

McDaniel, Art

OCCUPATIONAL DISEASE (RCW 51.08.140)

Hearing loss

A claim for hearing loss can be allowed without a showing of compensable loss so long as occupational exposure to harmful levels of noise caused a loss of hearing. ...*In re Art McDaniel*, BIA Dec., 03 10546 (2004)

Scroll down for order.

1 Hanford, in addition to the truck noise, Mr. McDaniel was regularly exposed to construction noises,
2 including, welding, jackhammers, and other noises. Mr. McDaniel did not wear hearing protection
3 because he was operating trucks at close proximity to other workers and needed to hear directions
4 in order to ensure everyone's safety.
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7 While working at Hanford, Mr. McDaniel was given hearing tests every other year from 1977
8 until 1989, and then every year thereafter. The claimant's last hearing test was on April 13, 1998,
9 his 65th birthday, which was also the date he retired. None of these tests showed a **compensable**
10 hearing loss. Mr. McDaniel's scores on the April 1998 test were as follows: left ear: 5 dB loss at
11 500 Hz; 15 dB loss at 1 KHz; 25 dB loss at 2 KHz; and 15 dB loss at 3 KHz, for a total of 60 dB total
12 loss, well below the 25 dB (average) threshold for **compensable** loss. The right ear scores were:
13 10 dB loss at 500 Hz; 25 dB loss at 1 KHz; 20 dB loss at 2 KHz; and 20 dB loss at 3 KHz, for a total
14 of 75 dB total loss, again well below the 25 dB (average) threshold for **compensable** loss.
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19 Mr. McDaniel testified that the audiograms were conducted in a room in which up to twelve
20 people were being tested simultaneously. He stated that he found it hard to concentrate during the
21 testing due to the shuffling of paper, moving of chairs, and other background noises. Janet S.
22 Arnold, M.D., the claimant's attending family practice doctor, who acknowledged that she was never
23 present at Hanford when hearing testing was performed, stated that these types of tests had poor
24 validity. John O. Kildow, M.D., a retired surgeon with occupational medicine experience who was
25 employed by the Hanford Environmental Health Foundation, testified that the employer conducted
26 the tests in a four-chair booth with individual headsets. He acknowledged the possibility that the
27 workers being tested could be distracted. Dr. Kildow testified that the machine used for the
28 audiogram was calibrated the day Mr. McDaniel was tested, the test was performed by a certified
29 "technician" (the record is unclear whether that person was an audiologist), and the records at the
30 time of the test indicated Mr. McDaniel had not been exposed to noise within the 14 hours prior to
31 the audiogram.
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38 Mr. McDaniel's testimony indicates that he first noticed he was having hearing problems in
39 the late 1980s or early 1990s. Although he had yearly physicals and hearing tests, he was never
40 told that he had hearing problems. While he remained employed at Hanford, the claimant never
41 sought medical treatment for his hearing loss. After he retired on April 13, 1998, his hearing
42 "started going downhill worse;" he could not hear someone talking in the next room. Mr. McDaniel
43 went to a hearing aid company, Quality Hearing Solutions, had an audiogram performed on
44 October 19, 2001, and filed the application for benefits for occupational hearing loss. It is unclear
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1 by whom, or exactly when Mr. McDaniel was informed that he had hearing loss related to work.
2 Another audiogram was performed in June 2003 at the Columbia Basin Hearing Center. In
3 August 2003, having become disenchanted with the hearing aid company, Mr. McDaniel sought
4 treatment from Dr. Arnold.
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7 According to Dr. Arnold, the June 2003 audiogram revealed moderate to severe
8 sensorineural hearing loss with tinnitus that was "not [in] a classic pattern" for noise induced hearing
9 loss. Nonetheless, Dr. Arnold concluded that the hearing loss quantified by the audiogram was
10 proximately caused by occupational exposures to noise at work. She concluded that he needed a
11 specific type of hearing aid, a V-5252 in ear programmable aid. Dr. Arnold stated that the
12 audiogram revealed a ratable hearing loss equal to 27.25 percent left ear/36.625 percent right ear,
13 for a binaural rating of 28.8125 percent complete loss of hearing. Dr. Kildow testified that both the
14 October 19, 2001 and June 16, 2003 audiograms showed **compensable** loss that "may reflect
15 noise-induced loss" in a pattern that suggested a combination of effects (causes) of the loss.
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20 We recognize that there are questions regarding the validity of the employment audiograms.
21 However, Mr. McDaniel's description of twelve people in a room, all being tested at the same time,
22 was refuted by Dr. Kildow and not supported by first-hand observation by Dr. Arnold. The validity of
23 those audiograms is supported by their consistency over time. They revealed a slow and
24 consistent progression of hearing loss in the claimant, a pattern that is supported by the history of
25 his exposures to injurious noise at work. Dr. Kildow admitted that there was a chance that workers
26 could become distracted by the presence of up to three other workers being tested at the same
27 time. If such distractions caused errors in the test results, those errors should either consist of
28 inconsistent and obviously erroneous results when compared with other audiograms or the
29 recording of higher scores (greater hearing loss) if the distraction caused a failure to acknowledge
30 or report a noise that was in fact heard. It is difficult to imagine how distraction during an
31 audiogram could result in consistent scores suggestive of better hearing than a worker actually has.
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38 In order for Mr. McDaniel's claim for occupational hearing loss to be allowed, he must prove
39 that occupational exposures to noise were a natural and proximate cause of his hearing loss. The
40 claimant's testimony clearly established that he was exposed to an excessively noisy work
41 environment for over four decades. The great weight of medical evidence supports the conclusion
42 that he sustained a hearing loss that was caused **at least in part** by exposures to noise at work,
43 even though the hearing loss had not reached a "compensable" level until it worsened after he
44 retired. Dr. Arnold noted that the 1998 audiogram showed hearing loss that was caused by
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1 exposures to noise at work. Dr. Kildow concurred, testifying that the series of employment
2 audiograms beginning in 1977 "indicates a very perceptible increase in decibel loss over the
3 21 years" the claimant was employed at Hanford, which is to be expected with aging and exposure
4 to industrial noise. Dr. Kildow did not deny the existence of a causal link between noise exposures
5 at work and at least some of the claimant's hearing deficits.
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8 Relying on the April 18, 1998 audiogram and the earlier pre-retirement audiograms, the
9 employer argues that the claim should be rejected because any hearing loss the claimant sustained
10 was not **compensable**. The term "compensable loss" in occupational hearing loss cases refers to
11 hearing impairment that has reached a level at which the worker becomes entitled to a permanent
12 partial disability award. Hearing loss sufficient to require treatment in the form of hearing aids may
13 manifest itself in a worker even though it does not reach the level of a "compensable loss" of
14 hearing. A similar circumstance was presented to us by *In re Robert MacPhail*, BIIA Dec., 89 3689
15 (1991). In that case we accepted a hearing evaluation that showed that the worker had a "minimal"
16 binaural hearing loss, but one that did not reach the threshold to establish a permanent impairment,
17 and directed the Department to allow the claim notwithstanding the lack of any compensable
18 hearing loss. Like our industrial appeal judge, we believe that to be the appropriate disposition of
19 the allowance issue in this case as well.
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22 However, in addition to directing claim allowance, the Proposed Decision and Order also
23 directed the employer to pay a permanent partial disability award based on the scores found in one
24 of the post-retirement audiograms. We believe this direction to be beyond the scope of our review
25 in this appeal. In *MacPhail*, the scope of our review extended to the issue of permanent partial
26 disability only because the Department order that rejected that claim rested on a finding by the
27 Department that "no compensable hearing loss had been sustained." We noted that the inclusion
28 of this language in that order meant that the Department "had an opportunity to, and did in fact,
29 pass on the issue of permanent partial disability." *MacPhail*, at 3. In this case, however, the
30 Department order under appeal rejected the claim merely because "the condition was not the result
31 of the exposure alleged." The Department never considered or ruled upon the issue of permanent
32 partial disability of the hearing loss condition. As indicated in *MacPhail*, the Board's authority is
33 appellate only; it may not pass upon an issue that had not been considered by the Department.
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36 We recognize that not ruling on Mr. McDaniel's entitlement to a specific form of treatment
37 and permanent partial disability may result in further litigation in the future. Even if that were true,
38 such an argument does not justify an extension of the scope of our review beyond that allowed by
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1 law. We also believe it is factually premature, as well as legally premature, for this claim to be
2 closed with or without a permanent partial disability award. Mr. McDaniel has never been evaluated
3 by an otolaryngologist or other physician specializing in hearing loss and/or diseases of the ear.
4 Both Dr. Arnold and Dr. Kildow acknowledge unusual aspects to the claimant's pattern of hearing
5 loss. His hearing loss is worsening dramatically, as recorded by the post-employment audiograms.
6 We do not believe that any of the parties to this claim are served by its premature closure under the
7 circumstances.
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11 **FINDINGS OF FACT**

