

M. E. v. Knight Industries

(January 2, 2007)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

M. E.

Opinion No. 56-06WC

v.

By: Margaret A. Mangan
Hearing Officer

Knight Industries

For: Patricia Moulton Powden
Commissioner

State File No. W-05140

Hearing held in Montpelier on September 14, 2006

Record closed on October 6, 2006

APPEARANCES:

Christopher J. McVeigh, Esq. for the Claimant

William J. Blake, Esq. for the Defendant

ISSUES:

Did the Claimant suffer a compensable hearing loss as a result of his work for the Defendant?

FINDINGS OF FACT:

1. In 1979 the Claimant began a two-year involvement with the Army Reserves. While in the reserves, the Claimant trained with a rifle, machine gun, and used a grenade. Hearing protection was available to the Claimant.
2. Beginning at roughly this same period, continuing through 2002, the Claimant consecutively held a number of different jobs. These jobs included working in a parts warehouse in shipping and receiving, performing oil changes in a garage, truck driving, pouring concrete, driving a limousine, framing houses, handyman work, machine operator, and unloading lumber. Hearing protection was available to the Claimant.
3. During the Claimant's work history, up until the time he was employed by the Defendant, he was exposed to various loud noises including an air pressure valve, cement trucks, concrete mixer, air compressor, chainsaws, power tools and various types of heavy machinery.
4. In December 1985, after being exposed to a shrill air compressor valve noise, the Claimant underwent a hearing test that showed a bilateral hearing loss around the 6000HZ, indicating that he suffered a noise induced hearing loss. The audiologist who performed the test noted that this hearing loss appeared to be permanent.

5. In February 1986, the Claimant again underwent a hearing evaluation. There was a documented hearing loss around the 6000HZ range in both ears, but more severe loss on the right. The physician's notes again indicate that this is a noise induced hearing loss.
6. In 2000, the Claimant's hearing was again tested. In this evaluation the Claimant showed a hearing loss at the 4000HZ and 6000HZ.
7. The Claimant's hearing was next tested in 2002. This exam showed no significant change from the previous exam.
8. From 2002 through 2005, the Claimant worked as a service person for the Defendant. This position involved delivering materials and taking service calls where he upgraded and repaired kitchen and bathroom cabinets.
9. During this time, the Claimant drove a van and two large trucks. The Claimant was required to keep a log documenting his driving time. The logs showed that while he regularly drove the large trucks, the Claimant spent more time operating the van.
10. In March 2004, at the Claimant's request, the Defendant installed metal racks in the service van. The Claimant stored tools and bins of tools on these racks. The racks were not padded.
11. When the Claimant drove on rough roads the tools made a fair to medium volume rattling sound on the shelves. The noise level in the van was not abusive. Claimant was exposed to this noise on an intermittent basis for roughly one year.
12. The Claimant did not discuss the noise level in the van with anyone at work.
13. Also in March 2004, the Claimant again had his hearing tested. However, both the Claimant and Defendant's medical experts agreed that the results of this test were flawed and could not be relied upon.
14. In March 2005, the Claimant's audiology results again indicated a noise induced hearing loss.
15. In April 2005, the Claimant quit his job after an argument with his supervisor.
16. In October and November 2005, hearing examination results were consistent with the March 2005 results.
17. The Claimant's elderly mother exhibits hearing loss.
18. The Claimant currently owns a gun, and has owned other guns in the past.
19. The Claimant regularly spends time at a recreational camp where target shooting is a regular activity.

20. The Claimant is requesting attorney fees and costs. Claimant's Counsel has spent 108.90 hours related to this litigation and has included an itemized list of litigation costs totaling \$2,979.09.

Medical Testimony

Robert Aaron Levine, M.D.

