

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1619/03

[1] This appeal was heard in Toronto on September 4, 2003, by Tribunal Vice-Chair B.L. Cook.

THE APPEAL PROCEEDINGS

[2] The worker appeals a decision of Appeals Resolution Officer Rema Nestereiczcyk, dated September 3, 2002. That decision concluded that the worker was not entitled to benefits for hearing loss or tinnitus.

[3] The worker appeared and was represented by Gerry LeBlanc from the United Steelworkers' of America Injured Workers Program. Merv King from the same organization attended as an observer. A co-worker of the worker was present as a witness. The employer is no longer in business.

THE RECORD

[4] The Case Record, two Addenda and a hearing ready letter were marked as exhibits.

[5] Oral evidence was heard from the worker. Mr. LeBlanc made submissions.

THE ISSUES

[6] The worker is now 62 years of age. He worked in hazardous noise for many years. He has a bilateral sensorineural hearing loss, which is asymmetrical. The hearing loss on the left is worse than on the right. The worker suffers from tinnitus in his left ear as well. The Board has denied the worker's claim for benefits because the hearing loss in the right ear is below the level required for entitlement under the Board's policy. The policy regarding tinnitus requires that a worker have an accepted claim for hearing loss before entitlement to benefits for tinnitus can be granted. The issues in this case are:

1. Is the worker entitled to benefits for his hearing loss?
2. Is the worker entitled to benefits for tinnitus?

THE REASONS

(i) Background

[7] The employer manufactured glass. The worker started his employment with the employer in 1970, at age 28. He had previously lived in Italy, where he was born. He testified that he worked as fisherman in Italy and participated in mandatory service in the armed forces as a seaman in the Navy. He testified that he was not exposed to loud noise in these pursuits. He has never fired a gun and has not been around weapons. He recalled that he had chicken pox as a

child but could not recall any other significant childhood illnesses. His mother died of cancer at age 56 and did not have any hearing problems. His father had some hearing loss in his old age. Apart from his grandfather, he is not aware that anyone in his immediate family has any hearing problems.

[8] When the worker started his employment with the employer he worked as a “pick off man”. He worked on a line as a packer and handler of glass. In this process, pieces of waste or damaged glass were sorted into large metal bins or through metal chutes. The noise of breaking glass was quite intense. As Mr. LeBlanc emphasized, in addition to the ambient noise of the factory, the breaking glass resounding against the metal bins and chutes resulted in “impact noise”.

[9] The worker testified that after a few years as a pick off man he worked as a driver. He mostly drove two types of vehicles, one was called a pack truck and the other a squeeze truck. Both of these were used to transport pieces of glass around the factory. Both were propane powered. The worker testified that both were driven in reverse, with the load in the front. He indicated that as a result, he would hold the steering wheel with one hand and turn his head to see where he was going. While doing this, his head was directly above the motor and the noisy exhaust system.

[10] The worker testified that he did this job until he was laid off in 2000 when the plant was closed. He was often assigned to other work duties on the lines when there was no driving to be done. Information provided by the employer to the Board indicates that the worker had various job titles after 1973, including labourer, glass handler and driver. However, the worker testified that this information is not correct. Although he did the various jobs indicated, he did them on an as needed basis and that he was mostly a driver.

[11] The same information from the employer confirms that all of the jobs where the worker worked throughout his employment had noise levels of between 85 dB and 95 dB. The information indicates that the driver position was the noisiest, with levels of 95 dB.

[12] For the first many years of his employment, the worker was not provided with hearing protection. In his testimony, the worker could not recall when he first started to use hearing protection, but he thought that protection was introduced in about the mid-1980s.

[13] The worker testified that he worked a great deal of overtime, and often worked double shifts. He notes that as a result, he had even more noise exposure than someone who worked only eight hours a day.

