

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MICHAEL HADYKA,)
)
 Claimant,)
)
 v.)
)
 SKYWEST AIRLINES,)
)
 Employer,)
)
 and)
)
 INDEMNITY INSURANCE COMPANY)
 OF NA,)
)
 Surety,)
)
 Defendants.)
 _____)

IC 2010-031704

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

Filed February 8, 2012

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Boise on September 28, 2011. Claimant represented himself and appeared by telephone from Tucson, Arizona. R. Daniel Bowen and Nathan Gamel of Boise represented Employer/Surety. Oral and documentary evidence was presented. There were no post-hearing depositions, but post-hearing briefs were submitted. This matter came under advisement on December 9, 2011.

ISSUES

By agreement of the parties, the issues to be decided are:

1. Whether Claimant complied with the notice requirements set forth in Idaho Code § 72-448; and, if so

2. Whether Claimant has incurred a compensable occupational disease.

CONTENTIONS OF THE PARTIES

Claimant contends that he suffered a hearing loss resulting from many years as a station manager for Employer airline. Over the years, he spent about half of his time outside near aircraft jet engine noise, which is a proven cause of hearing loss. Claimant maintains that he gave Employer notice of his alleged occupational disease as soon as he was informed by his physician that his hearing loss was work-related.

Defendants contend that even if Claimant has incurred an occupational disease, which they deny, he failed to inform Employer in a timely manner of his alleged disease. Claimant has known for years that he has a hearing loss, and even purchased hearing aids some seven years before he notified Employer. Certainly Claimant should have suspected a relationship between his exposure to jet engine noise long before his alleged actual notice in that he was provided with, and wore, hearing protection devices long before he notified Employer. Finally, even if it is established that timely notice was given, Claimant has failed to provide the required medical nexus between his job duties and his hearing loss.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Testimony of Claimant, adduced at the hearing.
2. Claimant's Exhibits A-K, admitted at the hearing.
3. Defendants' Exhibits 1-9, admitted at the hearing.

After having considered all the above evidence and briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was 63 years of age and resided in Tucson, Arizona, at the time of the hearing. Claimant began his career with Employer as a ticket agent in Pocatello in 1984 and retired as the station manager in Boise in 2011.

2. During the course of Claimant's 20-plus year employment, he was exposed to jet engine noise about 50% of his workday. Some of the jet engine noise exposure involved auxiliary power units, a smaller jet engine located generally in the back of the plane near the cargo hold where baggage was stored during the flight. He would be subjected to the noise from this engine while loading/unloading baggage on the occasions when he would help other rampers.

3. Claimant began experiencing documented hearing difficulties by at least 2003. Claimant saw his family physician, Stephen Spencer, M.D., on July 30, 2003 because ". . . his wife nags at him to have his hearing tested." Defendants' Exhibit 3, p. 3. Dr. Spencer suggested that Claimant set up an appointment with Dean Harmer, Ph.D., an audiologist, for a hearing evaluation.

4. On August 14, 2003, Dr. Harmer wrote to Dr. Spencer that Claimant has had difficulty with hearing over the past ten years and had a history of exposure to loud noises both on and off the job. Claimant testified that he told Dr. Harmer about his job exposing him to jet engine noise, and also told him of hunting and target shooting in 1999 or 2000. Dr. Harmer diagnosed moderate, bilateral sensorineural hearing loss with expected good benefit from hearing aids. Claimant purchased a hearing aid for his right ear as a result of this visit.

5. Claimant testified that in 2004 or 2005, Employer expressed concern about Claimant's hearing in a performance evaluation and suggested that he take steps to improve it. As a result, Claimant purchased his second right ear hearing aid in December 2006.

6. On November 9, 2010, Claimant presented to audiologist Spencer Cheshire, Au.D, for another evaluation. Dr. Cheshire noted that Claimant had been suffering from hearing loss for "many years." Dr. Cheshire found Claimant's hearing loss to be mildly to moderately severe. Arthur C. Jones, III, M.D., of the same clinic, indicated that the duration of Claimant's hearing loss was "years" and the setting in which it first occurred was "none identified." Also, "associated manifestations" was "none identified." Defendants' Exhibit 2, p. 7. Dr. Jones indicated that Claimant's hearing loss was likely due to exposure to loud noises and Claimant should wear hearing protection devices around those noises such as target shooting and moderate noises such as lawn mowers, weed eaters, power saws or any other continuous noise exposure. Dr. Jones rated Claimant's hearing loss at 17% of the whole person.

7. Claimant did not suffer an "accident" as that term is statutorily defined.

DISCUSSION AND FURTHER FINDINGS

Idaho Code § 72-448 provides in pertinent part:

Notice and limitations. – (1) Unless **written notice** of the manifestation of an occupational disease is given to the employer **within sixty (60) days after its first manifestation**, or the industrial commission if the employer cannot be reasonably located within ninety (90) days after the first manifestation, and unless **claim** for worker's compensation benefits for an occupational disease is filed with the industrial commission **within one (1) year after the first manifestation**, all rights of the employee to worker's compensation due to the occupational disease **shall** be forever **barred**. Emphasis added.

Idaho Code § 72-102(18) provides: "Manifestation" means the time when an employee knows that he [*sic*] has an occupational disease, or whenever a qualified physician shall inform the injured worker that he [*sic*] has an occupational disease.

The definition is stated in the disjunctive. Manifestation means either the date on which a claimant “knows” that he or she suffers from an occupational disease or the date on which a qualified physician informs a claimant that he or she has an occupational disease. See *Sundquist v. Precision Steel & Gypsum Inc.*, 141 Idaho 450, 111 P.3d 135 (2005).

8. While Claimant may have testified that his hearing difficulties beginning around 2002, the medical records indicate such difficulty started around 1993. Defendants argue that Claimant knew his hearing loss was work-related by 1993. However, there is no indication that Claimant knew his hearing loss was work-related at that time. To give Claimant the benefit of the doubt, the Referee finds that Claimant knew his hearing loss was work-related by at least 2005, when Employer asked that he take measures to correct it. Claimant had worn hearing protection devices for years by that time, and had supervised others to make sure they were wearing them. It is inconceivable that Claimant did not equate the wearing of hearing protection devices to the loud noise made by jet engines. Why else would he and other ramp workers be required to them? Claimant did not file a written claim until 2010 is clearly outside the parameters of Idaho Code § 72-448 and his Complaint should be dismissed.

9. Assuming, *arguendo*, that Claimant gave proper notice of his alleged occupational disease, the Referee finds that his claim must fail in any event. Claimant has failed to produce any medical evidence linking his hearing loss to exposure to jet engine noise. Claimant’s testimony that Dr. Jones related the same to him verbally is given no weight. Had Dr. Jones so indicated, there is little doubt that such would appear in his medical records. Further, Dr. Jones’ notes indicate that the cause of Claimant’s hearing loss is unknown. Dr. Jones mentions certain noises around which hearing protection devices should be worn, but none of those include jet airplane noise. Moreover, it cannot be determined from Dr. Jones’ notes just how much he knew

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ORDER

Filed February 8, 2012

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee’s proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant has failed to comply with the notice requirements of Idaho Code § 72-448.
2. Claimant’s Complaint is dismissed with prejudice.

3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 8th day of February, 2012.

INDUSTRIAL COMMISSION

/s/
Thomas E. Limbaugh, Chairman

/s/
Thomas P. Baskin, Commissioner

/s/
R. D. Maynard, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of February 2012, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

MICHAEL HADYKA
3254 N MEADOW MINE PL
TUCSON AZ 85745

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Gina Espinosa