CASE LAW UPDATE
NOVEMBER 2010

City of Philadelphia v. WCAB(Seaman) No. 2564 C.D. 2009, Commonwealth Court of Pennsylvania

Whether a Claimant in a hearing loss case must have a medical opinion and evidence showing that Claimant had compensable hearing loss at the time of retirement?

A Claimant has three years after leaving work to seek compensation for a hearing loss that is work-related, per Section 306(c)(8) of the Act. The Claimant must prove permanent hearing loss of more than 10% caused by exposure to noise in the workplace. The Act does not require that a hearing loss of greater than 10% be measured on or before the Claimant's last day of work.

Here, Claimant retired from the city as a firefighter after 40 years of service on July 8, 2006. He filed a claim petition on September 17, 2007, alleging that he sustained binaural hearing loss as a result of his work. Claimant's medical expert testified that at his audio logical examination of Claimant, it showed he suffered from a hearing impairment of 47.5%, which his expert determined was due to exposure of noise to the inner ear. Furthermore, his expert noted that Claimant's hearing loss was "extremely atypical" for someone of Claimant's age.

The WCJ held that Claimant proved he sustained a compensable, permanent binaural hearing loss of 47.5% and awarded Claimant 123.5 weeks of compensation benefits. On appeal, the Board affirmed the WCJ and the employer then appealed arguing that Claimant's expert opinion was equivocal and not supported by the evidence showing that the Claimant had compensable hearing loss at the time of his retirement.

Employer's position is that Claimant failed to provide evidence supporting that Claimant's hearing loss was occupational despite being retired for almost eleven months. The employer based the argument on McGuire v. WCAB (Chamberlain Manufacturing Co., 821a.2d178, (Pa.Cmwlth.2003), which required Claimant to establish how his work-related hearing loss could develop almost a year after he retired and was no longer exposed to noise in the workplace. However, this Court notes that *McGuire* has a significantly different fact pattern in that Claimant had a regular routine hearing test provided by his employer prior to his retirement. At the last examination, which occurred approximately four months before his retirement, it showed a binaural hearing loss of 4%. However, Claimant waited to file a claim petition until nine (9) months after his retirement when his hearing loss had reached 15.625%. Claimant in *McGuire* failed to present expert medical testimony that established his hearing loss was caused by his employment and failed to explain how there was a dramatic increase in his hearing loss from July of 1998 to April 1999 and how this could be work-related. Here, Claimant did not have his hearing loss diagnosed until after he retired when, for the first, he underwent an audiogram, and revealed a binaural hearing loss of 47.5%.

The Road Toad Inc. v. WCAB (McLean) No. 2581C.D.2009, Commonwealth Court of Pennsylvania

Whether employer's medical opinion can be considered by the WCJ in a petition for review of a UR Determination when the physical examination does not occur until after the petition has been filed?

The WCJ can deal with competent evidence to be reviewed on the merits in the review of a UR Determination and that either party is free to offer evidence beyond that which was considered in the UR process.

Claimant was severely disabled in 1996, such that the employer paid for unskilled home assistance for Claimant for eight hours a day, five days a week. In 2002, Claimant requested a UR seeking an increase in her home assistance to twelve hours a day, seven days a week, and referrals to occupational, speech and physical therapy. The reviewer found the increase in assistance and referrals were reasonable and necessary and the employer filed a petition for review of UR determination.

The employer presented the deposition testimony of Dr. Brian Ernstoff who examined the Claimant after the employer filed the review petition of the UR Determination, but before it filed the petition to review medical treatment and billing. Dr. Ernstoff stated the Claimant's condition had not changed and the additional hours and days were not necessary. The WCJ concluded that the referrals and the additional time were not necessary such that the only assistance Claimant needed was eight hours a day, but that it would be increased to seven days a week.

Claimant appealed to the Board, arguing that Dr. Ernstoff did not examine her until after the petition of review of the UR Determination, and thus the WCJ should have not considered it. The Board agreed and reversed the WCJ. Here, the Appeal Board misapplied United States Steel Corporation v. WCAB (*Luczki)* 887 A.2d 817 (Pa.Cmwlth.2005), which held that when an employer files a petition challenging a UR Determination without medical evidence in its possession at the time of its filing of the petition, the employer has not presented a **reasonable contest and attorneys' fees may be awarded** to the Claimant. The Commonwealth Court notes that the Board misapplied the ruling in *Luczki* in that, that case only dealt with what constituted a "reasonable contest". This Court referenced Seamon v. WCAB (Sarno & Son Foremals), 761 A.2d 1258,1262, (Pa.Cmwlth.2000), which noted that a UR Determination is a "*de novo proceeding" which either party is free to offer evidence beyond that considered in the UR process in meeting the burden of proof.)*

Duncannon Borough and Authority and SWIFT v. WCAB (Bruno) No. 1191 C.D. 2010, Commonwealth Court of Pennsylvania

Whether the Workers' Compensation Appeal Board erred as a matter of law by finding that Section 306(c)(8)(iii) of the Workers' Compensation Act (Act) is not applicable when hearing loss is caused by trauma?