[14] The worker was asked if he could think of reasons why his hearing loss is so much worse on the left side than it is on the right. He related the difference between the ears mostly to driving the vehicles. Since he had to drive backwards with one hand on the steering wheel, he was always driving with one ear directed to the rear of the vehicle where the greater noise came from. He indicated that he usually had his right hand on the steering wheel, so his left ear had more noise exposure. However, he agreed that he also drove with his left hand on the steering wheel, depending on which direction he was traveling. The worker indicated that certain positions on the glass lines resulted in greater noise exposure in one ear than the other. For

example, when at a position next to one of the bins, the noise was obviously greater in the ear that was closest to the bin. However, the worker agreed that he worked at all of the various positions so that sometimes his left ear would be closer to the noise and sometimes his right ear would be closer to the noise.

[15] Another factor that the worker thought might be relevant is an injury that occurred at work in 1980. The worker testified that he was in the process of moving a stack of large 6 mil pieces of glass. He estimated that each plate of glass weighed approximately 200 pounds. The panes of glass were stacked vertically. The worker did not notice that the outside plate was cracked. The plate broke and half of the plate of glass fell on him. Fortunately, he was wearing his hard hat. The worker noted that if had not been wearing his hard hat he might well not have survived the injury. This was in fact later recognized by safety officials, and he received a certificate to this effect (part of a safety awareness campaign referred to as the Gold Helmet program). The plate of glass knocked the safety hat off the worker's head. The glass then fell onto his arm resulting in a severe laceration. The arm injury was quite serious and required multiple stitches. The worker testified that he does not recall any lingering effects from the head injury. He believes that he might have lost consciousness for a second, but he may just have been in shock. He does not recall any headache or concussion symptoms. Of course, the main concern at the time was the arm injury. The worker does recall that the blow to the head was to the left side of his head.

[16] A claim was established for this injury but there are apparently no documents in the claim. It was allowed as a no lost time injury.

[17] The worker testified that he began to notice significant problems with his hearing in around the late 1980's. The problem was particularly noticeable on the left.

[18] The worker testified that he has suffered from tinnitus for several years. He has tinnitus only in his left ear. He described it as a whistling noise. The noise is always present but is particularly bothersome at night when he is trying to get to sleep. The noise sometimes prevents him from getting to sleep. He sometimes uses medications to help him get to sleep, including "an extra glass of wine." The worker indicated that the tinnitus is in some ways more of a problem for him than the hearing loss.

(ii) The medical evidence

[19] The Case Record includes a large number of audiograms taken over the years. Some of the testing was done at the factory. Many of the tests were done at the Scarborough General Hospital Audiology Clinic. The worker indicated that on many occasions, he was sent for audiometric testing during the working day, after he had been working in noise. As Mr. LeBlanc noted, this could result in an audiogram that was not completely reliable.

[20] Audiograms chart a person's hearing loss at different frequencies. The person being tested indicates the decibel level at which he/she can hear a sound at the different frequencies tested. If the audiogram indicates 20 dB at 500 Hz, for example, this means that the person cannot hear a sound at 500 Hz (a low sound) below 20 dB. As noted in the Tribunal Discussion Papers included with the case materials, an audiogram with someone with noise induced hearing loss typically shows a "notch" at about the 4000 kHz range.

[21] The Board determines the level of a worker's hearing loss by calculating the average loss at 500, 1000, 2000 and 3000 Hz.

[22] The earliest audiogram in the record is dated March 26, 1971. This was within a year of when the worker started to work for the employer. This audiogram was done at the Scarborough General Hospital. This audiogram showed that the worker had mild hearing loss in both ears. When the average loss at 500, 1000, 2000 and 3000 Hz was calculated (as required by the Board's policy) the worker had a loss of 11 dB in the right ear and 15 dB in the left. The loss in the left ear was significantly worse at 4000 Cycles per second as compared with the right. In other words, as early as 1971, it appears that the worker had some hearing loss and that the loss was not symmetrical, as it was worse on the left. An audiogram done in May 1972 indicated that the worker had a significant loss in both ears with quite a profound loss at the 4000 kHz level in the left ear. When calculated under the Board's method, the hearing loss was 5 in the right ear and 28 in the left ear (these are approximate since hearing at 3000 kHz was not tested).

[23] A 1979 audiogram indicated a bilateral hearing loss that was relatively symmetrical, and only a little worse on the left than the right. When calculated under the Board's approach, the hearing loss was 13 on the right and 16 on the left.