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13 1. On December 12, 2001, the claimant, Art McDaniel, filed an application
14 for benefits with the Department of Labor and Industries, alleging that he
15 had sustained hearing loss due to exposure to noise arising out of the
16 course of his employment with the Department of Energy/Fluor Hanford
17 on April 15, 1997. On March 10, 2003, the Department issued an order
18 in which the Department rejected Mr. McDaniel's claim on the grounds
19 that his condition was not the result of the exposure alleged. On
20 March 17, 2003, the claimant filed an appeal with the Board of Industrial
21 Insurance Appeals from the March 10, 2003 order. On March 27, 2003,
22 the Board issued an order granting the appeal, assigning it Docket
23 No. 03 10546, and directing that proceedings be held.
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- 25 2. For approximately 32 years, Art McDaniel worked for Fluor Hanford and
26 its predecessors as a truck driver, retiring in April 1998. During his
27 32 years of employment at Hanford, Mr. McDaniel was exposed to loud
28 noises from numerous sources, including diesel engines, heavy
29 equipment, jackhammers, and air compressors. Mr. McDaniel never
30 wore any type of hearing protection during his 32 years of employment
31 at Hanford.
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- 33 3. As of March 10, 2003, Mr. McDaniel suffered from bilateral hearing loss
34 that was naturally and proximately caused, at least in part, by his
35 exposure to injurious levels of noise arising out of his employment with
36 Fluor Hanford and its predecessors. This condition required medical
37 diagnostic testing and treatment.
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39 **CONCLUSIONS OF LAW**

- 40 1. The Board of Industrial Insurance Appeals has jurisdiction over the
41 parties to and the subject matter of this appeal.
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- 43 2. Art McDaniel's bilateral hearing loss constitutes an occupational disease
44 within the meaning of RCW 51.08.140.
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3. The order of the Department of Labor and Industries dated March 10, 2003, is incorrect and is reversed. The claim is remanded to the Department to issue an order directing the self-insured employer to allow the claim as an occupational disease and to provide benefits as indicated by the facts and the law.

It is so **ORDERED**.

Dated this 15th day of June, 2004.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
THOMAS E. EGAN Chairperson

/s/ _____
FRANK E. FENNERTY, JR. Member

/s/ _____
CALHOUN DICKINSON Member