

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LOUIS MONNIER III,

Claimant,

v.

MANPOWER,

Employer,

and

NEW HAMPSHIRE INSURANCE COMPANY,

Surety,

Defendants.

IC 2017-004561

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER
Filed February 10, 2020**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned this matter to Referee Douglas A. Donohue. He conducted a hearing in Boise on February 8, 2019. Claimant appeared *pro se*. Eric Bailey represented Employer and Surety. The parties presented oral and documentary evidence. The parties took a post-hearing deposition. Claimant, in writing, elected not to file an opening brief. Defendants submitted a brief. Claimant filed a reply brief. The case came under advisement on August 26, 2019, and is ready for decision.

The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issues their own findings of fact, conclusions of law, and order.

ISSUES

The issues to be decided according to the Notice of Hearing are:

1. Whether Claimant incurred an occupational disease per Idaho Code § 72-437 and § 72-102 (18 and 22);
2. Whether Claimant has complied with notice and limitation requirements of Idaho Code § 72-448;

3. Whether Claimant suffers from a compensable occupational disease;
4. Whether and to what extent Claimant is entitled to:
 - a) Temporary disability,
 - b) Permanent partial impairment,
 - c) Permanent disability in excess of impairment,
 - d) Retraining,
 - e) Medical care, and
 - f) Attorney fees; and
5. Whether apportionment is appropriate under Idaho Code § 72-406.

CONTENTIONS OF THE PARTIES

Claimant contends his hearing loss, tinnitus, and ear pain constitute a compensable occupational disease. When Employer assigned Claimant to Micron from April 2016 through December 2016. Claimant contends that machine noise to which he was exposed, and lack of hearing protection, caused the injuries. At hearing, Claimant acknowledged neither TTD nor retraining benefits were being claimed, but he seeks PPI for hearing loss. However, retraining benefits were re-asserted in Claimant's post-hearing reply briefing. Additionally, Claimant seeks medical care or compensation to cover the cost of Bluetooth hearing aids. Further, Claimant argues Dr. Friedman's opinions are motivated by bias.

Employer and Surety contend Claimant failed to show an injury or occupational disease. Additionally, Claimant failed to link hearing loss to the Micron work environment. Instead, Claimant's hearing loss is consistent with hearing loss typical for his age. Nevertheless, medical benefits including doctor visits, an audiology test, a medical evaluation, prescriptions, and an overpayment of \$1,617.00 were paid to or on behalf of Claimant. Further, Claimant failed to prove a probable impairment or disability rating, and TTD benefits are not payable since no work time was lost. Claimant also failed to establish retraining eligibility and, without an attorney,

attorney fees.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant;
2. Claimant's exhibits A through S;
3. Defendants' exhibits 1 through 10; and
4. Post-hearing deposition of Robert Friedman, M.D.

FINDINGS OF FACT

1. While working for Employer, Claimant was assigned to Micron as a machine operator from April through December of 2016. (Hr'g Tr. 6:7-11). During each 12-hour shift, up to four (4) employees moved trays filled with computer chips through various processing stages.¹ *Id.* at 11:3-22. The machines sounded alarms every 35-40 minutes to signal stage completion, and indicate the trays needed moving. *Id.*; *Id.* at 28:1-5.² Claimant testified each process sounded different, and estimated the sound at 90 – 100 decibels because the alarms were louder than a conversational voice but quieter than a fire alarm. *Id.* at 28:5-25.³
2. No employees on Claimant's shift wore hearing protection. *Id.* at 27:1-12.
3. Starting in October, Claimant noticed a "buzzing sound in [his] head" followed by headaches at home after the 12-hour shifts. *Id.* at 12:11-19.

¹ Claimant first testified two or three employees were watching the machines, but when asked directly by the Referee Claimant said four employees were on each shift. (Hr'g Tr. 11:3-6; 27:3-9).

² Claimant also testified, on a busy day "there was 15 or 20 different machines going off at the same time." (Hr'g Tr. 13: 17-21).

³ After the first estimation at 90-100 decibels, Claimant then said, "it's probably 100 always minimum and a little bit higher." *Id.* at 29:10-11.

4. On December 9, 2016, Claimant sought treatment with primary care physician, David Ballance, M.D. at Family Health Care for persistent ringing in the ears, and hearing loss symptoms. (Defs' Ex. 5, p. 59). Dr. Ballance is Claimant's primary physician and has been for approximately four years. (Hr'g Tr. 16:1-3). During the visit, Dr. Ballance prescribed Claimant hearing protection and recommended an audiology exam. (Cl's Ex. E; Defs' Ex. 5, p. 60).