21. Dr. Levine is a Board Certified in Adult Neurology and Otolaryngology. He has been practicing in his field for over thirty years.
22. After reviewing the Claimant's deposition and audiology reports, Dr. Levine opined that the Claimant's noise induced hearing loss began before 1985 and has progressed through the present time.
23. Dr. Levine used a standard consistent with the American Academy of Audiology and Department of Health and Human Services standards.
24. Upon comparing all of the Claimant's audiograms, Dr. Levine found that all of the Claimant's results were within the accepted test-retest variable, which is within a normal margin of error. This signified that the Claimant's hearing reports did not worsen as a result of his employment at Knight Industries.

Deborah Rooney

25. Ms. Rooney is an audiologist who has been administering audiology exams for 22 years.
26. Ms. Rooney did not use the same standard applied by Dr. Levine. Instead, she applied an Occupational Health and Safety standard used to indicate where a shift in hearing had taken place. This is not a standard used to indicate a significant hearing loss.
27. Although Ms. Rooney had all of the Claimant's audiograms available to her, she used only the 2002 and March 2005 exams in formulating her opinion. After her review, she opined that the Claimant suffered a noise induced hearing loss during his time working for the Defendant.

CONCLUSIONS OF LAW

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks*, 123 Vt. 161 (1962). The claimant must establish by sufficient credible evidence the character and extent of the injury and disability as well as the causal connection between the injury and the employment. *Egbert v. Book Press*, 144 Vt. 367 (1984).
2. To qualify for workers' compensation benefits, the personal injury must arise out of and in the course of employment. See 21 V.S.A. § 618 (a)(1).

3. There must be created in the mind of the trier of fact something more than a possibility, suspicion or surmise that the incidents complained of were the cause of the injury and the inference from the facts proved must be the more probable hypothesis. *Burton Holden & Martin Lumber Co.*, 112 Vt. 17 1941. Where the causal connection between an accident and an injury is obscure, and a layperson would have no well-grounded opinion as to causation, expert medical testimony is necessary. *J.G. v. Eden Park Nursing Home*, Opinion No. 52-05WC (2005) (citing *Lapan v. Berno's Inc.*, 137 Vt. 393 (1979)).
4. When medical experts disagree, this Department has traditionally examined the following criteria: 1) the length of time the physician has provided care to the claimant; 2) the physician's qualifications, including the degree of professional training and experience; 3) the objective support for the opinion; and 4) the comprehensiveness of the respective examinations, including whether the expert had all the relevant records. *J.C. v. Richburg Builders*. Opinion No. 37-06WC (2006). (citing *Miller v. Cornwall Orchards*, Opinion No. 20-97WC (1997); *Gardner v. Grand Union*, Opinion No. 24-97WC (1997)).
5. Neither expert examined or treated the Claimant. Rather, both experts relied on medical records when formulating their opinions. While equal in these respects, Dr. Levine's background and experience as an otolaryngologist and neurologist lend considerably more weight to his opinion that the Claimant did not suffer a compensable hearing loss.
6. Dr. Levine's opinion is also supported by sound methodology. First, Dr. Levine's report is founded on a comparison of all of the Claimant's audiograms. By contrast, Ms. Rooney focused on just two exams, thereby failing to notice the range of hearing loss experienced over two decades. Second, Dr. Levine used the more reliable standard for determining hearing loss. Ms. Rooney, on the other hand, used a method more suited to detecting shifts in hearing rather than substantial hearing loss.
7. The facts also support Dr. Levine's opinion that the Claimant's hearing loss was not caused within the single year of driving the van. The Claimant's noise induced hearing loss was first documented in 1985. Since that time, he has had a history of exposure to loud noise levels while performing other occupational and recreational activities. Similarly, every valid audiogram over this twenty-year period has documented a pattern consistent with noise related hearing loss.
8. Furthermore, the Claimant never mentioned this noise to his supervisor or any other employee, and has failed to show more than an intermittent exposure to low or moderate levels of noise.

ORDER:

THEREFORE, based on the above Findings of Fact and Conclusions of Law, the Claimant has failed to meet the burden of proof, and the Claimant's claim is **DENIED**.

Dated at Montpelier, Vermont this 2nd day of January 2007.

Patricia Moulton Powden
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.