Section 306(c)(8)(iii) does apply to the facts of this case such that Claimant is barred from an award of hearing loss benefits as his binaural impairment is not greater than 10%.

The Board improperly affirmed the WCJ's determination that Section 306(c)(8)(iii) of the Act did not apply to Claimant's trauma related monaural hearing loss. Because Claimant's binaural impairment is below the 10% threshold as set forth in Section 306(c)(8)(iii) of the Act, the Board is hereby reversed.

Claimant was a police officer who was involved in a car accident on October 16, 2007, which resulted in him suffering from ringing in his right ear. The uncontroverted medical evidence established Claimant suffered from monaural (single ear) hearing loss of 31.88% and a binaural (both ears) hearing impairment of less than 10% as a result of this accident and that he reached MMI with the assistance of hearing aid.

Employer issued an NCP for the physical injuries, and Claimant filed a review petition seeking specific loss benefits under Section 306(c)(8)(ii) of the Act due to permanent hearing loss of his right ear. The WCJ granted Claimant's specific loss benefit on the sole basis of Claimant establishing a 31.88% permanent right hearing loss. The Board affirmed the WCJ's decision and Employer appealed.

Employer's position was that Section 306(c)(8)(iii) of the Act precludes an award of benefits when Claimant's binaural hearing loss is 10% or less. The court agreed with Employer and noted that the fourth edition of the Impairment Guides of the American Medical Association's Guides to the Evaluation of Permanent Impairment is to be used when calculating monaural or binaural impairment for workers' compensation purposes. *See Webber etal., PA Workers' Compensation Practice Procedure, p.147(2007).* According to the *Guides*, there is a formula to be used in order to convert a monaural hearing loss into a binaural impairment figure. The formula used is:

> binaural hearing impairment (%) = [5 x (% hearing impairment in better ear) + (% impairment in poorer ear)]/6.

With this formula, each and every Claimant whether alleging a hearing loss in one or both ears due to long-term exposure or trauma has a binaural impairment rating and an award is barred if not greater than 10%.

Joy Mining Machinery Company v. WCAB (Zerres) No. 485 C.D.2010, Commonwealth Court of Pennsylvania

1. Whether Claimant must specifically address that he was exposed to hazardous occupational noise during the three-year period preceding his claim for benefits?

2. Whether the Claimant must demonstrate that he has, in fact, been exposed to hazardous occupational noise?

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1. **No, all Claimant must do under Section 306(c)(8)(i) of the Act is to *prima facie* establish that the claim was timely filed by showing that he or she was exposed to occupational noise while working for the Employer during the three years preceding.**

2. **No, the employee does not have the burden to demonstrate that he has, in fact, been exposed to hazardous occupational noise, but rather the employer may assert an affirmative defense that claimant's exposure to such noise was not hazardous or long-term.**

Claimant worked for Employer for over 40 years, began wearing hearing muffs in the 1970's and sometimes wore earplugs in addition to hearing muffs. Claimant filed a claim petition for occupational hearing loss as of December 1, 2006, caused by exposure to hazardous noise at work. His medical expert, Dr. Michael Bell, documented Claimant to having a binaural hearing loss of 13.125%.

Employer's expert, Dr. Moises Arriaga agreed with Claimant's expert that he suffered a binaural hearing impairment of 13.125%; however, he argues that this was atypical for purely occupational hearing loss and that Claimant's recreational shooting, recreational tool use, familial predisposition to hearing loss, and other changes contributed to this loss. Dr. Arriaga opined that only 9.2% of the Claimant's binaural hearing loss could be attributed to exposure to occupational noise.

The claimant testified and the WCJ found that he had ongoing exposure to loud noise since the 1970's and that he reported a hearing problem in the late 1980's along with wearing hearing protection thus he did not need to specifically address the three previous preceding years.

While Employer submitted evidence of a noise level survey, in which none of the evidence directly related to Claimant's personal exposure to noise. Dr. Callen, conductor of the survey, found that none of the individuals tested exhibited hearing loss similar to Claimant. However, Dr. Callen admitted that the area where Claimant works is one of the plant's nosiest areas, thus the WCJ could conclude that the noise levels presented in the studies did not reflect Claimant's individual exposure.