

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
TALLAHASSEE DISTRICT OFFICE

Tonnie Rollins,
Employee/Claimant,

OJCC Case No. 18-011649JLN

vs.

Accident date: 4/6/2018

City of Tallahassee Fire Department/City
of Tallahassee,
Employer/Carrier/Servicing Agent.

Judge: Jacquelyn L. Newman

FINAL COMPENSATION ORDER

THIS CAUSE came before the undersigned Judge of Compensation Claims for final hearing in Tallahassee, Leon County, Florida on June 21, 2019 on the Petitions for Benefits filed on May 14, 2018 and October 22, 2018. Kristine Callagy, Esquire, appeared on behalf of the Employee/Claimant, Tonnie Rollins, who appeared live at the final hearing and testified. Christopher J. DuBois, Esquire, appeared on behalf of the Employer/Carrier, the City of Tallahassee. Corlis Hill, Workers' Compensation Examiner for the City of Tallahassee, also appeared live at the final hearing and testified on behalf of the Employer/Carrier.

At the hearing, the following claims were made:

1. Authorization of medical care with an ENT, audiologist, or other physician to treat hearing loss;
2. Compensability of hearing loss;
3. Payment of impairment benefits from 10-19-18 to the present and continuing based on the impairment rating of 13% assigned by the Claimant's independent medical examiner (IME);
4. Authorization and payment of hearing aids as prescribed by IME; and
5. Penalties, interest, costs and attorney's fees.

The claims were defended on the following grounds:

1. Alleged hearing loss unrelated to any work exposure at Tallahassee Fire Department;
2. No medical necessity or causation;
3. Alleged impairment rating unrelated to any work incident/exposure;
4. Major contributing cause defense; and
5. No penalties, interest, costs or attorney's fees due at the expense of the Employer/Carrier.

The following documents were admitted into evidence:

Judge's Exhibits:

1. Petition for Benefits filed May 14, 2018 (DN 1);
2. Response to Petition for Benefits filed May 23, 2018 (DN 5);
3. Uniform Statewide Pretrial Stipulation filed September 25, 2018 (DN 28);
4. Petition for Benefits filed October 22, 2018 (DN 29);
5. Response to Petition for Benefits filed November 19, 2018 (DN 31);
6. Uniform Statewide Pretrial Stipulation filed February 25, 2019 (DN 60);
7. Claimant's Trial Memorandum filed November 30, 2018 (argument only) (DN 40);
8. Claimant's Supplemental Trial Memorandum filed June 18, 2019 (argument only) (DN 73);
9. Employer/Carrier's Trial Memorandum filed December 4, 2018 (argument only) (DN 47);
10. Employer/Carrier's Updated Trial Memorandum filed June 19, 2019 (argument only) (DN 75);
11. Order Appointing Expert Medical Advisor dated January 4, 2019 (DN 50); and
12. EMA Report dated April 1, 2019 (DN 64).

Joint Exhibit:

1. Deposition of Dr. Charles C. Greene, with exhibits, taken on June 6, 2019 (DN 77).

Claimant's Exhibits:

1. Deposition of Dr. Robert Contrucci, with exhibits, taken on November 13, 2018 (DN 36); and
2. Deposition of Corlis Hill, with exhibits, taken on October 23, 2018 (DN 39).

Employer/Carrier's Exhibits:

1. Deposition of Dr. Brian Szwarc, with exhibits, taken on November 6, 2018 (DN 42).

The parties entered into the following stipulation at hearing:

The parties stipulate and agree that Dr. Szwarc assigned a 0% impairment rating for the Claimant's hearing loss pursuant to the Florida Impairment Guidelines.

Findings of Fact and Conclusions of Law:

In making my findings of fact and conclusions of law, I have reviewed and considered all of the evidence presented, including the testimony of the witnesses. Although I have not attempted to summarize the substance of the testimony of any live or deposition witness, or list all of the facts of this case, I have considered all of the evidence presented and have attempted to resolve all conflicts in the evidence. After hearing argument of counsel and having considered the applicable law cited herein, I find as follows:

1. The Office of the Judge of Compensation Claims has jurisdiction over the parties and the subject matter of this claim.
2. The stipulations agreed to by the parties in the Uniform Statewide Pretrial Stipulations filed September 25, 2018 and February 25, 2019 are accepted and adopted.
3. Any claims that were ripe for adjudication at the time of this hearing but were not

pursued by either party (even where no evidence was produced and no ruling was made) will be presumed resolved and the issues waived. Betancourt v. Sears Roebuck & Co., 693 So.2d 253 (Fla. 1st DCA 1997).