[24] A July 1986 audiogram indicated a similar shape to the audiogram for both ears. The loss on the left was 22.5 and 11 on the right, when calculated under the Board's approach. The same audiogram indicates that the worker was complaining of "a slight noise in right ear (buzzing)."

[25] A July 1990 audiogram again indicated an audiogram with a similar shape for both ears. When calculated under the Board's approach the loss was 21 on the right and 34 on the left.

[26] A July 14, 1995 audiogram indicates that the worker had a loss of 16.25 on the right and 38.75 on the left.

[27] An audiogram done in January 1999 indicated that the worker had a loss of 16.25 dB in the right ear and 47.5 in the left, when calculated under the Board's approach.

[28] In January 2000, the worker was referred to the Toronto General Hospital for assessment of his hearing. Dr. John Rutka, an otolaryngologist, and clinical fellows working with Dr. Rutka, assessed him.

[29] At the time of the January 2000 assessment, an audiogram was done which showed "a high frequency sensorineural hearing loss in both ears." However, there was "a slight asymmetry between the right and the left, with the left being slightly worse than the right." The worker was referred for an MRI scan "to rule out any retrocochlear pathology." It was noted, however, that his hearing loss "would be in keeping with a noise induced loss."

[30] The MRI scan was reported to be normal. A second audiogram was done on February 15, 2000. In a February 28, 2000 report, Dr. Rutka commented:

[The worker] was able to provide me with copies of previous audiograms that had been performed at his place of work over the past three decades. His audiogram of March 26, 1971 of interest demonstrates the presence of a significant asymmetry to left

sided hearing even then. For the most part repeat audiometric testing has demonstrated this asymmetry to be present. To the best of [the worker's] knowledge he did not have an audiogram prior to his employment.

[The worker] is an individual who has been identified to have a bilateral sensorineural hearing loss (worse in the left ear) this asymmetry has been present at least since 1971. If [the worker] was exposed to loud noise potentially injurious to hearing and did not wear protection then I think it reasonable to assume that the majority of his hearing loss is probably occupationally related. In general although occupational noise typically causes a bilateral symmetric sensorineural hearing loss [the worker's] MRI scan was within normal limits and this would exclude the remote possibility of his having an acoustic neuroma accounting for this loss. [The worker] informed me that when he initially began working in the glass factory he was exposed to more impact type noise.

[31] When calculated using the Board's approach, the January 2000 audiogram indicated that the worker's hearing loss was 27.5 on the right and 55 on the left. However, the February 2000 audiogram indicated that the worker's hearing loss was 14 on the right and 44 on the left. Since it is not likely that any noise induced hearing loss would improve so significantly, it must be assumed that the February 2000 audiogram better reflects the worker's actual hearing loss. The audiograms that were done in 2000 were not done immediately after the worker had been exposed to noise.

[32] In a June 5, 2001 report, Dr. Rutka commented on the worker's tinnitus in the following terms:

As you are aware [the worker] has been aware of a bilateral hearing loss for some time. Over the past 3 – 4 years he claims to have a persistent constant left sided tinnitus (unwanted head noise) which is described as a whistling sensation. This noise has affected his well being and his ability to sleep at night.

If [the worker's] hearing loss is considered occupational in nature then it would be reasonable to assume the tinnitus he experiences could be due to this as well.

(iii) Board policies

[33] Pursuant to section 126 of the *Workplace Safety and Insurance Act*, the Board has forwarded *Operational Policy Document # 04-03-10* (Noise-Induced Hearing Loss, On/After January 2, 1990), dated January 26, 1993. This policy notes that a different policy applies in claims with an "accident date" that is before January 2, 1990. "Accident date" is defined as:

The earlier of 1) the date of the claim, or 2) the date of documented evidence for the hearing loss.

[34] If the accident date is before January 2, 1990, the policy provides that entitlement is to be determined pursuant to an earlier policy on noise induced hearing loss. That policy is *Operational Policy Document # 04-03-06*.