5. The next day, December 10, 2016, Claimant sent Employer an e-mail reporting the exam, needed hearing protection, and suggested audiology testing. (Cl's Ex. R; Defs' Ex. 5, p. 65; Hr'g Tr. 6:18-21). Upon the report, Employer immediately supplied hearing protection, and found Claimant a new assignment by the end of December. (Hr'g Tr. 6:11-23).

6. Claimant's symptoms continued after leaving Micron. (Cl's Ex. D; Defs' Ex. 2, p. 6). On March 20, 2017, Claimant visited Cindy Olsen, AuD, CCC-A at Audiology and Hearing Aid Center for the referred audiology evaluation. *Id.* On exam, Dr. Olsen observed and removed earwax impactions.⁴ *Id.* After removal, Dr. Olsen's visual exam revealed Claimant's bilateral ear canals and tympanic membranes appeared normal. *Id.* With further examination, Dr. Olsen reported "excellent middle ear mobility and normal middle ear pressure bilaterally," and that "ipsilateral and contralateral acoustic reflexes were present at normal levels bilaterally." *Id.* Dr. Olsen further noted that Claimant rated his tinnitus to be a "'9' on a 1 to 10 scale," and his answers for the tinnitus handicap inventory severity scale scored "'catastrophic' tinnitus." *Id.* However, Dr. Olsen also reported that Claimant denied tinnitus symptoms at the end of the examination, and further stated that the sounds are brief, and primarily when going to sleep or waking up in the morning. *Id.*

⁴ Dr. Ballance told Claimant to use hydrogen peroxide to clean his ears at the December 2016 appointment. However, Claimant admits he failed to do so. (Cl's Ex. D; Defs' Ex. 2, p. 6).

7. In summary, Dr. Olsen reported the “test results are only judged to be fair for reliability,” and opined Claimant “may have bilateral mild hearing loss.” *Id.*

8. After the audiology exam, Claimant visited Dr. Ballance for follow up care on April 19, 2017. Dr. Ballance reported, Claimant “continues to have tinnitus,” but that it is “much rarer now.” (Cl’s Ex. B; Defs’ Ex. 1, p.1). Nevertheless, the report also reflects Claimant’s statement of continued buzzing, ringing, and an occasional roar, but that it is “actually quite better than when he was working at Micron.” *Id.* During this follow up, Dr. Ballance reviewed the audiology report and noted Dr. Olsen’s reliability concerns. *Id.* Dr. Ballance opined that the audiology report “confirmed some level of hearing loss,” and that Claimant suffered from “tinnitus with noise induced hearing loss” that appears “to be related to occupational exposure.” *Id.*

9. Dr. Ballance advised Claimant that hearing aids could be considered, and ones equipped with blue tooth could reduce tinnitus symptoms by receiving continuous sound. *Id.* Dr. Ballance also prescribed Claimant tizanidine 4 mg, but specifically noted the prescription was a “nonspecific treatment for tinnitus,” as it “might reduce” Claimants neck spasms from cringing at tinnitus sounds. Dr. Ballance further advised Claimant that usual tinnitus treatment is “to avoid aspirin and to have adequate sound protection when working around loud noises.” *Id.*

10. On May 3, 2017, Claimant returned to Dr. Ballance for another follow up. (Defs’ Ex. 1, p. 2). During this visit, Claimant again reported the “humming” had improved, and the prescribed tizanidine made his ears “pop” when taken at night. *Id.* Dr. Ballance noted there was no eustachian tube dysfunction upon examination. However, Dr. Ballance continued to advise Claimant that evidence existed showing hearing aids would be beneficial and encouraged Claimant to “follow through with his workers compensation disposition regarding [a] plan for

the future.” *Id.*

11. From May 3, 2017 until January 30, 2019, Claimant did not receive further treatment, medications, or care for his ears. (Hr’g Tr. 45:9-21). Additionally, Claimant did not miss any work and was never released from work by a physician. (Hr’g Tr. 45:22-25, 46:1-2).

12. Robert Friedman, M.D., reviewed Claimant’s records and sent an opinion letter on January 21, 2019. (Defs’ Ex. 4, p. 14). Dr. Friedman has experience with hearing loss issues related to both industrial and non-industrial incidents. (Friedman Dep. 6:21-25, 7:1-2).