4. The Claimant, Tonnie Rollins, a Fire Captain and firefighter employed with the City of Tallahassee Fire Department (the “Employer” in this case), was first hired to work in a full-time firefighter position on November 4, 1991. The Claimant worked with the Employer in its firefighter “reserve” program for approximately three years before he was hired. The Claimant testified that his Employer did not provide hearing protection to use in connection with his work as a firefighter until approximately 1996. The Claimant first noted problems with hearing loss approximately 10 years ago when he experienced difficulty hearing phone calls and listening to the television. He testified that yearly physical examinations also began to show a chronic hearing loss.

5. The Claimant testified that he is currently assigned to the Adams Street Fire Station number one (1) and has worked there “off and on” for the last 15 years. The Claimant estimated that at his station the sirens go off approximately 30 to 50 times per shift. He also estimated that he spends approximately 40% of each shift in the firetrucks with the sirens on. He is also required to wear a radio/“walkie-talkie” on his uniform while on duty, which he wears on his left side. He spends approximately 60% of each work shift near the fire truck engine while it is running. The Claimant alleges that he struggles to hear people speaking to him and to hear others on the telephone talking to him.

6. The Claimant first notified his Employer of his claim of work-related hearing loss on April 6, 2018. A Petition for Benefits was later filed on May 14, 2018 alleging that he developed

hearing loss over the course of his career as a certified firefighter. In response to the Claimant's May 14, 2018 Petition for Benefits, the Employer/Carrier invoked the 120-day pay and investigate provision of the statute and scheduled the Claimant an appointment with Dr. Brian Szwarc, a board certified otolaryngologist (or ear, nose and throat specialist (ENT)), for June 18, 2018.

7. Dr. Szwarc was deposed in this case on November 6, 2018 and testified that he evaluated the Claimant on June 18, 2018 for complaints of hearing loss. The Claimant was also evaluated by Dr. John Koonz, an audiologist, for hearing tests and preparation of an audiogram (a chart of the hearing test involving tones, levels, and speech recognition). The Claimant's audiogram showed that the ear canals looked good, the pressures in the ears were normal, and a type A tympanogram was normal. The testing showed mild hearing loss. The Claimant also reported to Dr. Szwarc a complaint of mild tinnitus. Dr. Szwarc testified that the Claimant had a mild amount of hearing loss on both sides, but that his clarity of speech was quite good with a little bit of volume. Dr. Szwarc's overall assessment was that the Claimant demonstrated low to normal hearing and that he was in need of hearing amplification devices. Dr. Szwarc reported that the Claimant's hearing loss was consistent with age changes and some noise exposure. Dr. Szwarc opined that the major contributing cause of the Claimant's hearing loss was more likely than not as a result of the natural aging process as opposed to any exposure in the workplace. The parties stipulated that Dr. Szwarc was of the opinion that the Claimant's permanent impairment rating for his hearing loss is a 0% rating per the Florida Impairment Guidelines.

8. Based on the Claimant's evaluation with Dr. Szwarc, the Employer/Carrier denied the hearing loss claim, asserting that there was no accident within the course and scope of the

Claimant's employment and that the alleged hearing loss was unrelated to his employment.

9. On October 9, 2018, the Claimant obtained an IME with Dr. Robert Contrucci, a board certified otolaryngologist, head and neck surgeon. Dr. Contrucci was deposed in this case on November 13, 2018 and testified that the Claimant complained of a progressive hearing loss and tinnitus in his ears, including having problems at work and socially understanding speech. Dr. Contrucci reported that hearing tests performed in his office showed sensorineural hearing loss in a similar pattern from his previous testing. The Claimant's ear pressure was good and his ability to understand word recognition was fairly good. Dr. Contrucci noted that the Claimant's hearing was just down from the normal operating ranges. Dr. Contrucci diagnosed the Claimant with sensorineural, or nerve-related, bilateral hearing loss. Dr. Contrucci recommended amplification devices to improve his hearing and quality of life and to mask or lesson his tinnitus. Dr. Contrucci opined that the major contributing cause of the Claimant's hearing loss was his occupation as a firefighter. He assessed the Claimant to be at maximum medical improvement (MMI) as of October 9, 2018 with a 13% total body impairment rating. Dr. Contrucci recommended hearing aids to improve the Claimant's hearing and tinnitus symptoms and repeat hearing tests every 12 to 18 months.