[35] A difference between the two policies is how each deals with asymmetrical hearing loss. The later policy provides:

Entitlement to health care and rehabilitation benefits begins with a hearing loss of 22.5 dB in each ear when the hearing loss in the 4 speech frequencies (500, 1000, 2000 and 3000 Hertz) are averaged.

[36] Under the later policy it is thus necessary to have at least a 22.5 dB loss in *each* ear before entitlement to any benefits can be accepted.

[37] The earlier policy provided that in a case of asymmetrical hearing loss, entitlement could be granted:

when the average hearing loss is 35 decibels in at least one ear

BUT

less than 25 decibels in the other,

AND

when the pattern of hearing loss is clearly consistent with occupational noise exposure.

[38] In this case, the audiograms provide documented evidence of a hearing loss prior to January 2, 1990. It therefore appears that the earlier policy applies.

[39] Both policies distinguish between entitlement to health care benefits (e.g. a hearing aide) and entitlement to permanent benefits (a pension or NEL award). Under the later policy, entitlement to health care benefits requires a loss of at least 22.5 in each ear. Under the earlier policy, entitlement to health care benefits may be granted if the loss is at least 35 dB in one ear.

[40] Entitlement to permanent benefits is calculated pursuant to a noise induced hearing loss rating schedule, which is the same for both policies. Under both policies, permanent benefits are not granted unless there is a loss of at least 35 dB in at least one ear.

[41] *Operational Policy Document* Numbers 04-03-07 and 04-03-11 pertain to tinnitus for pre 1990 and post 1990 claims, respectively. Both require “an accepted claim for occupational noise induced hearing loss” and a “clear and adequate history of two or more years of continuous and severe tinnitus.” Except in unusual circumstances, an award for tinnitus will not exceed 2%.

(iv) Conclusions

[42] There is no dispute in this case that the worker was exposed to sufficient noise exposure to cause hearing loss.

[43] He testified that he began to use hearing protection at some time in the mid to late 1980's and this seems consistent with the notes on the audiograms. Hearing protection only reduces the decibel level reaching the ear if used properly. The sound levels provided by the employer indicate that the noise levels associated with driving the trucks was 95 dB. The worker's evidence is that this was the job that he primarily did for most of his career with the employer.

[44] Dr. Rutka's opinion is that the worker's hearing loss is consistent with occupational noise exposure. Other possible causes of hearing loss have been investigated. No other cause is apparent from the worker's history, and the MRI scan revealed no abnormality that might explain the worker's hearing loss.

[45] Dr. Rutka reported that the worker's hearing loss in February 2000 was 14 in the right ear and 44 on the left, when calculated under the Board's formula for determining hearing loss. He

notes that the January 2000 audiogram suggested a greater hearing loss, but feels that the February 2000 audiogram must be considered to be more accurate.

[46] Under the pre-1990 policy, and based on Dr. Rutka's February 2000 findings, the worker would be entitled to health care benefits and a pension of 1%.

[47] The audiograms suggest that the worker's hearing loss exceeded 35 dB in approximately July 1995 when the loss was 16.25 on the right and 38.75 on the left. Those levels would result in a permanent disability award of 0.7%.

[48] I conclude that the worker is entitled to a permanent disability award of 0.7%, dating from July 1, 1995. That award is increased to 1% as of February 1, 2000.

[49] I also accept Dr. Rutka's opinion that the worker's tinnitus is probably related to his occupational noise induced hearing loss. There is documented evidence that the worker has been complaining of tinnitus from at least 1995. I conclude that the worker is also entitled to a pension for tinnitus. As noted, tinnitus awards do not usually exceed 2%. Since the worker suffers from tinnitus only in one ear, I conclude that he is entitled to an award of 1% for this condition, with arrears to July 1, 1995.

THE DECISION

[50] The appeal is allowed.

[51] The worker suffers from an occupational, asymmetrical noise induced hearing loss.

[52] The worker is entitled to a pension of 0.7% dating from July 1, 1995. That award is increased to 1.0% as of February 1, 2000.

[53] The worker is also entitled to a 1% award for tinnitus, with arrears to July 1, 1995.

DATED: September 25, 2003.

SIGNED: B.L. Cook.