13. Dr. Friedman did not conduct a forensic examination for this claim. (Defs’ Ex. 4, p. 14). However, Dr. Friedman did examine Claimant for an IME on a 2014 carpal tunnel injury. *Id.* The records reviewed for the January letter included Claimant’s previous medical records, Dr. Olsen’s audiology report, and prior Industrial Commission reports and claims (including the IME Dr. Friedman conducted in 2014).⁵ *Id.* In his January 21, 2019 letter, Dr. Friedman opined that Claimant’s hearing loss is inconsistent with occupational exposure because it is bilateral⁶, and Claimant’s “high frequency hearing loss and tinnitus” is “most consistent with aging, medication, and his underlying medical conditions.” *Id.*

14. On a subsequent visit with Dr. Ballance Claimant read Dr. Friedman’s report to Dr. Ballance. (Hr’g Tr. 44:3-15). Claimant testified Dr. Ballance did not comment upon hearing the report, and there was no discussion. *Id.* at 44:16-18.

15. On January 30, 2019, Dr. Ballance issued a letter on Claimants behalf. (Cl’s Ex. A). In this letter, Dr. Ballance opined Claimant’s hearing loss was “caused by his work

⁵ Surety also provided Dr. Friedman various complaints, by Claimant, to the Board of Medicine and Industrial Commission “regarding provider and sureties with whom he had difficulties.” *Id.*

⁶ Dr. Friedman would expect monaural hearing loss from exposure to loud noise with unilateral abnormalities; generally heavy machinery typically stays in one place and sound does not come in symmetrically to both sides at the same time. (Friedman Dep. 26:3-9, 27-28; Defs’ Ex. 4, p. 14).

environment and not being provided appropriate hearing protection,” but also acknowledged the causation opinion was based upon Claimant’s history of a work environment with machines producing “extremely high volume noise.” *Id.* Dr. Ballance further opined Claimant’s hearing loss at 15-20%, and that the audiology evaluation found Claimant “to have high frequency hearing loss in a pattern consistent with noise induced hearing loss.” *Id.*⁷

16. Claimant testified that the January 30, 2019 letter and PPI rating were not discussed with Dr. Ballance prior to hearing. (Hr’g Tr. 43:7-14).

17. After hearing and after reviewing Dr. Ballance’s January letter, Dr. Friedman was deposed May 15, 2019.

18. In the course of his deposition, Dr. Friedman testified that tinnitus is a subjective symptom, and not a disease in and of itself. (Friedman Dep. 12:15-23). Dr. Friedman confirmed tinnitus can be a symptom of noise exposure, but also testified that tinnitus can indicate high blood pressure, a head injury, hypertension, age induced hearing loss, and ear wax impaction. *Id.* at 13:6-25, 14:1-17. Additionally, Dr. Friedman testified multiple medications in Claimant medical report may induce tinnitus as a side effect. *Id.* at 15:10-25, 16:1-18.

19. Dr. Friedman also addressed Dr. Olsen’s audiology report. *Id.* at 23-26. Experience led Dr. Friedman to opine Claimant was “not giving [Dr. Olsen] 100 percent accurate information” during testing, based on Dr. Olsen’s comments of “fair reliability” and inconsistent scores. *Id.* at 24:20-25, 25:1-20. Dr. Friedman emphasized that patient reliability is generally measured as “excellent, good, fair[,] and poor,” and Claimant was rated only “at the fair level.” *Id.* at 25:18-20. Further, by comparing the tables provided on the audiology report, Dr. Friedman

⁷ Dr. Ballance’s letter notes age can lead to hearing loss, but does not mention knowing of, or acknowledge Dr. Friedman’s opinion. (CL’s Ex. A).

testified Claimant's hearing is "probably normal." *Id.* at 23:1-10. Dr. Friedman explained "normal" hearing is a range, and "not an arbitrary number." *Id.* at 23:16-25. So, even though Claimant's right ear technically showed a five-decibel difference, Dr. Friedman explained the difference between 25 and 30 was not enough to consider it "abnormal." *Id.* As such, Dr. Friedman opined that even if Claimant was exhibiting "mild hearing loss, as opposed to normal hearing," the minimal difference between the left and right ear shows a bilateral manifestation, and any hearing loss symptoms are not noise induced. *Id.* at 25:23-25, 26:1-25. Rather, Claimant's symptoms are more likely related to age, medication, or one of Claimant's underlying medical diagnoses. *Id.* at 26:20-25, 27:1-4.