10. Following the depositions of these physicians, the Employer/Carrier filed a Motion to Appoint Expert Medical Advisor (EMA), pursuant to section 440.13(9)(c), Florida Statutes, asserting that the employee should be evaluated by an EMA given the disagreement in the opinions of the health care providers. The undersigned granted the motion by Order dated December 5, 2018, finding that there was a disagreement between the opinions of Dr. Szwarc and Dr. Contrucci as to whether the Claimant's employment was the major contributing cause of

his hearing loss and, if so, his permanent impairment rating. On January 4, 2019, Dr. Charles C. Greene, a board certified otolaryngology head and neck surgeon, was appointed to be the EMA in this case.

11. Dr. Greene first evaluated the Claimant on February 28, 2019 for chief complaints of hearing loss and tinnitus. The Claimant later had a hearing test with tinnitus masking assessment on March 12, 2019 and returned to discuss his test results on March 28, 2019. Dr. Greene was deposed on June 6, 2019 and testified that he performed both a physical examination of the Claimant and a records review as part of his EMA evaluation. The Claimant's physical examination was essentially normal with no obstruction of his ear canal, no evidence of middle ear fluid, and a normal, bilateral healthy tympanic membrane. The Claimant's hearing test indicated that the Claimant has asymmetric high frequency hearing loss with tinnitus. Dr. Greene pointed out that the medical records from the Claimant's two prior physicians showed different test results. Dr. Greene testified that the test results were the likely result of the Claimant giving different responses on the different test days, but he did not believe the Claimant was malingering or magnifying his hearing loss when he saw him.

12. Dr. Greene diagnosed the Claimant with high frequency hearing loss and tinnitus that would benefit from use of a tinnitus masking device — or special type of hearing aid — and repeat hearing tests once a year to follow his hearing loss. Dr. Greene opined that the Claimant's hearing loss does not prevent him from working but that the tinnitus does impact his quality of life. Dr. Greene testified that the Claimant would be at MMI once he obtains the tinnitus masking device. It was Dr. Greene's opinion that the major contributing cause of the Claimant's hearing loss and tinnitus is loud noise exposure at work as a firefighter. Dr. Greene explained

that it was his experience that workers in the firefighting industry frequently experience loud exposures that exceed 90 decibels for an extended period of time which can cause damage to hearing nerve cells. He further testified that it is very common that firefighters develop high frequency hearing loss as a result of their work in a loud noise environment.

13. The Claimant seeks a determination as to compensability of his hearing loss. The Employer/Carrier has denied compensability of the alleged hearing loss arguing it is unrelated to any work exposure at Tallahassee Fire Department. Dr. Greene was appointed to be the expert medical advisor with regard to the controversy in the medical evidence regarding causation of the Claimant's hearing loss. "The opinion of the expert medical advisor is presumed to be correct unless there is clear and convincing evidence to the contrary as determined by the judge of compensation claims." § 440.13(9)(c), Fla. Stat. (2018). In this case, I accept Dr. Greene's opinion that the major contributing cause of the Claimant's hearing loss and tinnitus is loud noise exposure at work as a firefighter and I conclude from my review of the evidence in this case that there is no "clear and convincing evidence to the contrary."

14. As the EMA, Dr. Greene was asked to address whether the Claimant's employment was the major contributing cause of his hearing loss. After an examination of the Claimant, including a formal hearing test, and review of the medical records of both Dr. Szwarc and Dr. Contrucci, Dr. Greene determined that the major contributing cause of the Claimant's hearing loss and tinnitus is loud noise exposure at work as a firefighter. All three physicians concluded that the Claimant was experiencing some amount of hearing loss and that hearing amplification devices were needed. Dr. Szwarc, the only physician in this case who presented a conflicting opinion on the issue of causation, testified that the Claimant's hearing loss was consistent with

both age changes *and* noise exposure. Although Dr. Szwarc concluded that the major contributing cause of the Claimant's hearing loss was more likely than not the natural aging process, I do not find his testimony to be "clear and convincing evidence" to rebut the causation opinion of Dr. Greene, who carefully considered the opinions of the other physicians, along with his examination findings, to come to his opinion on causation.

