outside work, there is no way to determine if the claimant's hearing loss is work related. He further opined the claimant was never in an area where he was exposed to noise averaging 85db or greater over an eight hour period while working for the employer and stated the claimant's job at the parts counter would not have caused significant loud noise exposure. Dr. Neal indicated hearing loss from noise exposure typically causes a relatively acute hearing loss that stabilizes and does not slowly worsen, as the claimant's did. Finally, Dr. Neal stated the claimant's audiogram did not display the pattern typically seen in patients with noise induced hearing loss.

The claimant failed to meet his burden of proof of all the elements of a compensable hearing loss by clear and convincing evidence. Dr. Neal's conclusions about the claimant's noise exposure at work with the employer may not be accurate, but we credit his specialist opinion indicating the claimant's audiogram is not characteristic of noise-induced hearing loss.

Dr. Neal's opinion "there is no way to determine if his hearing loss is due to work related exposure," because of claimant's history of loud noise exposure outside work also raises questions about whether the claimant's noise exposure at work caused the hearing loss. The claimant failed to meet his burden of proof of a compensable occupational disease.

**III. Conclusion**

The Deputy Commissioner's May 6, 2015 Opinion is **AFFIRMED**.

This matter is hereby removed from the review docket.

APPEAL

You may appeal this decision to the Court of Appeals of Virginia by filing a Notice of Appeal with the Commission and a copy of the Notice of Appeal with the Court of Appeals of Virginia within 30 days of the date of this Opinion. You may obtain additional information concerning appeal requirements from the Clerks' Offices of the Commission and the Court of Appeals of Virginia.