20. Although Surety originally denied the claim, all medical bills have been paid as of the hearing date, and Claimant received a check for \$1,617.00. (Hr'g Tr. 51:1-22).

21. The \$1,617.00 check was accidentally sent by Surety to the Claimant on January 18, 2018. (Defs' Ex. 6, p. 301). Realizing the mistake, Surety put a stop payment on the check, and left a voicemail for Claimant explaining the situation. (Defs' Ex. 6, p. 297). Notwithstanding this notification, thinking the check was a payout, Claimant cashed the check at a Money Tree on January 30, 2018. (Defs' Ex. 6, p. 297, 303). The stop payment order did not stop the check from being negotiated (Defs' Ex. 6, p. 297-304). However, the stop payment did cancel the initial reimbursement from Surety to Money Tree. In so doing, Money Tree sought repayment from Claimant. *Id.* Surety settled the issue by honoring the payment, and letting Claimant keep the money. (Hr'g Tr. 8:2-14). Claimant was not instructed as to what the money was for, but viewed it as a "gift" (Hr'g Tr. 50:15-18; Defs' Ex. 6, p. 306).

22. Surety is not asking for reimbursement. Although Surety questions why Claimant did not use the \$1,617.00 for hearing aids, it concedes Claimant could use the money for

anything. (Hr'g Tr. 53:1-16).

Prior Medical Care

23. Including the 2014 carpal tunnel workers compensation injury, Claimant has worked physical labor jobs and made various workers compensation claims for muscular, orthopedic, nervous system, and stress induced injuries and/or diseases in California, Pennsylvania, and Idaho. (Hr'g Tr. 32-36; Defs' Ex. 5).⁸

24. In March 2014, Claimant sought treatment for headaches, and chronic neck and shoulder pain. (Defs' Ex. 5, p. 189).

25. Additionally, in July 2014, Claimant hit his head on a beam while working and immediately reported dizziness, nausea, headache, and tinnitus. A few days later, Claimant had a negative CT scan, but reported continued headaches, neck pain, periodic but improved nausea and dizziness, and resolved tinnitus. *Id.* at 199.⁹

26. The July 2014 accident was the only mention of possible ear dysfunction prior to the subject claim.

27. Along with the prior injury reports, Claimant's past medical history consists of type II diabetes, hypogonadism, right shoulder pain, nasal congestion, and hypertension. (Def's Ex. I, p. 1-2; CL's Ex. B). Claimant's current medications are glipizide, metformin, actos, isoprene, testosterone, cycloset, hydroxyzine, and lovastatin. (Hr'g Tr. 46-48; Def's Ex. I, p. 1-2; CL's Ex. B).

DISCUSSION AND FURTHER FINDINGS OF FACT

⁸ Claimant's reported injuries included, but are not limited to, headaches, stress, anxiety, respiratory disorders, fibromyalgia, periodontal disease, back and neck pain, sleep apnea, rheumatoid arthritis, sexual dysfunction, and aggravated type II diabetes and hyperthyroidism.

⁹ Claimant did remember the accident, but does not remember reporting tinnitus symptoms to the doctor. (Hr'g Tr. 49:13-22).

28. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996).

29. Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992). Uncontradicted testimony of a credible witness must be accepted as true, unless that testimony is inherently improbable, or rendered so by facts and circumstances, or is impeached. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 447-48, 74 P.2d 171, 175 (1937). *See also Dinneen v. Finch*, 100 Idaho 620, 626-27, 603 P.2d 575, 581-82 (1979); *Wood v. Hoglund*, 131 Idaho 700, 703, 963 P.2d 383, 386 (1998).

30. The credibility determination made concerning the testimony of a witness is either observational or substantive. *Stevens-McAtee v. Potlatch Corp.*, 145 Idaho 325, 331, 179 P.3d 288, 294 (2008). *See also Moore v. Moore*, 152 Idaho 245, 269 P.3d 802, (2011). Observational credibility requires the Commission to be present for the hearing, but substantive credibility may be judged on inaccuracies or conflicting facts of record. *Id.*

31. At hearing, the Referee observed Claimant and did not find him to be credible. The Referee described Claimant as feisty and evasive in certain aspects of his testimony, but subdued when speaking of hearing loss.¹⁰ The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility.