15. The Employer/Carrier challenges Dr. Greene's opinion on causation on the basis that he did not address the specific amount and duration of noise, or specific decibel levels of noise, that the Claimant may have been exposed to while working as a firefighter for the Employer. The Employer/Carrier cites to section 440.02(1), Florida Statutes, which provides that,

An injury or disease caused by exposure to a toxic substance, including, but not limited to, fungus or mold, is not an injury by accident arising out of the employment unless there is clear and convincing evidence establishing that exposure to the specific substance involved, at the levels to which the employee was exposed, can cause the injury or disease sustained by the employee.

§ 440.02(1), Fla. Stat. (2018) (emphasis added). This statute does not apply here, however, because noise is not a toxic substance. I cannot find, and the Employer/Carrier has not presented, any support for its position that the more stringent statutory burden of proof for cases involving "a toxic substance," requiring evidence as to the levels of the specific substance involved, should be applied to a noise exposure claim.

16. Section 440.09(1), Florida Statutes, addresses cases involving repetitive exposure and provides that "both causation and sufficient exposure to support causation must be proven by clear and convincing evidence." § 440.09(1), Fla. Stat. (2018). Here, based on the opinions of the EMA and the Claimant's testimony regarding the nature of the noise to which he was

exposed during his work shifts over many years, I find that both causation and sufficient noise exposure were established by clear and convincing evidence to support the Claimant's compensable claim of hearing loss under section 440.09(1), Florida Statutes.

17. I also reject the Employer/Carrier's contention that the Claimant's complaints of hearing loss and tinnitus to the various physicians were substantially different and demonstrated an attempt by the Claimant to deceive those physicians. Although Dr. Greene reported that the hearing tests performed by the Claimant's two prior physicians showed different test results than those conducted in his office, he testified that there were multiple possible reasons for the different test results and that he did not think the Claimant was magnifying his symptoms when he evaluated him. Although the Employer/Carrier argued at hearing that the Claimant failed to initially report problems with tinnitus, the medical evidence demonstrates that the Claimant did complain of tinnitus to Dr. Szwarc when he was first evaluated following his notice of injury. I find the Claimant's testimony as to his complaints of tinnitus and hearing loss to be credible.

18. The Claimant also seeks authorization of medical care with a physician to treat his hearing loss and authorization and payment of hearing aids. The Employer/Carrier has defended these claims by asserting that there is no medical necessity for the treatment requested. The medical evidence presented in this case establishes, however, that the Claimant has experienced high frequency hearing loss and tinnitus that would benefit from use of a tinnitus masking device — or special type of hearing aid — and repeat hearing tests once a year to evaluate his hearing loss. The testimony of all three physicians supports this conclusion. Accordingly, I find it is medically necessary for the Employer/Carrier to authorize a physician to treat the Claimant's hearing loss and to authorize and pay for the recommended hearing aids.

19. The Claimant also seeks payment of impairment benefits based on an impairment rating of 13% as opined by his IME physician, Dr. Contrucci. At hearing, the Claimant acknowledged that Dr. Greene, the EMA, opined that the Claimant has a 1.9% impairment rating for his right ear and, therefore, requested impairment benefits based on that 1.9% rating. Dr. Greene's EMA report, however, establishes that, when converting the rating for his right ear to an impairment of the whole person using the 1996 Florida Uniform Permanent Impairment Rating Schedule, the Claimant has a 0% rating for the total body. The opinion of the EMA is presumed to be correct unless there is clear and convincing evidence to the contrary. In this case, I accept Dr. Greene's opinion that the Claimant has a 0% impairment rating to the body as a whole. His opinion in this regard is supported by the record evidence, is consistent with logic and reason, and I find no "clear and convincing evidence to the contrary." Accordingly, no permanent impairment benefits are payable to the Claimant as a result of his compensable hearing loss.

WHEREFORE, it is **ORDERED and ADJUDGED** that:

1. The claim for compensability of the Claimant's hearing loss is **GRANTED**;
2. The claim for authorization of medical care with an ENT, audiologist, or other physician to treat the Claimant's hearing loss is **GRANTED**;
3. The claim for authorization and payment of hearing aids is **GRANTED**;
4. The claim for payment of permanent impairment benefits related to the Claimant's hearing loss is **DENIED**;
5. The claim for costs and attorney's fees is **GRANTED** with respect to the award of compensability and medical care herein;
6. Jurisdiction is reserved to determine the amount of the fees and costs due if the parties are unable to agree.

DONE AND SERVED this 18th day of July, 2019, in Tallahassee, Leon County,

Florida.



Jacquelyn L. Newman
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