32. The Commission did not observe Claimant's demeanor, but question Claimant's substantive credibility. Claimant's testimony is evasive, and contradictory. When asked if his

¹⁰ The Referee also noted Claimant gave off the impression of acting.

statement denying “experiencing any ringing, roaring or buzzing noises in the ears” during Dr. Olsen’s exam was accurate, Clamant said,

“I don’t remember giving her that statement. I remember telling her my symptoms, the same I had with Dr. Ballance, because I discussed everything with Dr. Ballance before I seen her, so I don’t know why I would say anything opposite of what I was feeling at the time.”

(Hr’g Tr. 38:2-11). When asked if ringing, roaring, or buzzing existed at hearing, Claimant testified it was “continuous since.” (Hr’g Tr. 38:16). Claimant later testified the pain he was experiencing was gone, but when asked about that statement Claimant responded with:

“It didn’t exactly go away. Ear protection will go ahead and stop it from being aggravated and stop the immediate pain that I was feeling when I got the high pitch, because a lot of those alarms, they were different tones...so when they finally did give me ear protection, they were somehow less painful, but still there. That’s what I’m trying to get and it’s hard maybe for a doctor to say, you know 10 sentences and put it into one, like I’m explaining to you, but I’m telling you now that, you know, that’s what I told him.”

(Hr’g Tr. 39:8-21).

33. Furthermore, when asked directly, “after you got hearing protection and you left that job and went to a different type of position, did your issues get better, resolve to some degree or did they not?” Claimant again evaded the question stating, “[t]he only thing that I can say is that I’m not – I’ll give you my feelings,” and went on to testify the nausea and headaches went away after receiving hearing protection, but that if he returns to Micron “who knows what’s going to happen.” *Id.* at 40-41:1-21.

34. Claimant also denied telling Dr. Ballance, in April 2017, the tinnitus symptoms were “actually quite better than when he was working at Micron.” *Id.* at 42:21-25; 43:1-6.

35. Claimant’s symptoms are subjective, Claimant is inconsistent with reporting the symptoms, and throughout testimony either denies or does not remember reporting improved

symptoms to two different physicians. *Id.* 38-39. The audiology test results are dependent on the accuracy of Claimant's subjective responses, and Dr. Olsen reported the reliability as only "fair." Additionally, the alleged precipitating cause, loud alarms at work, is unsupported. No objective alarm volumes are available of record, and Claimant's estimated decibel levels were speculative and without foundation. Moreover, nothing in the record supports Claimant's assertion that the workplace was "loud."

36. Further, Claimant failed to provide a reliable PPI rating. Dr. Ballance's opinion Claimant suffered permanent hearing loss at 15-20% is unsupported as a whole person rating.

Causation

37. A claimant has the burden of proving a causal connection between his work environment and an occupational disease to a reasonable degree of medical probability. *Wichterman v. J.H. Kelly, Inc.*, 144 Idaho 138, 141, 158 P.3d 301, 304 (2007). Proof of a possible causal link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). Magic words are not necessary to show a doctor's opinion is held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. *Jensen v. City of Pocatello*, 135 Idaho 406, 412-13, 18 P.3d 211, 217-18 (2001).

38. Claimant fails to make a persuasive showing of causation. Dr. Ballance's opinion is expressly dependent upon Claimant's assertion that the Micron environment was so loud it could have been a cause of hearing loss. That assertion is unsupported in the record.

39. Dr. Friedman's opinion is persuasive here. To the extent they represent an actual

condition, Claimant's symptoms and hearing loss are more consistent with age, medication or underlying medical conditions, and inconsistent with noise-induced hearing loss.

CONCLUSIONS OF LAW AND ORDER

1. Claimant failed to show his hearing loss and tinnitus were caused by employment; therefore, he failed to show he incurred or suffered a compensable injury or occupational disease;

2. All other issues are moot;

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

DATED this ___10th___ day of ___February___, 2020.

INDUSTRIAL COMMISSION

_____/s/_____
Thomas P. Baskin, Chairman

_____/s/_____
Aaron White, Commissioner

_____/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:


_____/s/_____
Assistant Commission Secretary

Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the ___ 10th ___ day of ___ February ___ 2020, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

ERIC S. BAILEY
PO BOX 1007
BOISE ID 83701-1007

LOUIS MONNIER


_____/s/_____
